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EDITORIAL

India as is seen during present days has changed its conscience towards a new penal jurisprudence in abolishing the capital punishment. This is perhaps to counter the plenary provisions of article 6 of International Covenant on Civil and Political Rights, 1966 and its protocol in 1989 where the State parties believed that abolition of death penalty should be in the scale of enhancement of human dignity and progressive development of human rights and recalling article 3 of Universal Declaration of Human Rights adopted on 10th December, 1948 as well as article 21 of our own Constitution.

It is well said "I don't punish you for killing the man but so that the other cannot be killed". That is, the chief aim of capital punishment to make deterrent to others for same crime. Now this concept is having a new direction. The Supreme Court and High Courts in India interpret the cases before giving the death sentence as rarest of rare cases. The court moves its eye also for other aspects of society. The landmark cases where the death sentences were awarded in India like *Ranga Billa* case, *Indira Gandhi* and *Rajiv Gandhi* assassination case, *Laxman Nayak* case and most recently in 2004 *Hatten* case of West Bengal.

In the year 2003 Government laid a bill in the Parliament which proposed to add a provision of the punishment, death sentence in Drugs and Cosmetics Act as also it is in POTA. After the induction of new government in June 2004, President of India Dr. A.P.J. Abdul Kalam suggested the Parliament for considering the abolition of death sentence in *toto*. It is also the manifesto of present government to abolish such barbaric punishment. Taking many aspects of this brutal punishment it can be commented that the physical pain and suffering which the actual execution of the sentence of death involves is also no less cruel and inhuman. The death penalty is cruel and disproportionate. These are the reasons why the world community is in favour of abolition of death penalty and are submitting with a lethal change to cope with UNDHR, International Convention on Abolition of Death Penalty and its supplementary protocol in the light of social change, human dignity and right to life and personal liberty.

We at the ALR desk taking this issue as a social concern, address to the legal profession on a dynamic change in the prevailing penal jurisprudence.

MANISH ARORA

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DEFAMATION IN CYBERSPACE

*T.K. Viswanathan

Problems Posed by Internet

Ability of users to communicate and post messages in cyberspace anonymously or pseudonymously, the opportunity to access the Internet in the privacy and seclusion of one's own home and the interactive, responsive nature of communications on the internet, have all combined to liberate the internet users from decency and social inhibitions which restrain their conduct in the real world. Because of this, cyberspace has been described as a breeding ground for all vices like pornography, gambling and defamation. To deal with these evils, lawmakers have to respond with a suitable legal framework. Of the three types of wrongs mentioned above, responding to defamation in cyberspace calls for a major international initiative since it raises complex problems of conflict of laws and jurisdictional issues cutting across national boundaries. Since internet has increased the power of free speech and has dramatically altered the way in which people express themselves any attempt to deal with the problem of defamation should ensure that freedom of expression and freedom of the press are not endangered.

Cyberspace as a Fertile Defamatory Hinterland

Technology always created new challenges for lawmakers and enforcers. Defamation is one area wlere this challenge is readily visible. Digital technology causes unique problem for applying the traditional defamation law to cyberspace since one of the requirements for an action in defamation to succeed is that the alleged matter should have been published. In the pre digital environment any person wanting to defame another has to get the matter alleged to be defamatory be published in a

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newspaper or a magazine or any other media. This will not be easy since the defamatory material has to pass through the scrutiny of the editors. Internet has changed this scenario. World Wide Web has rendered publishing very easy and any one can publish anything in the Internet without the aid of the intermediaries like the publishers. Users can build their own website, can post e-mail messages on Bulletin Boards, send e-mails to web logs and list-server. Hence on the Internet everyone can be a publisher. In addition the interactive nature of the Internet causes difficulty for applying the predigital defamation law to cyberspace. The ease, with which users of the Internet can access bulletin boards and Usenet and communicate with each other, makes it qualitatively different from any other medium. In all these instances messages will not be subject to any editorial controls. These factors compounded by the easy accessibility of Internet have increased the scope for defamation exponentially. The speed of communications and the large audiences to which messages can reach by the click of the button presents a fertile defamatory hinterland for individuals to conduct hit and run guerilla campaigns against their rivals. Even if the defendant pleads guilty and agrees to remove the offensive material from the website still the victim would have suffered damage to his reputation and any subsequent retraction may not reach all the audience who happen to read the earlier message. While there is no doubt that the original author of the message, which is defamatory, should be held liable, the tendency has been to target the more financially sound intermediaries for defamation as a secondary publisher. This deep pocket phenomenon of targeting tactical targets has added to the burden of intermediaries. In addition there are a number of features unique to the Internet, which distinguish it from other media like the print or broadcast medium. These features require re-examination of the doctrine of liability for defamation under the existing laws with a view to adapt their application to cyberspace.

Borderless Cyberspace

First problem of applying defamation law to cyberspace relates to questions of conflict of law posed by the borderless nature of the cyberspace. The question In which jurisdiction did the publication of the defamatory matter took place raises difficulties. Theoretically it can be assumed that every time a third party accesses a defamatory posting on the Internet, publication occurs. If this is taken as a basis of liability then technically one may incur liability in multiple jurisdictions for defamatory message posted on the internet. Action can be justified in the place of residence of the plaintiff or the defendant or the place of publication of the defamatory material. In view of the wide option available place of suing, becomes a contentious issue. Under the US law, a single edition of a newspaper or book is considered to be a single publication, regardless of

the copies distributed. Under this single publication rule any one edition of a book or newspaper, or any one radio or television broadcast is a single publication. This means that only one action may be brought, in one jurisdiction, even if the defamation has been communicated to many different places.

Choice of Jurisdiction & Law

Second problem relates to the diversity of legal regimes governing defamation law in different countries thus conferring upon an aggrieved person, the option of choosing the jurisdiction, which is most favourable to him. Choice of jurisdiction will also decide the choice of applicable law. There is a wide divergence in approaches between the US and other common law systems on this subject. In the U.S First Amendment protection and the public figure defence are available which are not available in other countries governed by common law. The advantage enjoyed by American ISPs lies not in jurisdiction rules but in the difficulties of enforcing judgments against them because the American courts have been unwilling to enforce foreign judgments which are said to be contrary to the guarantees of freedom of speech contained in the United States' constitution. This tendency was very much in evidence in the case of *Yahoo* v. *LICRA* decided by the United States District Court, N.D. California.. Viewed in this context the euphoria arising out of the ruling in the Australian case in *Gutnick* v. *Dow Jones* though victory for the victim of a defamation may be short lived since the judgment against the publisher has to be enforced in US which may prove to be difficult. The case has taken an interesting turn with the American journalist William Alpert, the reporter for *Barron's* magazine, being sued by Australian businessman Joseph Gutnick, filing a complaint with the United Nations High Commissioner for Human Rights in Geneva, alleging that Anstralia's libel laws violate his right to publish on the Internet.

Public Figure Doctrine

Thirdly until recently, the parties to defamation suit were only celebrities, publishers or businessmen. Internet has changed this scenario with the ordinary man in the street who accesses the Internet can be the accused or a victim in an action for defamation. With the growth of the internet, everyone now has the possibility of communicating internationally, as material placed on the World Wide Web may be accessed in any country in the world. Consequently, every person participating in a chat room or BBS assumes the character of a public figure and hence the question arises whether the public figure defence should apply to statements made on the Internet. Thus any statement posted on the internet is likely to render the user liable for defamation in multiple jurisdictions. Thus the prospects of any individual not necessarily a public figure being victimized by defamatory statements having recourse to legal

proceedings in a convenient jurisdiction are likely to increase. In the US the *public figure doctrine* requires that the plaintiff in a defamatory action must prove actual malice on the part of the publisher to succeed in an action for defamation. This position was established in the famous landmark defamation case *New York Times* v. *Sullivan* by the US Supreme Court in 1964.

Liability of ISPs

Fourthly, more than the individual users the Internet Service providers and digital publishers run the risk of being hauled up in every jurisdiction where material alleged to be defamatory is downloaded. The liability for defamatory statements revolves around whether the ISP was a primary publisher or a secondary publisher. Internet service providers (ISPs) offer a wide range of services to their customers, including e-mail accounts, website hosting, and newsgroups. The ISPs would qualify as "secondary publishers in those situations where they are involved in disseminating a defamatory statement, other than as the author, editor and commercial publisher. While offering these services they are merely acting as a conduit and may escape liability for handling third party defamatory material if they can show that they have exercised due diligence and were not aware of the defamatory nature of such material. However in certain cases ISPs may also deal with content provided by their customers like online magazines or newspapers over which the ISPs do not have any editorial control in the sense that the content is not read or moderated by the ISPs themselves. Aggregators are news agencies who "aggregate" information, by selecting and compiling information from other sources defy classification. Aggregators of information provide their users with global news and business information. The content is derived from numerous sources, including newspapers, magazines, and company reports. The service differs from its hard-copy equivalent in the scale of its operations, with over million items placed on the website per month. Considering the magnitude and speed of their operations it is virtually impossible for them to check the content of each item before it is placed on the site and control can be exercised only when a complaint is received. Since the ISPs do more than merely providing a communication network through which a message is sent, questions arise in such circumstances whether the ISPs should be treated as mere conduits or as something different so that a higher degree of standard of care than that of a common carrier should be imposed upon them. A court would need to decide whether aggregating information in this way should be categorized as primary or secondary publishing. Thus in a sliding scale liability regime, a secondary publisher could end up being saddled with the liabilities of a primary publisher in certain cases.

Liability for Third Party Material

In view of the above internet publishing increases the liability of Internet Service Providers (ISPs) for other people's materials and also exposes them to liability in other jurisdictions. This necessitates an urgent review of the way in which defamation law impacts on Internet service providers. While actions against primary publishers are usually decided on their merits, the current law places secondary publishers under some pressure to remove material without considering whether it is in the public interest, or whether it is true. Since ISPs are viewed as tactical targets they are subjected to intense pressure to remove offensive material even in cases where the matter alleged is true because playing safe is the better alternative than getting embroiled in a protracted litigation. This gives rise to a possible conflict between the pressure to remove material and freedom of expression and public interest.

The European Union

The European Union directive of June 2000, limits the liability of ISPs on a range of legal issues, including defamation, obscenity and copyright. "Mere conduits" are essentially no more than telephonic networks. They must not "initiate the transmission", "select the receiver of the transmission", or "select or modify the information". Furthermore, the information must not be "stored for any period longer than is reasonably necessary for the transmission". This would, for example, exclude websites, Usenet or web-based e-mail, all of which are stored by the ISP. The E-Commerce Directive is far from comprehensive. Many services would appear to fall outside its provisions. For example the status of providers of hyperlinks and location tools. By analogy, it could be argued that a hyperlink which "points" to a defamatory statement would amount to secondary publication. The person responsible for placing the link may be able to take advantage of the section 1 defence, but is not granted any additional immunities under the Directive or subsequent Regulations.

United Kingdom

The United Kingdom Defamation Act, 1991, defines a primary publisher as "a person whose business is issuing material to the public" and who issues the material "in the course of that business". However, those who are only involved in "processing, making copies, distributing or selling any electronic medium in which the statement is recorded" are defined as secondary publishers. The key issues therefore whether an aggregator is "issuing material" or "distributing a medium". Those who select individual articles and extracts would appear to come nearer to selling material than a medium. If this view is correct, aggregators would be considered primary rather than secondary publishers. They would therefore be directly liable for the content they distributed, whether or not they were aware that it was defamatory. Neither the innocent

dissemination defence nor the Directive immunities would be available to them. The current practice in UK is that if ISPs are aware that a website contained a defamatory statement, their common practice is to remove the whole site and only reinstate it once the customer had given a written undertaking not to repeat the defamatory statement.

U.S.A.

In the United States of America, federal law provides ISPs with extensive immunity. The matter generated concern after the 1995 case, *Stratton Oakmont, Inc,* v. *Prodigy Service Company,* in which an ISP was held liable for defamatory remarks posted on a bulletin board. The court found that Prodigy exercised editorial control over messages on bulletin boards and also used "Board Leaders" to enforce the content guidelines, and provided them with an "emergency delete" function to control content. In view of this, the New York Supreme Court found that Prodigy was a publisher rather than a distributor, and was therefore liable for the content in the same way as a newspaper publisher.

Indian Legal Context

In the Indian legal context the liability of service providers is not clearly spelt out by any legislation. The general principles applicable to the print and broadcast medium appears to hold the field. Section 79 of the Information Technology Act, 2000 contains a due diligence clause which is more of a clarificatory nature rather than spelling out the immunities and liabilities of the network service providers. In order to leverage the benefits of the digital revolution there is an urgent need for a legislation to clearly spell out the Immunities and liabilities of the service providers in India.

Conclusion

As the digital revolution sweeps across the globe more and more newspapers and magazines are bound to migrate to Cyberspace with their electronic versions. This will also lead to the increase in the number of defamation cases. The mass media and journalists have a public watchdog role to play which requires greater degree of protection against defamation. As observed by the US Supreme Court free press needed a breathing room so that its reporting on matters of public concern can be robust and vigorous. Hence, there is an urgent need for reviewing the way in which defamation law impacts the mass media, the journalists, the digital publishers and internet service providers through a major international initiative to address the concerns expressed above.

LEGAL ISSUES RELATING TO FREE AND OPEN SOURCE SOFTWARE

Professor Brian Fitzgerald*

Graham Bassett**

1. INTRODUCTION

1.1 Background

In the classic free software scenario embodied in the GNU General Public Licence (GPL) software source code is distributed in a manner that is open and free allowing software developers (usually many hundreds, known broadly as the "hacker community") further down the line to modify and improve upon the initial software product. The initial distributor of the code controls its presentation and further dissemination through copyright and contract law (contractual software licence). In general, down the line developer and modifier is required to make source code of any derivative work that they distribute, available for all to see. In this process copyright law is used to create a "copyleft" effect as opposed to a "copyright" effect by mandating that code should be open and free for all to use in innovation and development of software. By way of contrast, in a proprietary or closed distribution model source code is not released and can only be ascertained through decompilation or reverse engineering.

Software code is protected as expression in the form of a literary text under copyright law. Copyright law will protect the expression of an idea or facts but not the idea or facts themselves. Patent law and trademark law,

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amongst other things, may also bestow legal rights in relation to software.[1] Once code is written it can be protected in copyright law for the life of the author plus 50 years in some countries and up to 70 years in other countries (USA, Europe). As a general rule if code is written in the course of employment then the employer will be the lawful owner of the copyright in that code. Software is generally not sold but distributed through software (contractual?) licence s. This has led some to say in relation to software and other informational goods that the "licence is the product". In the case of free and open source software the legal regime is built on the back of copyright in the original code along with the terms of the licence . Therefore the terms of the licence are crucial to understanding user and exploitation rights especially in a commercial setting.

1.2 Proprietary and communal software licensing

Software licensing has two approaches—proprietarial and non-proprietarial.

Proprietary methods involve employing a team of programmers and tying them to a non-disclosure agreement. Cloistered for a period of time, they create, test and debug their code.

Most importantly, copyright is claimed over the resulting code.[2] Software is marketed as a copyright licence and defined as "any product we make available for licence for a fee".[3] Bill Gates has made it clear that code is zealously guarded and presented in executable form only: "...a competitor who is free to review Microsoft's source code ... will see the architecture, data structures, algorithms and other key aspects of the relevant Microsoft

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1. B. Fitzgerald, "Digital Property: The Ultimate Boundary?" (2001) 7 Roger Williams University Law Review 47; B. Fitzgerald and A. Fitzgerald, Cyberlaw: Laws Relating to the Internet, Digital Intellectual Property and E Commerce (2002) Lexis Butterworths, Sydney Australia; A. Fitzgerald, B. Fitzgerald, C Cifuentes and P Cook (eds.) Going Digital 2000: Legal Issues for Electronic Commerce, Multimedia and the Internet (2000) Prospect Publishing, Sydney.

2. Software has been protected as a literary work under the US Copyright Act since 1980: *Lotus Development Corporation* v. *Borland International Inc*, 49 F. 3d 807 (1st Cir. 1995), and under the Australian Copyright Act since 1984: *Data Access Corporation* v. *Powerflex Services Pty Ltd.*, [1999] HCA 49. Article 10 (1) of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) Agreement, part of the World Trade Organisation Agreement of 1994 and binding on all members of the World Trade Organisation (WTO) provides that: "Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)." More recently software has been subject to a vast amount of patenting throughout the world; *Welcome Real-Time SA* v. *Catuity Inc.*, [2001] FCA 445 (Australia); *State Street Bank & Trust Co* v. *Signature Financial Group Inc.*, 149 F. 3d. 1368 (Fed. Cir. 1998) (USA).

3. Microsoft Open Licence Agreement v 6.0, October 1, 200 1, para [1] applicable from July 1, 2002.

product. That will make it much easier to copy Microsoft's innovations, which is why commercial software vendors generally do not provide source code to rivals."[4]

Licences are sold under a Volume Licence Product Key (VLPK) and the consumer is held liable for any unauthorized use of this key.[5] A customer can run the program which is defined as the capacity to copy, install, use, access or display the product for the number of copies authorised. A proprietary licensee may not "reverse engineer, decompile, or disassemble products except to the extent expressly permitted by applicable law".[6] This is contrary to the view that software diversity is best facilitated by reverse engineering.[7] Even so, a proprietary licence recognizes that a copyright owner cannot require a licensee to enter a contract that is prohibited by statute, as is a contract to override reverse engineering rights in Australia[8]; although it is unclear in the US whether the right to reproduce a program in order to facilitate reverse engineering for the purpose of interoperability can be overridden by contract.[9] A licensee may not rent, lease, lend or host products.[10] In return, the user is offered a limited warranty that the product will "perform substantially in accordance with our user documentation" for a period up to ninety (90) days from first running the program[11] Whether the final product is sold by shrinkwrap or clickwrap licence, licensees are dependent on the vendor for upgrades and patches. Traditionally upgrades enabled a licensee to purchase modifications when, and, as they saw fit. Microsoft's Software Assurance scheme requires a user to buy an upgrade

4. *State of New York* v. *Microsoft Corporation*, Direct Testimony of Bill Gates, April 18 2002 [http://www.microsoft.com/presspass/trial/mswitness/2002/billgatesibillgates.asp], para [307] April 20 2002.

5. Note 3, para [4].

6. Note 3, para [7].

7. B. Fitzgerald, C. Cifuentes, A. Fitzgerald and M. Lehmann, "Innovation, Software and Reverse Engineering" (2001) 18 Santa Clara Computer An High Technology Law Journal 121; B. Fitzgerald "Intellectual Property Rights in Digital Architecture (including Software): The Question of Digital Diversity?" [2001] EIPR 121.

8. Note 7, pp. 143-144. For example in Australia, under s. 47D of the Copyright Amendment (Computer Programs) Act, 1999, the owner or licensee of a program is permitted to reproduce a program (under certain conditions) in order to engage in reverse engineering for the purpose of achieving interoperability, and this right cannot be negatived or overridden by contract. However, this right is granted on the basis that the reverse engineering is undertaken to facilitate interoperability required by the owner or licensee of the program. In US law, reverse engineering for interoperability is allowed in certain cases under the fair use doctrine provided for in s. 107 Copyright Act, 1976: see *Sony* v *Connectix*, 203 F. 3d 596 (9th Circ 2000), and s. 1201(f) Digital Millennium Copyright Act, (DMCA) 1998.

9. See section 105 Uniform Computer Information Transactions Act (UCITA).

10. Note 3.

11. Note 3, para [9a].

subscription as part of the licence of a product.[12] Critics claim that this upgrade scheme applies a fee to the licensee even if no upgrade is provided in that period and this merely offers a "right to upgrade that previously existed without any requirement for advanced payment to preserve the right".[13]

Conversely, non-proprietarial software is created by communities of disparate developers for little commercial gain. Its benefits were propounded by Eric Raymond in his work *The Cathedral and the Bazaar*, first written in May, 1997.[14] He compares the commercial (non-free) development of software to the building of large cathedrals: "carefully crafted by individual wizards or small bands of mages working in splendid isolation, with no beta to be released before its time".[15]

Raymond identified 17 features of the non-proprietarial system that contributed to its successful creation of software such as the alternate operating system GNU/Linux.[16] The most important are:

- Good programmers know what to write. Great ones know what to re-write and re-use.
- Many programmers build on the efforts of others rather than doing things from scratch.
- The best programs are written by reacting to a need perceived by programmers.
- Treating users as co-developers allows bugs to be identified quickly and more effectively.
- Such communities have a scalability of reaction to a perceived problem that commercial developers even as big as Microsoft have come to realize.[17] Raymond asserts: "[G]iven enough eyeballs, all bugs are shallow".[18]

12. Note 3, para [11].

13. A NZ company has made a formal complaint about the impact of this new 'software-as-service' paradigm. *See* "Complaint to the Commerce Commission by Infraserv Limited as to certain anti-competitive behaviour of Microsoft NZ Limited", [www.elendons.co.nz], May 09 2002.

14. Eric Raymond, The Cathedral and the Bazaar, version 2, 24 August, 2000.
<http://www.tuxedo.org-/-esr/writings/cathedral-bazaar/cathedral-bazaar/index.html>, (27 July 2001).

15. *Ibid.*

16. For a brief overview of the development of GNU/Linux see section 1.2.1 of this paper.

17. In two leaked memos Microsoft admitted to the benefits of on-proprietarial development methods at Linux and proffered whether such development could be slowed by court challenges: Bob Trott, "Microsoft Pondering Legal Challenge to Linux", CNN. com, November 1998, <http://www.cnn.com/TECH/computing/9811/06/linux.threat.idg/>, (November 22, 2001).

18. Note 14.

- Programs are best released early and often and feedback sought from users.

Raymond argues developers in such communities are not motivated by commercial gain. An internal market of reputation exists. The principal role of the project leader is to facilitate egoless programming".

Raymond claims community members are driven by "egoboo" - the enhancement to self-esteem that results from successful participation in the group. The free community can bring more rapid attention to a problem whereas the proprietary closed-source responses are "frequently as late as they are disappointing".[19] "In the world of cheap PCs and fast Internet links we find pretty consistently that the only really limiting resource is skilled attention."[20] Critically, developers should have access to the source code of a program thus enabling modification and distribution with limited obligations to the licensor. It is source code that "links computers and humans. To understand how a program runs; to be able to tinker with it and change it; to extend a program or link it to another - to do any of these things with a program requires some access to the source".[21]

Free and open source development also has supporters in the commercial market place. Equipment manufacturers are keen supporters of open source software that will make their machines interoperable and broaden potential market share. They might use free or open code in ROM chips which are executed when a computer starts up and dictates the range of activities it can perform. Interoperability is needed between these ROM chips and any software to be added later. For example, a manufacturer of computers may wish to be operable with Sun's Star Office application and would use any open source or free code that could enhance such operability. In order to have their machines used as Web servers they would wish to be operable with all ranges of web software on the market. A hardware company that could sell a machine with a free or open source operating system may be able to increase its profit margins when it does not have to pay mandatory licence fees to a particular supplier. Recognising quality, in 1998 IBM stopped putting out its own server product with its machines and adopted Apache, an open source server product with over 80% market share.

Governments, too, recognise the benefits of open source development.[22] A recent study by Mitre Corporation on behalf of the US Department of

19. Patrick K Bobko, "Open-Source Software and the Demise of Copyright" (2001) 27 *Rutgers Computer & Tech. L.J. 51* at [79].

20. Note 14.

21. Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World*, (2001) Random House, NY, p. 50.

22. For an article overviewing international legal efforts to utilise open source code see: Paul Festa, "Governments push open source software", CNET News.com, August 29, 2001, [http://news.com.com/2100-1001272299.html?legacy] 19 July, 2002.

Defence was cautiously optimistic concluding open source "encourages significant software development and code re-use, can provide important economic benefits, and has the potential for especially large direct and indirect cost savings for military systems that require large deployments of costly software products".[23] Taiwan has an open source project supported by the National Science Council and Ministry of Education. It is examining use of open source products to save royalty payments for office software in government agencies and schools.[24] Due to the high regard for privacy considerations in Europe, the German government is supporting an open source project, GnuPG, to reduce reliance on proprietary privacy enhancing code such as PGP.[25] The Linux community has entered a cooperative project with the Software Research Institute of the Chinese Academy of Sciences and NewMargin Venture Capital, a venture arm of the Chinese government called RedFlag. Initially, it developed a localised operating system for servers but now incorporates developments for PC systems, PDAs, and China's computerized lottery system.[26] The Peruvian parliament has a Bill before it to mandate use of open source products in government offices. Peruvian Congressman, David Villanueva Nuñez, circulated a letter to Microsoft on the Internet that sparked much debate on the relative merits of free and open code as opposed to proprietary development.[27]

The clash, between non-proprietary and proprietary forms of development, is a political, social and economic struggle. "Software pervades modern society; it can be found in almost every product. So naturally, if only a few people control software, their power increases and restricts users' freedom."[28] Development of such 'gift cultures' can mitigate "worrisome concentrations of corporate power in the software industry [by disdaining] those who seek to financially profit from the community's shared body of knowledge".[29]

23. Carolyn A. Kenwood, " A Business Case Study of Open Source Software", The MITRE Corporation, July 2001, [http://www.mitre.org/support/papers/tech_papers-01 /kenwood-software/index.shtml] 19 July, 2002. pxxv.
24. Tiffany Kary, "Taiwan opens door to open source", ZDNet News, June 4, 2002 [http://zdnet.com.com/2100-1104-931885.html] 19 July, 2002.
25. The GNU Privacy Guard, [http://www.gnupg.org/].
26. [http://www.redflag-linux.com/].
27. Thomas C Greene, "MS in Peruvian open-source nightmare", June 5, 2002, [http://www.theregister.co.uk/content/4/25157.html] 17 July, 2002.
28. Shawn W Potter, "Opening Up to Open Source", (2000) 6 Rich JL. & Tech 24, <http://www.richmond.edu/jolt/v6i5/article3.html>, (18 August, 2001); B Fitzgerald, "Intellectual Property Rights in Digital Architecture (including Software): The Question of Digital Diversity?" [2001] EIPR 121.
29. David Bollier, "The Power of Openness, Why Citizens, Education, Government and Business Should Care about the Coming Revolution in OpenSource Code Software: A Critique and A proposal for the H20 project", paper for the Berkman Center for Internet and Society", Harvard University, March 10, 1999, <http://eon.law.harvard.edu/opencode/h2O/>, (23 July, 2001).

This does not mean non-proprietary development groups are united. They differ over how to best maintain the communal aspects of software development. Since the stock market 'tech wreck', non-proprietary groups have accelerated their split into two main camps—the free software and open source movements. Their essential difference lies in their approaches to the commercialization of non-proprietary code.

1.3 Free Software Foundation (FSF) and Copy Left

"Free software does not mean that the software is free, as in requiring no payment. When I speak of free software, I'm referring to freedom, not price. So think of free speech, not free beer."[30] Thus asserts Richard Stallman, the founder of the Free Software Foundation. Software is not free because it has no price, it is free because it contains values that enhance liberty for users and programmers. Stallman applies four strict criteria to maintain free values in software:

(1) "The freedom to run the program, for any purpose (freedom 0).

(2) The freedom to study how the program works, and adapt it to your needs (freedom 1). Access to the source code is a precondition for this.

(3) The freedom to redistribute copies so you can help your neighbour (freedom 2).

(4) The freedom to improve the program, and release your improvements to the public, so that the whole community benefits. (freedom 3). Access to the source code is a precondition for this".[31]

1.3.1 GNU/Linux

Stallman realised the advantage of accessing source code when he tried to change a program given to him by Xerox so it would run on printers in his MIT lab. Xerox did not make the source code-available and instructed an employee not to give Stallman copies of the software. Comparing the sharing of programs to the sharing of recipes (and the improvement of programs and recipes by changing the source), he strongly criticizes proprietary control of software:

> So imagine what it would be like if recipes were packaged inside black boxes. You couldn't see what ingredients they're using, let alone change them, and imagine if you made a copy for a friend,

30. Stallman Richard M, "Free Software: Freedom and Cooperation", Speech at New York University, New York, 29 May, 2001 <http://www.gnu.org/events/rms-nyu-2001 -trapscript.tx , (August 27, 2001) On the power of free software models to enhance digital diversity consider: B Fitzgerald, "Intellectual Property Rights in Digital Architecture (including Software): The Question of Digital Diversity?" [2001] EIPR 121.

31. "The Free Software Definition", Updated 27 October, 2001, <http://www.fsf.org/philosophy/free-sw.html>, (23 July, 2001) .

> they would call you a pirate and try to put you in prison for years. That world would create tremendous outrage from all the people who are used to sharing recipes. But that is exactly what the world of proprietary software is like. A world in which common decency towards other people is prohibited or prevented.[32]

Free software developers often contribute to a program by accident and share source code on some "intellectual commons",[33] usually the Internet.[34] One module can be used to integrate with a need of another developer. Thus software progresses incrementally.

When broken up due to anti-trust findings against it in 1984, AT&T tried to licence use of its previously free Unix code. in reaction to this, Stallman launched a project called GNU - a recursive acronym meaning "GNU's not Unix". The aim was to create tools to build an operating system and then to produce such a system called GNU OS. By the end of the 1980's tools such as a compiler had been developed but the project slackened as the kernel for GNU OS was being formed. In 1991, Stallman found by accident the Linux module developed by Linus Torvalds in Finland to add to his GNU program after his attention was drawn to it by other free developers who had seen parts on the Internet.[35] Torvalds joined with Stallman and the GNU/Linux operating system emerged. This system was distributed with its source code.

In '91 only Macintosh had advanced beyond a command-driven interface for operating systems. Such a system of complicated commands had to be mastered chilling the proliferation of computers to novice and irregular users. How many wanted to remember a command like 'copy *.* A:' in order to copy all files to a floppy disk from a hard drive? During '91 Microsoft developed a serious graphical user interface (GUI) for an operating system not reliant on a DOS command driven system. The methods used by Microsoft to develop and ensure consumer loyalty to this system they developed and propertized is the subject of an extensive series of ongoing anti-trust cases. The GNU/Linux system has also met this challenge by adopting contributions of groups such as Samba to produce GUI interfaces for file and print servers.[36]

32. Note 33.
33. For the enhanced power code writers have in the cyberspatial intellectual commons see: Lawrence Lessig, "Symposium: Key Address: Commons and Code" (1999) 9 Fordham I P., Media & Ent. L.J 405 at [410].
34. For example, Apache is a widely used open source, web server program: <http://httpd.apache.org/dist/>, (23 November, 2001).
35. Note 33 The history of this connection is best covered in the book by Sam Williams mentioned in Note 39.
36. For a detailed overview of the history of GNU/Linux see: Q. Moody, Rebel Code: Linux and the Open Source Revolution, (2001) Penguin Books, NY, USA. *See* also: Lawrence Lessig, The Future of Ideas: The Fate of the Commons in a Connected World (2001) Random House, NY, p50ff.; Sam Williams, Free as in Freedom: Richard Stallman's Crusade for Free Software (2002) O'Reilly, Chapter 11.

The result is that Linux now represents an operating system with significant profile in the community, so much so that it is said to threaten the dominance of MS Windows. A recent statistical study shows some comparative findings:

- Reliability: In a ten-month test for reliability run by ZDNet, NT servers crashed an average of once every six weeks, the GNU/Linux servers never went down
- Security: Insurance companies covering "hacking" incidents have begun charging clients 5 to 15 percent more where Microsoft's Windows NT software is employed Instead of Unix or GNU/Linux, in Internet operations.[37]

1.3.2 General Public Licence (GPL)

A licensing system that promoted sharing and innovation was critical in the development of GNU/Linux. The free software movement is concerned with colonization by commercial (non-free) groups incorporating free code into their developments. Any copyright taken out over the resultant program effectively privatizes the free code used. Furthermore, non-free developers have freeloaded by not contributing anything back to the free community. To counter this, Stallman introduced the GNU General Public Licence (GPL). The GPL covers the initial program and "any derivative work under copyright law: that is to say, a work containing the Program or a portion of it, either verbatim or with modifications and/or translated into another language".[38]

Stallman places the GPL in a direct commercial and political context called 'Copyleft':

> To copyleft a program, we first state that it is copyrighted; then we add distribution terms, which are a legal instrument that gives everyone the rights to use, modify, and redistribute the program's code or any program derived from it but only if the distribution terms are unchanged. Thus, the code and the freedoms become legally inseparable.[39]

It is a powerful licence . By mixing GPL'd code with new code in a derivative work the obligation arises to make all the source code known or "free". Consequently, a commercial developer who takes free code under a

37. David A. Wheeler, "Why Open Source Software / Free Software (OSS/FS)? Look at the Numbers!", [http://www.dwheeler.com/oss_fs_why.html] April 23, 2002.

38. "The General Public Licence (GPL)", Version 2, June 1991, <http// www.opensource.org/licenses/gpl-license.html>, 19 August, 2001. See section for a detailed discussion of derivative works and the GPL.

39. "What is Copyleft?", Updated 5 November, 2001, <http://www.gnu.org/copyleft/copyleft.html> 24 November, 2001.

GPL licence into the code of their product is obliged to make the source code of the entire product available. Stallman argues this ensures 'freedom three' is maintained and the whole community benefits. The GPL "actually has the strength to say no to people who would be parasites on our community".[40]

1.4 The Open Source Movement

The open source movement is a non-profit organization. Its leading proponent, Eric Raymond, has conceptualized business models enabling commercial exploitation of open, source programs.[41] Programs distributed with the Open Source Certified trademark (OSI Certified)[42] are published on an approved list of licences[43] that conform to the open source definition.[44] The main elements of such licence s are:

- Free re-distribution so that a party may not charge a fee or royalty for the program unless it is a component of an aggregate software distribution containing programs from several different sources.
- The licence shali not require a royalty or other fee for such sale.
- The program must include source code, and must allow distribution in source code as well as compiled form. If a program is not distributed with source code (e.g. Apache licence) there must be a well-publicized means of obtaining the source code for no more than a reasonable reproduction cost preferably, downloading *via* the Internet without charge.
- Derived works and modifications must be allowed and be capable of distribution under the same terms as the original licence .
- The licence must maintain the integrity of the authors code by guaranteeing that source be readily available, but may require that it be distributed as pristine base sources plus patches. In this way, "unofficial" changes can be made available but readily distinguished from the base source.
- The licence must not discriminate against any person, group of persons or fields of endeavour.

40. Richard M Stallman, Note 31.

41. These include loss leader; widget frosting; give away recipe/open restaurant; accessorizing; free the future, sell the present; free the software, sell the brand; free the software, sell the content. Potter Shane W, "Opening UP to Open Source" (2000) 6 Rich. JL &Tech 24.

42. Open Source.Org, Revised April 30, 2001, <http://www.opensource.org/docs/certification mark.html>, (24 November, 2001).

43. Open Source.Org, <http://www.opensource.org/licenses/index.html>, (24 November, 2001).

44. Open Source.Org, Version 1.9, <http://www.opensource.org/docs/definition.html>, (20 July, 2002).

- The licence must not discriminate against fields of endeavour.
- The rights attached to the program must not require entry to some other form of licence or agreement such as a non-disclosure agreement.
- The rights attached to the program must not depend on the program's being part of a particular software distribution.
- The licence must not place restrictions on other software that is distributed along with the licensed software. For example, the licence must not insist that all other programs distributed on the same medium must be open-source software.[45]

1.5 Tension between Open Source and Free Software

It could appear that the difference between open source and free software is minimal but the move to embrace the commercial market by open source developers has led the free software movement to clearly differentiate themselves. The distinction is over the implications of the GPL. Copyleft software maintains freedom for all developers (and consequently users). It requires a licence e to give back under the terms of the GPL the source code of any changes or modifications. Open source software will allow non-free versions to be made. For example, the Apache licence allows a work to be distributed with or without modifications in source or binary form. The licence e can make changes without a requirement to share them provided the name of the derivative work is changed. The Berkeley Software Distribution (BSD) licence contains no obligation to disclose source code of modifications when distributing a derivative work.[46]

Open source developers can use free software to add to proprietary software so a system can become a combination. While acknowledging that the real enemy is proprietary software companies, FSF are wary of open source groups who mix free and non-copylefted software. "In effect, these companies seek to gain the favourable cachet of "open source" for their proprietary software products—even though those are not "open source software"– because they have some relationship to free software or because the same company also maintains some free software.[47]"

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45. Open Source.Org, Version 1.9, <http://www.opensource.org/docs/definition.html>, (20 July, 2002).

46. For more on the differences between GPL, free software and open source see: Joe Barr, "Live and let license" IT world.com, 23 May, 2001, [http://www.itworld.com/AppDev/350/LWD010523vcontrol4/; Larry Rosen, "Which open source licence should I use for my software?" [http://www.rosenlaw.com/html/GL5.pdf]

47. Gnu.Org, "Why Free Software" is better than 'Open Source'", <http://www.gnu.org./philosophy/freesoftware-for-freedom.html>, (13 November, 2001).

The tension is exacerbated by what many call the 'viral' nature of free GPL-Licensed (GPL'd) code.

Basic Clauses of Some Free and Open Source Licences

2.1 The GNU General Public Licence (GPL)[48]

Definition of source code (Clause 3) - "the preferred form of the work for making modifications to it." Includes for all modules, interface definitions files, scripts for compilation and installation of the executable.

Program or "work based on the Program" = the Program or any derivative work under copyright law "a work containing the Program or a portion of it, either verbatim or with modifications and/or translated into another language". (Clause 0)

Aggregation of other works not based on the Program (*e.g.* stored together or shared on a server) does not bring other work under this Licence.

Clause	Permits	Obliges
1	Copy and distribution of verbatim copies Charging fees for: • Act of transferring copies • Offer warranty protection in exchange for a fee	"Conspicuously and appropriately publish" on each copy a copyright notice Disclaimer of warranty Pass on a copy of this licence with the copy Keep intact any current notices in program
2	Make modifications "thus forming a work based on the program" Copy and distribute modifications	Place prominent notices in modified files of your changes and date thereof Allow any work "that in whole or in part contains or is derived from the Program any part thereof" to be licenced "as a whole" for no charge to all third parties under the terms of this licence.
3	Copy and distribute work as object code or in executable form	Accompany this with complete machine readable source code under licence requirements of Clause 1 and 2 OR accompany it with written offer for up to 3 years to give any third party at a fee for no more than costs the source code under licence requirements of Clause 1and 2

48. www.opensource.org/licenses/gpl-license.html.

5		Modification or distribution of the Program constitutes acceptance of the licence terms
7		Legal obligation under other intellectual property rights prevent you from distributing the Program
11	No expressed or implied warranty, not even with regard to merchantability or fitness for purpose Entire risk and cost for defects is borne by licencee	
12	Licensor is immune from damages arising from Program unless stipulated in writing	

2.2 GNU Lesser Public Licence[49]

Notes: This licence is for software libraries. A software library is a "collection of software functions and/or data prepared so as to be conveniently linked with application programs (which use some of those functions and data) to form executables. Yet when a program is linked with a library the result is a derivative work. Under GPL this would mean the entire work would have to be made free. Compatibility of the library with other software that may be proprietarial is paramount. To avoid that whole work coming under GPL requirements the aim of this licence is to "permit linking those libraries into non-free programs."

For example, proprietarial developers may wish to use a 'free' library that has become a *de facto* standard such as many of the Linux standards. This licence would allow this software standard to be incorporated into a non free product.

Terms

Work based on the library = code derived from the library
Work that uses the library = code must be combined with the library in order to run

1	Copy and distribution of verbatim copies of the library's complete source code	"Conspicuously and appropriately publish" on each copy a copyright notice Disclaimer of warranty Pass on a copy of this licence with the copy Keep intact any current notices in program
2	Modify the library or any portion of it Copy and distribute modifications	Modified works must themselves be a software library and copied and/or distributed with notifications for free to third parties

49. www.opensource.org/licenses/lgpl-license.html.

3	Can apply terms of the GNU GPL to a derivative work not part of a library that uses a portion of code from the library	
4	Distribution of copies of the library or portions or derivative works must be accompanied by Source code	
5	Work that Uses the Library Program that contains none of the library but is designed to work with it is outside scope of licence as are those that have only minimalist links to the library such as numerical parameters, data structure layouts, inline functions of ten lines or less.	Linking a work that uses the library with the library creates an executable that is a derivative of the library. This executable is covered by the licence

2.3 BSD[50] and MIT Licence

BSD Redistribute and use program in source or binary form with or without modification	Redistribution of source code and binary form to contain copyright notices and disclaimer as to warranty only, licence silent on making source code for derivative works available Need to publish disclaimer as to warranty
MIT No limits on rights to use, copy, modify, merge, publish distribute, sub licence, and/or sell copies of the software	

2.4 The Artistic Licence[51]

Package=collection of files distributed by copyright holder, and derivatives of that collection of files
Standard Version = a program package that has not been modified or has been modified in accordance with wishes of the copyright holder

1	Copy and distribute verbatim copies of the Standard Version of the Package
2	Can apply fixes and other modifications derived from public domain or from the copyright holder of the Package. Package so modified becomes the standard version

50. www.opensource.org/licenses/bsd-license.html.
51. www.opensource.org/licenses/bsd-license.html.

3/4	Can further modify/distribute package	Notices in each changed file and must do ONE of the following: 1. Place modifications in a public domain 2. Use modified package only in own organization 3. Make other distribution arrangements with copyright holder 4. Rename executable not in standard version and provide documentation of how they differ to standard
5	Charge fees you choose for support of package but not the Package Itself Can distribute Package in aggregate with other (possibly commercial) packages	May not advertise the package as a product of your own

2.5 Sun Industry Standards Source Licence (SISSL)[52]

Initial developer = individual or entity identified as initial developer in source code notice
Larger work = a work which combines original code or portions thereof with code not covered by terms of this licence
Original code = source code of software
Contributor version = combination of original code and modifications made by that contributor

2.1 (a)-(d)	Initial Developer Grant World wide, royalty free, non exclusive licence subject to third party intellectual property claims to use, reproduce, modify, display, perform, sub-licence and distribute original code with or without modifications and/or as part of a larger work A patent claim to sell and offer for sale the original code.	No patent licence for code portions taken from original code or modifications to it.
3.1		Distribution of licencee's modified code must comply with all requirements of the sub standards body. If they do not meet requirements must publish deviations from standards and offer in source code from under this licence

52. www.opensource.org/licenses/sisslpl.html.

3.2	Can charge fee for warranty support indemnity liability obligations for modified works but not Initial Developer	
3.3	Distribute any executable and source versions of modifications under licence of own choice	Terms which differ from this Licence are not offered by Initial Developer and indemnify Initial developer from any liability
3.4	Can combine original code with other code to create a larger work and distribute as a single product	

2.6 Mozilla Public Licence Version 1.0[53]

Contributor = each entity that creates or contributes to the creation of Modifications
Contributor version = original code, prior modifications and modifications of particular contributor

2.1	(a) Initial Developer grants world-wide, royalty-free, non-exclusive licence (subject to third party intellectual property claims) to use, reproduce, modify, display, perform, sub-licence and distribute (b) Utilize patents of original developer to the extent necessary to use original code	
2.2	Each contributor to give rights under 2.1 (a)-(b) above	
3.2		Source code versions of modifications must be made available on same media as executable version of program or via an accepted electronic distribution mechanism (if by ELM must be available for 12 months after date it initially became available or at least 6 months after a subsequent version became available)

2.7 Apache Licence

Redistribute source code and binary forms with or without modification

1-2	Redistributions in source or binary form must include copyright notice, disclaimers and list of conditions in licence	

53. www. opensource.org/licenses/mozilla1.0.html.

3	End-user documentation included with the redistribution, if any, must include acknowledgement of Apache
4-5	May not use Apache name in derivative works or to endorse any derivative works

3. Some Legal Issues in Free and Open Source Licenced Software

3.1 The "Viral" Nature of Free Software

The GPL aims to "control the distribution of derivative or collective works". Clause 2 states that you can form a new work based on the original program provided that such a derivative work is itself licenced to all third parties at no charge under the terms of the GPL. Source code must be supplied. It is not aimed at claiming rights over entirely new works. The GPL refers to a derivative work as defined in copyright law.[54] In US copyright law[55] a derivative work must be based on one or more pre-existing works, and must recast, transform or adapt an original work.[56] To be a derivative work the licencee must change the code in the original GPL'd work (pre-existing work). The copyright owner of the pre-existing work has the right to authorise preparation of derivative works.[57] Copyright subsists for the author of the derivative work[58] but only to the extent of the material added to the pre-existing work.[59] In addition, copyright for the derivative work "does not extend to any part of the work in which such material has been used unlawfully."[60]

54. GPL, Note 41, Clause 0. Nonetheless there still appears to be some uncertainty as to what this means and as to whether this is the only type of derivative work contemplated by the GPL. Is any work that employs GPL'd code regardless of whether it would be a derivative work under US copyright law - a derivative work in the eyes of the GPL?

55. Australian copyright legislation does not use the term "derivative works". A copyright holder has the exclusive right to make adaptations of a work under ss. 31(1)(a)(vi) of the Australian Copyright Act, 1968. For software purposes, an adaptation is a "version of the work (whether or not in the language, code or notation in which the work was originally expressed) not being a reproduction of the work": section 10 Copyright Act, 1968.

56. Copyright Act, US 17 USC § 10 1.

57. Note 59, § 106(2).

58. Note 59, § 103(a).

59. Note 59, § 103(b).

60. Note 59, § 103(a). Contrast the Australian position: *A-One Accessory Imports Pty Ltd. v. Off Roads Imports Pty Ltd (No 2)* (1996) 34 IPR 332; S. Ricketson, *The Law of Intellectual Property* 2nd ed. Volume 1 (1999) Law Book Co., Sydney, 116 120.

Here lies an interesting issue. The copyright statute gives the author of the derivative work the right to control copyright in the added (non pre-existing) parts of a derivative work.[61] The GPL insists they must reveal such changes. In this sense the GPL appears to override the rights given under the copyright statute to control the added (non pre-existing) parts of the derivative work. However, for the author of a derivative work to claim copyright under US law they will need to show they have not used the pre-existing work unlawfully.[62] Therefore an author of a derivative program will need to rely on the permission to use code granted in the GPL (which also contains an obligation to disclose source code) in order to assert copyright in the derivative work, thereby relinquishing complete control over the added (non pre-existing) parts of the derivative work. Although, in an instance where the use of GPL'd code is a lawful act of fair use under s 107 of the US Copyright Act the need to gain permission pursuant to the GPL is removed.[63] Does this mean there is no obligation to disclose source code in this instance?

It is these types of uncertainties that have led non-free developers to fear their source code might need to be revealed by any contact with GPL licenced software. Compounding these concerns, the GPL is silent on length of licence term.[64]

With one exception to be covered later in this paper, the GPL has not been tested in court. In order to avoid copyright infringement and the need

61. Note 59, § 103(a).

62. *Ibid*. A further issue is the extent to which the unlawful user prevents copyright arising in any part of the later work: M. Nimmer and D. Nimmer, Nimmer on Copyright Lexis Nexis, Chapter 3. Cf, the Australian law: *A-One Accessory Imports Pty Ltd.* v. *Off Roads Imports Pty Ltd (No. 2)*, (1996) 34 IPR 332, which suggests copyright can be claimed and protected in an adaptation unlawfully embodying a pre-existing work. This may impact on the legal significance of the GPL under Australian law.

63. *See* further: S. McJohn, "The Paradoxes of Free Software" (2000) 9 Geo. Mason L. Rev. 25.

64. *See* further Uniform Computer Information Transaction Act (UCITA) s. 308(1) & (2). Updated August 10, 2001, <http://www.ucitaonline.com/ucita.html>, (November 23 2001). UCITA is a model law promulgated for adoption by the US states which creates a 'sale of goods' styled regime for the licensing of software and other informational transactions. It is argued that the process of transacting software and other informational products is not adequately covered by existing sale of goods type legislation, which finds it hard to classify software. In the case law software is sometimes classified as a good and sometimes as a service; leading commentators to label software the digital chameleon. UCITA aims to avoid this debate by creating a *sui generis* regime governing the formation, performance and termination of information transactions. It has been highly controversial in its content and has only been adopted by two US states: Maryland and Virginia, http://www.nccusl.org/uniformacts-subjectmatter.htm.

to rely on the GPL, the down the line developer who wishes to distribute software will need to show that their code is an independent work and that it does not infringe the copyright owner's exclusive right to reproduce or prepare a derivative work. What does current law say is an infringement of the exclusive right of the copyright owner to prepare a derivative work under sec. 106 US Copyright Act? There is not a plethora of cases testing this issue with regard to software. For an infringement, there must be substantial similarity in the "total concept and feel" of a derivative work in comparison to the underlying work. "The little available authority suggests that a work is not derivative unless it has been substantially copied from the prior work."[65] Yet, in another case, digital images that were "touched up or modified selections" of original works were not found to make the later work an infringing derivative.[66] Most importantly for free and open source developers, infringement was not found in a later work that was an improvement of a Nintendo computer game.[67] The later work allowed a user to add lives to a game character, increase the speed of its movements and empowered it to float over obstacles. However, in another case, a company that downloaded game levels created by users utilising the 'build' utility provided in the game and burnt these to a CD for commercial gain was found to have created an infringing derivative work.[68]

One commentator suggests three factors to consider when establishing whether a later work infringes. First, does the later work "substantially incorporate" or is it "substantially similar" to the pre-existing work? Second, has the copyright holder of the pre-existing work been compensated for such use. Third, what rights did the creator of the later work have to "display or to copy" the underlying work.[69] It is further argued that the copyright owner of the pre-existing work must prove the derivative use "was not customary or reasonably expected" thus denying them opportunity to be compensated for their work.[70] All free and open source developers know it is customary and reasonably expected for other developers to build on their efforts and, often, the only form of compensation in the GPL is the publication of source code for any derivative changes. The harm in misuse of GPL products often lies in lack of specific performance in publishing source code of the derivative changes.

65. *Litchfield* v *Spielberg*, 736 F. 2d. 1352, para [1357] (9h Cir. 1984).

66. *Tiffany Design Inc.* v. *Reno-Tahoe Specialty Inc.*, 55 F. Supp 2d. 1113, para [1121] (Dist. Nevada 1999).

67. *Lewis Galoob Toys Inc* v *Nintendo of Am. Inc*, 964 F. 2d 965 (9th Cir. 1992).

68. *Micro Star* v. *FormGen*, 154 F. 3d. 1107 (9th Cir. 1998).

69. L Loren "The Changing Nature of Derivative Works in the Face of New Technologies" (2000) 4 J. Small & Emerging Bus. L., 57, para [84].

70. Amy Cohen "When Does a Work Infringe the Derivative Works Right of a Copyright Owner?" (1999) 17 *Cardozo Arts & Ent L. J* 623, para [657].

As indicated above, the GPL does not apply to programs "reasonably considered independent and separate works in themselves"[71] which can be distributed within a modified work but not come under GPL obligations. Chief legal representative of the open source licensing certification process, Larry Rosen, argues concerns about GPL's 'viral' nature are exaggerated. "A derivative work is not created by merely touching, any more that one catches AIDS by merely hugging. A more intimate relationship is required."[72] Rosen indicates clear examples where infringement of the GPL work's copyright would not occur. First, a proprietary program that runs a GPL work such as in the GNU/Linux operating system does not alter the GPL licenced work. Secondly, programs that are dynamically linked such as a printer driver for a Linux operating system do not interfere with each other's source code. Thirdly, programs that interact with common data but use an application program interface (API) do not alter the source code of each program. For an infringement of the GPL to occur an author must "consciously recast, transform, or adapt the GPL-Licenced software" and then distribute this work under some licence other than the GPL. Rosen also objects to the term 'viral'. He sees the GPL licence as a bargain between a developer who makes their work 'free' in return for others making their enhancements free. "A derivative work inherits the benefits of the GPL," Rosen claims. He prefers to see the power of the GPL as resulting in 'inheritance' of benefits rather than diseased infection.

3.2 Entering the Licence Contract

At what point is one contractually bound by taking an open source licence ?

Acceptance of a licence is a contractual agreement. To date, case law indicates a licencee accepts the conditions of a software licence by opening the shrink-wrap of a program even if the licence is not on the box, but inside it.[73] For programs distributed digitally by some electronic distribution mechanism, the licencee must act in a way that plainly manifests assent in a clickwrap agreement. Mere downloading is not sufficient. Assenting action must be unambiguous. "The primary purpose of downloading is to obtain a product, not to assent to an agreement. In contrast, clicking on an icon stating "I assent" has no meaning or purpose other than to indicate such assent.[74]

71. GPL, Note 41, Clause 2.

72. Rosen Larry, "The Unreasonable Fear of Infection", RosenLaw. Com, [http://www.rosenlaw.com/html/GPLPDF], (23 September, 2001)

73. The decision of *ProCD, Inc* v. *Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) held that shrink-wrap, and arguably click wrap, licences are enforceable in the USA in certain circumstances: *Hotmail Corporation* v *Van Money Pie Inc*, 47 U.S.P.Q. 2d. 1020 (N.D. Cal. 1998)

74. *Specht* v. *Netscape Communs. Corp*, 2001 U.S. Dist. LEXIS 9073 at [26] per Hellerstein USD].

The GPL however indicates a different form of acceptance. Assent occurs "by modifying or distributing the Program (or any work based on the Program)".[75]

3.3 International Issues

As the free software distribution model grows throughout the world legal notions such as "jurisdiction" and "choice of law" will highlight the legal nature of the GPL and its international enforceability. Some of these issues may turn on whether we see the GPL as a licence or a contract? To date in this article, these words have been used almost interchangeably. The distinction is important. Contract law is subject to the vagaries of various national approaches. For instance, some legal systems require a contract to be in local language for enforceability. A copyright licence enables products to come under intellectual property laws that have been harmonised by international treaties such as the *Berne Convention for the Protection of Literary and Artistic Works*, *WIPO Copyright Treaty* (1996) and TRIPS. Along with the principle of national treatment this means that copyright law is (arguably) more widespread and uniform than contract.

Chief counsel for the Free Software Foundation, Eben Moglen, suggests the GPL is a copyright licence not a contract.[76] "Licences are not contracts: the work's user is obliged to remain within the bounds of the licence not because she voluntarily promised, but because she doesn't have any right to act at all except as the licence permits."[77] In the only case to consider enforcement of the GPL requirement to publish source code, he made the following claim:

> *The GPL is a very simple form of copyright licence, as compared to other current standards in the software industry, because it involves no contractual obligations. Most software licences begin with the exclusive rights conveyed to authors under copyright law, and then allow others access to the copyrighted work only under additional contractual conditions. The GPL, on the other hand, actually subtracts from the author's usual exclusive rights under copyright law, through the granting*

75. GPL, Note 41, Clause 5.

76. It could be argued that if the GPL is a mere licence it can be revoked at will leaving developers on a free software platform at the mercy of the licensor: I Malcolm, "Problems in Open Source Licensing" (2003) <http://www.ilaw.com.au/public/licencearticle.html>

77. Eben Moglen, "Free Software Matters: Enforcing the GPL, I", August 12, 2001, [http://emoglen.law.columbia.edu/publications/lu-12.html January 25, 2002. *See* also: B Fitzgerald, "Digital Property: The Ultimate Boundary?" (2001) 7 *Roger Williams University Law Review* 237; B Fitzgerald, "Commodifying and Transacting Informational Products Through Contractual Licences: The Challenge for Informational Constitutionalism" in CEP Rickett and GW Austin (eds), *Intellectual Property and the Common Law World*, *Oxford*, Hart Pub, 2000, 35.

> *of unilateral permissions. When a work of copyrighted software is released under the GPL, all persons everywhere observing its terms are unilaterally permitted all rights to use, copy, and modify the software. Because these permissions are unilaterally given, users who wish only to use the software themselves, making copies for their own use, or who wish only to make derivative works for their own use, do not have to "accept" the licence, because they have no reciprocal obligations under it.*[78]

An analogy can be made with land to demonstrate Moglen's view. I can give you a licence to walk on my land. This requires no counter obligation from you. It remains a unilateral permission not a contract. But such a view ignores the obligation to publish source code on a developer wishing to distribute a derivative work based on a GPL product. This obligation makes the licence more like a contract.[79]

In *Progress Software Corp* v. *MySQL AB*, Progress were accused of intentionally distributing a program called Gemini, allegedly a derivative work of the GPL program MySQL, without source code. The case was an application for a preliminary injunction to prevent Progress and its subsidiaries from sublicensing or distributing the program. The finding of the court was an inconclusive outcome for this test of GPL enforceability. "With respect to the General Public licence ("GPL"), MySQL has not demonstrated a substantial likelihood of success on the merits or irreparable harm."[80] In addition, Progress did comply with its source code publication requirements under the GPL during the course of the dispute and this did much to cure the breach according to the judge.

The licence or contract categorisation issue is one point of consideration that needs to be resolved before it is known whether the GPL will be subject to the vagaries of local contract law or remains internationally effective as a copyright licence. It will be interesting to see how courts respond to this issue. In *Sun Microsystems Inc* v. *Microsoft Corp* the Court explained that:

> *Generally a copyright owner who grants a non-exclusive licence to use his copyrighted material waives his right to sue the licencee for copyright infringement and can sue only for breach of contract: Graham v. James, 144 F 3d 229, 236 (2d Cir. 1998). If however, a Licence is limited in scope and the Licencee acts outside the scope, the licensor can bring an action for*

78. *Progress Software Corp.* v. *MySQL*, AB 2002 U.S. Dist. LEXIS 5757. The "Declaration of Eben Moglen in support of defendant's motion for a preliminary injunction on its counterclaims" made on February 22, 2002 is found at: [http://www.fsf.org/press/mysql-affidavit.html] May 08, 2002.

79. Cf. J Malcolm, "Problems in Open Source Licensing" (2003).
<http://www.ilaw.com.au/public/licencearticle.html>

80. Note 80, para [2].

copyright infringement: S.O.S. Inc. *v.* Payday Inc., *886 F 2d 1081, 1087 (9th Cir. 1989); Nimmer on Copyrights 1015 [A] (1999).*[81]

4. Conclusions

Another commentator argues that the differentiation between licence as an intellectual property right and contract is not one that creates conflict. Rather they are "two areas of law that have long co-existed and that, at least with respect to one, depend on the other for support in the direction of the goals that are purportedly at the heart of the core legal regime. Copyright and other forms of intellectual property law cannot, and have never been able to, foster active development and distribution of information products in society without relying extensively on contracts".[82] The free and open source licences use this nexus between copyright and contract to create a new paradigm for creation and distribution of digital property.

The remedying of a breach of the GPL is also an evolving issue. Harm and loss, the traditional paradigms of the atom-minded, are difficult to show in communities where *egoboo* is the principal form of exchange. Other forms of loss have to be argued. What is most sought from any infringer is an equitable remedy to specifically perform by publishing the source code benefits of their changes to the whole community. In addition, misusers of GPL code would be more wary to impugn if they knew that upon a finding for infringement they could be held to account for profits.

81. 188 F. 3d 1115 at 1121 (9th Circ, 1999).

82. Raymond Nimmer, "Breaking barriers: The relation between contract and intellectual property law", [http://www.2bguide.com/docs/rncontract-new.html] May 1, 2002.

A TRIBUTE TO NANI PALKHIVALA

Maj Gen Nilendra Kumar*

For many years Nani had taught at the Government Law College in Mumbai. Noted lawyer, Murlidhar Bhandare was one of his students. He remembers, if "Dr Ambedkar (the then Principal) could recall the constitution of the major countries in the world without referring to notes, Palkhivala had equally great memory. His eloquence and erudition were spell binding. It never occurred to me, even once, to miss his class. He taught us jurisprudence, the foundation of law".

Rajya Sabha Member and eminent counsel Fali Nariman recalls, "I started practice in 1951 – in Kanga's chambers. It was a crowded place; with only seven tables for seven seniors, all immensely successful. Nani was then eight years in practice, already a "boy-wonder"; he had a table to himself but with space just enough to hold conference with one client. When more clients were present, Nani would confer with them in his car parked outside! He could work anywhere; always brilliant, never pretentious. He worked, and walked, at break-neck speed."

Those were the days when cramped for spaced in a noisy atmosphere full of excitement, all of us young entrants truly experienced the hustle bustle of a packed chamber of practicing lawyers. We learnt early on as Nani used to tell us briefless juniors, that "God pays-but not every Saturdays."

In the words of the legal luminary TR Andhyarujina, "His rise in the legal profession was meteoric. He innovated a skill in persuasive advocacy which seemed to have escaped most lawyers. During my time I have seen many excellent advocates in court in India and England. I have no hesitation in saying that no one excelled Palkhivala in lucidity and persuasiveness of

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his case as Palkhivala did the most complex legal and knotty problem was unravelled by him with minimom effort and disarming simplicity".

Behram, younger brother wrote of Nani, "On all occasions, big or small, Nani's arguments in court were mercilessly intellectual. On big occasions, at times, they were also spiritual. To a question posed by a Judge to corner him, he would, without a moment's thought come out with - "There are four answers - or -- there are five answers." I once asked him how it was possible, even for a man of his intellect, to do that. He gestured, stretching out his hand and bringing it back with open fingers towards his head, "I seen them coming to me" "All of them together?" "yes".

A Supreme Court Judge, once met Nani at a private function. He said, "I have now decided never to put you such a question. Because whenever I do, you straightaway reply, "There are five answers" or "There are six answers", and I am made to look small in the open court."

Nani was absolutely sure he became what he was only because of his parents influence. His eyes moist with tears, he once told RM Lala in an interview, "My father, Ardesbir, taught me compassion and kindness for the less privileged. I remember, I was not more than two years old. I was about to help myself to a bowl of almonds when my father reminded me of the poor orphan who lived next door. I was so moved by his words that I immediately handed over the entire bowl to the boy. The incident has made a deep impression on me ever since."

Nani was blessed with a photographic memory. Maharashtra Advocate General Goolam Vahanvati has remarked, "It was his capacity to memorise and rattle off facts, figures and quotations that captivated audiences all over the world, whether it was at his budget meetings or at American Universities. When he was the Indian Ambassador to America he used to lecture at several American universities. He spoke without a scrap of paper in front of him and as usual he rattled off dates, events, facts, figures and quotations. The Americans were incredulous. We are told that some of them decided to check the quotations and called for the transcripts of a speech. It was found that every single statement was entirely accurate.

Veteran Journalist Kuldip Nayar holds the view that, "Palkhivala's finest hour was when he returned the brief of Prime Minister Indira Gandhi, indicted by the Aliahabad High Court for a poll offence. When he accepted the case, he said he would not take the opposition, his friends, because they wanted her to quit. But when he returned the case, he took the risk of annoying the all-powerful Prime Minister. He did not want to defend a person who had suppressed democracy, which he knew the nation cherished."

Talking about the Bank Nationalisation case, the solicitor concerned has written, "on a Saturday, the Ordinance was issued. On the following day, a

Sunday, Mr. Palkhivala flew to Delhi and came to my office to dictate the writ petition. And in record time of three hours he dictated the writ petition under Article 32 which was ready to be filed for the following day.

How do some of the eminent Judges rate him. In the words of Jusfice VR Krishna Iyer who was one of the fifteen judges sat to consider whether the theory of basic structure declared by the Supreme Court in Keshavananda Bharati required reconsideration, "to praise Palkhivala is to paint the lily, to guild refined gold and throw a perfume on the jasmine.....Sri Palkhivala appearing on the other side rose to raise preliminary point. He contended that the question of Basic Structure of the Constitution did not fall for consideration at all and was therefore not properly within the scope of the case before the court. He presented suavely and puissantly. I was impressed and conveyed my view to some of my colleagues who seemed to agree. The Chief Justice had a different view but respected my view and dissolved the bench as the main point did not arise, according to us."

In the words of former Chief Justice RS Pathak, "Nani was no pursuer of judicial office, and even when it was offered he politely turned the proposal aside, believing that his effective contribution to society lay as a crusader at the Bar or on the public podium. It is said that when at the age of 42 years he declined an appointment to the Supreme Court Bench, one of Home Minister YB Chavan's wry comments was that Nani did not even ask for time to consider the proposal."

Nani had a brief but impressive stint as India's Ambassador to the United States between 1977 and 79. Seasoned diplomat JN Dixit was then serving as Minister in the Indian Embassy in Washington. In his words, "within a fortnight of his arrival he changed the entire functional and social atmosphere in the embassy and proved that our skepticism was irrelevant. He dispensed with the procedural formalities of interaction between him as Ambassador and all the other officials of the Embassy. He was devoid of the burden of official experience in its social dimensions. No prior appointments were required to meet him. All one had to check was to see if he was in office and free, and then walk in. The most remarkable feature of his tenure in Washington was the personal rapport that he established with President Carter and especially with his mother Mrs Lilian Carter."

Dinesh Vyas, Senior Advocate, had a long association with Nani. He reminiscences, "I have never seen in my life any other man who valued the importance of time as much as Palkhivala did. To him waste of time was a big crime. For frequent fliers on Mumbai-Delhi-Mumbai flights, Palkhivala glued to a chair at the airport or to his seat on the plane reading books or briefs was a frequent sight."

"Palkhivala was not only an outstanding lawyer, but one of the most eminent and conscientious citizens. His concern for the country and its

problems manifested itself in his speeches and articles. He was one of the most fascinating speakers of his time," opines PP Rao, Senior Advocate. In the words of , Rajeev Dhavan, what made Palkhivala special was his constitutional interventions at a time when new ideas were needed to give strength to not just to the Indian Constitution—but its counterparts the world over. In the fifties and sixties, Palkhivala saw the Indian Constitution being hijacked by politicians. Constitutional amendments had made a mockery of the constitutional process. There was a nice joke that many bookshops would not carry a copy of the Constitution because it had become a periodical. If as in Palkhivala's words—the Constitution had become "defaced and defiled", what was to be done? Palkhivala successfully attacked many of the constitutional changes, in the Compensation (1965) and Bank Nationalization Cases (1970) - but only to invite more constitutional amendments. Finally, in a triumphant strategy, he successfully argued in the Fundamental Rights Case (1973) that Constitutions have a 'basic structure' which cannot be amended out of existence. It was a simple poignant proposition. From the rough and tumble of politics, Palkhivala discovered, resurrected and consecrated the Constitution's soul."

No one could fail to be impressed with his good manners. Reputed scholar Prof Venkat Iyer has written; "He was a man of immense good manners. No visitor to his home would be sent away without Nani accompanying them personally in the lift six floors down and being shown to their car, however late the hour. When travelling, he would not show the slightest sign of impatience, preferring instead to wait patiently in queues for security checks and for boarding planes—you only have to spend a few minutes in any Indian airport to realize how rare such behaviour has become."

Soli Sorabjee, the Attorney General, rates Nani as outstanding for his charitable works. "His contributions to charitable causes were frequent but anonymous. Dr Badrinath of Shankar Netralaya, a hospital in Chennai, recounts the story of him being invited by Nani in Bombay for dinner. As Nani was seeing the doctor to his car he slipped him a small envelope saying this was a token contribution for the hospital. When the doctor opened the enveloped he saw Nani's personal cheque for Rs. two crores. When Nani heard of the proposed move to place a plaque in the front building of the hospital commemorating his name he protested and requested that the same be removed".

In his tributes veteran editor CR Irani recalls, "His towering intellect was matched with a compassion for those less fortunate than himself; he lived a simple life and had few wants. When I told him that he could not imagine how proud I was of him, he waved a deprecating hand but he know I meant what I said. He suffered ill-health towards the end of his life but he did not complain. He had faith in the divine and his own well-being never bothered him.

Famous columnist Sucheta Dalal had the first experience of the power of his oratory in the 1980s when as a junior reporter she covered an ACC annual general meeting, "that was expected to be controversial after a significant change in its shareholding. The Patkar Hall in Mumbai was packed" and before the meeting began, several front bench investors had assured me that they planned to grill the chairman. Palkhivala rose to speak and after 45 odd minutes of his powerful and persuasive explanation of developments within the company, the auditorium simply emptied out. I have no questions any more· mumbled one departing investor when I asked him about the little chit of questions he had quietly stuffed back into his pocket.

If Nani had a fault it was that he was far too pre-occupied with the concerns and chores of the movement. In the words of Fali Nariman "What is this life if full of care, we have no time to stand and stare? asked the poet. Nani had "no time to stand and stare". In fact when he was young and burdened with briefs, he literally filled the unforgiving minute with sixty seconds worth of distance run—always in high gear, always at top speed". He was just in time for a Court hearing, just in time for a Board meeting, just in time for a public lecture. In fact not infrequently at Bombay airport one would hear the announcement; 'last call for Mr Palkhivala for Flight 182 to Delhi.' And one could see Nani rushing along to the departure gate, just in time to board his flight.

Former Minister and eminent lawyer Ram Jethmalani recounts an incident during the emergency when he happened to be in London for some professional work. "Soli Sorabjee too had happened to be in the same hotel. We decided to entertain ourselves for the evening at famous Raymond Review in Soho. We were agreeably surprised to see Nani there on the opposite side of the theatre. Soli impishly whispered into my ear "If Nani sees us he will drop dead." I was convinced he would survive and he did. He was not a fun-hating prude and did partake of the joys of ordinary mortals like Soli and me."

On a more serious note, Jethmalani opines, "His intellectual endowment was far superior to that of many of his competitors as well as collaborators. He turned out to be a sensitive soul who found the world more corrupt than he had hoped and Government more inept than he had imagined. He often neglected the outward forms of grace. Thereby he kept inferior man at a distance. He lived in an environment filled with malign flatterers, hypocrites and poseurs, fake ascetics and even some pimps of the press. From all he was determined to keep a secret that he was a glorious mixture of the hedonist and puritan with a tough shell, hiding a fine and gentle core. Neither in professional practice nor in politics did he ever tread water. He regularly took a header into deep water and the splash usually shocked envious spectators."

Senior Advocate Dinesh Vyas was associated as a junior to Nani for over three decades. His views, "For a gifted man such as Mr. Palkhivala who was ordained by destiny to rise spiritually higher and higher, Parsi birth was a divine design and not an accident. The noble soul flourished more in a noble body in a noble family in a noble community. He was proud to be a Parsi. At a function held by the Bombay Parsi Panchayat to honour him upon his appointment as an Indian Ambassador to the US in 1978, he completed his speech by observing that in his next birth too he would wish and desire to be born a Parsi."

Rajya Sabha Member Dr. PC Alexander had known him closely during the nine and half years of his tenure as Governor of Maharashtra. He recalls that towards the end of his life, "he had been feeling immensely worried about the sharp deterioration of moral standards in the country. He appeared to have become quite distressed and even depressed at the all-pervasive corruption in our society; the hypocrisy and double standards, which according to him had become normal practice among most of the present leaders, and particularly the manner in which the common people had become tolerant of corruption in our society. He had always believed that improving standard of life is more important than improving standards of living and had felt very unhappy at the growing tendency among the people in resorting to any means driven by the greed for money."

Nature was not too kind to Nani at the end of his journey. He had lost the ability to recognize people and his physical movements and speech were severely restricted. S Ramakrishnan of Bharatiya Vidya Bhavan was a witness to a moving scene. "On May 25, 2000, I visited Nani at his residence. Nani was not well. Even then he insisted that we go to Breach Candy Hospital where his wife, Smt Nargesh was admitted for blood transfusion. The room was small. Nani was on the wheel chair extending his arm to hold Nargesh's hand, Nargesh was on the other side of the bed also extending her arm to hold Nani's hand but both could not hold each other's hands. For a while, more than a minute, both were trying to come closer to each other till I moved Nargesh and both were able to hold each other's hands. Both cried."

Nargesh breathed her last on 4 Jun, 2000. Nani, a few months later, on Dec 11, 2002.

MOTOR VEHICLES ACT, 1988: A SOCIAL SECURITY LEGISLATION

M.C. Garg*

The Motor Vehicles Act, 1988 belongs to the branch of social welfare legislation as it provides for compensation in accident cases. It is based on the consideration that society under the Constitution wedded to socialism or the social justice is bound to provide for the victims of the accidents and their dependents. It is the primary duty of the state to take care of them.

The word 'compensation' means anything given to make things equivalent, things given to or make amends for loss, recompense, remuneration or pay.

According to Webster's dictionary, the word 'compensation' means the act or action of making up, making good or counter-balancing, rendering equal.

According to Black's Law Dictionary, the word 'compensation' gives the meaning as equivalent in money for the loss sustained, equivalent given for property taken or for an injury done to another.

In the Oxford English Dictionary, the meaning of the term is given as the action of compensating or condition being compensated, counter-balance rendering of an equivalent requital, recompense.

The law of compensation for the accident victims under the Motor Vehicles Act has not been stationary or static. It has been gradually growing towards improvement. It has thus travelled from fault liability to 'no fault' liability. Not only the owner and the driver of the motor vehicle involved in the road accident are liable under the Motor Vehicles Act to pay compensation under different heads, the insurance company with whom the vehicle is insured is equally liable to make payment to the claimant as a compensation for the injuries inflicted upon the victim in a motor accident.

Motor Vehicles Act as amended in 1994 incorporated many changes.

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Motor Vehicles Act, 1988: A Social Security Legislation

Section 166 and section 163A of the Act gives detail mechanism as to how an application for claiming compensation arising out of the use of motor vehicle can be filed; where it can be filed and who are the necessary and proper parties to the petition. Section 147 of the Act makes it compulsory for the owner of every motor vehicle to purchase an insurance policy to cover the risk likely to be caused to the third parties arising out of the use of motor vehicle.

Provisions of Section 169 of the Act require adjudication of the claim petitions so filed as expeditiously as possible. It authorizes the claims tribunal to adopt such summary procedures as it may deem fit to dispose off the petition as early as possible. Tribunal is also authorized to take help of experts if felt necessary for the purpose of deciding the case, as provided for under section 169(3) of the Act.

In the case of *Minu B. Mehta*[1], the Apex Court had observed, that negligence of the driver of the offending motor vehicle, is an essential ingredient for invoking the liability of the owner under section 166 of the Motor Vehicles Act. However, this preposition has been diluted from time to time by extracting principle laid down by English Courts in the case of *Reyland* v. *Fletcher*[2].

In *Gujarat State Road Transport Corporation* v. *Ramanbhai Prabhatbhai*,[3] application of the aforesaid rule in cases arising out of motor accident has been extended. Following observation made by E.S.Venkataramiah. J, is relevant: **"Today, thanks to the modern civilization, thousands of motor vehicles are put on the road and the largest number of injuries and deaths are taking place on the roads on account of the motor vehicle accidents. In view of the fast and constantly increasing volume of traffic, the motor vehicles upon the roads may be regarded to some extent as coming within the principle of liability defined in *Reyland* v. *Fletcher*, 1861-73 All ER. From the point of view of the pedestrian the roads of this country have been rendered by the use of the motor vehicles highly dangerous. 'Hit and run' cases where the drivers of the motor vehicles who have caused the accidents are not known, are increasiug in number. Where a pedestrian without negligence on his part is injured or killed by motorist whether negligently or not, or his legal representatives, as the case may be should be the responslbility of the society to the deaths and injuries caused in road accidents. There has beeu a continuous agitation throughout the world to make the liability for damages arising out of motor vehicle**

1. *Minu B. Mehta* v. *Balkrishan Ram Chander Nayan*, (SC) (CA No. 1249/1976 decided on 28-1-1977), AIR 1977 SC 1248.
2. *Reyland* v. *Fletcher*, (1868) LR 3HL 330: 1861-73 All ERL
3. *Gujarat State Road Transport Corporation* v. *Ramanbhai Prabhat Bhai*, (SC) (SPL civil) No. 2802/87 decided on 11-5-1987.

accidents as a liability without fault......" Like any other common law principle, which is acceptable to our jurisprudence, the rule in *Reyland* v. *Fletcher* (supra), can be followed at least until any other new principle which excels the former can be evolved, or until legislation provides differently. Hence, we are disposed to adopt rule in claims for compensation made in respect of motor accidents".

In the aforesaid Judgment, it was also held, ...'No fault liability' envisaged in section 140 of the M.V. Act is distinguishable from the rule of strict liability. In the former the compensation amount is fixed and is payable even if any one of the exceptions to the rule can be applied. Compensation on account of accident arising from the use of motor vehicles can be claimed under the common law even without the aid of a statute. The provisions of the M.V. Act permit that compensation paid under 'no fault liability' to be deducted from the final amount awarded by the Tribunal. Therefore, these two are resting on two different premises. We are, therefore, are of the opinion that even apart from section 140 of the M.V.Act, a victim of an accident, which occurred while using a motor vehicle, is entitled to get compensation from a Tribunal unless any one of the exceptions would apply."

The scheme of the Act entitles any person(s) who is/are injured or is/are the legal heirs of a person who dies due to the use of motor vehicle to approach a Motor Accident Claims Tribunal having jurisdiction to try the claim petition either by himself or through his authorized agent, as the case may be, for claiming compensation. The petition can either be filed under section 166/140 or under section 163A of the Act before the Claims Tribunal having jurisdiction setup by the appropriate Government under section 165 of the Act. In a hit and run case, it can be filed under section 161 of the Act before the competent authority as may be appointed under the scheme framed under section 163 of the Act.

When the claim petition is filed under section 166 of the Act, the tribunal can also grant interim compensation under section 140 of the Act on the basis of no fault liability. Substantive compensation is required to be awarded by taking into consideration nature of injury, time taken in the treatment, loss of income as also towards the pain and suffering of the victim. In an injury case, if the injury results in permanent disability, compensation towards such disability can also be awarded besides awarding expenses for future treatment and cost of limbs etc. Extent of permanent disability can be worked out on the basis of the schedule attached to the Workmen's Compensation Act, 1923 and the Personal Injuries (Compensation Insurance) Act, 1963. As per the provision of Section 168, the interim award is to be adjusted in the final award.

In a death case compensation can be granted on the basis of the loss of estate suffered by the dependents by taking into consideration the financial

contribution which the deceased used to make for the family including his future prospects as held by the Apex Court in *Sarla Dixit's* case[4]. In the case of the death of a housewife also loss can be ascertained by taking into consideration her services to family. Wherever required notional income or minimum wages formula and the multiplier as given in the 2nd Schedule of the Act can be used.

Section 158(6) of the Act mandates upon every investigating officer of a police case, registered in connection with a road side accident to collect all the relevant papers such as the driving license of the driver(s) of the vehicle's involved, registration book of the vehicle, insurance cover besides M.C and Post Mortem Report where ever applicable, and to submit copies thereof to the Tribunal having jurisdiction over the area, to the relations of the deceased or the injured and to the insurer within one month of the registration of the case.

Such documents can be made admissible *per se* in evidence by following summary procedure, which can be followed by the claims tribunal in exercise of its powers as contained under section 169(1) of the Act subject to the right of the respondents to challenge their authenticity.

The claims tribunal has also been vested with the power to treat the report of the police officer under section 158(6) of the Act, as a claim petition, *suo motu* in exercise of the powers vested in it under section 166(4) of the Act. This is akin to the provisions of section 190(1) of the Code of Criminal Procedure.

Section 166 of the Act governs the jurisdiction of the tribunal. By the amendment of the aforesaid provision that took away sub clause 3 of section 166 of the Act, now there is no limitation for filing a claim petition. It has also been so held by the Apex Court in the case of *Ramesh Bhai C. Patel* v. *New India Ass.Co. Ltd.* as reported in I.As Nos. 1-3 in SLPs (C) Nos. 1057-1997 (decided on 7-2-1997).

In all such claim cases the insurer has very limited defenses as provided under section 149 of the Act. However, these defenses does not absolve the insurance company to first compensate the victim. If the defenses are proved than the insurer may get a right to recover the money from the owner after making the payment. However, for the adjudication of the defense of the insurance company it is not necessary to prolong the litigation as the adjudication about the right of recovery is basically lies between the insurer and the insured and can be decided in a separate suit filed by the insurance company. However, to avoid multiplicity of cases and to restrict its liability towards interest on account of delay it is expected that the insurance company take the defense available to it at the earliest and proves them at the first possible opportunity. If that is done even a claim tribunal may be in a position to grant them the right of recovery while awarding the compensation to the victim as held by Hon'ble Supreme Court

4. *Sarla Dixit* v. *Balwant Yadav*, (SC)(CA No. 5157/92 decided on 29-2-1996), 1996 MLJ 55.

in the case of Kamla. However, the law in this regard has also developed further in the case of *United India Insurance Company Ltd.* v. *Lehru*[5]. There is need to understand this aspect of the matter by the insurers. Use of computers and internet can do wonders and may lead to desirable results if all the RTA's and various branches of insurance companies are connected on line which may expedite verification of the policy and the driving licence etc.

The trend of judicial precedent virtually makes it mandatory to award compensation, once it is established that the injury or death is caused by the use of the motor vehicle, against the owner of the vehicle which can be satisfied by the insurer if the vehicle is covered by a third party insurance cover as required to be taken under section 147 of the Act.

The word 'use of vehicle' has been given widest possible definition in the case of *Rita Devi*[6] of the Apex Court. Causing accident while driving is only one of the causes to claim damages under the Act. There may also be other situations where the liability to compensate may arise as have been discussed in the *Kausnava Begum's*, Gujarat Transport and *Rita Devi's* cases by the Hon'ble Supreme Court.

The interpretation of law also liberalised the extent and the standard of evidence to be led in such cases. The police challan and the investigation report can be taken as a *prima facie* evidence about the involvement of the vehicle in the accident unless it is rebutted by cogent evidence. Reference can be made to a latest judgment delivered by Justice S.K. Mahajan in the case of *Moti Chand* v. *Bala Devi*[7].

The defenses of contributory or composite negligence are only to be used for bifurcation of the liability and cannot be used for denying the compensation. Reference can be made to a Judgment of Delhi High Court (DB) in *Angoori Devi's case*[8].

By exercising the powers vested in the tribunal under section 169 of the Act the tribunal can regulate the procedure for filing of the petition and the written statements by prescribing a checklist of the documents to be annexed with their pleadings. Evidence can be taken on affidavits. Parties can also be persuaded to go for conciliation, if possible. This process can drastically reduce the delay in the trial of the cases under the aforesaid Act. Such procedure has been laid down by the author for the court presided over by him.

The law is developing fast to meet the desire of the legislature *i.e.* to avoid destitution on account of sudden death or on sustaining bodily injury, so as to compensate the loss suffered by the victim due to injuries sustained as quickly as possible. Of course, caution is required to see that the compensation awarded should not bring a bonanza but it should be, just and fair.

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5. *United India Ins. Co. Ltd.* v. *Lehru*, (2003) III AD (SC) 605.
6. *Rita Devi* v. *New India Ass. Co. Ltd.*, (CA No. 3021/2000 decided on 27-4-2000 (SC).
7. *Moti Chand* v. *Bala Devi*, (Delhi) FAO No. 3/2000 decided on 21-10-2003.
8. *Angoori Devi* v. *Megh Raj*, (Delhi) 2001 ACCJ 24 (DB).

AN OVERVIEW OF RECENT ELECTORAL REFORMS IN INDIA AND THE NEED FOR MORE

Professor (Dr.) Subhash C. Jain*

I. Introduction

India is the largest functioning democracy. The democracy functions through the Parliament, State Legislatures, Panchayats and Municipalities and other grassroot institutions. An independent Election Commission is in existence at the Centre and there are also Election Commissions in the States to conduct elections to elect representatives to these bodies.

Over the years, certain deficiencies were noticed in functioning of the democracy some of which have been rectified through electoral reforms while others are yet in the process of discussions within the political parties or are lying buried due to paucity of time or resources.

Several bodies including the Dinesh Goswami Committee, Indrajit Gupta Committee, the Law Commission of India, the Election Commission of India itself and recently the National Commission to Review the Working of the Constitution (NCRWC) have given recommendations for reforming the electoral laws. They have all given divergent views on some of the issues. The NCRWC has, however, come to the conclusion that no major changes are required in the Constitution of India and that the objective of reforms could be achieved by amending the ordinary laws.

Every one who has the interest of the country at heart is deeply concerned with the reform of electoral law in India. It is another matter that every one is not well informed as to the current law on the subject. It is, therefore, necessary to review what has been done recently and what more needs to be done.

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Almost every political party has been talking of comprehensive electoral reforms. However, it is impossible to achieve a consensus on a complex subject like this in one go. A comprehensive Bill was introduced in the Rajya Sabha on 30th May, 1990 for amending the Representation of the People Act, 1950 but seems to have been later on withdrawn on 13th June, 1994. In the present state of political situation prevailing in the country when no single political party enjoys majority, each of them is bound to have its own views as to how best the country can be run. What is the priority before the political parties? Is it stability of the country or government or is it free and frank expression of views by its members irrespective of the party line on the subject that is of prime concern to the leadership. Perhaps their goal is to achieve both. The concern for stability of government has led the political leaders to seek restriction on freedom of speech and expression.

In a democratic and parliamentary form of government as in India, it is in the fitness of things that major electoral reforms should be discussed in meeting of the political parties. After a Bill is introduced, it generally gets referred to the Department-Related Standing Committees of Parliament which are in existence since the early part of nineties. This process has helped the government to build up a general consensus on the desirability of bringing the legislation though the Committee of Parliament may recommend some further changes in matters of detail. Sometimes, a discussion in the committees is avoided either due to likely delay or known division of opinion.

II. Reforms Undertaken

During the last five years, several meetings of the political parties have taken place. These meetings were held in 1998, May 2000, September 2001 and July / August 2002. The Election Commission of India has also held a number of meetings with the political parties on various issues concerning electoral reforms. The views of the political parties are not necessarily in conformity with those of the Election Commission. Perceptions of both, given the complexity of the issues and considerations of ethics, differ. On some of the issues, the views of political parties *inter se* also differ. Their political interests are at variance with each other.

In the above scenario, it may be pertinent to discuss in detail the electoral reforms which have been effected recently. At the back of the consensus arrived at or recommendations made by the Parliamentary Committee, the skills of the Legislative Department, the perseverance of members of the Parliamentary Committee and hard work of staff of the Secretariat of the said committee have all played significant and constructive role. The criticism that there was not much debate on many matters and that the Bills were adopted without much discussion therefore lacks substance. The Parliamentary Committees and their Secretariats are generally well informed and they have ample resources to extract the best possible inputs

from the government. However, experience makes every one concerned wiser. Maturity of democracy is a time-consuming process. Every citizen of the country has a duty to the democratic process and must help its healthy growth by all means at his disposal. In this regard, one cannot but make a special mention of the role of the media. It must contribute towards enabling the people to make informed opinions rather than indulge in ill-informed criticism of the proposals.

The impression often created by the media that the Election Commission and the government are at daggers drawn is also not correct. There may be genuine differences of opinion but this should not be made out to be a battle cry. Two very important issues which were hanging fire were settled to the mutual satisfaction of both the government and the Election commission.

One relates to disciplinary jurisdiction of the Election Commission over the employees deemed to be on deputation with the Commission. A Writ Petition pending before the Supreme Court (*Election Commission of India* v. *Union of India*)[1] was disposed of in terms of the settlement. The government conceded disciplinary jurisdiction of the Election Commission to the extent that the latter could suspend any officer or police officer for insubordination or dereliction of duty and substitute such person with another, with appropriate report on the conduct of the suspended officer. It could also make recommendation to the competent authority for taking disciplinary action against the suspended officer.

The other matter relates to the enforcement of Model Code of Conduct during elections. A Special Leave Petition was filed by the Union of India against the judgement of Punjab and Haryana High Court in *Harbans Singh Jalal* v. *Union of India*[2] in 1997. The main contention of the Union of India was that the Model Code of Conduct could be enforced only from the date of notification of the elections and not from the date of announcement thereof.

Eventually, the Union of India agreed with the view taken by the Election Commission that the Code should be applicable from the date of announcement of elections in the interest of free and fair elections. With a view to ensuring that the normal functioning of the government was not affected for unduly long time, it was agreed that the Code be amended to provide that (a) if any programmes or schemes were to be inaugurated, these should be by the civil servants rather than Ministers; and (b) the gap between the date of announcement and the date of notification of elections should not be more than two or three weeks.

It would thus be seen that the issues could be resolved to the mutual satisfaction of both the government and the Election Commission of India

1. (2000) 7 SCALE 368.
2. The Judgement of Punjab and Haryana High Court is reported in (1997-2) 116 PLR 778.

keeping in view the political realities as well as the need to ensure free and fair elections. These considerations should not be lost sight of in the forthcoming elections to the Assemblies, which are to take place shortly. Of course, if a genuine difference of opinion persists, there is no option for the parties but to knock the doors of a court of law for resolution of the matter.

As already stated, any effort to effect electoral reforms in one go is unlikely to succeed. It would only mean indefinitely postponing some of the reforms, which in fact brook no delay.

It is better to lay the foundation and to build and construct in the light of one's needs and experiences, rather than not do anything at all.

With the aforesaid background and perspective, the recent efforts of the government to bring about electoral reforms might call for examination.

The Tenth Schedule of the Constitution dealing with defections contains provisions which provide that if a group consisting of specified number of members of the Legislature splits or merges with another party, it would not come within the purview of the concept of defection. However, a Bill called the Constitution (Ninety-Seventh Amendment) Bill, 2003 was introduced in Lok Sabha on 5th May, 2003 *inter alia* proposing to delete paragraph 3 of the Tenth Schedule relating to splits. The Bill has recently been passed by both the Houses of Parliament after recommendations made by the Department-Related Parliamentary Standing Committee on Home Affairs were accepted by the government and has become the Constitution (Ninety-First Amendment) Act, 2003 after receiving assent of the President on 1st January of this year. It would now no longer be possible for the members to effect splits and still not get disqualified for defection. The legislation would strengthen the political parties and provide stability to the governments. Another needed reform made in this law is the reduction in the size of the Council of Ministers to 15% of the strength of lower House of Parliament or State Legislature, as the case may be. A number of other reforms have also been undertaken through this amendment.

Even though the earlier governments had taken the initiative to bring in various electoral reforms, the present government has succeeded in pushing several of them.

Some of the major electoral reforms or modifications which have already been made in the electoral law since the advent of the present government are summed up as under:

(i) Members of the Armed Forces of the Union and certain other personnel to whom the provisions of the Army Act, 1950 have been made applicable have been provided with the additional option to vote through the system of proxy at the elections and for this purpose, the Election Laws (Amendment) Act, 2003 has been enacted. The rules required in this connection have also been issued

with the result that in the forthcoming elections to Legislative Assemblies of States, these personnel would be able to effectively participate in the elections.

(ii) The government discussed certain proposals for electoral reforms including the issue of 'criminalisation of politics' with political parties on 13th September, 2001. Consequently, provisions of sub-section (1) of section 8 of the Representation of the People Act, 1951 relating to the commencement of disqualification period have been brought at par with sub-sections (2) and (3) thereof. The Representation of the People (Amendment) Act, 2002 has removed the discrepancies between sub-section (1) on the one hand and sub-sections (2) and (3) of the Representation of the People Act, 1951 on the other by amending sub-sections (1) of section 8 to provide for separate periods of disqualification depending on whether a person is convicted only with fine or with imprisonment and in the latter cases, the amended law provides for disqualification for a period of six years since a person's release from prison. The Act also brings the offences under the Commission of Sati (Prevention) Act, 1987, the Prevention of Corruption Act, 1988 and the Prevention of Terrorism Act, 2002 under the purview of sub-section (1) of section 8 of the Representation of the People Act, 1951. Thus, the provisions of sub section (1) of section 8 of the said Act have been made more stringent to prevent entry of criminal elements into politics.

(iii) The Representation of the People (Second Amendment) Act, 2002 has been enacted to enable holding of long pending elections to the Legislative Councils in Bihar.

(iv) A candidate contesting an election to Parliament or a State Legislature is required to disclose as to whether he is accused of any offence punishable with imprisonment for two years or more and whether he has been convicted of an offence in which the punishment has been awarded for one year or more. That apart, every elected candidate for a House of Parliament is required to declare his as well as those of his spouse and dependent children's assets and liabilities to the Presiding Officer of the concerned House of Parliament. For this purpose, the Representation of the People (Third Amendment) Act, 2002 has been enacted. This is expected to prevent criminalisation of politics by giving right of information to voters as regards criminal antecedents of a candidate.

(v) In order to curb money and muscle power as well as prevent cross-voting in elections to the Rajya Sabha, the Representation of the People (Amendment) Act, 2003, has been enacted. The Act *inter alia* seeks to introduce the system of open ballot for elections to Rajya Sabha. The Act also removes requirement of residence of a State or territory for contesting an election to Rajya Sabha.

(vi) To bring transparency in the funding of political parties and also to provide partial funding for elections in kind to the political parties and candidates by the State, the Election and Other Related Laws (Amendment) Act, 2003 has been enacted.

These changes may need to be elaborated to get a clear perspective as to what has been done. Proxy voting by members of the Armed Forces and certain other personnel had raised controversy since it was contended that postal ballots did not reach them in time and therefore there was a clear need to give them additional facility of proxy voting. It was, however, contended that the system of proxy voting would result in compromising secrecy of ballots. This contention, however, seems to be without much substance as it is well-known in practice that members of a family do share their secrets. The system of proxy voting is also available in a number of other countries and extends to even other categories of voters who are unable to vote due to disability or various other reasons. The demand of the Armed Forces for proxy voting apparently had support of the Election Commission of India. If one goes by the system prevailing in other countries and practical needs of the men in uniform, one can consider it as a welcome reform.

The amendment of section 8 of the Representation of the People Act, 1951 which would result in a further period of disqualification after release from the prison for committing serious offences mentioned in sub-section (1) of the said section as distinguished from disqualification from the date of conviction, should have salutary effect on the electoral system. When section 8 of the Act was earlier amended in 1988, certain serious offences were added to sub-section (1) of section 8 but without increasing the period of disqualification as in other sub-sections of section 8. The disqualification was only for a period of six years from the date of conviction and there was no provision for further disqualification in case of imprisonment. Thus a person who was convicted of rape could still contest an election from jail as he was not disqualified for a further period till his release from prison. Now, a person would continue to be disqualified for a further period of six years since his release. The offences falling under the Commission of Sati (Prevention) Act, 1987 have been brought within the purview of this amendment with the result that the requirement of six months imprisonment as was earlier provided is not necessary for a person to be disqualified. The offences under the Prevention of Corruption Act, 1988 as recommended by one of the judges of the Supreme Court in *B.R. Kapur* v. *State of Tamil Nadu*[3] case and the Prevention of Terrorism Act, 2002 have also been added so that conviction even for a day with imprisonment for offences under these Acts would attract disqualification for being chosen as, and for being, a member of Union or State Legislature. These changes in law were obviously desirable.

3. (2001) 7 SCC 231.

Fourth Schedule of the Representation of the People Act, 1950 was amended by the Representation of the People (Second Amendment) Act, 2002 to effectuate changes in the nomenclature of the local authorities for purposes of elections to the Legislative Council of Bihar. This was necessary in view of sub-section (2) of section 27 of the Act which provides that the electorate for the said Council shall consist of members of such local authorities as are specified in the Fourth Schedule. The matter attained urgency in view of public interest litigation in the High Court of Patna for holding elections to the Bihar Legislative Council without delay.

The matter relating to criminal antecedents and other particulars of the candidates was brought before the High Court of Delhi on 1st December 1999 in *Association for Democratic Reforms* v. *Union of India*[4] in pursuance of the 170th Report of the Law Commission of India given on 9th June, 1999. The government obviously could not but be in sympathy with the concerns expressed by the petitioner in his petition regarding criminalisation of politics. However, preparation of necessary ground for amendment of the statutory provisions meant necessary consensus to be built up amongst the political parties.

Disqualification even before conviction on the basis of charges having been framed for certain offences was specifically on the agenda of the meeting of political parties convened by the Election Commission of India on 29th April, 2000, but no consensus could emerge on the subject. As such, it was not considered appropriate to proceed with amendment of the statute. As the decision of the High Court was adverse, the matter went up to the Supreme Court, which delivered its judgement on 2nd May, 2002[5]. The Supreme Court held that voters had the right to know under article 19 (1) (a) of the Constitution. It held that it was incumbent on the candidates to furnish certain information to the voters. Directions were given to the Election Commission of India to exercise powers under article 324 of the Constitution on the assumption that the field was unoccupied by any legislation. The Commission sought to implement the judgement of the Supreme Court by issuing directions on 28th June, 2002. There is scope for reconsideration as to what information should be given by the candidates to the voters since it is a matter of policy. This policy would be reflected in the law made by Parliament in exercise of powers under article 327. The question also arises whether it is practical or feasible to give the information envisaged in the judgement of the Supreme Court. The right to information was sought to be provided in the Representation of the People (Third Amendment) Act, 2002 (Act No. 72 of 2002) in a manner different from the Supreme Court replacing an Ordinance which was also challenged in Public

4. The High Court of Delhi delivered the judgement on 2-11-2000 (AIR 2001 Del. 126).

5. *Union of India* v. *Association for Democratic Reforms and another with Peoples Union for Civil Liberties and another*, AIR 2002 SC 2112.

Interest Litigation (PIL) by a Non-Governmental Organisation (*People's Union for Civil Liberties (PUCL)* v. *Union of India*)[6]. The apex court in its judgement dated 13th March, 2003 generally reiterated its earlier stand stating that the Election Commission could fill up gaps till there was legislation on the subject. The Court also struck down section 33B inserted in the Representation of the People (Third Amendment) Act, 2002, which provided that a candidate was not obliged to provide any information other than that laid down by the Act as amended or the rules made thereunder. In pursuance of the judgement, the Commission issued modified directions under article 324. In accordance with these directions issued on 27th March, 2003, the candidates are required to provide the information on the following lines in their nomination papers in addition to that prescribed in the Conduct of Election Rules, 1961:

(1) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past– if any; whether he is punished with imprisonment or fine.
(2) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the court of law. If so, the details thereof.
(3) The assets (immovable, movable, bank balance, etc.) of a candidate and of his/her spouse and that of dependants.
(4) Liabilities, if any, particularly whether there are any over dues of any public financial institution or government dues.
(5) The educational qualifications of the candidate.

The Election Commission has, accordingly, prescribed the affidavit to be given by the candidates with their nomination papers and has also clarified that its earlier direction regarding verification of assets and liabilities by means of a summary enquiry and rejection of nomination paper on the ground of furnishing wrong information or suppressing material information was not enforceable. It has further clarified that the candidates will also have to comply with the Act and rules as amended.

The government has also issued a notification dated 3rd September, 2002 in pursuance of the Ordinance (which has now been replaced by Act No 72 of 2002). Thus existing statutory set up envisages as under as far as a candidate is concerned:

i. A candidate to an election to the Union Legislature or State Legislature would be required to furnish information regarding his conviction, if any, under section 8 of the Representation of the People Act, 1951. (This section disqualifies a person from contesting election and for being a member of the Legislature if he is convicted for certain specified offences).

6. (2003) 4 SCC 399.

ii. A candidate would also be required to furnish information regarding (a) as to whether he has been accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed, and (b) as to whether he has been convicted for an offence (other than that mentioned in section 8 of the Representation of the People Act, 1951) or sentenced to imprisonment for one year or more.

The notification which was issued in consultation with the Election Commission of india also prescribes the form of affidavit to be given by the candidates for providing information in respect of certain matters where disqualification is not attracted. The notification does not envisage rejection of a nomination paper where information is not relatable to any past disqualification.

Information with respect to acquittal or discharge in a case may hardly serve much purpose except to satisfy the curiosity of voters. Further, punishments such as those prescribed in Act No. 72 of 2002 for giving wrong information or concealing any relevant information required of a candidate can only be provided in a statute and not otherwise. As such, directions of the Election Commission may not be an adequate substitute for a statute. However, the Supreme Court in its judgement of March, 2003 has stated that the voter's right to know is independent of an election law. A candidate has, therefore, not only to comply with the directions issued by the Supreme Court in terms of its latest judgement but also in terms of Act No. 72 of 2002 and the rules as amended in pursuance of the said Act.

The right to know, without being able to make use of it, in the absence of verification of facts may not go too far. However, this right as now implanted in law does meet popular demand and would supposedly cleanse the political system. Only time would tell whether this expectation would come true.

A major change has been effected in the electoral law by the Representation of the People (Amendment) Act, 2003 by making a provision for open ballot in elections to Rajya Sabha. The provision in this regard was not supported by the Election Commission of India. The opinion was divided among members of Parliament as seen from ninetieth report of the Department-Related Parliamentary Standing Committee which deliberated on the Bill.

While the members supporting the Bill felt that the measure would help in lessening horse trading and "rampant corruption" in elections to Rajya Sabha and that the concept of secrecy was only relevant for ordinary voters at the polling booths, those opposing reasoned that secret voting continued to be applicable to Presidential and Vice Presidential elections and as such it should continue to be available for Rajya Sabha elections too. They also felt that there was need to put a check on the political parties from receiving funds in consideration for getting a member elected to Rajya Sahha. There was, however, unanimity in the Committee that money power

must be curbed for such elections. Earlier, the Ethics Committee of Rajya Sabha had also in its report given in 1998 noted a trend of cross voting in elections to Rajya Sabha and desired that introduction of open ballot in this regard should be examined. The Supreme Court of India in a decision given in 1980 in *Raghbir Singh Gill* v. *Gurucharan Singh Tohra*[7] held that if "secrecy of ballot instead of ensuring free and fair elections is used to defeat the very public purpose for which it is enacted, to suppress a wrong coming to light and to protect a fraud on the election process or even to defend a crime *viz.* forgery of ballot papers, this principle of secrecy of ballot will have to yield to the larger principle of free and fair elections." The Attorney General who was consulted in the matter also upheld the constitutionality of the proposal. It may be noted that the Constitution does not require resort to secret voting for Rajya Sabha elections. All that article 80(4) provides is that the members shall be elected to the Council of States (Rajya Sabha) in accordance with the system of proportional representation by means of a single transferable vote. Rule 70 of the Conduct of Election Rules, 1961 lays down the procedure according to which the elector has as many preferences as the number of candidates but it is only compulsory to give the first preference vote. There is no compulsion to give subsequent preference votes. The government may need to elaborate by rules the manner in which open ballot would be ensured.

Another limb of the above legislation dispenses with residential requirement for Rajya Sabha elections as the provision was being observed more in breach. The change of law would now be closer to reality and cannot be said to fall foul of federal character of the Constitution which was claimed to have been reflected in the provision earlier made in law. The reform in law made now would allow leaders of various political parties to campaign for others without being worried about their own election.

The means of funding for the political parties have not been transparent. With the enactment of the Election and other Related Laws (Amendment) Act, 2003, the contributions made by individuals or corporate bodies (other than contributions having foreign source or made by government companies and by any person wholly or partly funded by the government) to these parties, whether recognized or not, would be eligible for deduction from the total income of such corporate bodies or individuals. The Indrajit Gupta Committee in its report had recommended that financial contributions in kind be made in equal measure both by the Central Government and State Governments.

However, State Governments were generally reluctant to do so. Hence, there was no option but to find some source of funding for the political parties. Even though in the United Kingdom, such income-tax concession was not agreed to inspite of the recommendation made by the Committee on Standards in Public Life, in some other countries such as Australia, Canada and Germany, some kind of tax benefit is available to the political parties.

7. AIR 1980 SC 1362.

The innovation in the new legislation is the conferment of tax concessions on the contributors though contribution itself to the extent of 5% of the profits of the company was already admissible under the Companies Act, 1956. The contributions except those falling under section 13A of the Income-tax Act, 1961 are required to be intimated to the Election Commission in the prescribed form falling which no tax concession is to be available to a contributor. A number of other electoral reforms have also been carried out through the legislation under consideration. These include: amendment of section 77 of the Representation of the People Act, 1951 deleting existing *Explanation I* enabling leaders of recognized and non-recognized political parties (whose names would be intimated in advance to the Election Commission) to campaign in elections and exclusion of expenditure on travel for this purpose from the total expenditure of the candidate.

The rationalization of territorial constituencies has been overdue as these are too big or too small and no action could be taken in this regard in the absence of delimitation. In accordance with the Constitution (Eighty-seventh) Amendment Act, 2003, the delimitation is required to be done on the basis of figures of the latest census after the same are published. Further, the number of seats, except for Schedule Castes and Schedule Tribes constituencies which would be based on figures of their population, would not undergo any change till the year 2026. This is expected to give incentive to population control and stabilization.

The ceiling on expenses to be incurred for elections to Lok Sabha and State Legislative Assemblies has been raised recently.

III. Reforms Needing Consideration

The abovementioned reforms are welcome steps but should not make anybody complacent with regard to the need for further changes. The law has to be kept under review. The Election Commission has been in favour of some restrictions being placed on the opinion polls prior to the election or the exit polls when certain elections are still to be held. A view will have to be taken keeping in mind article 19(1)(a) of the Constitution. The matter is of urgent importance. The Election Commission had issued the guidelines which were challenged before the High Courts and the Supreme Court of India. However, the matter remains inconclusive.

Even though some views were expressed on behalf of the Election Commission of India on simultaneous polls to Lok Sabha and Legislative Assemblies, the issue cannot be said to be closed keeping in view the fact that the expenditure on elections needs to be kept in check. Only when simultaneous elections take place is the expenditure between the Union and State governments shared. As such, in view of the precarious financial position of the States, the matter needs consideration in the proper perspective.

The position of independent candidates in the Indian political set-up needs serious consideration. In this connection, it may not be out of place to mention that a distinction has already been made in law among recognized

political parties, unrecognized political parties and independent candidates in the matter of reserved symbols, deposits and time to be allotted on the electronic media. No income-tax concessions have been given to the independent candidates in the recent law for making any financial contribution to them. Most of the independent candidates lost the deposits. Law Commission has recommended barring of independent candidates though Mr. Justice Krishna Iyer and others are opposed to this. The NCRWC has also recommended that the independents should be discouraged from contesting.

Compulsory voting has been introduced in some countries. In India, the percentage of votes cast is constantly decreasing. A private Member Bill was recently introduced for this purpose in Parliament. Compulsory voting has already been introduced in some countries such as Australia with a view to inculcate a sense of participation among the people in the formation of government and with a view to strengthen democracy. The idea of negative voting in this connection also needs serious consideration to make compulsory voting meaningful.

List system of voting in contrast to First Past the Post System prevailing at present has been recommended by the Law Commission of India in its 170th Report on Reform of the Electoral Laws. The main argument put forth in favour of the 'list system' is that it would provide a truly representative Legislature. Two major political parties at the national level are opposed to the 'list system'. Smaller parties are in favour of this system. The 'list system' has the merit that votes cast by the people do not go waste. On the other hand, it may vest more power in the hands of the party leadership in that the persons for various constituencies in the elections will have to be nominated by the party in advance. Whichever party wins in the 'list system', its nominee would be the winner. The NCRWC has not favoured the 'list system'.

Yet another area where reform may be called for is expediting of election petitions. Election petitions lie to the High Courts but take quite long time. In this connection, it may not be out of place to mention that the law requires day to day trial being conducted in regard to an election petition and the High Court has to make every endeavour to dispose of the petition within six months of the same being presented. In practice, this does not happen. The Ministry of Law & Justice had, therefore, requested the Law Commission in November 1995 to favour the government with its comments. However, the Law Commission considered it advisable to concentrate on other issues which it thought were more significant.

Women's reservation issue needs to be resolved without any further delay to render social and political justice to them. Yet another issue is population control through disqualification of members of Parliament and State Legislature if they have more than two living children. The Supreme Court has already recently upheld a Haryana legislation which provided for

disqualification for elections to Panchayats and Municipalities on similar grounds.

There are several reforms which the NCRWC has not considered acceptable being impractical or unnecessary. These are the following:

(1) Negative voting;
(2) Multi-member constituencies;
(3) Recall of representatives;
(4) Proportional representation;
(5) List system (as already mentioned earlier.)
(6) President's rule in the States during elections (This was forcefully supported by the then Chief Election Commissioner Mr M S Gill).
(7) Putting a limit of two terms for any political position; and
(8) Prescribing literacy qualifications for legislators (However, the recent judgement of the Supreme Court of India has already held that voters have the right to information regarding educational qualifications of the candidates. Their nominations cannot be rejected on the ground of inadequate educational qualifications).

The Government had convened a meeting of all political parties in October last year to discuss the details of the open ballot system, parity among members of the Election Commissioners (including the Chief Election Commissioner) in the matter of their removal from office, the issue of increasing security deposit of candidates contesting elections etc.[8]

The NCRWC has also identified a number of problem areas which need to be tackled[9] as early as possible.

A successful democracy also needs stable governments at the Centre and in the States so that both political and economic stability could be achieved. In that connection, the NCRWC has recommended the relevant rules of procedures of the concerned Houses to be amended to bring in a constructive vote of confidence whenever it is proposed to move a vote of non-confidence.

Various issues discussed above and other issues need serious debate so that proposals could be concretized to provide good governance to the people of this country and with a view to further strengthening democratic processes. The Report of the NCRWC provides a good basis for starting a national debate on various electoral reforms which are and may be needed by the country.

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8. Review of the Working of the Constitution: Report of the National Commission to Review the Working of the Constitution (Vol. 1), para. 4.7.2. p. 124.

9. According to the NCRWC, these include: increasing cost of elections, booth capturing and fraudulent voting, flawed electoral rolls, use of muscle power, criminalization of the electoral process, misuse of religion and caste, ineffective and slow judicial process in dealing with election petitions, fake and non-serious candidates used indirectly to subvert the electoral process, problems of the instability and hung legislative houses and decline in political morality (*ibid.*, pp. 122-123). The issues being too numerous, only some of these issues have been touched in this paper.

AFFIRMATIVE CONSTITUTIONALISM: AN INDIAN CONTRIBUTION

J.K. Mittal*

Progressive development, is implied in the evolutionary process, started immediately after the involution as a result of the Big Bang. This is evident from the emergence of matter, plant life, animal kingdom and the mental being, all imbibing the ultimate Truth. This progressive development has not come to an end with the emergence of the mental being but, logically speaking, it will reach a supramental state giving rise to a new being—an enlightened and perfect being. This has been demonstrated around the middle of the twentieth century by a modern sage Sri Aurobindo. Thus, the progressive development is a divine law in operation that is taking this vast visible universe—a projection of the invisible reality to that reality till this development reaches its logical conclusion The entire humanity is ordained to advance not only materially but integrally, meaning thereby social, cultural and spiritual development as well. Centuries back Newton and Descartes had pronounced that the Universe was a big machine governed by physical laws. This formulation led to the establishment of political, economic and social systems, which cared only for material well-being without any reference to the hidden truth of life. However, the twentieth century had gone much ahead of what was formulated long back and great scientists like Albert Einstein, Heisenberg, Stephen Hawking, Fritjof Capra and Amit Goswami have rejected the theory of a mechanised universe and demonstrated that its dimensions were many more and we have to look at this vast projection integrally—not only in terms of its physical appearance but also in terms of its spirit that sustains it. The emerging theory of the unified field vindicates the philosophy of non-dualism, that is, "oneness" propounded by ancient sages of this country several miliennia back. It is

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really intriguing that the ancient wisdom of sages now accepted scientifically has had a deep impact on the human thought of the twentieth century so much so that the economic development has been rejected as the sole criterion of development and now other criteria—social, cultural and spiritual - have been added giving rise to what is called total, wholesome or integral development of the human and his environ. This is quite evident from the annual reports of the United Nations Development Programme (UNDP). Not only at international level but at regional and national levels also, this concept of integral development has been accepted as the guiding principle for development strategies.

Coming to India, ancient society was governed by the principles of *Dharma* which may mean, though not exactly, righteousness, which subjected the king and the subject alike to the rule of law, gave rise to just political, social and economic order and ensured the well-being of all—not only of human beings but the entire environment covering animals, plants and matter. Freedom and dignity were the hallmarks of the social life. The later history of the country supplied correctives to the degeneration, whenever and wherever, set in our body politic. For example, Buddhism was a great corrective to the historical distortion of the principle of equality enunciated by the *Vedas*. The fourfold classification of the social order may be cited as an example. And yet the partial corrective supplied subsided gradually and the revival of the social degeneration on account of this classification sustained itself till the present times. The political setback at various points of our history did not live long and political institutions functioned with a sense of responsibility especially at the grassroots level. Similar had been the fate of our economy and till a few centuries back India was considered to be the Golden Bird—so much prosperous it was.

The British entry into india as traders, to begin with, and then their gradual acquisition of political power on account of a weak indigenous political authority landed this country into unprecedented calamities, not only economic but political as well. The sole objective of the British dominion was the economic exploitation of the subject people and they did so by destroying indigenous industry and political institutions. On the social plane they tactically refrained from interfering with the outdated fourfold classification of the society, created more social classes and treated the Indian womanhood as derogatory and unequal by recognizing the supremacy of the world of men.

The British rule was not, however, destined to last long. The first war of independence, of course, collapsed in 1857 but the fire kept burning. Towards the end of the nineteenth century there was tremendous social and political awakening. Social movements had already started awakening masses to the needs of social and cultural reform. The political awakening came with the movement started under the inspiring leadership of

Lokmanya Tilak, to begin with. The Constitution Acts given by British Parliament were intended to serve the interests of the rulers only. The British charged Indians with incompetence to run democratic institutions. As a result, Tilak got framed the first indigenous Indian Constitution Bill in 1895 which pledged to bring out social and economic change through parliamentary institutions. The Bill guaranteed some fundamental rights, a few principles in the nature of directives to the state to work affirmatively for the people. This was shocking to the British.

The beginning of the twentieth century witnessed the emergence of *Swadeshi* (indigenous) movement boycotting foreign goods and propagating the use of indigenous productions. The leadership was now demanding self-governing institutions within the framework of British empire but there were radicals who were looking for something higher. Sri Aurobindo was the first to put forward the demand of complete independence for India as the base for the regeneration of masses. The movement upset the British. Consequently they initiated the policy of divide and rule and segregated constitutionally the second majority community—the Muslims- by granting them communal electorates in 1909. This intensified the national movement for the establishment of home rule and for a formal guarantee of fundamental rights. The British constitutional grant of some sort of responsible government was viewed with suspicion. This was the time when Gandhi and Nehru emerged on the political scene of India and gave a new direction to national movement.

The decade 1922-31 is a significant period for ideology formulation. During this period a *Swaraj* (self-rule) Constitution was framed and this was followed by another report on constitutional reforms made by Indian leaders. These two documents contained elaborate constitutional principles for governance and for massive uplift of the people. The demand for dominion status was turned down by the British and this led to the passage of the Complete Independence Resolution demanding total freedom from the British rule. During this period the leadership pledged itself to establishing in free India a sovereign, secular, democratic republic and to guarantee to the people not only political and civil but also economic, social and cultural rights. This is evident from the elaborate enumeration of fundamental rights and duties along with incorporation of a full-fledged economic and social programme especially for the peasantry and labour as also backward classes and women. Equality, liberty and fraternity were the hallmarks of this period for constitutional policy formulation. There was a special emphasis on the protection of minorities. This policy formulation guided the future course of our political movement till we gained Independence in 1947 and became the basis of the Objective Resolution moved by Nehru in the Constituent Assembly which was entrusted with the task of framing an elaborate constitution for free India. The Assembly

deliberated for about three years and gave to the nation a Constitution based on the ancient values of India and the modern political thought emerged especially in the Western hemisphere. The Resolution was later modified and incorporated in the Constitution as its preamble.

The preamble establishes the sovereignty of the people of India as the reservoir of all power, and a secular democratic polity meant for a plural society. It contains the solemn resolve of the people to secure to themselves justice, liberty, equality and fraternity with a view to assuring individual dignity as also emotional unity and physical integrity of the nation. In fact the preamble, which has been declared to be a part of the Constitution, spells out the constitutional philosophy of development to be realized through a participative democracy. The rest of the Constitution is primarily the elaboration of what is contained in the preamble.

The objectives of the Constitution are reflected in the trinity of fundamental rights, directive principles of state policy and fundamental duties. This trinity is intended to bring about great reforms of social revolution in the country.

Prior to coming to presenting a bird-eye view of this constitutional plan of development, the following passage from the speech of B. R. Ambedkar, the Chairman of Drafting Committee, delivered in the Constituent Assembly in November, 1949, is worth quoting because it is both a caution and a guide to the future leadership of India. After hoping that the nation would value democratic institutions, hold fast to constitutional methods of achieving social and economic objectives, and adhere to the principle of fraternity, he said: "We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life, which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equailty, equality cannot be divorced from liberty. Nor can liberty and eqnality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them. We must begin by acknowledging the fact that there is complete absence of two things in Indian society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic place we have a society in which there are some who have immense wealth as against many who live in abject poverty. On 26 January, 1950, we are going to enter into a life of

contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up."

To begin with, the fundamental rights and directive principles of state policy did not have separate existence. These were, however, separated into two different parts by the Constituent Assembly itself because the rights were taken as negative and the directives as positive obligations on the state and the enforcement of the latter depended on the availability of resources. This is why fundamental rights are available against state action and justiciable in High Courts and the apex court. On the other hand, directives are not enforceable in these courts and yet these are fundamental in the governance of the country and the state has been obligated to apply them while making laws. The fundamental duties are a later addition and may be enforced through legislation. Let us have a look at the trinity.

On the commencement of the Constitution fundamental rights were classified into seven categories. Now there are only six because in 1978 the right to property was deleted as a fundamental right and incorporated as merely a constitutional right. This was to end a long drawn controversy between the legislature and the judiciary, the latter giving that right a very wide scope which was not in consonance with pre-independence pledges, the intention of the framers of the Constitution and the economic directives contained in the Constitution.

Right to equality is the first in the list of fundamental rights. Apart from a general equality provision, the other provisions prohibit, generally, discrimination on grounds of religion, race, caste, sex or place of birth; ensure equality of opportunity in matters of public employment and abolish untouchability and titles. The practice of untouchability, which has been a bane of our society, is now punishable according to a law of Parliament. These provisions also provide for reservation for backward classes in educational institutions and public employment as also for women and children with a view to ensure their upliftment to the mainstream of the society.

The second category of fundamental rights is the right to freedom, which is guaranteed by several provisions. Freedoms of speech and expression; peaceful assembly; association; movement; residence and

settlement; and profession, occupation, trade or business have been guaranteed to all citizens. At the same time the state has been enabled to enact laws imposing reasonable restrictions on the exercise of these freedoms in public interest. There is a guarantee against *ex post facto* laws, double jeopardy and self-incrimination. This is followed by an outstanding provision protecting life and personal liberty, which shall not be taken away except according to procedure established by law. During the last five years, this single provision has become a repository of guarantees of wholesome and dignified life and a vehicle of human development. In fact a good number of internationally ordained human rights have become fundamental rights by a creative interpretation of this provision. Then there is a provision for protection extending against arrest and detention including preventive detention in certain cases.

Right against exploitation is the third category of fundamental rights. There are provisions which prohibit traffic in human beings and forced labour as also employment of children in hazardous places like factories. The state has legislated to give effect to this prohibition.

Then comes the fourth category of fundamental rights, namely, right to freedom of religion which means freedom of conscience and free profession, practice and propagation of religion. But this freedom is subjected to public order, morality and health and the state has also been empowered to provide for social welfare and reform. Thus there is freedom of religion but certain dogmas and practices, which have distorted the true meaning of religions, have to be discarded and the state can bring about reforms in this respect. It is worthy to mention that our state has no religion of its own and it is obligated to have equal respect for all religions.

Cultural and educational rights constitute the fifth category of fundamental rights. The language, script and culture of various sections of citizens have been protected and discrimination in the matter of admission to certain educational institutions on the basis of religion, race, caste or language has been ruled out. There is a specific right guaranteed to minorities to establish and administer educational institutions of their own choice subject, however, to the conditions of excellence and fairness.

As mentioned earlier, the right to property constituted the sixth category of fundamental rights but that right has been deleted as fundamental on economic considerations. However, there are certain provisions saving around 284 legislations especially meant for agrarian reforms against any challenge to their constitutional validity as also the laws, which are meant to give effect to certain economic directives.

The last category is the right of constitutional remedies and this is in fact the soul of fundamental rights. Under this category the Supreme Court can be moved for vindication of any of the fundamental rights alleged to

have been violated by any state action. In certain cases, the court has gone even to the extent of awarding exemplary damages to the victim of the state action, violating the provision protecting his life and personal liberty.

There are 17 articles, which relate to directive principles of state policy. The first is the general directive, which urges the state to secure and protect a social order in which social, economic and political justice shall inform all the institutions of the national life. This is followed by a declaration of certain principles of policy to be followed by the state in relation to adequate means of livelihood to both men and women equally; equal pay for equal work for both men and women; non-abuse of the health and strength of workers and tender age of children; opportunities to children to develop in a healthy manner and in conditions of freedom and dignity. The other two principles are known as economic directives to the state to secure that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

Other directives relate to equal justice and free legal aid; organisation of village panchayats, right to work, to education and to public assistance in certain cases; just and humane conditions of work and maternity relief; living wage for workers; participation of workers in management of industries; uniform civil code for all the citizens; free and compulsory education for children; promotion of educational and economic interests of scheduled castes, scheduled tribes and other weaker sections of society; the level of nutrition and the standard of living as also the improvement of public health; organisation of agriculture and animal husbandry; protection and improvement of environment and the safeguard of forests and wild life; protection of monuments and places of national importance; and the promotion of international peace and security.

A large amount of legislation has come up to give effect to the directive principles and this is no secret that people at all levels have immensely been benefited in their development through the implementation of this legislation.

In the early fifties and sixties, directive principles were somehow assigned a secondary status in comparison to fundamental rights by the judiciary which thought that directive principles, being non-justiciable, had to run subsidiary to fundamental rights which were thought to be sacrosanct. However, this balance in favour of fundamental rights was tilted in seventies in favour of directive principles but then, at the beginning of the eighties, the apex court placed the directives and the rights on a footing of equality and discovered a balance between the two which the court held was an essential feature of the Constitution, not to be tampered with by the political wings of the state. The latest is that fundamental rights and

directive principles are not considered as distinct and separate entities but as one integral whole to bring about revolutionary reforms in the country. In fact many directive have been converted into fundamental rights through the creative interpretation of the provision relating to the right of life and personal liberty by our judiciary.

The last wing of the trinity is fundamental duties. In nutshell all citizens including the ones in legislatures, governments and administration have been put under the duty to abide by the Constitution and respect its ideals and institutions; to cherish and follow the noble ideals which inspired the independence movement; to uphold the sovereignty, unity and integrity of India; to render national service; to promote harmony and the spirit of common brotherhood amongst all sections of people; to renounce practices derogatory to the dignity of women; to preserve the rich heritage of our composite culture; to protect and improve the natural environment; to have compassion for living creatures; to develop the scientific temper, humanism and the spirit of inquiry and reform; to safeguard public property and to abjure violence; and to strive towards excellence in all spheres of individual and collective activity. Some of these duties have already found expression through legislation as also judicial decisions.

Evidently the Constitution of India imbibes the spirit of classical, modern and postmodern constitutionalism. In fact it is itself a classic example of what we may call an embodiment of *affirmative constitutionalism*.* It not only protects a person from adverse state action but obligates the state to plan, and act for, individual and collective development as also provides for correctives to take care of the ill-effects of modernization.

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* The term affirmative constitutionalism has been coined by the author.

APPLICATION OF DNA TECHNOLOGY IN CRIMINAL INVESTIGATION VIS-À-VIS CRIMINAL LAW JURISPRUDENCE*

Dr. G. I. S. Sandhu**

DNA fingerprinting or DNA profiling is becoming a new method of identification that analyses and compares fragments of deoxyribo nucleic acid (DNA) from separate/independent sources. This is immensely useful and powerful method of criminal investigation, if applied and used with precision and care. Primarily the use of DNA technology in criminal investigation is based on the premise of comparison of one tissue sample collected from the crime scene and another from the accused person. Thus police always need a second source for comparison to already known DNA fingerprint developed from the sample recovered from the scene of crime. At the same time matching two samples of DNA and convicting a person of a crime are completely different things. It depends upon whether the test has been carried out by following proper scientific procedure with care and caution. Secondly, the sample tested must be the same procured from the scene of crime. Thirdly, the sample with which it is compared was lawfully obtained from the accused and consequential report is admissible under rules of evidence.

The application of DNA technology in Criminal Investigation raises many scientific, technological, legal and ethical issues. In this paper an attempt has been made to study the aforesaid issues regarding the use and admissibility of DNA technology in crime solving and criminal investigation vis-à-vis established norms of Criminal Justice Process.

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DNA finger printing or DNA profiling

DNA is the genetic material found in all living organism. The DNA finger printing is based on the principle that complete DNA of each individual is unique. DNA or genetic fingerprinting is the only definitive, positive and permanent identification method of a person as one's DNA neither changes during one's lifetime nor it can be altered by any method. Other identification methods like picture ID and fingerprints or thumb impressions have their limitations.

The photograph may fade or has to be updated frequentiy and finger prints can smear or can be altered by surgery or difficult to acquire as in case of an infant. The samples to carry out DNA finger printings are obtained from the trace amount of blood, semen or vaginal smear, buccal smear, hair or skin cells. The "Chemical Scissions" known as restriction enzymes are then used to cut the extremely long DNA at specific points into smaller fragments. Each individual has fixed points where restriction enzyme acts and it gives rise to specific pattern of the DNA fragments. These fragments are specific not only in terms of their number but also in terms of their length. The DNA molecule being a charged molecule is further subjected to electric current in a jeliy like substance (gel electrophoreses) to separate the fragments produced by restriction enzyme. The number and position of the bands formed on the gel is the actual DNA fingerprints. This is compared with the control samples taken from the suspects. The DNA pattern as generated is called as "Restriction Fragment Length Polymorphisms (RFLPs). In rare instances two individuals might have the same pattern of fragments where one restriction enzyme is used. This problem can be overcome by using a combination of restriction enzymes. The RFLP technique can also be used to determine paternity or maternity of an individual, because one inherits RFLP pattern from his or her parents. The patterns are so specific that half of the DNA fragments will be common with that of the father and half with that of the mother. Parental RFLP can also be constructed even if oniy children's RFLP patterns are available.[1]

It is evident that DNA finger printing is highly technical. The human and laboratory errors cannot be ruled out at various steps during processing of DNA. For example, the long DNA fragment tends to break into shorter fragments. This may be caused by digestion by enzymes, the presence of chemicals that damage DNA, physical breakage due to smearing and exposure to ultra violent rays.[2] Similarly, samples may also be diluted with dirt, water, oil or even other body fluids coming from other sources. These contaminants are commonly found in floors, carpets, car seats and furniture. They may aliow the band pattern of RFLP analysis. In rape cases semen may

1. Rajiv Goyal, "Uses of DNA finger printing", The Tribune, April 4, 2002, Chandigarh, India.
2. Mark, "DNA printing takes the witness stand," 20 Science 1616 (1988).

be mixed with other body fluid and may produce false bands in the tests. However, such a band pattern will not falsely incriminate an innocent person because this will not make two prints to match, rather could exculpate guilty person in the absence of other convincing evidence.[3]

The other method of testing of DNA known as Polymerase Chain Reaction (PCR) is used to make millions of exact copies of DNA from a biological sample. This technique allows analysis on samples as small as few skin cells. The PCR consist of series of dots, which indicate presence of specific alleles. In PCR discrepancies can arise in reading the dot blots. Laboratory contamination and error in the interpretation cannot be ruled out. Contamination of sample may cause a dot to appear where it should not or to disappear where it should appear. In this spurious appearance a disappearance of a dot will cause a match between patterns from two persons, an innocent suspect could be falsely incriminated bnt if it hides a match between DNA pattern coming from one person alone a guilty suspect could be exonerated.[4]

Other technologies in its DNA forensic investigation are STR analysis used to evaluate specific region with nuclear DNA, Mitochondria DNA analysis is used to examine samples that cannot be analyzed by RFLP or STR. Y Chromosome analysis is useful in tracing relationship among males. In all methods of DNA analysis adequate precautions and safeguards are required to be applied at the laboratory and the courtroom to meet the ends of justice. Nonetheless DNA fingerprinting has proved to be a valuable tool in the field of forensic investigation of crimes.

RELEVANCE OF DNA FINGER PRINTING AS EVIDENCE

Crime investigation is conducted through systematic and rationale collection of material, which could establish the involvement of the accused in the crime. The material can be analyzed by the experts and put before the court in the form of a concrete piece of evidence in support of the existence or non-existence of a fact. The court may accept such evidence depending upon the authenticity of the source, satisfaction of having followed of established scientific procedure and correctness of the finding. An expert may help a court with his knowledge, skill, experience, training or education to form an opinion or otherwise. The views of the experts based upon scientific method also need to be relevant to facts in issue and must be scientifically valid, free from errors and accepted by scientific community.

In law of evidence, evidence is admissible when it relates to facts in issue or is relevant to the facts in issue and all other evidence is excluded as irrelevant.[5] The evidence need not conclusively prove the fact in issue or

3. Prof Pacifico Agabin, UP College of Law, "Integrating DNA Technology in the Judicial System" http://wwwsupremecourt.ph/csi/pec_oo/dna.httm.

4. *Ibid.*

5. The Indian Evidence Act, 1872 (I of 1872), section 5.

relevant fact but may have tendency to make the existence of any fact more probable or less probable that it would be without it.[6] In view of this, DNA evidence may be used as corroborative evidences if the accused has been identified by other proof. The court can be informed about the two samples whether they match or do not match. In case the samples match, this makes it probable that the DNA in the sample came from the same person suspected as perpetrator of crime. In the event of mismatch, this may lead to acquittal of the accused.

Weightage of DNA evidence

Even in the event of relevancy and admissibility of DNA evidence, the courts are not supposed to give it credence as such. Adversarial systems affords opportunity to cross-examine and question the finding relied by the prosecution. DNA evidence could be questioned or excluded because of poor handling or contamination of sample or because of error in following laboratory procedures or in analysis in matching or in the interpretation of statistical method or in ensuring the accuracy and qualitative interpretation of genetic typing. Therefore, the basic issue in the use of DNA evidence is not just the validity of scientific theory but also the reliability and observance of scientific procedure designed to implement the theory. This involves the ability and competence of lawyers and experts to present scientific evidence effectively and the ability of judges to understand and to draw reasonable inference from the evidence. The major grounds that may affect the weightage of DNA evidence could be : 1) Inherent error; 2) Testing error; 3) Laboratory procedure error and 4) interpretation error.

Therefore, techniques used in gathering and analyzing DNA evidence must have proven reliability comprising accuracy, precision, specificity and sensitivity. It should be accepted by a consensus of the scientific community. If DNA technology is as good or as better than method used to identify criminals and if the implications and limitations of DNA evidence are recognized by Judges, its use should pose no greater danger to the rights of accused than use of currently approved techniques of forensic identification. Moreover reliability of DNA evidence will permit to exonerate some people who would have been wrongfully accused or convicted without it. Therefore, DNA identification is not only a way of securing convictions; but

6. The Indian Evidence Act, 1872 (1 of 1872), Sec. 3...."Proved": A fact is said to be proved when after considering the matter before it the court believes it to exist, or considers its existence so probable that a prudent may ought under the circumstances of a particular case to act upon the supposition that it exists. "Disproved": A fact is said to be disproved when, after considering the matter before it, the court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of a particular case to act upon the supposition that it does not exist. "Not proved": A fact is said not to be proved when it is neither proved nor disproved.

it is also a way of excluding suspects who might otherwise be falsely charged with and convicted of serious crimes.[7]

Other forensic modes of identification and law

The question whether the DNA technology is superior to other methods of identification requires, comparing inter subjectively verified scientific evidence on the reliability and validity of the new method with evidence through other methods. Certainly as a personal identification method, fingerprinting is the definitive forensic technique and has many advantages. It has almost 100 years development, which has established that a person has unique fingerprints. These can be easily detected and examined without extensive chemical or biochemical manipulation. Limitation is often non-availability of usable fingerprints at the scene of crime. Other source is analysis of forensic serology *i.e.* physiological fluids for genetic marker such as ABO antigen enzymes. Hair evidence is often encountered in sexual assault and other violent crimes. It is valuable as exculpatory evidence and can be informative as to identity but it lacks specificity. Other forensic methods are examination of teeth in identifying deceased or bites marks. There are following rules of evidence and procedure adopted by investigating agency in collection of traditional forensic evidence, like taking of fingerprints, photographs, medical examination of the accused or comparison of signatures and handwritings etc.

(i) The Identification of Prisoners Act, 1920 empowers a Magistrate to permit taking fingerprints, foot prints and photographs of a convict or of an accused person arrested for an offence with imprisonment of one year or more.[8]

(ii) Similarly, Section 53[9] of the Criminal Procedure Code, 1973 (hereinafter referred as code) provides for examination of the accused by medical practitioner at the request of the police officer.

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7. National Academy Press, DNA Technology in Forensic Science (1992) P 156 at http://book.nap.edu/books/0309045878/html/156/html.

8. Sections 4 and 5 of the Identification of Prisoners Act, 1920.

9. The Code of Criminal Procedure, 1973, section 53.

Examination of accused by medical practitioner at the request of the police officer

(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(iii) Section 54[10] of the Code provides for examination of arrested person by medical practitioner at the request of the arrested person.

(iv) Section 45[11] of the Evidence Act, 1872 (hereinafter referred as Act) provides for relevancy of opinion of an expert on the question of identity of handwriting or finger impression.

(v) Section 73 of the Act provides for comparison of the signature, writings or seal with other admitted documents.

Under the exiting law there is no specific legislation binding the accused to give his writing or blood samples etc (except under POTA[12]).

Recommendations of the Malimath Committee

The Committee on the Reforms of Criminal Justice System in its Report[13] observed that Section 4 and 5 or the Identification of Prisoners Act, 1920, only empower a Magistrate to permit taking of finger prints, foot prints and photographs of a convict or of an accused arrested for an offence punishable with imprisonment of one year or more. There is no law binding

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(2) Whenever the person of a female is to be examined under this section, the examination shall be made by, or under the supervision of a female registered medical practitioner.

Explanation.—In this section and in section 54, "registered medical practitioner" mean a medical practitioner who possesses any recognised medical qualification as defined in clause (h) of section 2 of the Medical Council Act, 1956 (102 of 1956).

10. The Code of Criminal Procedure, 1973, Sec. 54,

Examination of arrested person by medical practitioner at the request of the arrested person

When a person who is arrested, whether on charge or otherwise, alleges, at the time when he is produced before a magistrate or at any time during the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body, the Magistrate shall, if requested by the arrested person so to do, direct the examination of the body of such person by a registered medical practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of justice.

11. The Indian Evidence Act, 1872, Sec. 45,

Opinion of experts

When the court has to form a opinion upon a point of foreign law, or of science or art; or as to identity of handwriting or finger impressions, the opinion upon that point of persons specially skilled in such foreign law, science or art, or in question as to identity of handwriting or finger impressions are relevant facts.

Such persons are called experts.

12. The Prevention of Terrorism Act, 2002, Sec. 27.

13. The report of the Committee on Reforms of Criminal Justice System, 2003, Part-I, Government of India, Ministry of Home Affairs.

the accused to give his specimen writings or blood samples for DNA finger printing. Similarly, under the existing law, an accused cannot be compelled to give the samples of his hair, saliva or semen etc. Sections 45 and 73 of the Indian Evidence Act, 1872 are not comprehensive enough to admit of such samples being taken on Court orders. Due to be above lacunae, it is difficult to build up a strong case, based on forensic evidence, against the accused. It is, therefore, essential that a specific provision is incorporated in the Code of Criminal Procedure and the Evidence Act empowering a Magistrate to order an accused to give samples of hand writing, fingerprints, footprints, photographs, blood, saliva, semen, hair, voice etc, for purposes of scientific examination.[14] Now Section 27[15] of the Prevention of Terrorism Act, 2002 which has limited application empowers court to direct asking of samples of handwriting, finger prints, foot prints, photographs, blood, saliva, semen, hair, voice of any person. If the accused person refuses adverse inference can be drawn against him under this Act.

The Malimath Committee has specifically recommended obtaining of samples for DNA fingerprints. However, there are opinions that there is need to adopt safeguards in relation to this type of provisions in general law or in Section 27 of the POTA that possibility of torture or cruel, inhuman or degrading treatment is not used to obtain such samples from the accused. Collection of such samples should only be on written consent of the accused[16]. Drawing of an adverse inference for refusal to provide sample is said to be violation of accused's right to presumption of innocence.

In view of the above discussion, it may be said that DNA technology is as reliable as other forensic tests. However it is required to be examined on risk benefit ratio. A critical step required in accepting the use of DNA technology in criminal trials is to ensure safeguards and to prevent its abuse. Though the technology is basically sound, yet it is necessary to see the practical aspect of accuracy and ethical permissibility required for judicial conclusions.

14. The report of the Committee on Reforms of Criminal Justice System, 2003, Part-I, Government of India, Ministry of Home Affairs, para 7.36

15. Power to direct for samples, etc.—

(1) When a police officer investigating a case requests the Court of a Chief Judicial Magistrate or the Court of a Chief Metropolitan Magistrate in writing for obtaining samples of handwriting, finger-prints, foot-prints, photographs, blood, saliva, semen, hair, voice of any accused person, reasonably suspected to be involved in the commission of an offence under this Act, it shall be lawful for the Court of a Chief Judicial Magistrate or the Court of a Chief Metropolitan Magistrate to direct that such samples be given by the accused person to the police officer either through a medical practitioner or otherwise, as the case may be.

(2) If any accused person refuses to give samples as provided in sub-section (1), the Court shall draw adverse inference against the accused.

16. Amnesty International, India, Report of the Malimath Committee on Reforms of the Criminal Justice System: Some observations, 19 Sept., 2003.

Protection against self incrimination and DNA test

The Supreme Court in *Swati Lodha's case*[17] observed that the Court cannot order an adult to submit to blood test. A blood test, which involves insertion of a needle in the veins of a person, is an assault, unless consented to. This is based on the fundamental that human body is inviolable[18] However the Court further observed that where a Court, makes a direction for a blood test, and the accused fails or refuses to comply with the blood test direction, the Court can in the circumstances of the case, use the refusal or failure of the accused to submit to blood test as a corroborative evidence against him. If a party refuses to submit to blood test, the Court may infer that some impediment existed which pointed out toward the implication of the accused.[19] Referring to Constitutional right against self-incrimination enshrined under Article 20 (3) the Court expressed the view that a blood sample by itself is no testimony at all being wholly innocuous. It is only material for comparison, in order to lend assurance to the Court that an inference based on other pieces of evidence is relevant. Consequently, the Supreme Court observed that taking of blood from the veins of an accused person does not amount to compelling an accused person to be a witness against himself. There is thus no violation of Article 20 (3) of the Constitution.[20] On the other hand, the Court said if an accused refuses to give sample the Court may draw adverse inference.

Presumption of innocence and DNA test

This is a cardinal principal of Criminal Justice that an accused person is presumed to be innocent until the prosecution proves contrary. In case an accused person refused to submit his body for taking samples, is it permissible to draw an adverse inference? Similarly, can the accused protest that his DNA record already available should not be used against him in case of repeat offenders whose DNA profile have been taken and stored in earlier investigation? In these circumstances, proper safeguards are required that he or his counsel should have adequate opportunity to examine papers, reports and documents before trial so that this could be given to another expert for an independent view. The other rule of admissibility of such data should also be followed. This policy is being followed in various cases in USA.[21] Similar rule can be adopted in India to ensure adequate safeguards to the accused.

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17. 1991 Cri L J 939.
18. *Id.*, p 949 para 16 (2).
19. *Id.*, para 16 (3).
20. Id., at p 944 para 7.
21. US Yec (129 FRD 629) *Proper* v. *Davis*, 601 NYS2d 174 (1993). *State* v. *Feldman*, 604 A2d 242 (1994).

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Privacy concern and DNA test

The right to privacy also demands that data extracted from DNA profile should be used to establish the identity of the person and nothing more. As DNA profile may include medical and genetic data, which the individual may like to withhold under the right to privacy. This includes evidence of disease, genetic disorders and identification of behavioural and mental characteristics like genetic bases of schizophrenia, bipolar disorder or Huntington's disease. In these circumstances the DNA analysis locates alleles that lie near a disease locus. The privacy concerns will raise issues like—(1) what information should be stored? (2) How should it be stored? (3) Who will have access to this information? Therefore, to protect such concerns a DNA database should include only information that reveals an individual's identity and nothing more. Such information should only be similar to other identification material like fingerprints, PAN number or a passport.

Constitution of panel on DNA profile

In December 2003, the Union Cabinet has cleared a proposal to set up a National Advisory Committee that would recommend measures for an orderly development of the DNA technology in crime investigation. This panel to be headed by a renowned microbiologist would assess among other things, the infrastructure requirements for DNA profiling, evolve uniform methods and standards to ensure quality examination of samples and offer advise on the directions for research and development. It would also act as an advisory body in formulating legislation on various aspects of DNA profiling and crime investigation. Other members of committee will be from the police force, forensic science, legal fraternity, and human rights and bio-ethic group apart from social activists. It would expect to come up with draft legislation on DNA profiling within two years.[22]

Conclusion and Suggestions

Recently DNA technology has opened up new scope of establishing the identity of the perpetrators of a crime. Identity of the suspects can be established by comparison of samples. The DNA fingerprinting can be used not only for securing the conviction of the accused but also to exonerate some person who would have been wrongfully accused or convicted without it. However, adequate safeguards are required before the acceptance of DNA evidence.

Laboratories testing the DNA should have proper quality control and finding should be free from error. Accused should be given opportunity to examine and challenge the authenticity of the test and report. In appropriate cases where accused is unable to defend the scientific evidence for ignorance

22. The Hindu, 12 Dec., 2003, "Panel on DNA Profiling gets Union Cabinet Nod".

or poverty etc., necessary advice/aid could be provided to him by the state.The admissibility of the reports should be on established procedural and evidentiary rules. Presently legislation in this respect is not available. It is suggested that a comprehensive legislation as being planned by the Union Government[23] should be enacted after thorough deliberation by the experts.

On the question does DNA tests affects established principles of Criminal Justice, it is concluded that Article 20(3) of the Constitution provides guarantee against self incrimination and no person can be compelled to be a witness against himself. In the context of role of DNA fingerprinting in criminal investigation a second sample is always required from the accused. The questions whether this can be taken compulsorily from the accused person's body without violating the constitutional guarantees? Supreme Court in *Swati Lodha's case*[24] has held that taking blood samples from accused person's body is not violative of Article 20(3) but at the same time accused can refuse to give blood samples. In that case only adverse inference can be drawn. Section 27 of the POTA also contains the provisions to this effect. Similar recommendations are made by the Malimath Committee in its report "Another view is that right under article 20(3) is basically to protect the accused from coercion or physical or moral compulsion to extort communication from the accused but it should not exclude evidence taken from the body of the accused just as material. However, any form of torture or inhuman treatment in compelling a person to adduce sample needs to be discouraged. The basic values behind the provisions safeguarding rights of accused should be honoured keeping in view the human dignity and not primarily search for truth".

The degree of invasion against an individual's privacy and method used should not be offensive to the sensitivities to the civilized society; otherwise, it could be violative of the constitutions. Therefore, its use should be limited to identification of the accused as it is done through other mode of identification. To finally conclude it is submitted that a comprehensive legislation covering all scientific, technological, legal and ethical aspects of the application and the DNA technology in Criminal Investigation is the need of the hour.

23. Supra, note 22.

24. Supra, note 17.

PROMOTING HUMAN RIGHTS THROUGH EDUCATION AND AWARENESS: SOME OBSERVATIONS ON THE ROLE OF UNIVERSITY GRANTS COMMISSION AND NATIONAL HUMAN RIGHTS COMMISSION OF INDIA*

Gurjeet Singh**

1. INTRODUCTION

For an effective realisation of human rights in any given society, a 'Human Rights Culture' needs to be evolved. And spreading of human rights education and promotion of human rights literacy are *sine qua non* for creating the human rights culture, for only people who are aware about their rights can be assertive about them and can also invoke legal remedies, should these rights are violated by anyone at any stage. However, educating people and making them aware about their human rights in a society as complex and textured as ours is the task that is, at once, both daunting and

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crucially important. It is also a task that calls for great patience and perseverance. Indeed, there is no easy way to create a culture of human rights: all sections of society have a role to play, and an ideal to sustain.[1] It is in this context that human rights education can go a long way in promoting human rights, creating human rights culture and thereby alleviating sufferings of the humanity.

Various actors have to play different role in the arena of human rights education. National Human Rights Institutions In particular have to play a monumental role in this field. Educational Institutions, too, are expected to play an equally significant role. It is through the co-ordinated efforts of both the institutions that creation of human rights culture, by way of spreading human rights education and literacy, can become a reality.

The object of the present paper is to highlight the role played by the two premier institutions, namely, the University Grants Commission (UGC) and the National Human Rights Commission (NHRC) in the arena of human rights education.

2. THE UNIVERSITY GRANTS COMMISSION (UGC) AND HUMAN RIGHTS EDUCATION

In the year 1998, the University Grants Commission released the IXth Plan Approach Paper[2] that contained the UGC's Policy regarding promotion of human rights education in universities and colleges across the country. According to the UGC, the existing status of human rights education in universities and colleges in the country reflects the "lack of intensity and understanding of human rights education in its present form"[3] and that "it needs to be strengthened"[4]. According to the Approach Paper, and rightly so, at the under-graduafe level, human rights education is given in the Law Faculties as a limited component in the papers on International Law and Indian Constitutional Law. At the post-graduate level, speciahsed human rights education is given as optional paper. Further, only a limited number of Doctoral Thesis have been successfully completed on the topic of human rights. And human rights education in the colleges is yet to be initiated as a full-tledged course.[5]

2.1 Objectives and Strategies for Human Rights Education

According to the UGC Approach Paper, following are some of the objectives and strategies for human rights education in the country:

1. *Annual Report of the National Human Rigths Commission* (1993-94), New Delhi; NHRC. p. 26.
2. *UGC IXth Plan Approach to Promotion of Human Rights Education (HRE) in Universities and Colleges* (1998), New Delhi: University Grants Commission.
3. *Ibid.*, p. 4.
4. *Id.*
5. *Ibid.*, p. 5.

(a) Mere knowledge about human rights is not sufficient. An understanding as to how human rights can become vulnerable to abuse of various structures and processes of power is crucial;

(b) Human Rights Education does not merely mean imparting knowledge in the class room, but it also has to cover all modalities which could sensitise a person, awaken his/her conscience and develop an attitude of mind imbibing respect for human rights of others;

(c) Human Rights Education cannot merely be an intellectual exercise alone. It requires building linkages between what happens in society and what is transmitted in the classes to the students. It requires capturing actual experiences of violation of human rights and denial of human dignity through field experience and action oriented ways of learning and teaching;

(d) Human Rights Education requires building strong linkages and networking between colleges/ universities and various Non-Governmental Organisations (NGOs) and other group working in the field and community for a grass root orientation. Collecting, collating and classifying the data and experiences that NGOs and groups working in the field have already acquired can be an important aspect of human rights education and may lead to create new knowledge and research;

(e) Human Rights Education must encompass in it a strong research component. Any teaching of or about human rights should be backed up by strong multi-disciplinary research on various aspects of human rights and their complexities;

(f) Training and public information are the indispensable components of human rights education. As such for carrying out awareness and other programmes, audio-visual aids and distance mode of education need to be used amongst other tools and inputs;[6]

(g) The Legal Aid programmes in the colleges could be more vigorously utilised by the Law Schools for the benefit of the needy to render legal advice and assistance for human rights enforcement;

(h) Co-ordination with and by the NHRC for a more purposeful use of extension programmes of the universities and colleges is necessary. Modalities for the same need to be worked out through joint consultation between the UGC and NHRC;

(i) Three alternative approaches for promoting human rights education could be pursued simultaneously, *viz.*: (i) Introducing separate

6. *UGC IXth Plan Approach to Promotion of Human Rights Education (HRE) in Universities and Colleges* (1998), New Delhi: University Grants Commission., p. 9.

courses on Human Rights; (ii) Human Rights issues to be incorporated in courses already being taught; and (iii) Reorientation of all courses so that the human rights component is not seen as an adjunct to the existing syllabi, instead the academic packages should be so offered as to have "people" as the central theme;[7]

(j) Setting up of the proposed human rights courts in each district all over the country could open up avenues of self-employment for a substantial number of students.

(k) There is a need to convince all Union and State Ministries and Departments especially those which provide service to the people like the Railways, the Post and Telecommunications and Electricity as well as all law courts and prisons and law enforcement agencies to appoint human rights experts as advisors and trainers.[8]

2.2 Scope and Contents of Human Rights Courses

According to the UGC, human rights education should preferably be inter-disciplinary. As human rights cannot be compartmentalised into academic disciplines, these have to be conceptualised in their entirety as these are central to all social sciences studies. In order to inculcate a broad comprehension of human rights as 'human existence with dignity'. The contents of human rights courses need to incorporate and reflect the concerns for democracy, development and peace. In particular, in a country like India, they must necessarily include issues of social justice, distributive justice, bringing marginalized and historically deprived sections to the mainstream of national life, protecting environment and ecological balance, and ensuring steady and meaningful progress and development in individual's as well as national life.

2.3 Curriculum Development: Compilation of Teaching Materials and Development of Teaching Methods

According to the UGC Approach Paper, human rights is an extremely expanding field and that these are bound to get enriched in content and extent with growing enlightenment in human society. Curriculum development in human rights has, to be a continuous exercise matured through workshops for better collaborative thinking and consensus building. As per the UGC, the curriculum development should take into account the changing global, national, and regional socio-economic and cultural contexts. The thrust of human rights education is on sensitisation of the individual groups/ community groups and the community. It aims at changing the attitude of mind and creating a human rights culture. There is no denial of the fact that appropriate teaching methods would be required

7. *Id.*

8. *Id.*

for achieving objectives specific to each group engaged in human rights education, *e.g.*, teachers, students, NGOs, other activists, field workers, government personnel like police, army and other law enforcement agencies and institutions. The objective could be dissemination of awareness of rights and obligations; it could he seeking enforcement of a particular right of a specific group or class; it could also be the training of law enforcement personnel in the observance of human rights norms in the performance of their duties and the like. Innovative inputs in pedagogy matched to each specific objective need to be worked out. Periodic workshops with inter-disciplinary participation including that of the NGOs could be rewarding. Holding periodic workshops of those engaged in imparting human rights education at the university, regional and national level could go a long way in building of capacities and expertise for implementing human rights education agenda effectively. Keeping in constant touch with international developments in human rights education is important.

2.4 Research on Human Rights

The UGC Approach Paper lays an increased emphasis on the need for research in the arena of human rights. According to the Plan Paper, the "focus of research on human rights requires a drastic change"[9] and that local, regional and national problems of specific disadvantaged and marginalized groups now need to be "intensively studied with a view to their viable solutions"[10] The Paper further suggests that the "research work, whether individual or institutional, directed towards a degree or otherwise requires to be promoted so as to offer depth and new dimensions to all important issues of human rights in our developing society."[11] Small Projects and Case Studies should also be initiated to bring them in touch with ground realities. According to the UGC Paper, as one aspect of human rights education is concerned with inculcation of right values and attitudes, multi-disciplinary research on changing people's attitudes and perceptions of 'others' based on stereotypes of gender, race, colour, religion and nationality, deserves priority in any scheme of human rights education.[12]

2.5 Field Action and Out Reach

According to the UGC, "field experience and field action are important kinds of research areas in human rights education."[13] Gaining field experience and organising field action needs building strong linkages between colleges/universities and various NGOs and other groups working in that area in the field of social and economic justice and human rights.[14]

9. *Id.*
10. *Id.*
11. *Id.*
12. *Ibid.*, pp. 14-15.
13. *Ibid.*,p.15.
14. *Id.*

2.6 Training of Teachers

There is no denying the fact that training teachers in the subject of human rights is a significant challenge. They not only require training in pedagogy suited to human rights education, preparation of teaching materials, development of curriculum, identification of viable projects for study and research, research methodology, formulation and direction of students' activities, interacting with various agencies, but also training in effective communication. According to the Plan Paper, the training of teachers has to be through regular workshops conducted with the help of able and experienced resource persons drawn from varied fields.

2.7 Co-Ordination with the National Human Rights Commission and State Human Rights Commissions

Establishment of the National Human Rights Commission and various State Human Rights Commissions (SHRCs) has contributed significantly to the promotion of human rights in the country and through their efforts, a significant national initiative has been institutionalised for the enforcement of human rights and promotion of awareness. Besides the NHRC and SHRCs, liaison/co-ordination with other statutory Commissions like the Commission for Women, Commission for Religious Minorities, Commission for Linguistic Minorities, Commission for Scheduled Castes and Scheduled Tribes is also to be envisaged. According to the UGC Paper, the NHRC has certain statutory obligations under section 12 of the *Protection of Human Rights Act*, 1993 which could be better carried out in collaboration with the universities only.

2.8 Human Rights Education Centre/Cell

According to the UGC Plan Paper, co-ordination and management of activities related to human rights education at the national level is indispensable for the success of the programme. For the creation of reference data base on human rights education, dissemination of information, overseeing the implementation of programmes and projects related to human rights education, organisation of workshops and other meets for various purposes and similar other functions a centre/cell is required to be set up in the University Grants Commission.[15]

2.9 Financial Support for Introduction of Courses in Human Rights Education

As per the Approach Paper of the UGC, the UGC has earmarked Rs. 1.5 crores per annum for starting Human Rights Education Programmes in Colleges and Universities.

15. *Ibid.*, p.17.

2.9.1 Allocation of Grant for the Introduction of Post-Graduate Course

The UGC has assured the sanctioning of Teaching Posts (One Professor or a Reader and One Lecturer) as well as financial grant for Library, Journals, and Extension Work. However, some conditions have been laid down in this regard. According to the UGC Plan paper, before a Department is considered for the UGC's special assistance for the purpose, it must certify that the Post Graduate Department in Law or political Science or in any other discipline is already a well established one in terms of cadre strength, infra-structure and teaching, research and extensions activities. These conditions are: (a) that the Department should have a strength of at least five full time teachers including Professor (s) and Reader (s); (b) that it should be contributing at least five journals (Indian and Overseas) and other reports, besides basic literature in the disciplines taught; and (c) that it is involved in teaching some human rights course (s) research, other studies and extension activities connected with human rights awareness or enforcement etc.[17]

For starting the One Year Post-Graduate Diploma Course also, the UGC has assured the Teaching Posts (One Reader or a Lecturer); Grant for Library, and grant for Extension Work.

Some other conditions have also been laid down. These are: (a) that the syllabus for the courses to be introduced should preferably be based on the recommendations of the Law Panel Report on Human Rights Education (1995); (b) that the number of regular students to be admitted to the course started with the UGC assistance should ordinarily be between five to ten; and (c) that the assistance under this programme will be for a period of five years and further subject to the condition the University/Institution will obtain an unconditional commitment in writing from the respective State Government to take over the liabilities (recurring, non-recurring and salary of the staff under the programme-after IXth Plan period and that the programme shall continue uninterruptedly).[17]

2.9.2 Allocation of Grant for the Introduction of Certificate Course

The UGC has assured financial assistance for introducing Certificate Course in Human Rights. For this purpose, it has assured grant of payment for the Co-ordinator, Guest Lectures, Library, and Extension Activities.

2.9.3 Allocation of Funds for Seminars, Conferences and Workshops

The UGC has also assured funds for organising Seminars, Symposia, and Workshops. Detailed guidelines have been laid down for the conduct of and allocation of funds for Seminars, Symposia and Workshops to be organised by the universities and colleges.[18]

16. *Ibid.*, p. 20.

17. *Id.*

18. *Id.*

After going through the UGC IXth plan Approach Paper, one gets convinced that the UGC seems to be very seriously concerned in introducing human rights education in universities and colleges. There were indeed certain apprehensions in the beginning as regards the commitment of the UGC in this matter. However, if the Annual Reports of the National Human Rights Commission are an indication, a number of universities have introduced new Human Rights Courses with the financial assistance of the UGC. Whereas some universities have introduced these courses in the Faculties of Law and Political Science, some others have started new Departments. Similarly, a number of Conferences, Seminars, Symposia and Workshops on the subject of human rights have been organised by the different universities and colleges with the UGC's assistance. These are indeed positive developments and are welcome steps in the direction of creating a strong human rights culture in the country.

3. THE NATIONAL HUMAN RIGHTS COMMISSION (NHRC) OF INDIA AND HUMAN RIGHTS EDUCATION

Section 12(h) of the Protection of Human Rights Act, 1993 requires the National Human Rights Commission "to spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means. "Whereas this undertaking requires the creation of a human rights culture across the entire country and amongst all people, the fulfillment of this responsibility also poses formidable problems in a country like India. As a matter of fact the magnitude of this responsibility must be seen against the extraordinary complexity and diversity of the economic and social circumstances of the country: a vibrant democracy functioning in a framework of unparalleled pluralism, at a time of unprecedented change; a nation of nearly a billion citizens, increasingly awakening to their rights and seeking their fulfillment; a nation that, despite the most remarkable growth in key sectors, remains challenged and deeply disturbed by the fact that some 360 million of its people live below the poverty line and that literacy continues to afflict nearly 450 million Indians.[19] Nevertheless, ever since its establishment, the National Human Rights Commission, in furtherance of this complex responsibility, has taken a number of steps to spread the message of human rights throughout the country by following a strategy of many parts: it has pressed for the introduction of human rights education in the curricula both of schools and of universities: it has involved NGOs in efforts to spread human rights awareness at the grassroots level; it has sought to bring about a greater sensitivity among civil servants, police and security personnel, and members of the judiciary by re-orienting their training programmes and organising

19. *Annual Report of the National Human Rights Commission* (1997-98), New Delhi: NHRC. p. 34.

seminars, workshops and the like; it has encouraged the media to report on human rights issues and it has urged the Central Government to devise a National Action Plan for Human Rights and a Plan for Human Rights Education. Further, visits by the NHRC staff to state capitals and other parts of the country, and their participation in numerous discussions on human rights, encompassing the entire range of such rights, have also provided an impetus to a wider awareness of human rights.[20] A summary of these efforts is provided below:

3.1 Observance of the UN Decade for Human Rights Education and Campaign for National Action Plan for Human Rights and Action Plan for Human Rights Education

The NHRC has played a catalytic role in the drawing up of a National Action Plan for observing the UN Decade for Human Rights Education (1995–2004). In a meeting convened by the NHRC in the beginning of 1997 with representatives of the Ministry of Human Resource Development, Department of Education, Ministry of Home Affairs and others it underscored the need for a clearly defined plan of action, as well as a apparatus to implement a programme of Human Rights Education. The NHRC urged that the following issues receive particular attention: (i) introduction of free and compulsory primary education until the age of 14 years: (ii) inclusion of human rights as a subject at the under-graduate and post-graduate level, (iii) identification of academic and governmental jobs which require specialised knowledge in human rights and the prescribing of desirable qualifications in this respect for recruitment to different categories of posts; (iv) imparting human rights education to professional groups such as lawyers, doctors, judicial officers, bureaucrats, trade unionists, members of the security forces (including the elements of the military, para-military and police), and including political functionaries, NGOs and religious bodies in such efforts; (v) arranging debates and seminars on human rights; (vi) arranging lectures for school and college students to impart knowledge about the Universal Declaration of Human Rights and a human rights culture; and (vii) introduction of short-term sensitisation and training courses on human rights, in particular for the *Panchayati* Raj and village level functionaries.[21]

3.2 Mobilising the Educational System

In order to promote a deeper understanding of human rights among students at various levels, the NHRC has, since its inception, been intensively interacting with the Ministry of Human Resource Development, the National Council for Education, Research and Training (NCERT) and the

20. *Annual Report of the National Human Rights Commission* (2001-2002), New Delhi: NHRC. p. 118.

21. *Annual Report of the NHRC* (1997-98), pp. 34-35.

National Council for Teachers Education (NCTE). As a first step, the NHRC had asked the NCERT to undertake a review of the existing text books with a view to eliminate from them those passages that were inimical to human rights. Steps were simultaneously initiated to encourage the inclusion of alternative materials, which showed a genuine sensitivity to human rights.[22]

The NCERT undertook a study of human rights awareness among school children in India, as a part of a 4-country project sponsored by the International Centre for Inter-Cultural Studies, Institute of Education, University of London. The Study covered eight schools, two each in Karnataka, Madhya Pradesh, Orissa and Rajasthan. Keeping in mind the need "to reflect the ecological, geographical and socio-cultural diversity of the country as well as the student population of both boys and girls from the various socio-economic strata." According to the NHRC, the findings of the study could be of great value to the Commission in the period ahead as they were related to the matters covering: (i) the curriculum; (ii) perceptions of law and administration; (iii) colonialism, independence, democracy, civil and social rights and responsibilities; (iv) consumer rights and violence; (v) perceptions of identity.

In a further step the NHRC has also recommended the inclusion of questions relating to such rights in the General Knowledge Paper of the Civil Services Examination for entry into the highest civil services in the country. The NHRC has pointed to the government that this would lead to a greater sensitisation on human rights issues.

At the university level, the NHRC, immediately after its establishment, addressed communication to all Vice-Chancellors, proposing four measures: (i) that the subject of human rights, in all of its dimensions, may find a clear place in the curriculum of the university; (ii) that research, seminars and publications concerning human rights should be furthered; (iii) that the NHRC would encourage linkages between the academic community and non-governmental organisation so that the best academic minds could bring their talents to bear up on the practical work being done by such groups; and (iv) that the NHRC would welcome continuing contact with the universities in these areas and that it would help, within its means and possibilities.[23]

At the instance of the NHRC, the Ministry of Human Resource Development (Department of Education), had set up a Working Group to oversee, monitor and coordinate the programme for human rights education at the level of higher education as well as to consider matters relating to international collaboration in this field.

22. *Annual Report of the National Human Rights Commission* (1995-96), New Delhi: NHRC. p. 32.

23. *See: Annual Report of the NHRC* (1993-94), p. 27.

At the instance of the NHRC, the University Grants Commission has constituted a Curriculum Development Committee on Human Rights and Duties Education in order to ensure a certain degree of uniformity in the course content and standard of teaching on human rights at various levels.

In order to provide a further stimulus to human rights education, the NHRC has taken the view that research should also be conducted on human rights issues under the aegis of the UGC. The Commission has, therefore, urged the UGC to earmark a certain number of fellowships for research on clearly identified human rights subjects.

3.3 Human Rights Training for Civil Servants

The NHRC has, for some time, been engaged in creating a greater awareness of human rights among young administrators so that they may retain sensitivity towards such rights throughout their careers and strive to promote and protect them. Accordingly, the Commission has been interacting very closely with the Lal Bahadur Shastri National Academy of Administration, Mussorie as well as Sardar Vallabhai Patel National Police Academy, Hyderabad in its on-going effort to create an awareness of human rights among young administrators. The NHRC is convinced that appropriate training can go a long way towards preparing them to deal with human rights issues that may arise in the course of their careers with fairness and sensitivity.

3.4 Human Rights Education for Police Personnel

Every since its establishment, the NHRC has been giving the highest priority to encouraging the training and re-orientation of members of the police and armed forces.[24] As regards the police, almost all states have made efforts to include human rights in the instruction of their cadres in their various institutions. However, according to the NHRC, these courses need to have a far higher standard and a greater degree of consistency.[25]

While the Sardar Vallabhbhai Patel National Police Academy in Hyderabad has for some years, been fully conscious of the need for such training, the NHRC has considered it necessary to take this message more fully to the state level training institutions.[26] According to the NHRC, a number of them have organised workshops on human rights and that the issues relating to human rights are being given increased weightage in their regular training curricula.[27] The NHRC is convinced that Training Programmes, if properly structured and conducted, "can have most valuable

24. For more details, see: "Human Rights Training of Police Personnel." In: *Human Rights Newsletter*. Vol.2. No. 12 (December 1995), p. 3.

25. *Annual Report of the National Human Rights Commission* (1994-95), New Delhi: NHRC. p. 23.

26. *Annual Report of the NHRC* (1996-97), p.47.

27. *Annual Report of the NHRC* (1999-2000), p.68.

effect on political personnel and improve their responses even in provocative situations."[28]

3.5 Human Rights Education for Paramilitary and Armed Forces personnel

The training and re-orientation of the military and para-military forces has been of great concern to the NHRC ever since it came into existence. Accordingly, this subject has been central to the discussions that the NHRC had with the Chief of the Army Staff and the Director General of the Border Security Force, among others from time to time. The NHRC had also encouraged and welcomed the involvement of the International Committee of the Red Cross (ICRC), New Delhi in courses conducted for Officers of the Boarder Security Force on International Humanitarian Law.[29]

According to the NHRC, there has been a greater sensitivity at all levels of the need to respect human rights even in the daily conduct of the armed forces. The members of the NHRC had availed every opportunity to speak to gatherings of armed forces personnel and the senior officers of the army had also been readily attending discussions organised by the NHRC.[30]

3.6 Human Rights Education for Political Parties

It may be appropriate to mention here that the NHRC has consistently drawn attention to the key role that political parties can play in the protection and promotion of human rights. The NHRC had urged all political parties to reaffirm their commitment to human rights through the choice of candidates having an 'unimpeachable human rights record. The NHRC had requested the political parties to set up Human Rights Cells at the Central, State and District levels of the party organisation, specifically charged with the responsibility of promoting and protecting human rights and for overseeing the conduct of their members. According to the NHRC, there is a need for the exercise of greater restraint and moderation by political parties when dealing with issues having sensitive human rights connotations and that all groups must turn away firmly from incitement to violence in the name of caste, creed, language, and religion. The NHRC recommended that political parties should establish a clear Code of Conduct to govern the behaviour of their cadres in matters affecting human rights of the people and that transgressions of such a code should be dealt with severely.[31]

28. *Annual Report of the National Human Rights Commission* (1998-1999), New Delhi: NHRC, p. 45.

29. *Annual Report of the NHRC* (1994-95), p. 23.

30. *Annual Report of the NHRC* (1995-96), pp. 34 35.

31. *Annual Report of the NHRC* (1997-98), pp. 38-39. Also see: "discussion with Political Parties on Human Rights." In *"Human Rights Newsletter*. Vol. 2. No. 11 (November 1995), pp. 1-2: "Political Parties Urged to Focus on Education to Curb Human Rights Violations." In: *Human Rights Newsletter*. Vol. 3. No. 2 (February 1996), p. 1: and "Commission Urges Political Parties to Abide by Commitment to Human Rights." In: *Human Rights Newsletter*. Vol. 5. No. 1 (January 1998), p. 2.

3.7 Establishment of the National Institute of Human Rights

In a major effort to establish a Centre for Excellence for Human Rights Education, the NHRC has set up the National Institute of Human Rights (NIHR) at the National Law School of India University, Bangalore. According to the NHRC, the National Institute will assist it in the discharge of some of its key statutory functions and would also undertake the following activities: (i) promote research in the field of human rights: (ii) review the safeguards provided by or under the constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation: (iii) spread human rights literacy among various sections of society; (iv) promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means; and (v) study treaties and other international instruments on human rights and make recommendations for their effective implementation.[32]

The NIHR, Bangalore has recently produced a Handbook on Human Rights for Judicial Officers with the help of a grant from the Australian Human Rights Fund Small Grants Scheme, which was given to the NIHR upon a recommendation of the NHRC.[33] According to the NHRC, this effort will not only be of assistance to members of the Judiciary, but also to police officers, administrators and NGOs interested in protecting human rights.[34]

3.9 Training Material for Staff of the Human Rights Commission

In the year 1998, the NHRC constituted a Core Group with the task of preparing training material for the staff of the NHRC and State Human Rights Commission. The Group consisted of the representatives from the Indian Institute of Public Administration, the National Commission for Women, the National Human Rights Commission, the National Institute of Criminology and Forensic Science, and the Punjab and Himachal Pradesh State Human Rights Commissions etc.

3.10 Conferences, Seminars, Workshops and Training Programmes

Ever since its establishment, the NHRC has organised, sponsored and co-sponsored a large number of Conferences, Seminars, Symposia, Round Tables, workshops, and Training Programmes. It has also organised a number of Meetings, Sensitisation Programmes, Consultations, Lectures, Colloquiums, Debates, as well as Essay Competitions, Writing Competitions, and Painting competitions, on various topics relating to human rights. These have been organised in collaboration with NGOs,[35] international

32. *Annual Report of the NHRC* (1998-99), p. 44.

33. *Annual Report of the NHRC* (2001-02), p. 121.

34. *Annual Report of the NHRC* (2000-01), p. 88.

35. For more details, *see*: Interaction with NGOs: NHRC's Workshop on Human Rights." In: *Human Rights Newsletter*. Vol. 2. No. 5 (May 1995), p. 5.

organisations working for human rights, State Human Rights Commissions and academic institutions.

3.11 Publications and the Media

Right from the very beginning, the NHRC has been publishing a monthly Newsletter that contains information relating to the work, programmes major decisions and concerns of the Commission. The NHRC mails more than 4000 Newsletters to places inside and outside India every month.

With a view to disseminate knowledge and important developments in the field of human rights, the NHRC has decided to bring out an annual publication entitled: The Journal of the Human Rights Commission.[36]

Besides this, twenty newspapers are scanned daily in the NHRC and all news items relating to human rights are clipped and filed in a computerised data base, facilitating retrieval of important clippings topic-wise, date-wise and newspaper-wise. The clippings serve as an important source of information to the NHRC for taking *suo motu* action. The clippings service is also of immense use to researchers, students and media persons working on human rights related issues. They are provided easy access to these clippings.[37]

According to the NHRC Annual Reports, the print and visual media has continued to be of great value to the Commission in its work of protecting human rights and creating awareness amongst the general public. The NHRC has also been working with a number of film and television serial makers by providing them with the case studies, on the basis of which they have made their films.[38]

Following a series of workshops in different regions of the country, the NHRC in collaboration with Prasar Bharati and UNICEF, framed a set of Guidelines to assist the media in reporting on the problem of child sexual abuse. Guidelines will serve in sensitising and equiping the media to play a more active and catalytic role in promoting the rights of children, particularly the right to profection, and to develop a clearer understanding of existing legislation and international instruments to combat sexual abuse.[39]

According to the NHRC, those who work for the media are key allies in the promotion and protection of human rights and in the correcting of social

36. For more details, *see:* "Journal of the National Human Rights Commission." In: *Human Rights Newsletter*, Vol. 9. No. 7 (July 2002), p. 3

37. *See: Annual Report of the NHRC* (1999-2000), p. 73.

38. *Id.*

39. For details, *see: Annual Report of the NHRC* (2000-2001), pp. 94-95.

attitudes that have, resulted in the violation of human rights in our country, particularly of the most vulnerable sections of society.[40]

3.12 Research Programmes and Projects

In pursuance of its statutory responsibility to undertake and promote research in the field of human rights, the NHRC has been pursuing a variety of programmes and projects.[41] Issues relating, *inter alia*, to the elimination of bonded and child labour, the prevalence of iron deficiency and its deleterious consequences on women and children, especially girls, child prostitution and quality assurance in mental hospitals have been regularly discussed in the NHRC's weekly programme agenda and in meeting of the Full Commission held every quarter. It may be appropriate to point out here that the studies on the three major projects undertaken on behalf of the NHRC, *viz.*, State of the Art: Forensic Sciences for Better Criminal Justice, Large Volume Parenterals - Towards Zero Defect and Quality Assurance in Mental Health have already been released.

Now, I would like to make some personal observations on the role and responsibilities of both the institutions, that is, the University Grants Commission and the National Human Rights Commission.

4. SOME OBSERVATIONS ON THE ROLE OF UGC AND NHRC IN THE ARENA OE HUMAN RIGHTS EDUCATION

After going through the UGC's IXth Plan Approach to Human Rights Education in Universities and Colleges, as well as on going through the various Annual Reports, Newsletters and other Publications of the National Human Rights Commission, the author is in a position to make some critical observations on the issue of human rights education. At the outset, it may be mentioned here that the author's observations may seem to be over-critical but these must not be mis-understood as unrealistic ones as they are based on the personal experiences of the author.

in the first place, as regards the UGC's IXth Plan Approach Paper on Human Rights Education, it has not hit the target very well. Even though the present statement may seem to be a sweeping one, there is nevertheless truth in it, and that is, due to the lack of publicity and information campaign, most universities have not been made aware about this Approach Paper and for that matter about the role and activities of the UGC in the arena of human rights much less of talking about the colleges. Normally, one gets such information only on visiting the UGC Office at New Delhi. However, not

40. For details, *see: Annual Report of the NHRC* (2000-2001), p. 97.

41. For more details, *see:* "NHRC and Canadian Human Rights Commission To Take Up Joint Projects." In: *Human Rights Newsletter*, Vol. 4. No. 7. (July 1997), pp. 3-4: "NHRC to Embark on a Project on Prison Reforms." In: *Human Rights Newsletter*. Vol. 5. No. 12 (December 1998), pp. 1-2: and "Project on Mentally Ill Persons in Jails of West Bengal," In: *Human Rights Newsletter*. Vol. 9. No. 8 (August 2002), p. 3.

many academics and administrators visit the UGC Office. The author did talk to a number of College Principals and administrators on different occasions like Convocations, Orientation Programmes, Refresher Courses, and Conferences, Seminars, Workshops and routine Meetings and they often pleaded complete ignorance about the UGC initiatives in the field of human rights. That is perhaps the reason that notwithstanding the fact that the major portion of the financial assistance to start new courses in human rights education is to be provided by the UGC, these courses have not been introduced in colleges and universities .What has happened seems to be just tip of the iceberg. Therefore, if UGC is serious about the introduction of human rights education at college level and if it is desired that various events relating to human rights education should be held in colleges and other educational institutions, adequate publicity needs to be given. In a vast country like ours, introduction of human rights courses by a few colleges in cities and towns do not mean much. The need of the hour is that the message of human rights should reach rural areas and remote areas. And for this the UGC has to cover a very long journey. Periodic meetings and workshops with the concerned people need to be organised from time to time.

Secondly, although the proposal by the UGC to give Teaching Positions to the Universities in case of starting Post-Graduate Course and Diploma Course in Human Rights has been considered a welcome step, there are some major practical difficulties attached with such a proposal. As per the proposal, the UGC would support the new academic course for a period of initial five years and the university concerned has to give an undertaking that it shall seek an unconditional commitment in writing from the State Government concerned to take over the liabilities (recurring, non-recurring and salary of the staff appointed under the programme after the IXth Plan period and that the Programme shall continue uninterruptedly). It is here that the real problem arises. In view of the resource constraints, no state government is ready to given such an undertaking and no university in turn is perhaps ready to give an undertaking that it will be able to run this newly started course with its own resources. This may not be true in certain case, but is true in majority of cases. And the net result would be that the Human Rights Course started with much fanfare by the universities would in all probability have to be discontinued. The continuity shall be possible only if the state governments give the required undertaking or in the alternative the institution concerned is able to generate sufficient resources. And both the alternatives are not easy ones.

Another issue is that even well formulated and structured proposals for the starting of the Post-Graduate Course in Human Rights have not been accepted for the financial assistance of the UGC for the simple reason that these proposals could not be justified or defended before the UGC/NHRC. And the net result has been that if a University had asked for the permission and Teaching Positions with necessary funding to start the Post Graduate

Course in Human Rights, they were offered the Diploma Course. similarly, if a College had asked for Diploma Course, the management had been advised to start the Certificate Course in the first instance. Whether it is really due to the inability of the administrators to justify or defend the proposals or it has been due to bureaucratic redtapism is best known to the people in the UGC and NHRC. in this connection it may be pointed out that neither the college nor the university is at loss. However, the people who are interested in teaching and studying the subject of human rights are the real sufferers. Therefore, both UGC and the NHRC should take note of these problems and do the needful.

As regards the role of the NHRC in the arena of human rights education, once again there is lack of information and awareness about its role and activities. The author has been frequently delivering lectures on the subject of human rights to the participants of the Orientation Programmes and Refresher Courses in Political Science, Law and Human Rights. What to talk about the college teachers, most surprisingly, even university teachers are not aware of an important institution like the National Human Rights Commissiou of India. There is no denying the fact that the regular publlcation of the Monthly Newsletter by the NHRC has indeed been a welcome step. Equally commendable step is putting the name of any and every interested academic/ individual on the mailing lisl of the NHRC on the former's request and willingness to send them the Newsletter, the circulation of the Newsletter must be increased and it must be sent to the libraries of all colleges and universities across the country so that in the initial stages, information may be disseminated amongst the academic community. Similar observations are applicable to the publication of the Annual Reports of the NHRC.

There is also the need for publication and dissemination of information about the activities and functions of the National Human Rights Commission and State Human Rights Commissions in local language so as to enable more anci more people to know and learn about these institutions and their day to day functioning in the sphere of human rights. These steps shall go a long way in promoting human rights of the people and in evolving human rights culture in the country.

Further, the Summer and Winter Internship Programme started hy the NHRC to train the university students is indeed a highly commendable step. The author, as Head of the University Teaching Department (Law) for three years (1999-2002), had the privilege to first recommend to the NHRC the names of the law students who were interested in attending the Internship Programme of the Commission and later to interact with those students who had got the opportunity to work with the Commission during their Internship Programme. In the beginning, their response was very enthusiastic and the Project Reports which they were asked to submit during

their Internship were also highly appreciable and commendable as they had a life time opportunity to work under experts in different wings at the NHRC, besides interacting with various learned scholars, police and army officers, judges and lawyers, human rights activists, and other distinguished intellectuals and speakers. However, after about six months, the same enthusiasm was found missing. The NHRC should endeavour to utilize their services in any form so that the intensive training imparted to these young interns does not go waste and they could do their duty for the society as far as promotion and protection of human rights is concerned. This is perhaps the only object with which the Internship Scheme of the NHRC must have started.

5. CONCLUSION

In summing up, it may be observed that the issue of human rights education is one that requires a long-term strategy and the involvement of all possible players, both governmental and non-governmental. The period 1995-2004 was designated by the United nations as the UN Decade for Human Rights Education. While the ground work has been laid by the National Human Rights Commission and its partners ever since its establishment, far more needs to be done to bring its various elements and possibilities together.[42] There is no denying the fact that human rights can flourish only in an open society, in which those in authority are accountable for their actions.[43] Respect for human rights of all, and the realisation of such rights, requires a continuous effort to evolve a culture that is sensitive to the basic needs of every human being, in a society that ensures equity and justice to every individual and every group. Human Rights Education is essential to the creation of such a culture and society. Thus in my own opinion, the aim before the NHRC should now be: **HUMAN RIGHTS EDUCATION FOR ALL BY 2005.**

42. *Annual Report of the NHRC* (1996-97), p. 47.

43. *Annual Report of the NHRC* (1994-95), p. 25.

DESIGNING ON-LINE AGREEMENTS: CONTRACTUAL CLOSURE AND INDIAN CONTRACT LAW

Rodney D. Ryder*

PART I: "the beginning"

To some it may sound strange, but electronic commerce has been with us for quite some time now. Traditionally, it has been used by established business partners, for example, between wholesalers and manufacturers or by banks exchanging magnetic tapes containing details of clearing cheques. It has been a long established manner of conducting business on a business to business basis. It is only in the past few years, with the advent of the Internet, that electronic commerce concluded over the Internet on a business-to-consumer or consumer-consumer-basis has become feasible, and allowed to grow at an exponential rate.

Electronic commerce by way of EDI is conducted between existing business partners operating under a pre-existing contract containing all the terms and conditions pertaining to all transactions between the business partners. These terms and conditions are usually negotiated between the business partners before any transaction takes place. The agreements are most likely to be extremely detailed and explicit leaving very little room for unresolved issues or the possibility of litigation. Each transaction over EDI is effectively an electronic agreement that is subject to the pre-determined terms and conditions between the business and consumer generally does not enjoy the same luxury of having such pre-existing contract in the event of a

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dispute, since such business is often conducted on a one-on basis. Under these circumstances, the parties must then rely on the standard terms and conditions of the merchant and the court's interpretation of available law to resolve any disputes.

Internet legislation

Contrary to popular belief, cyberspace is not a lawless arena for conducting commerce. More often than not, existing contract laws are generally able to deal with on-line and click-wrap agreements. In addition, the United Nations Commission on International Trade Law (UNCITRAL) has drafted a Model Law on Electronic Commerce that provides a basis for jurisdictions to prepare legislation relating specifically to electronic commerce.

Article 11 of the Model Law provides that "unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where such data message is used, the contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose." This concept, under the Model Law, has been adopted by various jurisdictions as a model for drafting their own electronic transaction legislation, including the Indian Information Technology Act, 2000.

However, the mere acceptance of on-line contracts is not in itself sufficient protection for the merchant. The contract itself still has to be structured in such a way for the merchants so as not to be caught by any deficiency under this new trading arena.

Contractual issues in cyberspace: a brief prologue

The issues relating to formation of a contract in cyberspace are intriguing. While rules on the formation of contracts are clear in the physical world, there are significant ambiguities in the electronic world. There is, therefore, a need to enact legislative provisions to clarify the rules of formation of electronic contracts. This would supplement the digital signature system, as the signatures are likely to be used in an environment where contracts and transactions are concluded electronically. The main issue involving the transmission of a message through different electronic mechanisms such as electronic mail is when the message was considered sent or received. For sending or dispatch, it is proposed that it occurs when the message enters a system outside the control of the sender. For receipt, a system of designating specific electronic mailboxes as receiving points is proposed. A message is deemed received by such designated mailboxes when it enters the system. If there is no designation, it is also to a mailbox other than the designated one; it is received when the recipient retrieves the message. The place of contract is also an issue in electronic contract formation. The proposal is to designate the place of dispatch and receipt as

the regular place of business or residence of the sender and recipient respectively, regardless on the actual place of receipt. In order to achieve harmony with other countries on the formation of international digital contracts, it is recommended that the provisions of the UNCITRAL Model Law on Electronic Commerce be adopted.

Is authentication by electronic means equivalent to the traditional signature? In our world of day-to-day business, a signed document denotes legal authenticity and validity. It imposes clearly defined legal rights and responsibilities on the parties who have signed it and represents a solid foundation upon which a commercial relationship can be sustained.

The genesis of legal relations

In principle, the formation of a contract takes place after an offer is made and that offer is accepted. The law requires a 'meeting of the minds'. This usually results from the acceptance of an offer. The growing e-commerce practice is that the on-line seller does not make an offer on-line, which would be accepted by the purchaser's acceptance, but merely an invitation to treat [*i.e.* a call for proposals]. This practice can be seen for example in Amazon's terms and conditions www.amazon.co.uk. The purpose of such a provision is to protect the seller from making a unilateral offer directed at the world and from being bound by an agreement that is finalized outside of its control. It ensures that a failure by the seller to honour an online request from a buyer will not adversely affect the seller and both parties are informed of the actual time of the conclusion of the contract.

There is no [legally] binding contract until there has been an assent to the offer signified in the mode required by the terms of the offer. In common law, *prima facie* an acceptance by post is complete when the letter is posted or by telegram when it is handed in; but acceptance by instantaneous form of communication takes effect only on receipt.

The formation of contracts over the Internet is a contentious issue. However, under the Indian Information Technology Act, 2000, electronic media is no longer an obstacle to forming a valid contract. The international dimension may add additional problems to the complicated issue and it is possible that courts other than those in India may have jurisdiction problems in the event of a dispute] for example, where one of the contracting parties resides overseas and the services or goods are to be provided to him there]. Non-Indian Courts also may hold that the local legal requirements have not been complied with to form a valid contract.

The 'elements'

Under the Indian Contract Act, 1982, there are four essential requirements of a contract:

[1] an offer;

[2] acceptance of the offer,

[3] an intention to create legal relations; and

[4] consideration.

In many [ordinary!] everyday situations, the four elements are obvious: a person sees the intended item of purchase in a showroom; he makes an offer which is accepted; he tenders the purchase price [the consideration] and the relevant documentation and receipt are handed over by the seller and a binding contract has been formed. However, if the potential purchaser saw the goods advertised in the newspaper and tendered the asking price, a valid contract would not be formed unless the seller accepted the offer. Advertisements, as rule, are generally only "invitations to treat', in other words invitation to the world at large to make an offer to buy. In other examples, it is less clear which party is the offeror and which one the acceptor. The distinction between an offeror and an acceptor is a subtle but an important one as it affects their respective abilities to withdraw or reject an offer.

Offer

In a number of cases where a company is likely to enter into contracts over the Internet, it will do so by way of an advertisement which, if worded correctly, would amount to an 'invitation to treat'. Thus, where a potential customer is applying for a service or purchasing over the Internet, the Web site owner would be entitled to turn down the application. Each case will turn on its own facts and the intended objectives of the Web site owner should determine how the advertisement is worded. The transaction should not be completed without confirmation that the terms and conditions have been accepted. These points should be in mind when designing a Web page.

Acceptance

As a rule, a contract will not be formed until acceptance of the offer has been communicated to the offeror. Parameters should be made clear; under the relevant terms and conditions or by a statement that will be seen by the user before he communicates acceptance. The contract will not, under these circumstances, be formed until the Web site owner has received the e-mail accepting the offer.

The Web site owner can pre-empt matters by specifying the law to be applied to the contract and the Courts which will have jurisdiction in the event of a dispute. However, the effectiveness of these measures would [in all probability] be determined by the foreign Court, and in any event, the measures would not bind third parties [such as a person who has been defamed on an electronic bulletin board run by the Web site owner] nor would they be effective to avoid regulatory regimes or criminal sanctions.

There is very little authority on when the offer is transmitted *via* a computer communication and when acceptance is deemed to have been received by the offeror. The case referred to for the purpose of the discussion deal with telex transmission, but there is no case law on facsimile transmissions or Internet. Therefore, all discussions in respect of computer communication can only be by analogy. The receipt rule must apply to computer communications where there is a direct link between the parties. Direct Internet communications, that is to say those relayed from one Internet node to another, are more closely analogous to a telephone conversation rather than a postal situation. If the communication is not received, one of the parties, probably the offeree, is likely to become aware of this. In addition, there is no intermediary to whom the transmission is entrusted. Therefore, the receipt rule would equally apply any analogy to Internet contracts, if there is no intermediary service provider. This would have to presume that the transmission is instantaneous and that once the acceptance is communicated, it is read immediately on receipt.

'A middle path'

The practical reality of communications *via* the Internet is that the are not as instantaneous as one would like to believe. There can be some, if not considerable, delay. In addition, there is no guarantee that the received message will actually arrive at the Web site owner's server, or that it will arrive without any corruption, or that it will be read immediately.

PART II: 'the bargain'

Terms and conditions

In addition to the necessity that the on-line agreement is binding, the merchant would want to sell its products under its own terms and conditions and not have to rely upon consumer laws. Therefore, it is vital that its standard terms and conditions of sale are properly incorporated into the on-line agreement.

The terms and conditions contained in an on-line agreement will not be negotiated - they will be drafted unilaterally by the merchant for the customer on a "take-it-or-leave-it-basis" and predominately for the benefit of the merchant. However, the benefit that the merchant proposes to achieve will not be achieved unless the terms and conditions have been made known to the customer before the customer places an order. If the merchant's terms and conditions were not made known before the contract was concluded, the merchant runs the risk of not being able to bind the customers with them.

Furthermore, the fact that the terms and conditions are merely somewhere on the merchant's website may not be sufficient. *In Parker* v. *South Eastern Railway Co.*, (7877) (C.P.D. 416) the railway's standard terms and conditions were printed on the back of the ticket. The court divided the concept of notice into three questions of fact, namely:

- Did the passenger know that there was printing on the back of the ticket?
- Did the passenger know that the ticket contained or referred to conditions? And
- Did the railway company do what was reasonable to notify prospective passengers of the existence of conditions and where the terms were placed?

In the case of an on-line agreement, this would probably mean onerous terms should be placed on the ordering from itself, as part of the sequenced of placing orders, and not just on the page containing the terms and conditions. Something startling could also be used, such as flashing icons that the customer must click through before being able to proceed any further.

Displaying the merchant's standard terms and conditions on the website

Unlike real world business, merchant's web sites have various means of displaying the merchant's terms and conditions to their customers. An examination of various websites has shown that the following are common methods of setting out the merchant's standard terms and conditions:

- Reference Statement without hyperlink

A reference with a hyperlink to a separate page containing the standard terms and conditions of the merchant is the most popular method of making known to the customer his standard terms and conditions. It has been able to achieve some kind of credibility without substantial disruption of content and the purchasing process of the customer.

In respect of onerous terms contained in the standard terms and conditions, the hyperlink method may not be adequate, as it may not sufficiently stand out. In *Interfoto Picture Library Ltd.* v. *Stiletto Visual Programmes Ltd.*, [12989] QB 433, the court held that the vendor had a duty to draw attention to particularly surprising or onerous terms using boldface type or a separate attached note.

- Displaying Terms and conditions at the bottom of the page

The merchant's standard terms and conditions may be placed on the same page as the order form itself. Such a form is usually extremely long and unsightly, but does lend greater weight to the legal requirement of giving notice as ascribed in the aforementioned cases. However, as the customer may not necessarily interact with the terms, it may not be possible to establish that the customer has had the opportunity to read the terms and conditions.

- Use of Click-wrap Agreements or Dialogue boxes

This is most likely the best available method of ensuring that the customer goes through the terms and conditions. There are many variations

of this method, typically the terms and conditions are contained in a dialogue box or within a page containing the merchant's standard terms and conditions. These are made part of the ordering sequence, and the customer must scroll to the bottom of the box or page before being able to press the "I accept" button agreeing to the Merchant's terms and conditions. Only when the button has been pressed can the customer click the "proceed" button and accept the merchant's terms and conditions.

The US decision in *Hotmail Corporation* v. *Van Money Pie Inc., et. Al.*, C98-20064 (N.D. Ca., April 20, 1998), and *Pro CD, Inc.* v. *Zeidenberg*, 86 F. 3d 1447 (7th Cir. 1996) held that click-wrap agreements were duly enforceable, stating that: "Shrink-wrap licences are enforceable unless their terms are objectionable on grounds." The Scottish decision of *Beta Computers* v. *Adobe*, that followed the US decisions, indicated that click-wrap agreements are also enforceable under English and Scottish laws.

Although the methods may, in the opinion of the merchant, seem tedious and troublesome, they are most effective and beneficial to the merchant in case of dispute. Because the customer has interacted with the merchant's standard terms and conditions, the customer must have realized that he has agreed to be bound by those terms and conditions irrespective of the fact that he may not have read the contents contained in the click-wrap agreement or dialogue box. Finally, in the light of the above cases, there is no doubt on the strengths of click-wrap agreements and that the use of this method ought to be the way forward.

Naturally the most "unattractive" method usually affords the best legal protection and may be designed so that the customer is "forced" to go through the terms and conditions before being able to make an offer to purchase. But the purpose of the website is for the sale of goods or services and not a lecture on law. Such designs may well be off-putting, in particular to those that are only purchasing items of law value, which may result in such potential customers leaving before they even have the opportunity to make an offer to purchase anything.

The merchant, therefore, needs to weigh his options and consider whether he wants the protection or not. Since virtually all on-line contracts require advance payment before delivery of goods and the probability that the customer is from a different jurisdiction, the chances that a customer will argue about the legality of the terms and conditions, or whether he is bound by them, may be bleak specially when the value is insignificant.

Designing the web page

From the above, we have seen what an on-line merchant has to be wary of when setting up a website to sell products, how a contract for sale is created and what must be done for its standard terms and conditions to be binding on the customer.

In order for the merchant to reap the rewards of selling on-line, it must have the purchasing process laid out in synchronicity, so that the sequence the customer must follow ensures that a valid binding and enforceable contact is created together with the proper incorporation of its standard terms and conditions. In addition, the merchant must also ensure that records recording each step of the transaction are maintained. Thus, an "audit trail", which records the customer's every click, should be maintained and may be used as evidence in the event of dispute.

The 'perfect site': the architecture of a lawyer's dream

A typical example of a well-laid out sequence should be similar to the following:

1. Products selected by the customer should be placed in a shipping cart, no matter what type of products are being sold.
2. When proceeding to the check out, express terms such as the description of the product (where possible including a photo), price, quantity, availability and estimated delivery time (after a mode of delivery has been selected by the customer) should be clearly stated. The customer should also have the option of removing any item from the shopping cart and be asked to confirm if the selection is correct before proceeding.
3. On proceeding to the next step, details of the customer are taken and if any particular field is not completed in a prescribed manner the customer should not be entitled to proceed. Such details would include whether the customer is a minor, whether the customer resides in a jurisdiction that the merchant does not wish to contract with, etc. When satisfactory details have been given the customer may proceed to the manner of payment.
4. Thereafter, the merchant's standard terms and conditions of the sale, as stated above, should be placed in a dialogue box with the customer having to complete a pre-programmed manoeuvre, whereby they have to type the words *"I agree to the above terms and conditions"* in a box which will only become active after having scrolled to the bottom of the dialogue box.
5. A final confirmation from the merchant detailing the products the customer offered to purchase together with the details referred to in step two. This should be accompanied by any onerous terms in bold (or pointed to with a red hand) placed in a prominent part of the page, and finally the option to cancel the order.
6. If the customer has not by now cancelled, the customer may proceed to offer to the merchant to purchase the selected products. A final message should be displayed to the customer to the effect that "this

is the customer's last chance of cancelling" prior to the customer scrolling to the bottom of the page and submitting the offer.

7. A screen should be displayed after the offer to purchase has been sent to the merchant requesting the customer to wait for a confirmation of acceptance.

8. Finally, sending an instantaneous confirmation notice to the customer that the offer has been accepted should be displayed to the customer, and a subsequent electronic mail sent to double confirm.

At each of the above stages, up to and including step six, it is necessary for the customer to be given the opportunity to cancel or discontinue the process and that such cancellation option should be placed prominently. Furthermore it would be ideal to design the page so that the "proceed button" should be at a different position on each page and placed near the button so that the customer has to scroll to the bottom of the page and look for the button. The purpose of this is to increase the customer's interactivity with the web pages.

The long, tedious and comprehensive sequence of events leading to the customer making an offer, together with an audit train, recording the customer's actions and pages viewed, would make it hard for the customer to argue afterwards that it had accidentally pressed the "proceed" buttons at the end of the transaction and claim that it had no intention of creating a legal relationship at any time. Although there is no authority to support this view, a reasonable court of law would probably not think otherwise.

A parting thought!

Designing and creating a successful website for electronic commerce is no small feat, let alone having to worry about the legal implications of how the site is set out and designed. There are many pitfalls awaiting the unwary merchant. Leaving the design and layout purely in the hands of a layman designer may bring about lawsuits it had never contemplated. An entrepreneur hoping to be successful in a dot com venture should probably consult its legal adviser first before consulting its designer!

BARRIERS TO TRADE IN EDUCATION SERVICES UNDER THE GATS: AN INDIAN EXPERIENCE

K.D. Raju*

"It is not the strongest species that survive, nor the most intelligent, but the ones most responsive to change"

... Charles Darwin

In the history of social change, it seems that those who are most responsive to the change will survive and others will perish. Globalisation and liberalisation of economies all over the world tempt the nations to open up their markets. Trade in education services is largest and growing strongly all over the world. Protectionism is a part of globalisation even though all the countries are preaching free trade. Barriers to trade in education services are also significant. India is a participant in the current WTO trade negotiations on education services. The objective of this study is to quantify the restrictions on trade in education services in general and in India in particular.

In a developing country like India, education is first and foremost considered as a public service, which is responsible for providing young people with instructions. The sector comprises an annual budget of $1,000 billion worldwide and employing 50 million people, and above all a billion potential customers in the form of students. In India, the higher education sector constitutes more than 8 million students. The education service is said

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to be a voluntary opening sector under the GATS Agreement. But education will be on the agenda, since the education market is growing at a breakneck speed.

The decision to extend the liberalization of international trade to services, which previously applied to commodities, was taken in 1994. The General Agreement on Trade in Services (GATS) included education on the list of services as an item to be liberalized. To stay outside the scope of this agreement, a country's education system must be completely financed and administered by the state, which is no longer, the case anywhere in the world including India. The Indian private sector also plays a major role in higher education. However, each country can still decide freely the commitments it wants to make, and especially the educational sectors it wants to expose to market forces. So far India is not committed to trade in educational services.

Part 4 of the GATS ("Progressive Liberalization") requires that fresh negotiations should be held by the end of 2000 and should be directed to "the elimination of the adverse effects on tiade in services of measures as a means of providing effective market access". Presently, the Members are in "request and offer" phase. The direction of request and offers are driving educational systems towards "commercialization."

A recent joint statement by the US, EU and Japan Service industries, says: "If barriers to trade in goods and services were completely eliminated, world economic welfare would increase an additional $1.9 trillion, benefiting developed and developing countries alike. A broader WTO Round should be able to reduce barriers to trade in goods and services by one-third, which would still add approximately $613 billion to the world economy."[1]

The Changing Scenario

First, education is a rapidly growing sector in which governments are finding it difficult to satisfy demand in higher education. Between 1985 and 1992, the number of students in higher education rose about 26 per cent - from 58.6 to 73.7 million. Meanwhile, public spending on education has tended to stagnate over the past 15 years (5-6 per cent of GDP in rich countries and 4 per cent elsewhere).

In view of this shortage of public spending, parents and students are increasingly looking to private education for a solution. Under pressure from economic interests, a process of "de-regulating" education systems has begun. The principal proponent of the de-regulation is the US. In 1996 the US generated a $6.6 billion trade surplus in its educational and training services export sector.[2] The growing independence of the sector is

1. Joint statement by the U.S., EU and Japan service industries, *European Service Forum press release*, 10 May 2001. http://www.wto.org

2. Viv Miley, *Higher Education on the GATS Chopping Block*, http://www.greenleft.org.

encouraging them to look for alternative sources of funding, ranging from sponsorship and many kinds of partnerships between Indian and foreign institutions. A European Commission Working Party on education and training says, "the time for out-of-school education has come . . .. the liberalization of the educational process thereby made possible will lead to control by education service providers who are more innovative than the traditional structures." The development and spread of information and communication technologies on a massive scale lead to the development of paid distance learning, using multimedia and the Internet for tutorials, exams, etc.

The WTO Secretariat set up a working group in 1998 to look at the prospects for more liberalized education. Its report pointed to the rapid growth of distance learning and noted the increasing number of partnerships between educational institutions and private firms. The WTO report lists many "barriers" that need to be removed before trade in educational services can be liberalized. These include "measures limiting direct investment by foreign education providers" and "the existence of government monopolies and high subsidization of local institutions."

Barriers to Trade in Educational Services

Identification and elimination of the barriers to trade in higher education service is fundamental because this is the objective of the GATS and WTO Agreements itself. Restrictions on trade in educational services cover government measures, which affect the movement of students, education providers, service operations and technologies. It also includes common types of restrictions, which operate in other service industries: for example, foreign direct investment restrictions. The WTO in consultation with representatives of the education industry has already identified certain barriers to trade in education services.[3] These barriers or obstacles can be categorized as generic and barriers in mode by supply.

a. General Barriers

- Lack of transparency in government policy, regulations and funding.
- Domestic laws and regulations are administered in an unfair manner.
- Subsidies are not made known in a clear and transparent manner.
- When government approval is required, long delays are encountered and when approval is denied; no reasons are given for the denial and no information is given on what must be done to obtain approval in the future.

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3. Jess Worth, *"The Threat to Higher Education: A Briefing on Current World Trade Organisation Negotiations,"* People and Planet, UK, p. 15.

- Tax treatment that discriminates against foreign suppliers.
- Foreign partners are treated less favourably than other organizations, which is against the MFN (Most Favourable Nation) treatment.

b. Modes of Supply and Barriers

(i) Cross Border Supply (distance education or e-education)

- Inappropriate restrictions on electronic transmission of course materials.
- Economic needs test on suppliers of these services.
- Lack of opportunity to qualify as degree granting institution.
- Required to use local partners.
- Denial of permission to enter into and exit from joint ventures with local or non-local partners.
- Partners on voluntary basis.
- Excessive fees/ taxes imposed on licensing or royalty payments.
- New barriers, electronic or legal for use of Internet to deliver education services.
- Restrictions on use/import of educational materials.

(ii) Consumption Abroad (students studying abroad)

Barriers to the consumption of education services abroad apply both inward and outward movement of students. The host economy's restrictions on the inward movement of students represent restriction on the export of education services by domestic educational providers.

- Visa requirements and costs.
- Foreign currency and exchange requirements.
- Recognition of prior qualifications from other countries.
- Quotas on numbers of international students in total and at a particular institution.
- Restrictions on employment while studying.
- Recognition of new qualification by other countries.

Other indirect interventions that might be seen as forms of barriers cover the limited access provided to foreign students public concessions like transport concessions.[4]

4. Duc Nguyen-Hong Robert Wells, *Restrictions on Trade in Education Services: Some Basic Indexes*, October 2003, p. 7.

(iii) Commercial Presence (branch or satellite campus, franchises, twining arrangements etc.)

Government measures restrict the commercial presence mode of supplying education services in two main ways. Firstly, they may limit establishment by service providers in the market of education services of the host economy. Secondly, education providers are also subject to barriers to ongoing operations in the market. For example, use of university title, local employment restrictions, curriculum content, fee setting, marketing arrangements and access to, and the use of foreign exchange and capital transfers. The main barriers on establishment could be summarised are:

- Inability to obtain national licenses to grant a qualification.
- Limit on direct investment by education providers (equity ceilings).
- Nationality requirements.
- Restrictions on recruitment of foreign teachers.
- Government monopolies.
- High subsidization of local institutions.
- Difficulty in obtaining authorization to establish facilities.
- Economic needs test on suppliers of these services.
- Prohibition of higher education, adult education and training services offered by foreign entities.
- Measures requiring the use of a local partner.
- Difficulty to gain permission to enter into and exit from joint ventures with local or non- local partners on voluntary basis.
- Tax treatment that discriminates against foreign suppliers.
- Foreign partners are treated less favourably than other organizations.
- Excessive fees/ taxes are imposed on licensing or royalty payments.
- Rules for twinning arrangements.

(iv) Presence of Natural Persons (teachers and researchers going abroad)

This is a hot issue on the concern of security for every country. Already there are number of restrictions in this field.

- Immigration requirements.
- Nationality or residence requirements.
- Needs test.
- Recognition of credentials.
- Minimum requirements for local hiring are disproportionately high.

- Personnel have difficulty obtaining authorization to enter and leave the country.
- Quotas on number of temporary staff.
- Repatriation of earnings is subject to excessively costly fees and/or taxes for currency.
- Employment rules.
- Restrictions on use/import of educational materials to be used by foreign teacher/scholar.

Most of the barriers are not new and are not specific to education sector. Some of the barriers seem to be protectionist and not have an economic rather than profit motive. Most of the impediments are against the mobility of students and teachers and academic exchange programmes comes under mode two and four.

The four modes of supply of education services is also subject to 'market access' commitments. Under the market access commitments, governments could not limit the number of educational institutions that are set up in a particular area. The goal of 'free trade' regime under WTO is to get these barriers removed in order to further liberalise the world economy.

The US has also identified several barriers, which make it difficult for foreign suppliers to market their services.[5] They can be identified as:

- Legislations that discriminate against foreign providers (*e.g.*, requirement of majority local ownership);
- Licensing requirements unique to external providers;
- Accreditation or quality assurance standards that differ from those for local providers; little or no access to local accreditation;
- Lack of an opportunity to obtain authorization to establish facilities within the territory of the Member country;
- Restrictions on electronic transmission of course materials and customs duties on cross border supply;
- Denial of permission to enter into or exit from joint ventures with local or non-local partners on a voluntary basis.
- Where government approval is required, exceptionally long delays are encountered and when approval is denied, no reasons are given for the denial and no information is given on what must be done to obtain approval in future.
- Government red tape for foreign providers;
- Tax treatment that discriminates against foreign suppliers.

5. ACE the International Initiatives Programme, *An Overview of Higher Education and GATS*, p. 5, http://www.acenet.edu.

- Foreign partners in a joint venture are treated less favourably than the local partners.
- Franchises are treated less favourably than other forms of business organization.
- Domestic laws and regulations are unclear and administered in an unfair manner.
- Subsidies for higher education are not made known in a clear and transparent manner and not available to foreign providers;
- Minimum requirements for local hiring are disproportionately high, causing uneconomic operations.
- Specialised, skilled personnel (including managers, computer specialists, expert speakers), needed for a temporary period of time, have difficulty obtaining authorization to enter and leave the country;
- Repatriation of earnings is subject to excessively costly fees and/or taxes for currency conversion;
- Excessive fees/taxes are imposed on licensing or royalty payments;
- Telecommunication restrictions on foreign access to the internet or phone services; and
- Visa and other travel restrictions on foreigners that affect education.

However there are only 44 countries out of 148 WTO Members that are committed to trade in education services and only 21 of these have included commitments to higher education.[6] Majority of them are from developed countries for all the four sub-sectors except for 'Other Services". The United States has opened foreign competition only for "Adult education" and "Other education services." Japan has also opened up adult education sector. But in Japan, under national law, education can only be provided by recognised non-profit-making organizations. In India also only-registered societies under the Societies Registration Act, 1860 working on non-profit basis can set up educational institutions. This is going to be a major barrier to foreign suppliers.

Barriers in India

Indian higher education sector is one of the largest in the world comprising 8.8 million students, 306 universities under the Government,

6. These countries are Australia, Czech Republic, Jamaica, Liechtenstein, Norway, Sierra Leone, Switzerland, Congo RP, European Union, Japan, Mexico, Panama, Slovak Republic, Trinidad and Tobago, Costa Rica, Hungary, Lesotho, New Zealand, Poland, Slovenia, and Turkey. Source: UNESCO. See also WTO (1998), Education Services, *Background Note by the Secretariat*, Council of Trade in Services, S/C/W/49, 98-3691, available from: http://www.wto.org/english/tratop e/serv_e/sanaly_e.htm

nearly 150 private universities, majority of them in the State of Chhattisgarh. India is an importer of higher education and nearly one-lakh students went abroad in the year 2002 costing India $ 1.5 billion per year. The higher education sector is mainly controlled by the Governmental bodies like the University Grants Commission (UGC), All India Council for Technical Education (AICTE), Distance Education Council (DCE), Medical Council of India (MCI), Bar Council of India (BCI) etc.

According to the UGC Act, 1956 only those universities established under the Act of Parliament or a State Legislature, or granted deemed university status, are entitled to call themselves as universities and confer degrees. Any violation of this rule will be penalized in accordance with the Act (section 24). Under the Act, foreign institutions are not permitted to operate within the country without the permission of the UGC and their degrees were not recognised by the Indian universities. The UGC is entrusted with the maintenance of standards in institutions for higher education or research and scientific and technical institutions. Under its rule making power (section 26) recently it promulgated the UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003. This Act made restrictions on the working of private universities for *e.g.*; these universities have to operate within the boundary of the state where it was established. Only after five years, and that also in exceptional cases only these universities are permitted to open study centers and off-shore campuses. This adversely affects the self-financing universities to open their centres in and outside the country.

"UGC Regulations, 2000 Regarding Minimum Qualifications for Appointment and Career Advancement of Teachers in Universities and Colleges" stipulates qualifications of teachers to be appointed in the Indian universities.[7] The foreign teachers cannot cope with the minimum qualifications especially the National Eligibility Test (NET) for lecturership in the Indian universities. The non-recognition of degrees is another barrier for the foreigners.

Recently, the UGC issued regulations[8] for the admission and conducting entrance tests to specified professional programmes in the country in accordance with the judgment on August 14, 2003 of the 5 Judge Bench of the Supreme Court in the case of *Islamic Academy of Education* v. *State of Karnataka* read with Majority Judgment on October 31, 2002 of 11 Judge Constitution Bench of the Supreme Court in the case of *TMA Pai Foundation* v. *State of Karnataka* and with a view to avoiding mental, physical and financial burden on students due to multiplicity of entrance examinations. The admission and fee structure also will be controlled by the

7. Regulation No.F.3-1/2000(PS), 4 April 2000.

8. UGC (Admission to Specified Professional Programmes) Interim Regulations, 26 December, 2003.

UGC in the country. The foreign universities coming to the country mainly on profit-motive will find it difficult to cope up with these regulations.

Another Agency in the maintenance of standards in education is AICTE, especially, in the management and technical education in the country.[9] Section 10(1)(i) of the AICTE Act, 1987 provides that the Council can lay down norms and standards for courses, curriculam, infrastructural and instructional facilities, staff pattern and qualifications, quality instructions, assessment and examinations. It means, the AICTE will decide the entire activities and working of the management and technical education institutions in the country. The AICTE can even fix the fee to be charged for the courses, admission procedures and preventing the institutions from commercialization.[10]

The Bar Council of India[11] is maintaining the standards of legal education in the country. It is difficult to maintain these standards and requirements especially with regard to infrastructure facilities. The Medical Council of India[12] and Nursing Council of India[13] are entrusted with maintaining standards in medical and nursing profession respectively. Here also the recognition of degrees is a matter of concern. Recently MCI issued regulations for passing a test before enrolling as a medical practitioner in the country for those who have obtained their medical degrees from some former Soviet Union countries.

The DCE is controlling and maintaining the standards in distance education sector in the country in accordance with the Indira Gandhi National Open University Act, 1985. In a recent circular, the DCE referred to a 1995 Union Government gazette notification[14] by which the Board of Assessment for Educational Qualifications decided that qualifications awarded through distance education by the Central, State or Deemed Universities will be automatically recognised for Government employment if the courses have the Council's approval. Under the goverument directive it is mandatory for the Central/Institutions/Directorates offering programmes through distance mode to apply to the DCE and obtain prior approval before starting a new Centre/Institution/Directorate Programme. If the degrees/diplomas/ certificates are not recognised, it may not be

9. Section 10(1) of the AICTE Act, 1987 provides that it shall be the duty of the Council to ensure co-ordinated and integrated development of management and technical education and maintenance of standards in the country.

10. Section 10(1)(j), (n) and (o) of AICTE Act.

11. Established under the Advocates Act, 1961.

12. Established under the Medical Council Act, 1956.

13. Established under the Indian Nursing Council Act, 1947.

14. The Department of Education, Ministry of Human Resource Development, Government of India notified *vide* the Notification No. 44 dated 2-3-1995.

considered for employment in Government services and the institutions will face de-recognition.[15] This Act will affect the US plans for the Internet mode of distance education.

Presently, only non-profit societies registered under the Societies Registration Act, 1860 are eligible to run higher education institutions in the country. The corporate universities working in most of the western countries will be denied entry under this barrier.

Concluding Remarks

Whether the GATS regime is a threat or an opportunity to public education system is the moot question. All economies of the world impose at least some restrictions in relation to each mode of supply. Barriers are most extensive for commercial presence. In India, all the modes are restricted by various legislations. The correct way of determining restrictions is based on the education policy of every country. The removal of these restrictions is vital as well as considered only after a thorough impact study on each sector. The following points should be the prime consideration in making any common policy on this regard.

- Quality assurance and academic excellence.
- The role of private and distance education.
- Mutual recognition of qualifications.
- Policy towards foreign providers and commitments under GATS.

There is an urgent need for change in rules and regulations in order to facilitate the expansion and export of education services.

15. *The Times of India*, New Delhi, 3 February 2004, p. 23.

GENETICALLY MODIFIED CROPS: A QUESTION OR A SOLUTION

Sheweta Gupta*

'To be or not to be' seems to be an old adage, but still finds some relevance in context of implementation of Geneticaliy Modified crops[1] (referred to as GM crops hereinafter), which has been the cynosure of all debates among the farmers in general and among the scientists and scholars in particular. It has been argued[2] that it is a boon to meet the challenge of the exponentially growing population[3] *vis-a-vis* the food production, while on the other hand it is said that GM crops are not desideratum or in other words, it is despicable. Being the part of this on going debate, it is *sine qua non* for us to know few terminologies like "biological diversities', *'bio-ethics'* and its importance to understand the different nuances of the subject. Besides, mother of this debate, *i.e.*, GM crops should be evaluated from social, legal, economic, cultural, scientific perspectives. Let us begin with the term "biological Diversity".

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1. A GM crop is a plant that contains a gene that has been artificialiy inserted in the plant to achieve desired results.
2. Prof. Laura Wright says "with population in developing countries growing exponentially, and availabie farmland stagnating, there is an urgent need to find ways to increase crop yields on the land that is available". For India it has been found more beneficial as , insects may pose a concern for farmers in the developed world , and insects thrive in India's Monsoonal climate, and growers there often do not have the expensive equipment or technological know-how to effectively blanket their crops with pesticides. Genetically modified crops in this way may provide dramatically greater yield in India. While Martin Qaim of University of Bonn and David Zilberman of University of California at Berkeley analyzed the results of the trials, and they found that GM Crops had yields averaging some 80 per cent larger than those of the other cotton hybrids.
3. According to TR Malthus (d.1834), the population growth is beyond its means of subsistence.

Biological Diversity

Biological diversity - or bio-diversity - is the term given to the variety of life on earth and the natural pattern it forms. The biodiversity we see today is the fruit of billions of years of evolution, shaped by natural processes and increasingly by the human influence. It is the combination of the life forms and their interactions with each other and with the rest of the environment that has made earth a uniquely habitable place for humans. However, biodiversity is threatened by many factors, including habitual destruction and degradation, pollution, climate change and introduced species. Biological resources and their exploitation are at the centre of global attention. Many laws, both at international and national levels have been formulated. Before dealing with those laws, first lets clarify as to what do we mean by biotechnology and bioethics.

The Convention on Biological Diversity (CBD), promulgated in the Rio Earth Summit, describes Biotechnology as 'any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use'. Biotechnology is a multi-dimensional issue and has social, economical, ethical and legal implications. The CBD emphasizes the need to conserve Biodiversity to support the bio-economy of humans.

Defining Bio-ethics

Before coming to the term 'bio ethics', let us first clarify the two terms—ethics and morals. Morals are the accepted norms that govern behaviour towards others whereas ethics involve rational, decision-making, balancing risks and benefits. Ethical principles are the same for all regardless whether one is rich or poor.

Basing our concept on above explanation we can say, ethics is a science of morals and rules of conduct recognized in human society and apply to individual living together in a society. But ethics are not same as law. They are at a higher pursuit, doing more than the law requires. The law is needed to protect people and to set a minimum standard but you cannot determine good moral behaviour by settling cases in the court of law. So, we can say, bio-ethics is the systematic study of human conduct in the area of life sciences and health sciences, keeping in view the moral values and principles existing during the particular period.

After understanding the basic premise of bio-technology and bio-ethics, the next question which props in our minds is, what is the need for regulation of bio-technology and bio-ethics. They do not sound too dangerous to be governed by laws/legal principles.

Bio-technology has an irreplaceable potentiality as regards the technique and the way in which it can change the course of nature and life. It is not just limited to agriculture and food but goes beyond to animals and

humans. Bio-ethics cases within itself, large and small problems - global, regional, national, community and individual issues.

But can the third world countries really afford it or is it a mere luxury for them (as according to few). Is it really important for them?

Answering the above in affirmative, we can say bio-ethics is even more important for the third world than for the west, reasons being as under:[4]

(a) Ethics and values are distinct elements of our cultural identity and our pluralistic civilization.

(b) Bio-ethics is particularly significant for us because it is third world bio diversity and human diversity that is being pirated by northern corporations.[5]

(c) Value dimensions determine the context of bio-technology developments because of safety issues.

Bio-technology has left no avenue of human existence untouched be it food, agriculture, medicine, animals, pollution, forestry, fisheries or for that matter humans also. Intervention of biotechnology in the world of agriculture has resulted in the origin of genetically modified crops (GM crops).

Genetically Modified Crops (GM crops)

A GM crop is a plant that contains a gene(s) that has been artificially inserted in the plant instead of acquiring it through poilination. The inserted gene (known as transgene) may come from another unrelated plant or from a completely different species.[6]

But why is that farmers are inclining towards GM crops when traditionally they were also engaged in doing something similar.[7] The answer to it being that the cross-breeding by farmers was limited to exchanges between the same or very closely related species. It also took a long time to achieve desired results whereas GM technology enables plant

4. Bio-technology: A Third World Issue by Dr. Vandana Shiva, Director, Research Foundation for Science, Technology and Ecology, Vice-President, Third World Network.

5. By northern corporations, she means the west.

6. There are two methods existing currently for introducing transgenes into the plant genomes. The first involves a device called a 'gene gun'. The DNA to be introduced into the plant cells is coated onto tiny particles. These particles are then physically shot onto plant cells. The second method uses a bacterium to introduce gene(s) of interest into the plant DNA.

7. Genetic manipulation to enhance favourable traits in agriculture is not a new phenomenon. Producers favouring certain characteristics and breeding out unfavourable characteristics have existed for natural selection. However, thus process has been modified significantly in recent years by the coming of Genetic Engineering.

breeders to bring together in one plant useful genes from a wide group of living sources, and not just from within the crop species or from closely related plants. In short, it expands the possibilities beyond the limits imposed by conventional plant breeding.

The benefits of GM crops can be broadly categorized under the following heads:

Crops

- increased nutrients, crop yields and stress tolerance
- reduced farm costs,
- reduced maturation time
- improved high resistance to disease, pests and herbicides
- enhanced taste and quality
- new products and growing techniques

Animals

- increased resistance, productivity and feed efficiency
- better yields of meat, eggs and milk
- improved animal health and diagnostic methods

Environment

- Friendly bioherbicide and bio-insecticides
- conservation of soil, water and energy
- bio-processing for forestry products.
- better natural waste management
- more efficient processing

Society

- increased food security for growing population

Most people do not know that GM crops – bearing potential for improving food security and reducing poverty, perform only if a certain number of conditions are met. What is being forgotten in the sparkle of these benefits is that with every new emerging technology, there are potential risks also. In case of GM crops, it includes:

1. The danger of unknowingly introducing allergens and other anti-nutrition factors in food.
2. The likelihood of transgenes escaping from cultivated crops into wild relatives. (Where a plant becomes more invasive than the original).
3. The potential for pests to evolve resistance to the toxins produced by GM crops.

4. The possibility that transgenic crops carrying antibiotic genes may generate anti-biotic resistance in livestock or humans.
5. The stability of inserted genes(the possibilities that a gene will lose its effectiveness or will be re-transferred to another host).[8]

Besides these rules there are other kinds of risks also which are neither caused nor are preventable by the technology itself. An example would be widening of the economic gap between developed countries (technology users) and developing countries (non-users).

Several genetically modified foods and products have entered the market in the last few decades. These include new protein sources from bacteria, filamentous fungi and yeasts and genetically manipulated plants and animals. The most controversial gene manipulation has been the insertion of Bacillus Thuringienis (Bt) gene which has now entered more than 400 foodstuffs mainly soyabean and cotton. Bt is a common soil bacterium. It is a natural recourse that has evolved over millennia, whose spray is one of the most important biological pest control techniques in use worldwide. Bt is the most effective in managing insects that are very hard to control for farmers producing cotton. The genetically modified Bt crop contains the insecticidal gene of Bt, that itself makes the toxin necessary for protection against pests. The plant itself becomes the pesticide. And this is where the problem begins.[9]

As known to all, the effectiveness of any pesticide depends critically on precision in the quantum and the timing of its dosage. In Bt crops, the toxin is produced in nearly all growing tissues. It is like using a pesticide indiscriminately which will certainly accelerate the development of resistance.

International Perspective

While advances in bio-technology have great potential for significant improvements in human well-being, they must be developed and used with adequate safety measures for the environment and human health. Before getting into the arena of its utility and seeing whether it is a solution for problems of developing countries, first lets see the kind of international and national support it shares.

There are few laws and regulations in force that have been explicitly enacted to govern access to genetic resources or to clarify the questions related to private *versus* community rights. At present only two sets of rules and regulations can be taken into account—Convention on Biological Diversity and TRIPS (Trade Related Intellectual Property Rights)

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8. http://www. Monsantoindia.com/monsantoin/literature/questions-answers/gm plants.html.
9. Mihir Shah and Debasis Bannerji in " Genetically Modified Crops"

The Convention on Biological Diversity (Biological Convention or CBD) was adopted at the Earth Summit in Rio De Janeiro, Brazil in June, 1992 and entered into force in December, 1993. As the first treaty to provide a legal framework for Biodiversity Conservation, the convention established four main goals—the conservation of Biological diversity, the sustainable use of its components, the fair and equitable sharing of the benefits on derived products and protection and traditional access to genetic resources and technology.

In January 2002 the Cartagena Protocol on Biosafety was adopted to supplement the provisions of the convention. This agreement which aims to protect biodiversity from the potential risks posed by genetically modified organisms (GMOs) came into force in September, 2003. The objective of this first Protocol to the CBD is to contribute to the safe transfer, handling and use of living modified organisms (LMOs)[10] - such as genetically engineered plants, animals and microbes—that cross international borders. The Biosafety Protocol is also intended to avoid adverse effects[11] on the conservation and sustainable use of biodiversity without unnecessarily disrupting world food trade though it does not address food safety issues. The Protocol establishes an Internet based "Biosafety Clearing House"[12] to help countries exchange scientific, technical, environmental and legal information about LMOs.

The CBD emphasizes the need to conserve biodiversity partly for its own sake but also to support the bio-economy of humans. Conserving biodiversity in agricultural landscapes is seen as essential to maintaining production of foods and fibre for human use, as well as to support ecosystem health.

The WTO Agreement on Trade Related Intellectual Property Rights (TRIPS) was negotiated during the Uruguay Round. The TRIPS agreement imposes minimum standards for countries to adopt in almost all areas of

10. A LMO is defined in Cartagena Protocol on Biosafety as any living organism that processes a novel combination of genetic material obtained through the use of modern technology.

11. Article 19.3, The Cartagena Protocol, Convention on Biological Diversity.

12. Article 20, paragraph I, of the Biosafety Protocol established a Biosafety Clearing House (BCH) to:

    (i) Facilitate the exchange of scientific, technical, environmental and legal information on, and experience with living modified organisms; and

    (ii) Assist Parties to implement the Protocol, taking into account the special needs of developing country Parties, in particular the least developed and small island developing States among them, and countries with economies in transition, as well as countries that are centers of origin and centers of genetic diversity.

Intellectual Property Rights (IPRs). The TRIPS agreement imposes obligation on WTO member countries to make substantial changes to their national laws to afford protection for the new inventions and technologies.

The main issues covered under TRIPS are—reduce distortion and impediments to international trade; promote effective and adequate protection of IPRs, including for plant varieties and other genetic innovations; ensure that measures and procedures to enforce IPR do not themselves become barriers to legitimate trade.

Article 27.3(b) of TRIPS relates to bio diversity. It says 'members may also exclude from patentability....

(b) plants and animals other than micro-organisms and essentially biological processes for the production of plants and animals other than non-biological and microbiological processes. However, members shall provide for the protection of plant varieties either by patents or an effective *sui-generis* system or by any combination thereof. The provision of this paragraph shall be reviewed 4 years after the date of entry into force of the WTO agreement.'

There are two key issues involved here—issue of patenting life forms and the protection of plant varieties. The first relates to the process of *bio piracy, i.e.* the theft of biological resources and traditional knowledge from the developing countries. The ability to identify, isolate and move genetic materials across species type has aroused great commercial interest and investment in biotechnology. Genetically engineered crops and foods are being produced with the global market as their target. Thus, the need to obtain IPR profection for such new products.

Both CBD and TRIPS enjoy equal nominal authority along with area of potential conflicts nameiy-- TRIPS asserts IPR protection of life forms, CBD asserts national sovereignty and right to prohibit such protection; CBD promises equitably shared benefits from use of biological resources and protection of traditional knowledge, TRIPS promotes private appropriation of benefits with no mechanism for acknowledging role of traditional knowledge from which industrial applications may derive.

The Biological Diversity Act, 2003

On the home front, India being a signatory to the said convention (CBD) found it necessary to give effect to the said convention and accordingly The Biological Diversity Act, 2003 came into force from 1st October, 2003. Section 2 (b) of the Act defines biological diversity as "..... the variability among living organisms from all the sources and the ecological complexes of which they are part and includes diversity within species or between species of eco-systems". As a precautionary measure there is section 3, which says that an approval is required for biodiversity related activities. The government acknowledges the role played by Multi

National Companies (MNCs) in adulterating the food chain. It says a person who is not a citizen of India, an Non-Resident Indian (NRI) a body corporate, association or organization which is not incorporated or registered in India but has only non Indian participants are required to take the approval of National Biodiversity Authority established under section 8, for undertaking any biodiversity related activities. The Act also provides for National Biodiversity Fund (sec. 26), preservation of extinct species (sec. 38), Biodiversity Heritage sites (sec. 37) and biodiversity Management Committee (sec. 41). Most importantly Sec. 58, which says that offences under this Act shall be cognizable and non-bailable.

Question or Solution?

Coming towards the most crucial part of the paper, questions that strain our minds are that (i) Are biotech powered Genetically modified crops appropriate for the developing countries? (ii) Will they provide a solution to hunger in the developing countries?

As mentioned earlier[13], geneticaliy modified Bt Crop itself becomes the pesticide. The risks of conventional pesticides are limited to specific circumstances of use and location and can conceivably be tackled, but the risks following Bt transgenic resistance are essentially irrevocable once resistance genes emerge and gain a foothold in populations, they cannot be recalled. And the worst part is that they would foster resistance against Bt spray, ultimately destroying the effectiveness of this safer bio-pesticides. The most important difference between Genetically Modified and the older Green Revolution Technologies is that the negative effects of the latter, though serious in nature, could in principle be reversed. The pollution caused by GM techniques is essentiaiiy irreversible.[14] The damage they cause could be beyond human control. It is this difference that must be the constant focus of our critique of GM Technologies

The benefits of GM crops cannot be ignored where there is not enough food to feed people and where food prices directiy affect the incomes of majority of population. These transgenic nutritionally enhanced foods could play a key role in helping to aileviate mainutrition in developing countries. But these benefits come at an expensive price. Most developing countries lack the scientific capacity to assess the bio safety of transgenic crops, the economic expertise to evaluate their worth, the regulatory capacity to implement gnidelines for safe deployment and the legal system to enforce and punish transgressions in law.

Extreme precaution has to be exercised when one is dealing with GM crops. Blindly aping the west would not serve the purpose and needs of the east. We have to see that why India/our government is experimenting with

13. Supra, note 9.

14. http://india-seminar.com

GM crops. Major reasons can be out marked as:—

a. Government feels that it will be a solution for the millions of hungry people of our country thus providing food security

b. There would be decreased pressure on land use.

c. Sustainable yield increase in marginal lands or inhospitable environment.

d. Reduced use of water and agro-chemicals in agriculture.

e. We are under tremendous pressure from the biotechnology industry to allow GM crops. These companies have resources to influence scientific opinion along with political support.

f. Lastly agricultural scientists are using biotechnology as a resort to their doubtful earnings. With nothing to show by way of scientific breakthrough in the past 3 decades GM research will ensure livelihood security for the scientists.

As regards, the first reason, it is generally argued that if technology could serve food to hungry, then green revolution would have done that long ago. In our country hunger has grown in absolute terms. Some 320 million people go to bed empty stomach every night. Two years back, India had a record food grain surplus of 65 million tonnes. If 65 million tonnes could not feed the 320 million hungry, which group of people does GM crop plans to target. The claim that agricultural bio-technology can be or is likely to be pro-poor is based on a number of highly questionable assumptions including, for *e.g.*, that Bio-technology can deliver elusive solutions to the key agricultural constraints affecting poor people, or that the private sector or public-private partnerships will deliver solutions suited to developing country needs. Pro-poor cannot by any means be taken for granted.[15]

The prevalent myth shared by the people is that GM crop is the sole tool to fight the age-old battle of malnutrition. The most common being, golden rice can help remove blindness. A live example of misplaced thinking. There are 12 million people in India who primarily live in food deficit areas. These are people who cannot buy their normal requirement of food. If they were adequately fed, there would be no malnutrition. The thought provoking *intelligent* question is that if they can't buy normal rice how can they buy golden rice.[16]

In real terms, GM food diverts precious financial resources to an irrelevant research, comes with stronger Intellectual Property Rights and is aimed at strengthening corporate control over agriculture. This means domination of world food production by a few companies, increased dependence on industrialized nations by developing countries and leading

15. http://www.ids.ac.uk/ids/env/biotech/PolProc.html

16. http://www.zmag.org/content/showarticle.cfm?

to biopiracy—foreign exploitation of natural resources. GM crops experiments show that the country is fast moving into a hitherto unforeseen era of biological pollution, which will be more unsustainable and also destructive to human health and environment. India's Biological Diversity Act, 2003 does not provide for an environmental assessment of GM crops and animals which in essence go against the very foundation of the biological diversity that we are trying to protect.

On ethical grounds also, GM crops have lead to some controversies—violation of natural organism's intrinsic values, tampering with nature by mixing genes among species and objections to consuming animal genes in plants and *vice versa*. But as we say 'every coin has two sides', this one too has another brighter side.

Looking at the other side of the coin, these GM foods are as safe and nutritious as their conventional counterparts, contrary to the belief that altered foods are unsafe[17]. The two modified crops that accounted for about 98 per cent of the genetically modified crops grown worldwide last year were a soyabean variety and a corn variety. Is it dangerous for us to eat foods made from these soyabean or corn varieties? Definitely not. The soyabean and corn varieties differ from their conventional parents in two ways: each has an extra gene and each makes a protein that otherwise would not be made. the protein made is toxic to the European corn borer is not toxic to people[18]. In fact, we digest it like we would any other protein. The same is true of the extra protein made by the herbicide-resistant soyabean.

The other concern expressed by critics is that these types of hybrids could cause allergic reactions. However, more than 90% of food allergies are known to occur in response to specific proteins in 8 foods: peanuts, tree nuts, milk, eggs, soyabeans, shell fish, fish and wheat.[19]

Now, even if GM crops are safe, is there any compelling reason to switch to them? There are economic as well as environment incentives to use modified varieties. In addition to increased yields, lesser quantities of herbicides and pesticides are needed. This lowers production costs and decreases the addition of chemicals to the environment.[20]

Epilogue

Modern biotechnology is a powerful tool in the fight against poverty and should be made available to poor farmers and consumers. The judgment on any vital issue should not be based on any prejudice, but things should

17. "Genetically modified foods not only safe but necessary", John B. Alfred, Professor in Dept. of Food Sciences and Technology at Ohio State University.

18. *Ibid.*

19. *Ibid.*

20. *Ibid.*

be decided on the rational reasoning where the fate of millions of people is involved. GM crops will said to be imposed if the following doubts are not prudently clarified:—

- The risk assessments done so far are not robust enough to take into consideration all the unknowns and uncertains that currently exist. We may be in for some unpleasant surprises. There is no answer of the question, why we need GM crops for a healthy and balanced diet.
- Inserted genes might come from plants and animals that have never formed part of our diet before, and this might led to unexpected health problems. Also, the insertion of the gene might disrupt normal function in ways we can't see or predict.

  Genes can cross from the food we eat to the bacteria in our stomachs, and these might include antibiotic resistant genes that have routinely used as marker genes in GM technology. This could render antibiotics ineffective against human and animal diseases.
- Since GM crops introduce new proteins into our diet, it is only a matter of time before a GM crop will be shown to cause one or other disease or allergy. There is already evidence on increasing allergy to soya products, for example, which might be linked with the growth in the use of GM soya.
- GM is being pushed forward far too fast, without adequate monitoring. The current testing and monitoring regimes deal with what we know now and are inadequate to pickup long term problems.
- GM makes it possible to take genes from one species and put them into a totally different species, crossing plant-animal boundaries, for example, effect of that transfer on the host organism are unpredictable, even scientists do not have convincing answer.
- The price of commercial Bt seed is four to five times the price of regular seed.
- The dream of increase in productivity through GM technology is shattered, as latest report suggests that the field trials in the US failed to show improvements in yield.

We actually know very little about what is happening, and how difficult it is therefore to track what harm is being or might be done. The safeguards in place are based on assumptions, not evidence, and on the current state of affairs not the future. If GM crops are accepted, our exposure to its products, in food and in the environment will radically increase.

Any problem in living system are different in kind from other products —once an organism is released, or cross-contamination occurs, we cannot 'recall' them if things go wrong or beyond control.

STRIKES THROUGH THE PRISM OF DUTIES

(UNDERSTANDING THE INDIAN CONSTITUTION THROUGH THE PHILOSOPHY OF THE MAHATMA)

Shubhankar Dam*

'A labourer's ultimate weapon[1], a weapon for industrial warfare[2], 'an inherent right of every worker[3], are some of the phrases employed to describe a strike. From a legal perspective, strike may be defined as 'a simultaneous cessation of work on the part of workmen[4]'. The definition has been expressed in many other ways[5]. In any case, the requirement of 'collective cessation of work' appears to be a fairly universal pre-condition

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1. *Andhra Pradesh State Road Transport Corporation Employees Union* v. *Andhra Pradesh State Road Transport Corporation*, [1970] Lab IC 1225 at 1226 (AP).
2. *Federated Municipal and Shire Council Employees Union of Australia* v. *Melbourne Corporation*, [1918-19] 26 CLR 508 (552-53) (HC) quoted with approval in *Bangalore Water Supply* v. *A Rajappa*, [1978] Lab I.C. 467 at 485.
3. *Supra* n. 1.
4. *Farrer* v. *Close* [1869] LR 4 QB 602 at 612 quoted in O.P. MALHOTRA, THE LAW OF INDUSTRIAL DISPUTES, 385 (1998).
5. *See generally* Encyclopaedia of Social Sciences, Vol. 14 at 419; Encyclopaedia Britannica, Vol. 21 at 470.

for a valid strike. Similarly, the significance of the right to strike an effective tool for collective bargaining is beyond doubt[6].

In the light of the singular importance of the weapon of strike for a worker, this paper is an attempt to assess the constitutional law relating to strikes.

The recent decision of the Supreme Court in *T. Rangarajan* v *Government of Tamil Nadu*[7] has evoked strong reactions. What had been secured through years of toil and tribulation was undone by the stroke of a pen. Any analysis by the court on the question of strike has always been from a rights' perspective. The endeavour of this paper is to discuss the issue of strike in the light of Part IVA of the Constitution, *i.e.*, in the light of fundamental duties. Is there a constitutional duty to strike?

My hypothesis for the paper is two fold. *Firstly, that there indeed is a duty to strike under the Indian Constitution. Secondly, that the said duty is restricted to industrial workmen who are not government servants.*

I. FUNDAMENTAL DUTIES IN PERSPECTIVE

Part IVA, introduced by the 42nd Constitution (Amendment) Act, 1976[8] enumerates mandatory fundamental duties for the citizens of India. Article 51A states that it shall be the fundamental duty of every citizen of India, *inter alia*, to *cherish and follow the noble ideals which inspired our national struggle for freedom.* The significance of the fundamental duties in the constitutional scheme is beyond doubt.[9] The same is evident from the use of the word fundamental; as also from the reference to the mandatory duty as expressed by the words, '[i]t shall be the duty of every citizen...' The word fundamental has been used only in two other instances[10]. It appears under Part III dealing

6. *See* R.E. MATTHEW, LABOUR RELATIONS AND THE LAW, 563.

7. WP No. 1906.

8. § 11 of the Amendment Act, 1976.

9. Even before the inclusion of Article 51A, Hedge J. in *Chandra Bhawan* v. *State of Mysore*, (1969) 3 SCC 84 held that '[i]t is a fallacy to think that under our Constitution there are only rights and no duties. Provisions of Part IV enable the legislatures and the Government to impose various duties on the citizens.' *See* also Rural Litigation and *Entitlement Kendra, Dehradun* v. *State of U.P.*, (1985) 2 SCC 431; *Rural Litigation and Entitlement Kendra, Dehradun* v. *State of Uttar Pradesh*, (1988) 4 SCC 226; *M.C. Mehta* v. *Union of India*, (1987) 4 SCC 463; *M.C. Mehta* v. *Union of India* (1991) 2 SCC 353; *Uttar Pradesh Pollution Control Board* v. *Modi Distillery* (1987) 3 SCC 684; *Sachidananda Pandey* v. *State of West Bengal*, AIR 1987 SC 1109.

10. The use of the word 'fundamental' appears significant because of the opinion of *Sikri C.J. in Keshavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 223 at. The learned Justice held: 'I have referred to the variation in the language of the various articles dealing with the question of amendment or repeal in detail because our Constitution was drafted very carefully and I must presume that every word was

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with fundamental rights and in Part IV dealing with the directive principles of state policy as mentioned in Article 37[11].

Even from the point of view of enforceability, status of fundamental duties remains unimpeached. While Part III has been made specifically enforceable[12] and Part IV specifically non-enforceable[13], there is no provision that restricts the enforceability of fundamental duties. In the absence of any such specific limitation, fundamental duties may be regarded as directly enforceable[14]. The same position of law has been reiterated by Bhagwati J. in *Minerva Mills* v *Union of India*[15] when he observed:

> A rule imposing an obligation or duty would not therefore cease to be a rule of law because there is no regular judicial or quasi-judicial machinery to enforce its command. Otherwise the conventions of the Constitution and even rules of international law would no longer be liable to be regarded as rules of law. This view is clearly supported by the opinion of Prof A.L. Goodhart who while commenting upon this point says, 'I have always regarded that if a principle is recognised as binding on the legislature, then it can be correctly described as a legal rule even if there is no court that can enforce it. Thus most of Dicey's book on the British Constitution is concerned with principles which the Parliament recognised as binding on it[16].

There is near unanimity among historians that *ahimsa* and *Satyagraha*[17]

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chosen carefully and should have its proper meaning. I may for this principle on the following observations of the *United States Supreme Court in Holmes* v. *Jennison*, (10 L. Ed 579) and quoted with approval in *Williams* v. *US*, (77 L. Ed 1372) - 'In expounding the Constitution of the United States, *every word must have its due force*, and appropriate meaning, for it is evident from the whole instrument, that *no word was unnecessarily used, or needlessly added*...'

11. Article 37 reads: Application of Principles contained in this Part—The provisions contained in this Part shall not be enforceable by any court, but the principle therein laid down are nevertheless *fundamental* in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

12. Article 32.

13. Article 37.

14. T.K. TOPE, CONSTITUTIONAL LAW OF INDIA, 364 (1992).

15. (1980) 3 SCC 625.

16. For a more elaborate discussion on the implication of Part IVA in the Constitution *see supra* n., 20 at 361-69.

17. Satyagraha has been referred to in the capital because it is probably the single most important phenomenon that contributed to India's freedom, to its ultimate 'tryst with destiny.' The process is similar to other historical events such as the Industrial Revolution or the Renaissance or in some respect even the Reformation or Counter Reformation in Western Christianity.

formed the fundamental ideals of our national struggle[18]. Propounded by Mahatma Gandhi, the ideological pillars of ahimsa and Satyagraha lured millions of Indians to selflessly contribute to the aspiration of a free motherland. Was strike an integral part of the philosophy of Satyagraha, as enunciated by the Mahatma? If strike did form an integral part of the Satyagraha philosophy, there is little doubt that Article 51 A (b) would cast a mandatory duty upon the citizens of India to strike under conditions that the Mahatma would have regarded as valid. At the same time, it would also become incumbent upon the Supreme Court to take into account Article 51 A (b) while deciding on the constitutionality of statutes that seek to make strikes *per se* illegal[19].

II. UNDERSTANDING NOBLE IDEALS OF OUR FREEDOM STRUGGLE

Satyagraha is a compound word that includes *'satya'* and *'aghra.'* Coined by the Mahatma himself in South Africa, *Satyagraha* literally refers to the 'insistence on truth' or 'holding on to truth.[20]' He traced the principle of Satyagraha in the actions of historical legends including Socrates, Prahlad[21] and Mirabai[22]. The principle, in the words of the Mahatma himself, was not new[23]. It was merely an extension of the rule of domestic life to the political[24]. It is the infliction of suffering on oneself without rancour or hatred towards anybody for a just cause[25]. For a resistance based on the

18. *See* SUNITI KUMAR GHOSH, INDIA AND THE RAJ 1919-1947,163(1989); *see* also (II) PERCIVAL SPEAR, A HISTROY OF INDIA, 198 (1999); *see also* R.C. MAZUMDAR, *et al*, AN ADVANCED HISTROY OF INDIA, 971-2 (1978).

19. It is now well-established that the Supreme Court will look to Part IVA while deciding on the constitutionality of statutes. In the light of Article 245 which states that the law-making power of the Parliament is *subject to the provisions of the Constitution*, the Supreme Court is under a constitutional obligatron to refer to fundamental duties (Part IVA) while deciding on the constitutionality of statutes. See generally *Mohan* v *Union of India*, (1992) Supp I SCC 594; *Mumbai Kamgar Sabha* v. *Abdulbhai*, AIR 1976 SC 1445.

20. *See* (Vol. XX) Satyagraha in COMPLETE WORKS OF MAHATMA GANDHI, (ed. Anon) 39 (2002) However, Satyagraha has also been referred to as the 'love-force' or 'soul-force.'

21. A devotee of God persecuted by his unbelieving father.

22. Medieval saint-poetess of Rajasthan, the queen of Mewar.

23. For further discussion on historical evidence *see* (Vol. XVI) Letter to Governor of Bombay, in *supra* n., 20 at 338-9.

24. *Supra* n., 20 at 40 For a discussion on the Satyagraha in ancient Indian culture see Baidyanath Labh, Satyagraha—Is it the Last Resort in Rediscovering Gandhi, 49-56 at 50 (1998).

25. *Id.* The Mahatma explains It in the following words: This law of love is the law of truth. Without truth there is no love... Satyagraha has therefore been described as a coin, on whose face yon read love and on the reverse you read truth. It is a coin current everywhere and has indefinable value.

principles of Satyagraha there must exist a real grievance[26]. A satyagrahi is one who openly and civilly breaks a law because he considers them unjust; and obedience to it dishonourable, but willingly submits to any penalty for such a course of action[27]. His only weapon is his uncompromising insistence on truth, *i.e.*, the insistence on just law.[28] Such insistence of truth could never be through violence[29]. A satyagrahi had to abjure the path of violence completely[30]. In other words, insistence on truth through self-suffering is what may be succinctly regarded as Satyagraha[31].

For Mahatma, Satyagraha was as much a birth-right as a duty[32]. This philosophy of Satyagraha or civil resistance was practised by a number of methods, including fasts, cessation of work, hartals and public demonstrations[33]. All of these techniques have been employed, either singularly or jointly, to resist against unjust law. Strike may be regarded as one of the most important aspects of Satyagraha, may be only second to fasting. The statement is clearly borne out by historical events. The Mahatma's first experiment with Satyagraha in South Africa against the imposition of $3 tax on indentured Indian labourers was with the weapon of

26. Speech at Public Meeting, Bombay, in *supra* n., 23 at 457.

27. *Id.* at 42.

28. *Supra* n., 23.

29. *Id.* at 23 Mahatma explains the complete disassociation of violence from the process of Satyagraha on the following reasoning. He argues: The question is asked why we should call any rule unjust. In saying so, we ourselves assume the function of a judge. It is true. But in this world, we have to act as judges for ourselves. That is why the satyagrahi does not strike his adversary with arms. If Truth is on his side, he will win, and if his thought is faulty, he will suffer the consequences for his fault.

30. It was violence, suffering unto oneself that made a satyagrahi pure. Mahatma thus referred to the weapon of Satyagraha as a self-purification process. *See supra* n., 20.

31. *Supra* n., 20 at 41 The Mahatma, has also referred to Satyagraha as a religious movement. It is religious in the sense that it includes the process of purification and penance. It was the development of the moral faculty that Mahatma regarded as religion. For further discussion on religion *see* Speech at Meeting of Mill-hands, Ahmedabad, in *supra* n., 20 at 221

32. *See* (Vol. XVI) Message to Satyagrahi Agriculturists, in *supra* n., 20 at 433; see also Speech at Meeting of Mill-Hands, Ahmedabad, in *supra* n., 20 at 219.

33. *See* (Labh) *supra* n., 23 at 52. The author explains the various processes of Satyagraha movement in the following words: Satyagraha movement can be operated through various methods, such as, (a) purificatory or penitential actions by the satyagrahis, e.g., pledges, prayers and fasts; (b) acts of civil disobedience, such as picketing, non-payment of taxes; and defiance of specific laws; (c) acts of non-cooperation, such as boycott, strike, *hartals* and so on; and (d) work of constructive removing untouchability, adult education, removing social and economic disparity etc.; *see generally id.* at 49.

strike[34]. In India, the events in Champaran[35], the Ahmedabad Mill incident[36], the agitation against the tyrannical Rowlatt Act[37] 1919 and the Civil Disobedient Movement[38] of 1929 universally used strike as one of the effective means to voice protest against the tyranny of the capitalists and the rulers, alike. The endeavour here is to reflect upon the philosophy of strikes as part of the greater Satyagraha movement as evident from the writings and speeches of the Mahatma himself.

The Mahatma held the work force of a nation in high esteem. While a rich man's wealth may disappear or be stolen or be lost in a moment of mismanagement, a worker's capital, in his opinion, was inexhaustible[39]. A rich man, because of his miscalculation, may become bankrupt, but not a worker[40]. Such a fate could never befall a worker for his hands and feet, the energy which enables him to work constitutes this inexhaustible capital, incapable of being stolen and bound to pay generous dividends at that time[41]. A worker's capital was far superior to that of a rich man. In the disciplined ability of large bodies of men and women who could effectively strike, who could suffer for a common purpose untold hardships, the Mahatma saw people who, given ordinary opportunities in life, could form an honourable part of nation[42]. Their ability to be martyrs for days without police supervisions and yet eschew any damage to property and person bore witness to the levels of discipline[43]. It was this work force that he sought to constructively employ in his quest towards a free nation.

34. In 1895 a Bill was passed in Natal imposing a tax on indentured Indian labourers who wanted to settle in Natal as free men.

35. Satyagraha in Champaran refers to the struggle led by the Mahatma against the exploitation of Indians by the European indigo planters in 1916.

36. The Ahmedabad Mill incident refers to the strike by thousands of mill-hands against the non payment of bonus and subsequently for the demand in the increase in wages by 35%.

37. Bill No. 2 of 1919 the Act sought to restrict individual liberty to an extent unprecedented in history and provided the police with arbitrary powers.

38. The Civil Disobedience Movement is epitomised by the famous Dandi March of the Mahatma when he walked to Dandi in Western India to make salt in defiance of the salt law regulation.

39. *See* Ahmedabad Mill-Hands' Strike (Leaflet No. 11) *in supra* n., 23 at 325.

40. *Id.*

41. *Id.*

42. *See* (Vol. XIV) Farewell Letter, *in supra* n. 14 at 258; *see also* (Vol. XXI) Speech on Rights and Duties of Labour, Madras, *in supra* n., 20 at 167. The Mahatma suggested that while a nation may do without its millionaires, its capitalists but a nation could never do without its labour.

43. *Id.*

Strike, for the Mahatma, was a weapon against unjust and oppressive laws and a weapon for securing just demands[44]. Clearly, strike had both a negative and a positive connotation. In the negative sense, it implied the birth-right and the duty of the people to disobey orders which, on mature consideration, they regarded as unjust or oppressive[45]. In the positive sense, the weapon referred to the right of the people to demand honourable conditions of labour and living. All instances of strike can be analysed from either of the two paradigms.

III. A 'JUST' STRIKE

The Mahatma laid great emphasis on the just nature of the demand. A strike was not a valid Satyagraha unless workers had a 'real grievance'[46]. In Natal, he fought for the impoverished, indentured Indians against the imposition of the $3 tax. Under the Bill, if an ex-indentured Indian left for India on the termination of the indenture or entered into further indenture, he was exempt from paying the tax[47]. If he, however, chose to do neither but wished to settle down in Natal as a freeman, he was bound to pay the tax[48]. The Mahatma realised that the Bill was merely intended at making people continue to live as slaves or force them back to the country from where they came only to avoid starvation[49]. It was under such circumstances that he described the tax, in a letter to the Indian Opinion, as a 'blood tax'[50]. Describing the indentured labourers as 'victims of gold hunger,' he argued that the passive resistance[51] was not only proper but also the primary duty of every Indian in South Aftica[52]. At the same time, Mahatma also laid emphasis on the failure of petitions and negotiations to obtain any relief for

44. *See* (Vol. XLI) Strikes, *in supra* n., 20 at 408.

45. *Supra* n., 27.

46. *Id.*; *see also* (Vol. XXI) Speech on Rights and Duties of Labour, Madras, in *supra* n., 20 at 169; (Vol. XXIV) Notes, in *supra* n., 20 at 285; (Vol. XLII) Speech at Prayer Meeting, *in supra* n., 20 at 190; (Vol. XXIV) Speech at Function of Workers' Schools, Ahmedabad, in *supra* n., 20 at 386.

47. *See* (Vol. XIII) The £3 Tax, *in supra* n., 20 at 321-22.

48. *Id.*

49. *Id.*

50. *Id.* at 321.

51. *See* (Vol. XIII) Interview to Rand Daily Mail, *in supra* n., 20 at 375. The passive resistance included strike by workers in a number of collieries. The success of the strike was explained by the Mahatma in the following words: A strike too, which promises to become very formidable, is going on in Natal. Up to now six collieries are affected and 2,000 Indians are on strike. I may say that, though I had hoped that the strike would come about, I had never expected that the response would be so spontaneous, sudden and large.

52. *Supra* n., 48 at 322.

the wretched people[53]. The breach of trust only added to the justification for the strikes[54].

Similarly, in the Ahmedabad Mill strike incident, because of the spread of plague, the 70% bonus earlier available to workers were withdrawn and restricted to 20%. The workers in turn demanded an increase in their wages by 35%. In making the demand one should be guided by a sense of justice, suggested the Mahatma[55]. He reasserted the demand on a number of occasions. For the success of a struggle, the workers should rely solely on the righteousness of their demands[56]. If the demands are unjust, a struggle is bound to fail[57]. In the case of the mill hands, the Mahatma did regard the demand for 35% wage increment as valid. He recalled the abject poverty in which almost all workers lived. Poor ventilation, dirty clothes, filthy surrounding were the conditions in which most workers lived. Most had no money to send their children to get education and, therefore, send them to work[58].

The Mahatma made a clear distinction between economic strikes and political strikes[59]. He opined that strikes for economic betterment should never have a political end as an ulterior motive[60]. Political strikes, according to him, must be treated on their own merits and never be mixed up with or related to economic strikes[61]. At the same time, he also appealed to the student force of the nation not to resort to political strikes[62]. There was no denying that students should have their own heroes, but their devotion to

53. *See* (Vol. XIII) An Official Statement, *in supra* n., 20 at 366.

54. It was agreed that non-payment of taxes would be made a criminal offence. However, after the Act came into force a labourer would be taken to a civil court and decree passed against him. When the labourer was unable to pay, it amounted to a contempt for which they he would be sent to the goal.

55. *See* Ahmedabad Mill-Hands Strike (Leaflet No.2), in *supra* n., 23 at 289 while explaining the qualities of character a worker must have to wield power, he suggested that '[h]e should have a sense of justice. If he asks for wages higher than his deserts, there will be hardly anyone who will employ him. The increase we have demanded in this struggle is reasonable.' A just demand in his opinion also had a number of other advantages. *See* Ahmedabad Mill-Hands Strike (Leaflet No.7), *in supra* n., 23 at 307 He suggested that, 'if we... ask only or what is our right not only shall we win but there will also be increased goodwill between the workers and the employers.'

56. *See* (Vol. XVI) Ahmedabad Mill-Hands Strike (Leaflet No. 13), *in supra* n., 20 at 329.

57. *Id.*; *see also* (Vol. XLII) A Discussion, *supra* n., 20 at 8.

58. *See* (Vol. XVI) Ahmedabad Mill-Hands Strike (Leaflet No. 10), *in supra* n., 20 at 313.

59. *Supra* n., 45 at 409.

60. *Id.*

61. *Id.* at 410.

62. (Vol. VXXXI) Constructive Programme: Its Meaning and Place, in *supra* n., 20 at 370; *see* also *supra* (Prayer Meeting) n., 47.

them should be shown by copying the best in their heroes, not by going on strikes, if the heroes are imprisoned or die or even sent to the gallows[63]. Sympathetic strikes, according to him, must be taboo until it is conclusively proved that the affected men have exhausted all the legitimate means at their end[64]. He opined that the labourers and artisans of India had not yet arrived at the degree of national consciousness, which is necessary for successful sympathetic strikes[65]. Such strikes could only succeed when behind it is the fixed determination not to revert to service[66].

The Mahatma was crystal clear that no unjust strike should succeed. He asserted that all public sympathy must be withheld from such strikes[67]. He suggested that it was unlawful demand which sought merely to take advantage of the capitalists' position. But it was all together lawfull demand when the labourer asks for enough wages to enable him to maintain himself and to educate his children decently[68]. Mahatma agreed that in deciding what is just and what is unjust, we assume the role of judge[69]. However, that by itself did not make the action invalid. He contended that in this world we always have to act as judges for ourselves[70]. But he did not deny the possibility of one wrongly judging a cause as just. And that is why a satyagrahi ought not to strike his adversary with arms. If he has Truth on his side, he will win, and if his thought is faulty, he will suffer the consequences of his fault[71].

It is this possibility of error that leads us to the other two most important principles of valid strike, *i.e. complete abstention from violence and the willingness to submit the dispute to arbitration.*

IV. Justifying a 'non-violent' strike

The non-violent nature of Satyagraha has been explained by the Mahatma in the following words:

> Satyagraha differs from passive resistance as the North Pole from the South. The latter has been conceived as the weapon of the weak and does not exclude the use of physical force or violence for the purpose of gaining one's end; whereas the former has been conceived as a *weapon of the strongest and excludes the use of violence in any shape or form.*[72]

63. (Vol. VXXXI) Constructive Programme: Its Meaning and Place, in *supra* n., 20 at 370; *see* also *supra* (Prayer Meeting) n., 47.
64. *Supra* n., 51 at 409.
65. *Supra* (Notes) n., 54 at 284.
66. *Id.* at 285.
67. *Supra* n., 54 at 410; *see also* (Vol. XL) Question Box, *in supra* n., 20 at 129.
68. *Supra* n., 20 at 219.
69. *Supra* n., 23 at 13.
70. *Id.*
71. *Id.*
72. *Supra* n., 20 at 39.

Non-violence formed the very cornerstone of Gandhian thought. The principle has also found place in Article 51A (i) of the Constitution[73]. In Satyagraha, the struggle is with oneself rather than with anybody else. A satyagrahi never injured his opponent and always appealed, either to his reason by gentle argument or his heart by the sacrifice of self[74]. For the Mahatma, violent means could lead to nothing but catastrophe[75]. He suggested, that workmen would be committing suicide and Indian would have to suffer indescribable misery if working men were to vent their anger by criminal disobedience of the laws of the land[76]. Non-violence was an integral part of just demand, for the means adopted to enforce such demand were as much important as the just demands[77].

On every occasion leading to Satyagraha, the Mahatma was never tired of reminding people of the necessity of remaining non-violent. He paid rich tributes to the ability of men and women to suffer silently for the just cause. In a moving letter to the Indians before he was taken to Dundee goal on November 11, 1913, he wrote:

> They have suffered horses' kicks. They have silently endured kicks and blows by whites. Women have walked in the heat of the noon, two month old babies in arms and bundles on head. Everyone has braved the rigours of weather, heat and cold rain ... We should put courage in the strikers' hearts and advise them not to retaliate even if mercilessly kicked.[78]

And it was them that he referred as people, who would, given ordinary opportunities in life, form an honourable part of any nation[79]. In their ability to eschew violence, they exhibited traits of heroes and heroines[80]. In the words of the Mahatma himself, 'These men and women are the salt of India; on them will be built the Indian nation to be. *We are poor mortals before these heroes and heroines.*[81]

The Mahatma saw an inherent relationship between just demands and absence of violence. If coercion is used, any struggle is likely to be weakened and would collapse[82]. For the success of their struggle, sole reliance is on the

73. Article 51A (i) reads: It shall be the duty of every citizen of India to safeguard public property and *abjure violence*.

74. *Supra* n., 20 at 217.

75. *Id.* at 218.

76. *Id.*

77. *Id.* at 219.

78. *Id.* at 401-02.

79. *See* (Vol. XIV) Farewell Letter, *in supra* n., 20 at 258.

80. *Id.* at 281.

81. *Id.*

82. *Supra* n., 58 at 329.

rightness of the demand[83]. If the demands are unjust, they cannot succeed. But even with just demands, the workers may lose their case if they resort to untruth, to violence or coercion[84]. He regarded as essential that workers do not resort to coercion for securing their demands[85]. Self-resistance was braveness and a reflection of a man's courage[86]. No victory was just unless it was achieved by pure means[87].

A violent strike also provides the capitalist with another excuse not to heed to the demands of the workers, even though just[88]. When the workers do not hesitate to resort to violence, do not hesitate to injure the property of the employers, dislocate machinery, harass old men and women who would not join the strike and forcibly keep out black-legs, how should employers behave, asks the Mahatma[89].

In other words, when the demands of workers are just, a strike would be spontaneous rather than manipulated. There would be no need for coercion. Nor would there be a need for violence to threaten workers. It is the unity, the solidarity arising from a just cause that would ensure that violence is eschewed. While this explains why a just strike *need* not resort to violence to ensure its efficacy, the reason as to why workers *should* not turn violent is far more profound. As suggested earlier, when workers decide that a cause is just, they sit in judgment about their own. While such a course of action does not necessarily become invalid, but does not attain finality either. It is only when the arbitrator too agrees that a strike was a just strike,

83. *See* (Vol XIV) Farewell Letter, *in supra* n., 58 at 329.

84. *Id.*

85. *Id.*

86. *See* (Vol. XXIV) Speech to Railway Workers, Chittagong, *in supra* n., 20 at 145. The Mahatma explained the braveness of a Pathan in the following words: Once a Pathan working in a coal-mine came to me and bared his back before me. It was all sore and swollen. He told me that he had received blows without the slightest movement of his body that the tyrant had all but skinned him alive; but he submitted it all because of the pledge he has taken before me in the name of God. Were it not for this, how dare the man beat him, he asked. He could have crushed the like of him in no time; *see also* (Vol. XVI) Ahmedabad Mill Hands' Strike (Leaflet No. 8), *in supra* n. 14 at 308.

87. *See* (Vol. XLJ) Question Box, *in supra* n., 20 at 43. In reply to a question as to how a strike be conducted so that hooliganism and violence are avoided, the Mahatma observed: A strike should be spontaneous and not manipulated. If it is organized without any compulsion there would be no chance for goondaism and looting. Such a strike would be characterized by perfect co-operation amongst the strikers ... It goes without saying that in a peaceful, effective and firm strike of this character, there will be no room for rowdyism or looting. I have known such strikes. I have not presented a Utopian picture.

88. *See* (Vol. XL) Capitalism and Strikes, *in supra* n., 20 at 130.

89. *Id.*

does the righteous nature of the strike attain finality. If the arbitrator were to disagree about the just nature of the strike, then workers would have to own responsibility for the violence they perpetrated.

V. 'ARBITRATING' THE DISPUTE

The other significant principle regarding strikes that flows out of self-assessment regarding the righteous nature of the strike is the need to submit the matter for arbitration. The Mahatma strongly advocated arbitration for the resolution of labour disputes. He justified his support for arbitration on a number of reasons. He opined that an unjust strike did not deserve public support[90]. However, the public had no means of judging the merits of a strike, unless it was backed by impartial persons enjoying public confidence[91]. Hence, there must be an arbitration accepted by the parties or a judicial adjudication[92]. For the Mahatma, arbitration was primarily a means of reassessing the righteous character of the demands[93]. He suggested that the relationship between owners and the labourers should be complementary in nature rather than conflicting[94]. The practice of arbitration allows the development of relationship between the two wheels of an economy along such complimentary lines[95]. Similarly, the process of arbitration teaches people the lesson of patience[96]. Those who demand justice should learn to wait, so suggested the Mahatma[97].

He opined that to seek justice without resorting to violence and by appeal to the good sense of the capitalist by arbitration was lawful[98]. At the same time he realised that for the process of arbitration to be fair to both parties it was essential that workers had unions[99]. He suggested a process by which workers would approach the union for the redressal of their grievance[100]. If the same was not achieved at the level of the union, they had a right to ask for arbitration[101]. He regarded strikes as an inherent right of working men for the purpose of securing justice[102]. However, the same

90. *Supra* n., 45.
91. *Id.*
92. *Id.*
93. *See generally supra* (Agriculturists) n., 33 at 434.
94. *Supra* n., 20 at 219.
95. *See* (Vol. XL) Capitalism and Strikes, *in supra* n., 20 at 130.
96. *See supra* (Workers' School) n., 47.
97. *Id.*
98. *Supra* n., 20 at 219.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Supra* n., 20 at 219.

would convert into a crime as soon as arbitration commenced[103]. While the arbitration process was on, there could not be any strike[104]. For such an action would defeat the very purpose of the process. The Mahatma regarded arbitration as beneficial because, apart from better relationship, it also ensured that the industry did not suffer unnecessary losses[105].

He expressed great pleasure over the manner in which the Ahmedabad Mill Strike was resolved. He observed that one good principle that had emerged as a result of the strike was the principle of arbitration[106]. According to him arbitration was a far more dignified weapon[107] and congratulated the Ahmedabad Mill workers on their having institutionalized the said process. He regarded this as a precedent and requested workers never to go on a strike for that was not the right way[108].

As is evident from the foregoing discussion, the evolution of the practice of arbitration did make the Mahatma regard it as more dignified than that of strikes. His emphasis on arbitration seems to emanate from his belief that it was a much more honourable process for resolving a dispute. While not denying the inherent right of workmen to strike, he insisted on the use of the arbitration mechanism. But if workers are under an obligation to submit to the arbitration process compulsorily, what becomes of their 'inherent right to strike'? What should we regard as the ideals that inspired the national struggle for freedom'- the right and duty of the workers to strike or their duty to submit the dispute for arbitration? While it is undeniable that strikes played a role in settling labour disputes during our freedom movement, it is also significant to note that the duty to submit a dispute for arbitration also arose from the very right to strike. The shift in his emphasis in his writings from Natal to Ahmedabad is palpable, to say the least. While in Natal and fighting against the 'blood tax,' he exhorted the Indian community to contribute to the success of the strike. He regarded it as the 'simple, primary duty' of every Indian in South Africa'[109]. Nearly five decades later he regarded Ahmedabad Labour Union as a model for all Indians to copy[110]. However, even on such occasion he did not fail to refer to the successful strikes by labour unions that were wholly non-violent[111]. He expressed hope that all Trade Union Congress would adopt the Ahmedabad

103. *Supra* n., 20 at 219.

104. *See* (Vol. XX) Speech on Settlement of Mill Strike, Ahmedabad, *in supra* n., 20 at 354.

105. *See* (Vol XX) Mill-Owners and Workers of Ahmedabad, *in supra* n., 20 at 324.

106. *See* (Vol XX) Mill-Owners and Workers of Ahmedabad, *in supra* n., 20 at 349.

107. *Supra* n., 109 at 353.

108. *Id.* at 356.

109. *See* (Vol. XIII) The £3 Tax, *in supra* n., 20 at 322.

110. *See* (VXXXI) Constructive Programme: Its Meaning and Place, *in supra* n., 20 at 374.

111. *Id.*

method and have the Ahmedabad organization as part of the all India Union[112]. But it appears from the writings of the Mahatma that the workers' right to strike was supplanted by their duty to submit the dispute for arbitration. This view is well supported by his reiteration of hope that a time would come when the economy would not be plagued by strikes and all disputes would be settled through arbitration. However, if the owners decide not to implement the decision of the arbitral panel, do the workers have a right to strike to ensure the implementation of the same? The Mahatma seems to suggest in the affirmative.

VI. 'Honour' at stake

The fourth and final ingredient of strikes relate to the honour of the workmen. Every decision to go on a strike involves a pledge. For Mahatma, a pledge meant an *unshakeable resolution* (emphasis in the original)[113]. In the capacity of a person who led a number of successful strikes, he suggested to all strike leaders that they must fix an unalterable minimum demand and declare it before embarking upon their strike[114]. He suggested that if one remained firm and clung to the truth, one was bound to win[115]. He regarded the duty to keep the pledge as one's dharma, and that it was even more important than one's property[116]. And so he suggested, '[n]ever betray your pledge[117]. In the context of the Ahmedabad Mill strike the Mahatma said that, '[t]he workers bore all these things in mind before taking their pledge and now they cannot resume work without securing 35 percent increase, whatever the inducement held out and whatever the suffering they may have to go through. *Their honour is at stake. If you weigh a pledge against a sum of hundreds of thousands, the pledge will be seen to be of greater consequence*[118]. Keeping one's pledge was also important for the sake of posterity. For the Mahatma, every pledge was in the name of God and thus inviolable[119]. No one should submit to the pressure of the situation but must stand firm[120]. He held in high esteem satyagrahis who could keep their pledge until death[121].

112. *See* (VXXXI) Constructive Programme: Its Meaning and Place, *in supra* n., 20 at 374.
113. *Supra* (Agriculturists) n., 33 at 434.
114. *Supra* (Notes) n., 47 at 285.
115. *See* (Vol XVI) Speech at Sunav, *in supra* n., 20 at 453.
116. *Id.*
117. *Id.*
118. *See* (Vol. XVI) Ahmedabad Mill-Hands' Strike (Leaflet No. 12), *in supra* n., 20 at 327.
119. *See* (Vol. XVI) Speech to Ahmedabad Mill-Hands', *in supra* n., 20 at 293. The Mahatma said: In due course, the world will know that Ahmedabad workers have taken a pledge, with God as their witness, that they will not resume work until they have achieved their object. In future, your children will look at this tree and say that their fathers took a solemn pledge under it, with God as the witness. If you do not fulfil the pledge, what will your children think of you?
120. *Id.* at 292.
121. *See* (Vol. XVI) Ahmedabad Mill-Hands' Strike (Leaflet No. 8), *in supra* n., 20 at 306.

In this message to the mill-hands' of Ahmedabad, he spoke highly of the satyagrahis in Natal who died trying live their pledge. He recalled Imam Hassan and Hussain as 'bold and resolute satyagrahis' whose capacities could not be compared to anyone else[122].

For him, inability to keep one's pledge was a humiliation. He referred to the hasty nature of the Bhavnagar strike and the subsequent retraction of the same without having achieved their demands as unfortunate[123]. He was shocked to learn about the apology the strikers had tendered to the Maharaja[124]. He opined that no body of men could make themselves into a nation or perform great tasks unless they became as true as steel and unless their promises came to be regarded by the world like the law of the Medes and Persians, inflexible and unbreakable[125]. And it was about this resolve to honour one's pledge that he once commented that 'the course of the sun may alter, but a pledge, just and taken after full deliberation shall not be abandoned'[126]. But what does all this discussion add up to? Clearly, the Mahatma's speeches and writings suggest four attributes essential for a valid strike. Just cause, non-violent, willingness to submit the dispute for arbitration and the ability to hold on to one's pledge are attributes that the Mahatma would have regarded as essentials for a valid strike. However, the contradictions among the criteria are clear on the face of it. Can a Union hold on to its initial pledge and yet submit the dispute for arbitration? What if the arbitrator were to regard the demands of the workers as unjust? Would the workers still continue striking? Or would they resume work? If they followed the former course, it would clearly go against the very purpose of arbitration, against the very purpose of an independent evaluation. If they followed the latter course of action, there ability to hold on to their pledge would be belied. The contradictions could not be more palpable.

Yet is it submitted that there is no contradiction. What appears to be contradictions on the face of it are reconciled by what he regarded as his fight for Truth[127]. If the demands of the workers were righteous, they were destined to win. Was there any possibility of the arbitrator not agreeing with the righteousness of the demand? The Mahatma would suggest that there was none. There would be no clash between the interest of the arbitrator and that of the workers if the demands of the latter were just: determining the just nature of the demands was the sole task of the arbitrator. If what the

122. *See* (Vol. XVI) Ahmedabad Mill Hands' Strike (Leaflet No. 8), *in supra* n., 20 at 308.

123. *Supra* n., 116 at 452.

124. *Id.*

125. *See* (Vol XVI) Letter to the Press, *in supra* n., 20 at 365.

126. *Supra* (Agriculturists) n., 33 at 434.

127. The Mahatma was an advocate of natural law, believing that there was something that could be regarded as the 'pure justice' or the 'ultimate Truth.' He urged humanity to pursue this 'ultimate Truth.' The word Satyagraha also has its root in 'Truth'; *Satya* as meaning the 'ultimate Truth.'

workers were asking for was righteous there can be no reason as to why the arbitrator would not agree with them. And, therefore, he suggests that if a satyagrahi has Truth on his side, he will win, and if he is faulty, he will suffer the consequences of his fault[128]. His understanding of the Truth cannot be divorced from his understanding of God. This is best explained by one of his conversations in a speech at a prayer meeting[129]. The question put to him was what should one do with a mad dog, *i.e.* should one kill it? In his reply the Mahatma observed that was '[a]n odd question. He should have actually asked what should be done when a man went mad. *But the fact is that if we have God in our hearts even a dog cannot behave madly with us.*[130] The Mahatma's faith in ultimate justice stemmed from his understanding of God whom he regarded as omnipotent and omniscient[131]. If the presence of God (*i.e.* Truth) in one would ensure that even a mad dog did not behave madly, there is no reason to believe that an arbitrator (in pursuance of the same eternal Truth) would regard the just demands of the workers as unjust. And it was this faith in the ultimate Truth prevailing in all actions of this universe that made the Mahatma reiterate that if the workers had just demands they were destined to achieve the same.

VII. Not the 'Public Servants'

Notwithstanding these conclusions, it is of little doubt that Mahatma's opinion regarding strikes underwent a distinct change in the later years, especially post 1940s. He lamented the daily increasing demands of the labour world and their willingness to resort to violence for the impatient enforcement of those demands[132]. Writing in 1947, he commented that 'going on strike is regarded as an act of bravery.[133] Still worse was the fact that the strikes were over trivial matters[134]. He regarded these indiscriminate strikes as 'symptoms of our sickness and weakness.[135] In a well-ordered democratic society there is no room, no occasion for lawlessness or strikes[136]. In such a society there are ample lawful means for vindicating justice[137]. Referring to the strikes in Bombay, strikes at Tata Iron Works, the strike in Gorakhpur and celebrated strike of the Railway labourers in the Punjab, he commented that the reason for the partial failure of the strikes was both poor leadership and the inability of strikers to find their own support to sustain the strike indefinitely[138]. He suggested that strikes in Kanpur, coal mines or elsewhere

128. *See* (Vol. XVI) Satyagraha-Is it Passive Resistance? *in supra* n., 20 at 13.

129. *See* (Vol. XLV) Speech at Prayer Meeting, *in supra* n., 20 at 161.

130. *Id.*

131. *See* (Vol. XX) Speech on Settlement of Mill Strike, Ahmedabad, *in supra* n., 20 at 353.

132. *Supra* n., 100 at 130.

133. *See* (Vol. XLV) Advice to Mill-Workers', *in supra* n., 20 at 61.

134. *Id.*

135. *See* (Vol. XLVIII) Speech at Prayer Meeting, *in supra* n., 20 at 303.

136. *Id.*

137. *Id.*

138. *Supra* (Rights and Duties) n., 47 at 169.

mean material loss to the whole society not excluding the strikers themselves[139]. Writing in 1920 he suggested that his own experience of the last six months made him believe that many strikes had done labour harm rather than good[140]. In suggesting this he was not oblivious of the fact that he himself had been responsible for many successful strikes[141].

However, it is submitted that these words against 'frequent strikes' cannot be read as words against 'strikes'. It is clear from the foregoing discussion that what the Mahatma spoke against was indiscriminate strike, frequent strikes, strikes without just cause or strikes that went against national interest at that point of time. None of this is inconsistent with his recognition of strike as an inherent right of workers, provided the conditions discussed above are all present.

But in all this discussion where did public servants feature? Did they have the same inherent right to strike as any other worker? The Mahatma would suggest a firm no. While arguing against indiscriminate striking, the Mahatma once suggested:

> If the mills are closed for a day or a month, the mill owners would not have to worry about their daily bread. But what would happen to you who live from day to day. *Similar is the case with Government clerks and postmen going on strike*[142].

Mahatma had an opportunity to express his views about strikes by public servants when the Bhangis[143] went to strikes. He suggested that in such cases (referring to strike by Bhangis) the proper remedy was not a strike but a notice to the public in general and the employing corporation[144]. He observed that there was a wide distinction between a strike and an entire discontinuation (not suspension of service). For him a strike is a temporary measure in expectation of relief[145]. He was clear on the view that there are certain matters in which strikes would be wrong[146]. Sweepers' grievance came in this category[147]. Just as a man cannot live without air so too he cannot exist for long if his home and surroundings are not clean[148]. And therefore he suggested that even if an absolute right existed, it may not be proper to use it in certain circumstances[149]. Around 1947 a number of government employees belonging to different departments had gone on

139. *Supra* n., 137.
140. *Supra* (Rights and Duties) n., 47 at 169.
141. *Supra* n., 143.
142. *See* (Vol. XLV) Advice to Mill-Workers, *in supra* n., 20 at 61.
143. Indigenous term for scavengers.
144. *See* (Vol. XLI) Question Box, *in supra* n. 20 at 163.
145. *Id.*
146. *See* (Vol. XL) Sweepers' Strike, *in supra* n., 20 at 255.
147. *See* (Vol. XL) Sweepers' Strike, *in supra* n., 20 at 255.
148. *Id.* at 256.
149. *See* (Vol. XL) A Harijan's Letter, *in supra* n., 20 at 350.

strike. The Account General's Office in West Bengal including the Post and Telegraph department, the dock workers in Bombay and others went on strike mostly demanding an increase in their pay[150]. These departments exist not for the good of any particular individual but for the community[151]. Who suffers when the Postal department goes on strike? It is not the people belonging to the upper echelons of society buf the very common men, not the rich who can afford privatized postal services but the very poor who are still at the mercy of state services. When the water supply department goes on strike, it is not the rich but those poor men and women who are unable to afford bottled water and are dependent on the municipal services. These sentiments were echoed by the Mahatma when he observed:

> Strikes for the economic betterment should never have a political end as an ulterior motive. Such a mixture never advances the political end and generally brings trouble upon strikers, even when they do not dislocate public life, as in the case of public utility services like postal strike. The Government may suffer some inconvenience but will not come to a standstill. Rich persons will put up with expensive postal services but the vast mass of poor people will be deprived during such a strike of a convenience of primary importance to which they have become used for generations. Such strikes can only take place when every other legitimate means has been adopted and failed[152].

Epilogue

This discussion on the status of the right of a public servant to go on a strike along with the discussion on the inherent right of a workman to go on a strike may be suggested as giving rise to the following conclusions. Firstly, workmen have an inherent right to strike. Secondly, such a right can be exercised only if it is for a just cause, non-violent and if the strikers are willing to hold on their pledge and also are willing to submit the matter for arbitration. Thirdly, the right to strike is not available to public servants except in cases when all legitimate means have been exhausted.

Therefore, the author would submit that in the light of Article 51 A (b) of the Indian Constitution, workmen have a duty to strike against a law or condition that is unjust provided the strike is in a non-violent manner and they are willing to submit the dispute for arbitration. However, public servants have a duty not to go on strikes save under exceptional circumstances. Failing such, workmen would have failed in their constitutional duty to *cherish and follow the noble ideals which inspired our national struggle for freedom.*

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150. *See* (Vol. XLVI) Speech at Prayer Meeting, *in supra* n., 20 at 148.

151. *Id.*

152. *Supra* n., 45 at 409.

RIGHTS OF A MINORITY AND EDUCATION

Abhinav Prakash*

Confidence is the key-stone of the administration of justice. Judiciary in the last resort is the guarantor of democracy and the protector of basic rights. Chief Justice *Burger* has noted "a sense of confidence in the courts is essential to maintain the fabric of ordered liberty for free people". *John Marshall*, the former Chief Justice of US Supreme Court declared that "it is emphatically the province and the duty of the judicial department to say what is law". Undoubtedly, the interpretation of laws and the exclusive jurisdiction of the Supreme Court very often added a new leaf to the history of judiciary. In a democracy, the courts belong to the 'citizen' and once we accept this democratic dimension of the judiciary, the rule of law gains a philosophical elevation. The highest is not above the law; the humblest is not beneath the law. The conception of the administration of justice is that, the lowly concern of the least person is of the highest consideration to the State and the Court. The socio-economic vision of the constitution is the lodestar that guides the court in its great hermeneutic task even though, as *Cardozo* observed long ago, the great tides and currents which engulf the rest of men do not turn aside their course and pass the judges by.

The recent pronouncement of the 11-member Bench of the Supreme Court headed by Chief Justice B.N. Kirpal, in *TMA Pai Foundation* v. *State of Karnataka*[1], is undoubtedly a landmark judgment. It stands out as is most significant in terms of its reach, complexity and potential for shaping future of education in the country.

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1. AIR 2003 SC 355; This judgment is an attempt to provide definite shape to the constitutional expressions like 'establishment and administration of educational institutions' in general and 'minority educational institutions' in particular. The court broadly classified Govt./Private Institutions and minority educational institutions. This was further classified into Aided and Unaided minority institutions.

Nevertheless, some jurists, legal luminaries, scholars and politicians aired their apprehensions over it by commenting that it has assigned unfettered power both to unaided minority and non-minority educational institutes in the sphere of admissions; that the abolition of the scheme[2] framed in *Unni Krishnan* v. *State of Andhra Pradesh*,[3] was undesirable; and that commercialization of education has been recognised by the apex court itself, which they said amounted to contradicting and overriding its earlier decisions. Pronouncing its verdict with full awareness of the reality of the situation and not making any dent in the veracity and nobility of the judiciary, the apex court has framed certain important questions concerning the meaning of the expressions "minorities" and "minority institution", "education" in various provisions of the constitution.

Whom you call a "Minority"?

The word "minority" derived from the word "minor" and the suffix "ity" which means "small in number". According to Encyclopedia Britannica 'minority' means "group held together by ties of common descent, language or religious faith and feeling deferent in these respects from the majority of the inhabitants of a given political entity". In Indian constitution the word minority is not defined, but it has been settled by decisions of the apex court in *Sidhajbhai Sabhjai* v. *State of Bombay*,[4] The Ahmedabad *St. Xavier's College Society* v. *State of Gujarat*[5] and *St. Stephen's College* v. *University of Delhi*,[6] that 'minority' means 'a non-dominant' group. In the Year Book on Human Rights UN Publication 1950 Edition, the word 'minority' has been described

2. Here the apex court confined the scheme only to 'professional colleges'. In the scheme:
   - A professional college shall be permitted to be established and/or administered only by a Society registered under the Societies Registration Act, 1860, or by a Public Trust registered under the Trusts Act, Wakes Act etc.
   - At least 50% of the seats in every professional college shall be filled by the nominees of the Government or University referred as "free seats".
   - The number of seats available in the professional colleges shall be fixed by the appropriate authority.
   - No professional college shall call for appellations for admission separately or individually.
   - Each professional college shall intimate the competent authority in advance the fees chargeable for the entire course.
   - Any candidate who fulfils the eligibility would be entitled to apply for admission.
   - Result of entrance examination shall be published in at least two leading newspapers.
3. AIR 1993 SC 2178.
4. AIR 1963 SC 540.
5. AIR 1974 SC 1389.
6. AIR 1992 SC 1630.

as non-dominant groups having different religion or linguistic traditions other than the majority population. The expression 'minorities' has been employed at four places in the Constitution of India, *viz.*, head note of Art. 29; head note of Art. 30 and sub-clauses (1) and (2) of Art. 30. The Apex court in *TMA Pai*[7] case observed that "the omission of the definition of 'minorities' in the constitution does not mean that the employment of words 'minorities' or 'minority' in Art. 30 is of less significance. It may be noted that the expression 'minorities' has been used in Art. 30 in two senses one based on religion and other on the basis of language. Since the States have been formed by grouping people on linguistic lines, the unit for determining a minority is set whole of India, but the State in question". Thus made the expression 'minority' more explicit and clear.

"Education" and "Educational institutes": Constitutional perspective

The expression "education" in the Articles of the Constitution means and includes education at all levels from the primary school level upto post graduate level. It includes professional education. The expression "educational institutions" means institutions that impart education. Under Article 19(1)(g), all citizens have the right to practice any profession and to carry on any occupation, trade or business. Though education has so far not been considered a trade or a business, in the *State of Bombay* v. *RMD Chamarbaugwala*,[8] the Supreme Court had observed that "Even if there is any doubt about whether education is a profession or not, it does appear that education will fall within the meaning the expression "occupation". In *Sodan Singh* v. *New Delhi Municipal Committee*[9]; it was observed that "It is difficult to comprehend that education, will not fall under any of the four expressions in Article 19(1)(g)". In *TMA Pai case*[10] the apex court observed that "Occupation" would be an activity of a person undertaken as a means of livelihood or a mission in life. The establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an occupation, even if there is no element of profit generation. Thus the apex court rightfully upheld the observations of *Sodan Singh case*[11] and held that the expression 'educational institution' comes within the ambit of Article 19(1)(g), therefore comes under the expression 'occupation'.

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7. Supra, note 1.
8. AIR 1957 SC 699.
9. AIR 1989 SC 1988.
10. Supra, note 1.
11. Supra, note 9.

Extent of fundamental rights to establish and administer educational institute

Articles 29 and 30 are a group of articles relating to cultural and educational rights. Article 29(1) gives the right to any section of the citizens residing in India or any part thereof, and having a distinct language, script or culture of its own, to conserve the same. Article 29(1) does not refer to any religion, even though the marginal note of the Article mentions the interests of minorities. Article 29(1) essentially refers to the sections of citizens who have a distinct language, script or culture, even though their religion may not be same. Article 29(1) gives the right to all sections of citizens, whether they are in a minority or the majority religions, to conserve their language, script or culture.

Article 30(1) bestows on the minorities, whether based on religion or language, the right to establish and administer educational institute of their choice. In order to interpret Article 30 and its interplay, if any, with Article 29, it is necessary to refer some of the decisions of the Apex Court. In *The State of Madras* v. *S.C. Dorairajan*[12] the court interpreted Article 29(2) that "if admission was refused only on the grounds of religion, race, caste, language or any of them, then there was a clear breach of the fundamental right under Article 29(2)". In the *State Bombay* v. *Bombay Education Society*[13], Court analysed the provisions of Articles 29(2) and 30 and held that "Article 29(2) guaranteed the right only to the citizens of the minority group. In the case of the minority educational institutions to which protection was available under Article 30, the provisions of Article 29(2) are indeed applicable". In *Sidhaibhai Sabhai* v. *State of Bombay*[14] was observed that "The right established by Article 30(1) is a fundamental right declared in terms absolute. Unlike the fundamental freedoms guaranteed by Article 19, it is not subject to reasonable restrictions". Supreme Court in *TMA Pai* case[15] held that "the right under Article 30 is not so absolute" as to be above the law. In the light of the above observation of the Apex Court the question, whether the right under Article 30 of the Constitution is absolute or not or the extent of the absoluteness is not very clear yet. The extent of absoluteness of the right under Article 30 may create confusion even in future.

Article 30 vis-a-vis secularism

In *T.M.A. Pai case*[15] the Supreme Court observed that Article 30(1) is a sort of guarantee or assurance to the linguistic and religious minority institutions to establish and administer educational institutions of their choice. Secularism and equality being two of the basic features of the

12. AIR 1951 SC 226.

13. AIR 1954 SC 561.

14. AIR 1963 SC 540.

15. Supra note 1.

Constitution Article 30(1) ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country". It was observed in *St. Xaviers College case*[16] that "the whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection, they will be dented equality". in other words, the essence of Article 30(1) is to ensure equal treatment between the majority and minority institutions. A citizen of India stands in a similar position. The Constitution recognises the differences among the people of India, but it gives equal importance to each of them, notwithstanding, their differences for only then can there be a unified secular nation. The essence of secularism in India is the recognition and preservation of the different types of people, with diverse languages, different beliefs, and placing them together so as to form a whole and united India.

Grant of aid to minority institution – Whether a right

Court in *T.M.A. Pai case*[17] observed that "the grant of aid is not a constitutional imperative. Article 337 only gives the right to assistance by way of grant to the Anglo-Indian community for a specific period of time. If no aid is granted to anyone, Article 30(1) would not justify a demand for aid, and it cannot be said that the absence of aid makes the right under Article 30(1) illusory. Article 30(2) only states that a minority institution shall not be discriminated against when aid to educational institutions is granted". In other words the State cannot, when it chooses to grant aid to educational institutions, deny aid to a religious or linguistic minority institution only on the ground that the management of that institute is with the minority. However, if an object surrender of the right to management is made a condition of aid, it would be violative of Article 30(2). Again, conditions of aid that do not involve a surrender of the substantial right of management would not be inconsistent with constitutional guarantees, even if they indirectly impinge-upon some facet of administration. The court further held that "when a grant is given to all institutions for imparting secular education, a minority institution is also entitled to receive it, subject to the fulfilment of the requisite criteria, and the state giving the grant knows that a linguistic or minority educational institution will also receive the same. Of course, the state cannot be compelled to grant aid, but the receipt of aid cannot be a reason for altering the nature or character of the recipient educational institution. 'Aid' by definition means to give support or to help or assist. It cannot be that by giving 'aid' one destroys those to whom 'aid' is given. The obvious purpose of Article 30(2) is to forbid the state from refusing aid to a minority educational institution merely because it is being run as a minority educational institution. Article 30(2) is an additional right

16. Supra, note 5.

17. Supra, note 1.

conferred on minorities under Article 30(1)". Therefore, the grant of aid under Article 30(2) cannot be used as a lever to take away the rights of the minorities under Article 30(1).

Unaided minority institution: Extent of State control

Like any other private unaided institution, similar unaided educational institutions administered by linguistic or religious minorities are assured maximum autonomy In relation thereto:

(a) Method of recruitment of teachers & staffs,

(b) Charging of fees,

(c) Admission of students, etc.

They only have to comply with the conditions of recognition, which cannot be such as to whittle down the right under Article 30.

For redressing the grievances of employees of aided and unaided institutions who are subjected to punishment or termination from service, a mechanism will have to be evolved. The Apex Court in *TMA Pai case*[18] suggested that, "appropriate Tribunals could and till then, such Tribunals could be presided over by a Judicial Officer of the rank of District Judge". The Court further held that "Fees to be charged by unaided institution cannot be regulated but no institution should charge captivation fee."

Here the Apex Court failed to provide clear guideline and thus what should be the extent of the state control in case of unaided minority institution, is still a big question and needs to be addressed.

State aid vis-a-vis admission procedure

In *TMA Pai Foundation case*[19], court held that "while giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, coupled with the reservation policy of the State qua non-minority students. The merit may be determined either through a common entrance test (CET) conducted by the concerned University or the Government on the basis of an entrance test conducted by individual institutions. The method to be followed is for the University or the government to decide. The authority may also devise other means to ensure that admission is granted to an aided professional institution on the basis of merit. In case of such institution, it will be permissible for the Government or the University to provide that consideration should be shown to the weaker section of the society".

In case of the aided linguistic minority, educational institution is given the right to admit students belonging to the linguistic minority to a

18. Supra, note 1.

19. Supra, note 1.

reasonable extent only to ensure that its minority character is preserved and that the objective of establishing institution is not defeated. If so, such an institution is under an obligation to admit the bulk of the students fitting into the description of the minority community. Therefore, the students of that group residing in the State in which the institution is located have to be necessarily admitted in a large measure becuase they constitute the linguistic minority group as far as that State is concerned. The management bodies of such institutions cannot resort the device of admitting the linguistic students of the adjoining state in which they are in a majority, under the facade of the protection given under Article 30(1).

Epilogue

In the judgment certain amount of ambiguity in the law laid down with the regard to the application of Article 29(2) against aided minority educational institutions. On the one hand the court does not water down the guarantees given by the Constitution to minorities; and in the flipside of the coin, it is reluctant give up the non-discrimination of Article 29(2) whenever public funds are utilized to support educational institutions. As far as, procedure and method of admission of students are concerned, they enjoy freedom for government control, provided they employ fair, transparent and merit-based method. The minority right to establish and administer educational institutions was so far governed by the law laid down in the famous *St. Stephen's College case*[20] where judgment allowed full freedom to minority institutions provided 50 per cent seats were given to non-minority students. But, in *TMA Pai case*[21] Apex Court found that "keeping a rigid percentage in not desirable in law or in practice."

In *Islamic Academy Education* v. *State of Karnataka*[22] the Apex Court ignored the basic approach text and philosophy of the *TMA Pai case*[21]. The court observed and held on the critical issue of government quota that "the Government wants quota for particle and patronage reasons. If unaided institutions were also to have government quotas (possibly 50 per cent), does it not amount to re-introduction of Unnikrishnan"? However, in *Christian Medical College* v. *State of Tamil Nadu*[23], Court relied on the law laid down in the *TMA Pai case*[21] and held that institutions are free to admit student as per its choice uncontrolled by the State Government.

Apex Court in *TMA Pai case*[21] recognised the charitable nature and service goals of education, it allows the authorities full freedom to collect fees and charges they find appropriate in unaided educational institutions, the only caveat being that they should not appear to be charging capitation

20. Supra, note 6.

21. Supra, note 1.

22. (2003) 5 Scale 207.

23. Supra, note 1.

fee for profiteering. It seems that Court is inclined to overlook the rampant rage regarding the fee levy and discriminatory dimensions of 'fee to loot' unaided bodies. Regulation becomes justified because public education is a matter of serious social concern, that too, in a socialistic democratic republic. The term 'capitation fee' is more a clever formality because the extra-levies have different terminology to outwit judicial vocabulary. The prescription of transparency and attention to merit in the matter of admission to unaided colleges is more placebo than an effective panacea. It is difficult to agree completely with such an assessment of the judgment when we look at the country as a whole. Of course, there are few excellent minority institutions which have been rendering quality education at moderate costs. The situation is different today because of liberalised privatisation, politics of conversion, and the compulsion of a democratic government especially in coalition era. Moreover, globalisation, liberalisation, privatisation and marketisation have captured the court's notice and the Preamble to the constitution is *de facto* judicially jettisoned. Minority institutions which continue to administer educational institutions in spirit of service (and not profiteering) have nothing to fear or lose from the judgement. However, in the light of *TMA Pai case*[24] and *Islamic Academy case*[25] judgments created a chaos, specially with regard to minority institutions to which the constitution affords a special protection but which the latest judgments of these cases only half protect.

24. Supra, note 1.

25. Supra, note 22.

THE ROAD FROM "IS" TO "SHOULD BE" AND BACK

Sujoy Bhatia*

FROM *"JURIS PRUDENTIA"* TO LEGAL REASONING

In the 4th Edition of his book "Legal Theory", written in 1960, Professor Friedmann of Columbia University had this to say about the legal world in which he had found himself after the Second World War:

> *"The new era of legal philosophy arises mainly from the confrontation of the professional lawyer, in his legal work, with problems of social justice. It is, therefore, inevitable that an analysis of earlier legal theories must lean more heavily on general philosophical and political theory, while modern legal theories can be more adequately discussed in the lawyer's own idiom and system of thought. The modern jurist's legal theory, no less than the scholastic philosopher's, is based on ultimate beliefs whose inspiration comes from outside the law itself".*

This sums up perfectly the road which legal philosophy has travelled from Aristotle to Nuremberg, from the orations of the Greek scholars to the sordid necessity of War Crimes Tribunals and an International Criminal Court.

Today, we see law as a tool of justice and equality, a social leveler, a crowbar to class privilege. Two thousand years ago, the only "law" came from natural power, whether the metaphysical might of "God" in his - or her - many forms, or the terrifying military might of Imperial Caesar. In those days "might" was "right", and conversely "right" was "might". There was a belief that there was a natural order of things which could never be

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changed, and that those who had either God on their team, or a strong right sword-arm, had the automatic right to the spoils.

Even in the Middle Ages, halfway through the two millenia of history, legal disputes could still be authoritatively settled either by means of "Trial by Combat" (when either the claimants or their hired muscle slogged it out, broadsword on chain-mail, in the belief that God would automatically support the one who deserved to win) or "Trial by Ordeal", in which a person accused of a crime would be exposed to death in the belief that if they were guilty, then the Devil and his associates would leap to their assistance. The price of being proved innocent was, illogically, to die without being so saved.

The modern concept of "right" as a "human right" which is naturally dispensed with mother's milk at birth to all human beings is the end-product of two thousand years of chiallenge, revolution, education and enlightenment. On the whole, throughout this entire period, there was barely a lawyer in sight.

Our current position as humans with "rights" owes as much to the publication of the first Lutheran Bible, the peripatetic teachings of John Wesley, the revelations of Charles Darwin, and the French and Russian Revolutions as it does to any natural and progressive development of legal philosophy. In this process of evolution from power for its own sake to justice for everyone's sake, the perceived role of law in society has been dragged, kicking and screaming, under the wheels of progress. Along with this process a change has come in our understanding of why we study law.

In Law School, we studied something called "Jurisprudence", and we did so with the greatest of reluctance. Had it not been a compulsory "core subject", the lecturer could have taken himself off to a Tibetan monastery and no-one would have been any wiser. My motivation to attend lectures was in no way elevated when I was advised that the word "Jurisprudence" was derived from the Latin term for mental torture *"Juris Prudentia"*, which translates as "Knowledge of Law". Since I was already acquiring that in my classes in Torts, Contract etc., I found it even more unjust that I had to spend three hours of every Tuesday and Thursday afternoon listening to the dialectical drivel of men who had died hundreds of years ago, and some justifiably so.

This pragmatic definition of "Jurisprudence" did not in fact change one *iota* until the late Eighteenth and early Nineteenth Centuries, when Jeremy Bentham became the first Professor of Jurisprudence at London University, and first drew the attention of the few who were listening to the need to distinguish between what the law "is" and what it "ought to be". Since he then spent the rest of his academic career cataloguing what the law "is", or rather "was" in his time, like some demented librarian, it was left to his disciple, Austin, to take up the other half of his thesis, just in time for the

industrial and political upheavals which ran through the NIneteenth Century like the lettering down a stick of rock.

Suddenly, Jurisprudence began to take on a new meaning. It had acquired humanity, a social conscience and a political agenda. It joined hands with philosophy, sociology and ethics to become a tool of social change. By the middle of the Twentieth Century, it had become "cool" to practice as a "Human Rights" lawyer, or a "Consumer Protection Advocate".

The conversion of Jurisprudence from its original function as simply the study of law to the role it now occupies is well highlighted in the writing of the Cambridge scholar Dias, who in 1976 ("Jurisprudence", 4th Edition, pp.18-19) was able to say that

" . . . . the ultimate function of law is to help in realising justice".

There had clearly been a major swing from simply studyIng what law is to prescribing what it ought to be, and Dias went on to identify the four main elements of "justice" as he perceived it, as being

- the distribution of advantages and disadvantages in society
- curbing the abuse of power and liberty
- deciding disputes (the aspect most closely associated with the work of lawyers)
- adapting to change

In the light of his belief that this is what the law is all about, Dias opened the Preface to the 4th Edition of his work with the following words.

> *"The study of Jurisprudence is an opportunity for the lawyer to bring theory and life into focus, for it concerns human thought in relation to social existence. Teachers of law always hope to encourage their students to learn how to think rather than just what to know, and Jurisprudence is peculiarly suited to this end because it can set law in wider contexts and proceed by way of stimulating ideas and not simply by instruction".*

From Babylon to Bin Laden

As we turn the pages of history, they are flagged with the legal philosophies of the ages which forged them. Many of them left behind principles which are either already embedded In our own legal heritage, or should be.

"By the rivers of Babylon"

The Jewish people left their bondage in Egypt determined never again to suffer any other sovereign power to dominate them other than the word of God, which each man was free to obey or ignore, but which could not be altered by man. The Ten Commandments – acquired on the Flight from Egypt into what became the Holy Land – dates back to 1250 BC, and was perhaps the first coherent behavioural code the world ever saw.

The main feature of Jewish Natural Law was direct rule by God as legislator, with guidance on his laws being supplied by the Torah, the Jewish Book of Laws. It placed heavy reliance on the independence of the individual human conscience, and even 250 years later, when Saul was, as "The Lord's Anointed", appointed as the first King of the Jews, his primary function was to enforce the laws of God. It was to be almost 3000 years before Individual human beings were ever afforded such priority of place by any subsequent legal system.

The Jews were also egalitarian, in that they regarded God's laws as being for the benefit of all mankind, and not just their tribes. Non-Jews who obeyed them would also ascend to the Kingdom of Heaven. It was this non-elitism which allowed the Christian Church to develop out of, and then alongside, Jewish tradition, and the eventual fusion of the Old and New Testaments into one Bible.

Unfortunately, the twin concept that the Jewish kings had been appointed by God also gave credence to the concept of "The Divine Right of Kings", which would be used to justify tyranny against the people for the next 1700 years.

"Beware of Greeks bearing gifts"

At approximately the same time, the Greeks were developing city states which practiced the nearest thing to pure (and therefore unworkable) democracy that the world has ever seen, before or since. It was, however, their belief that one can distinguish between nature, which is wise and eternal, and the law, which is arbitrary, expedient and flexible. It is also capable of being corrupt.

In the world of the Sophists, Law and Justice are two different things, and one does not necessarily lead to the other. Justice, to them, was based on immutable principles, while law is a matter of expediency, and will vary from community to community. Pitted against the Sophists was the rival school of Socrates, Plato and Aristotle, who argued that the law was at least guided by uniform principles which gave it stability. It also tended to preserve the *status quo*, and proceeded along the dangerous ground that man alone has the capacity to reason, and should develop towards a morally rational and social life in harmony with his fellow men. Aristotle argued that every man (even a slave) should accept his place in the natural order of things. Add to this the rival Stoic philosophy that emotion and worldly appetites should be suppressed in the pursuit of Reason, which is common to all men, and only obscured by selfishness, and the Moral Dictatorship is not far behind.

"Friends, Romans and Countrymen"

It was ironic that most Greek philosophies only found their way into the Roman toolbox when the Greeks were enslaved by the Romans, and

their philosophers were put to work educating the sons of the Roman aristocracy. The Romans themselves ruled by the sword, and it is hardly surprising that although they took on board the purity of Greek thought, they made it fit their own needs.

Thus, the Emperors claimed either that they were the law, or at least that they derived their absolute authority from it. Those who still argued that the only true Moral Authority came from God were testily reminded that Caesar was God. By a neat philosophical body-swerve, Roman lawmakers adopted the stance that "natural law" equated with animal instincts, and concentrated on the pragmatic task of developing laws to govern – in one single Code - all the vast lands they had conquered.

As the Roman Emperors fell more and more under the influence of the first Christian preachers (many of whom also managed to become martyrs in the process), they gradually became ashamed of their slavery mentality, and sought more and more inspiration from the teachings of Christ. The first Christian Roman Emperor was Constantine in the 4th Century AD, and given that by then, the mongol hordes were beginning to park in more and more of what used to be exclusively Roman chariot space, it was hardly a moment too soon.

"Oh, that someone might rid me of these turbulent priests!"

Living almost as a contemporary of Constantine was the most important of the early Christian philosophers, St. Augustine, who for the whole of his remarkable 76 years punted the standard Christian line that Man had fallen from his original state of grace, and that the only way back was via the teachings of Christ. This led in turn to the assertion (again wrongly accredited to St Augustine) that the Church, as the only true exponent and interpreter of the Divine Law, could – and should – interfere with the laws of the State when they were found to be morally defective. The stage was set for a massive head-butt between Church and State, and a lengthy divorce between "Natural" (=Divine) Law and "Positive (= Secular) Law.

"I am the way and the truth and the light. I also need a photo-opportunity"

Philosophy took a nasty knock with the fall of the Roman Empire to the Barbarians in 476. So did religion, with the Pope being obliged, in 800, to appoint, as the first Holy Roman Emperor, the most powerful man on the known earth, Charlemagne the Great. With that appointment came the revival of the claim to the Divine Right of Kings. There was an urgent and pragmatic need to re-establish law and order out of the chaos of the 400 years we now call the "Dark Ages". The only ones left who could read and write happened to be clergymen. They needed the emperor's military protection, and he needed intellectuals who could establish a Europe-wide public service. They both needed power over the people, and a rigid social order, if they were to succeed.

The kings of Europe did their bit admirably with something called "Feudalism", under which all land was held directly under the king by grace and favour, and could be taken away just as easily. In return for that land, in the early days at least, men fought the king's earthy battles. So far as concerned heavenly battles, the Church had an image problem. The last thing it needed was a revival of the Jewish/Greek idea that within every man was the key to his own salvation, under a social contract with God. The Roman Church, as the Wholesaler of Salvation, could not afford to have people cutting out the middle-man. It was not good for ecclesiastical business.

Therefore, in 1440, in the *Decretum Gratianum*, the Church claimed sole rights to Salvation Street, by blocking one end of it to all but those who joined its club. The Decretum stated that the Law of Nature was the Law of God. God created the world, and had retained the land rights. Obedience to His word was the only route to Salvation, and the clergy were the only ones with the maps. It went without saying (although the Decretum said it anyway) that Natural Law took precedence over the Positive Law of man. But if kings took the trouble to obtain, in advance, the Blessing of His Holiness, then by definition their laws were just, and should be obeyed.

Enter, St. Thomas Aquinas [1224-1274], who sought to lubricate the mounting friction between Church and State with the Medieval version of Natural Law, which argued that only Man is capable of rational reasoning which can shape his destiny, and that freedom of choice should be restricted by laws which are designed to assist Man to follow the Plan of Divine Wisdom. In effect, Aquinas made law part of the Divine Order of Things, with the Scriptures as the Essential Reading for the course.

The wheels came off this particular machine as soon as Man began to challenge the Church. The dawn of the Age of Scientific Discovery and the colonisation of America by those who sought freedom from the Old Church, brought new challenges to Rome, many of whose former supplicant kings had founded their own churches. Science was beginning to teach men that certain physical, mechanical and chemical events which they had hitherto thought of as signs and portents from Heaven were in fact natural emissions of gas, or the workings of gravity. Unfortunately, the fall of one horse in a two-horse race has certain inevitable consequences. Freedom from fear of excommunication and Papal strictures on how to run one's country led monarchs like Henry VIII, Mary, Elizabeth I and James I to behave precisely as they wished, while ironically still claiming that their right to rule was God-given.

"Let's hear it for the Common Man"

Every age produces its philosophers, and the Reformation Period in Europe produced, in its dying years, the trio of Hobbes, Grotius and Locke. Hobbes [1588–1679] justified absolute sovereign power on the basis that

there was a "compact" between ruler and ruled. Natural Law had, for Hobbes, become the antithesis of peace and good order, which could in fact only be guaranteed by total subservience to a sovereign ruler. He seems to have ignored the possibility of oppression in turn by that sovereign. Either that, or he regarded it as the lesser of two evils. Henry VIII would have loved him, particularly since there was no place in Hobbes' scheme of things for the Church.

An almost exact contemporary of Hobbes was the Dutch philosopher Grotius [1583–1645], who saw only too clearly the danger of absolute power corrupting absolutely, and called for some restraint on the power of monarchs over their subjects. It was his belief that there was an absolute Natural Law, but that it lay within the spirit of Man rather than the spirit of God or the rule of the Church, and could exist without either. The fuse was obviously set in the powder-keg of revolution, and the first to light it were the Dutch, who declared the Netherlands to be independent of the King of Spain in a document issued in 1581 which insisted that if a sovereign treats his subjects like slaves, then he loses the right to rule over them. This of course sent echoes all the way back to the appointment of the first King of Israel two and a half millenia earlier. The English were forming the same conclusion under the tyranny of the Stuart kings, notably Charles I, whom they eventually beheaded.

The third philosopher of the period, Locke [1632-1704], was a very young man when the royal dandruff was scattered all over Whitehall, and lived his early manhood under the misery of Cromwell's Protectorate. Little wonder that he was keen to see the return of the monarchy, and evolved a new social contract theory which would make things run a little smoother in future. For Locke, every man was entitled to liberty under a social contract with the monarch, but he was also entitled to the property in his person, and in particular the fruits of his labour. In declaring his belief that the social contract should guarantee a man the appropriate rewards for his work, Locke was ahead of Karl Marx by 200 years, and his idea of the power of the monarch extended only to the preservation of order and the enforcement of the law of nature.

Following the English Revolution in 1688, and writing in the years up to 1755, the French philosopher Montesquieu put forward another means of controlling royal power which set the seeds for the modern power battles between judges and Parliaments. It was called the "Separation of Powers", and it serves to protect Man from the tyranny of absolute sovereign power by dividing power into the three offices of Legislative, Executive and Judicial, each of which exercises some power over the other two.

What made such a system so remarkable to Montesquieu, as he viewed it from the other side of the English Channel, busily at work in England, was that there was no such thing in his native France, where the monarch still

reigned supreme under the continued patronage of the Pope. At least, he did until 1789, when France dispensed with both the king and the concept of monarchy all in one slice, as it were, and justified it with the words of another of their philosophers, Rousseau.

Rousseau [1712-1778] had advocated a social contract, not between the monarch and the individual, but between the community and the individual, under which the community guarantees the freedom and equality of each individual in exchange for the individual parting with some of his freedom, but having a right to participate in policy-making. This was probably the first conscious formulation of the concepts of parliamentary democracy and universal suffrage, and the belief that the common will of the people should prevail. What a pity that it was celebrated by the worst outbreak of ethnic cleansing the world would see again until the holocaust.

A Positivist approach – Britannia Rules the Rules

By the time that the Guillotine had dispatched its last victim, Jeremy Bentham [1748-1832] was safely installed as the first Professor of Jusrisprudence at London University. He set his heart on reforming and codifying English Law as one of the essential steps to social reform. In the process, he distinguished between what the law is, and what it should be. Given that he was a dedicated social reformer, it is ironic that he is best known today for his somewhat pedantic obsession with what the law is. In Latin, the word for the law as it is enacted is "positum", and the philosophical school Bentham founded is known as the "Positivist" school.

Bentham's disciple Austin [1790–1859] continued to distinguish between the "is" and the "ought to be", while at the same time widening the gulf between "laws properly so called" and "morality". Natural Law, Divine Right and the Inalienable Rights of Man became lost in a thicket of analysis which gave Jurisprudence a bad name. Indeed, writing in 1900, the observer Buckland said this

> *"The analysis of legal concepts is what jurisprudence meant for the student in the days of my youth. In fact it meant Austin. He was a religion; today he seems to be regarded rather as a disease"*

It was bad enough that the strict Positivism of Bentham and Austin continued to drone on well into the Twentieth Century, but in 1961 it grew fresh legs with the arrival of Professor Hart's book "The Concept of Law", and with it the new wave of "Analytical Positivism". Hart had as his central concept those "rules" which lie at the heart of all "obligations", which arise in turn from lawful commands. He analysed them in turn into "Rules of Recognition", "Rules of Acceptance" and "Rules of Change".

Because Positivism dominated British Legal Reasoning for a century and a half, during which some of the most significant – and largely bloodless – revolutions in the history of the world were taking place in factories,

schools, churches and ballot boxes – and apparently well out of the sight of Hart in his Oxford spires – it is hardly surprising that most of the legal theories to explain the exploding world came from other parts of Europe. While Bentham, Austin and Hart counted, labelled and classified the existing flowers, others were bringing out hybrids. In the years from 1845 to 1945, apart from the Positivist School in England, there were at least three major rival schools, each with its roots in different experience, and each with its own political agenda. Eventually, however, all roads lead to Dworkin.

The Economic and Materialist School – The Marxist Brothers Visit the World

The Nineteenth Century witnessed a massive industrial revolution, and with it came a new power to the people who kept the wheels of industry running. As machines became more technical, so those who operated and understood them demanded – and received – more natural respect from the traditional lords of society, and a greater "say" in how that society was run, and the fruits of their labours distributed.

The two leading names associated with this new charter for the working class were Karl Marx [1818 – 1883] and Friedrich Engels [1820 – 1895]. They were the champions for whom the working-class had been waiting – the Messiahs of the Machine Rooms. As traditional religion came under challenge from materialists, scientists and humanists, and as Positivism appeared only to endlessly catalogue and analyse what was, rather than what should have been, so the economic theories of Marx in particular became increasingly popular with the emerging union lawyers.

These granted sovereignty to the man who laboured with his hands for the ultimate benefit of society. Marx was primarily a social scientist who was convinced that the major conflicts in the history of Mankind up to that point arose from an uneven distribution of resources. Once man became selfish and greedy, he ceased to operate in harmony with others in society. Give everyone an equal share, argued Marx, and equilibrium would return. The only need for "law" was in order to bring that state of affairs about, and prevent it from slipping away again. In a classless society, there would be no need for law, which hitherto in history had simply been the means by which the "haves" held down the "have nots". Even Marx conceded that Man in his natural state was equal and free, but it was his view that only in a Proletariat Protectorate State would he remain equal and free.

The Historical and Anthropological School: From Noah to Nuremberg

The Historical School began, innocently enough, by examining what law had meant to societies in the past, in much the same way as we are doing today. It was also a reaction against Natural Law, but at the same time sought to avoid the arid narrative outlook of Positivism. Although the Roman Empire had died out as a military force, the "Jus Gentium" (the "law of all peoples") had proved so good as a legal code, particularly in the areas of Tort, Contract and Commercial Law, that it lived on in most of Europe,

was adapated to meet the needs of the day, and became absorbed into each country's legal system as the "civil code" which many of them still possess. Only the Common Law of England operated as a rival to the Roman Civil Code, and when lawyers studied in the great law schools of Paris and Bologna, it was Roman Law they studied.

The influence of Roman Law was particularly strong in Germany, which unfortunately became the birthplace of the Historical School. "Unfortunately" because of the excesses which were – wrongly – perpetrated in its name during the Nazi Regime of the Weimark Republic and the Third Reich. In an attempt to codify all the German legal customs into one Code, it was proposed to develop a new code, along the lines of the French Code Napoleon, which had in its turn been lifted from Roman Law in post-Revolutionary France.

The proposal was resisted by a group of philosophers led by Von Savigny [1779 – 1861], who, as an aristocrat, rejected the new French Revolution Code as anathema. So did most of his countrymen, through whose lands Napoleon had burned, raped and pillaged on his way to Moscow in 1812. Von Savigny was also an historian, and he persuaded everyone that German law was part Roman Law and part custom.

That customary law was, in turn, based on the spirit of the people who had created it. This "spirit of the people" became famous under its German name "Volksgeist", and all law, according to Von Savigny, was only valid because the spirit of the people had created it, and it should not be changed without good reason. This brand of legal ancestor worship was meant to replace Natural Law, and of course it was particularly deficient in offering practical proposals for testing, measuring and implementing the will of the people for the future.

Enter the Anthropological School, led by Hegel [1770–1831] who, while accepting the existence of Natural Law, considered it to be outside the control of Man, who should instead concentrate on Positive Law, which he is free to alter, but which will develop naturally within the society which creates it, in much the same way that Darwin was later to demonstrate the evolution of the species. It was in fact the general acceptance of Darwinian theory which led to the steady growth of a school of Jurists who believed that the state of intellectual development of a society could be measured by the wisdom of the laws it produced. The rapid rise, at the same time, of the science of psychology under the influence of pioneers like Freud led to a growing awareness of the power of group psychology. The stage was set for National Socialism, which under Hitler became Nazism.

It was based on the premise that people inherit a legal system in the same way that they inherit their genetic code – from their ancestors. Those with the best genetic material will devise the best society with the best legal system. This will involve unity of purpose by right-thinking members of

that society, who will combine under a leader who will personify that communal desire for perfection. Law and State are the same thing, the leader is the embodiment of the State, and there should be unquestioning obedience to the leader.

Ironically, that philosophy went on to support both Russian Communism and German Nazism, even though the two movements were diametrically and bitterly opposed to each other. Both are now gone, but it was the reaction to both of these forms of extremism which helped to create our current models of Legal Reasoning.

The Sociological School

"Degrees in Sociology – please take one"

(sign under a toilet roll dispenser, Nottingham University, 1967)

It has become fashionable in recent years to mock both sociology and its practitioners. However, they reflect a growing re-awakening within society to the importance of its central component - people - and the natural claim which each of them has to be treated fairly, and with dignity. From this growing awareness sprang what we call the Sociological School of Jurisprudence, from which, in turn, emerged the revival of Natural Law which we are witnessing today.

The reasons for this were complex, but they included the fact that society itself was becoming more complex, that the Utilitarian and Historical Schools had highlighted the importance of social history in the development of the law, and the fact that Analytical Positivism ran out of answers when it came to "too hard" social and ethical issues, particularly in science and medicine. It had also become glaringly apparent that law had to become a great deal more flexible if it were to have any hope of regulating a society increasing in size, cultural diversity, scientific and technical potential, and expectations of what "the system" should be doing for them. The development of the Welfare State was probably the single most important factor in all of these changes.

The modern Sociological School began with Ihering [1818–1892], who first boldly stated that the origins of law lay in sociological factors, and that the only real function of law is to serve the needs of society, and reconcile the selfish needs of individuals with the communal needs of society. His beliefs are usually described as "Social Utilitarianism". Ehrlich [1862–1922] made the important "discovery" that formal law usually lags behind customary law, and that current practices will not be reflected in new laws until they have been well tested by experience and practice. Put another way, the law of the future is the practice of today. There are obvious echoes here of Von Savigny's "Volksgeist", but on a more practical level.

In America, Pound [1870–1964], a Harvard Law Professor, led what has been called the "American Sociological School", which argued that law

should always take account of social factors such as individual personality, domestic relations, freedom of association and property, subject always to the duty of the State to engage in what he called "social engineering". This social engineering, in turn, should be aimed at maximising human wants and needs with the minimum of conflict and waste. There are clear acknowledgements in all this to the pioneering Utilitariansim of Bentham, and in his day Pound was as much revered as Bentham. However, like Bentham, he failed to appreciate how his theories could allow minority rights to be trampled on, and by the date of his death in the early 1960s, his well-meaning philosophies had been overtaken by events.

In France during the early period of the Sociological Movement, Duguit [1859 -1928] emphasised the interdependence of members of society upon each other, which increases as society becomes more complex technically. This requires laws which promote what Duguit called "Social Solidarity". However, one inevitable corollary of Duguit's philosophy was the suppression of individual or even institutional rights for the greater good of a happily-integrated and inter-dependent society. Such views could be – and were – used as a justification for both Communist and Fascist suppression of individual freedom, and once again – like Pound's social engineering – clashed with the ideals of the Human Rights movements from 1960 onwards. The philosophical furniture was therefore re-arranged for the re-entry of Natural Law.

Natural Law – the Ultimate Survivor

The British School of Analytical Positivism closed its doors for the last time with the departure from Oxford University of Professor Hart. His successor to the Chair of Jurisprudence was one of his leading critics, Ronald Dworkin, and his most famous writing is probably a series of essays under the general title "Taking Rights Seriously". The title says it all. In setting out to demolish Positivism, Dworkin takes as his central theme the impossibility of distinguishing between law as it is, and law as it should be. The cutting edge of that distinction becomes very prominent in what Dworkin calls "hard cases", that is, cases in which traditional Positivist analysis provides no clear answer.

In such cases, argues, Dworkin, one cannot separate Law from Morals, and all decision-making (at least in the courts) is by reference to basic "principles", to promote which those who govern society have developed "policies". Those principles are in turn derived from moral imperatives. One of the most important aspects of Dworkin's philosophy was to liken the development of law down the ages to the writing of a chain novel, to which each of the sitting judges in the appeal courts is invited to add a chapter. Law thereby becomes (as Erlich described it) a "living stream", which twists and bends as it goes, but has as its source an original set of moral principles. One of those was and remains – the total equality of every human being with every other.

As such, it fitted perfectly into the post - 1960s Human Rights compulsory reading list, and in particular it found favour with the American Liberal movement in its post-Kennedy years. One of its great gurus was – and still is – Professor Rawis of Harvard University, who in 1972 published "A Theory of Justice", which not only, in its broad appeal for a return to universal values and principles, supported what Dworkin was arguing across the Atlantic, but also brought Natural Law back full-circle, but in a new set of clothes. Rawis drew heavily on the basic tenets of the Sociological School in his insistence on the primary importance of social justice as the Holy Grail at the end of the journey. His weapons were (and are) "right", "value" and "moral worth", and these are the yardsticks against which all law is to be judged. The starting point for Rawls are certain immutable "principles of justice", and he postulates a world in which all men are returned to the "original position", and are stripped of all personal ambition and motivation under a "Veil of Ignorance", in order to bring about the "First Principle of Justice", which is

> *"Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all"*

The need for such basic rules to protect the weakest in society had become one of the greatest world-wide imperatives in 1945, when the full horror of Hitler's "Final Solution" became apparent as advancing allied troops reached the concentration camps.

The Nuremberg War Crimes Tribunal, the Charter of the United Nations, the International Convention on Human Rights and the Simla Agreement were partly a public recognition that "this must never happen again" (although of course it has, and more than once). We have now more recently discovered the need for an International Criminal Court. All these institutions were, and still are, also a re-assertion of values which go back to pre-Roman times, and in particular to two of the Ten Commandments. However, they were not intended as some sort of revival of the Supremacy of God, but rather a public acknowledgement of the sanctity of the human individual, each of whom carries his own religion inside him.

The spirit of the time was captured perfectly by the last of the jurists we encounter along this long road. John Finnis, writing in the 1980s and 1990s, brings us full circle in his work "Natural Law and Natural Rights". It combines the best of Aristotle and Aquinas in asking, first, what constitutes a worthwhile, valuable and desirable life for each individual, and then lists those immutable principles of Natural Law which bring it about. They arise, not from Divine Command, and even less from the command of a Divine Sovereign - but from the basic goodness inside every one of us. The answer has been staring at us in the mirror – or at least in our own reflection in the stream of life – for at least 3000 years.

BOOK REVIEWS

Contempt of Court, Justice JD Kapoor, Pages : xxxii + 719, Price : Rs. 595, Universal Law Publishing Co. Pvt. Ltd., Delhi, 2004

So you thought that lawyers and journalists, notoriously popular for their dare-devil attitude, fear nothing. They generally don't. But when it comes to their conduct in the courts or reporting of court proceedings, the apprehension of committing contempt, gives them nightmares. This can chiefly be due to two reasons. First, the reverence and dignity which the Indian judiciary, the sacrosanct and inviolable institution of the democracy, commands. The other is dearth of knowledge on the subject, owing to lack of a credible book on Contempt Laws. At last, there is at hand a well-researched treatise on contempt laws, which is a work of wisdom, beneficial to the law-man and the lay-man alike.

Apart from the content, what makes it stand out is the fact that it has been authored by a person with varied and rich experience, both as a member of the subordinate judiciary and then a Judge of the High Court. Justice JD Kapoor lends perspective to the subject, which no other person could possibly have given. The book reflects his profound knowledge, objectivity of thought and understanding of law, the qualities he is well known and admired for.

The author in the preface itself, succinctly states the need for Contempt Laws, "... the authority and dignity of the Courts has to be kept intact." The author's balanced approach is reflected in the lines , "...power to punish does not mean that every utterance or act impinging upon the authority should be exercised as legal thumbscrew." He further advises the courts to use their discretion judiciously by stating, "...not to be hypersensitive or exercise the jurisdiction on any exaggerated notion of the dignity of the judges."

The author is alive to the controversy over the scope of 'Contempt of Court' and so puts across a broad test to judge the same if, "...there is a *mala*

fide or wilful disobedience of the orders of the court or any utterance or act is directed against the authority or dignity of the court or any deliberate interference in the court proceedings." This test, in fact, contains the essence of the book and a guide to ascertain if a particular act constitutes contempt or not.

Quite interestingly, the book begins with a chapter on the 'History of Contempt Laws' referring to incidents like, when a person's hand was cut off and fixed at the Court's entrance gate as a punishment for throwing a brickbat on the Judge, and how, Henry V (then, the Prince of Wales) was imprisoned for committing contempt.

The next part deals with statutory provisions of The Contempt of Courts Act, 1971, picking up each section, detailing the case-law in India and other countries, mainly U.S.A. and U.K., providing illustrative instances and landmark judgments of topical interest. Segmentation of the case law into categories like Disobedience of Court Orders, Contempt by Government Functionaries, Breach of Undertaking, Scandalizing the Court, Interference with Administration of Justice etc. makes it practically a bible on contempt laws, a must-have for judges, lawyers, journalists and students of law.

The chapter on 'Definitions' (S.2) has been prepared painstakingly and answers all queries from trivial instances of contempt like 'Failure to rise in the Court room when the judge enters', 'Dress of a person appearing in the court' to gross ones like, 'Article publicising the ranking of High Court judges' and 'Imputing partiality, corruption, bias against the judge.'

Today is the age of the media. Keeping this in mind, the author has researched on contempt laws with reference to the role of media in reporting and elucidates it under the heading, 'Publication contempt -Justice in Media Age'. The chapters on 'Innocent publication and distribution of matter not contempt' (S.3), 'Fair and accurate report of judicial proceeding not contempt' (S.4) and 'Fair criticism of judicial act not contempt' (S. 5), should prove to be particularly useful for the journalists as to the defences available, in order to save themselves from contempt proceedings. Again, the chapter on 'Power of High Court to punish contempts of subordinate Courts' (section 10) provides authoritative guidelines for the subordinate judiciary.

In the end, one can say that Justice Kapoor, true to his reputation, has done complete justice to the subject. The present book, indeed can be termed as a tribute to the authority of the institution, which he served with distinction for over thirty years.

SURYA MALIK
Advocate and freelance journalist

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   Books - Kumar H.L. : A Practical Guide to Employees Provident Funds (2nd Edition, 2003) New Delhi, Universal Law Publishing Co. Pvt. Ltd.
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