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Law Centre-1
Chhatra Marg
University of Delhi
Delhi – 110 007
India

Phone: +91 11 2766 7991
E-mail: journal.lc1@law.du.ac.in
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From the Editor's Desk

Justice is a concept about which lot is written and still the occasions in which injustice occurs never seem to diminish. Law Faculties have an important role to play in promoting justice by inculcating critical thinking as well as by experiential learning through Legal Aid Clinics and legal literacy programmes in the community. Law Centre-1 is focusing on both fronts. The Legal Services Society of LC-1 provides experiential learning in issues of access to justice faced by poor and deprived sections of society through its Legal Services Clinic and Outreach Programmes in the community and colleges of University of Delhi. It started its Journal of Law Teachers of India to provide a fertile ground for scholars from around the world to generate ideas, critical writing, and knowledge on various aspects of law, its functioning, legal issues, and justice.

The short report about the Legal Services Clinic of Law Centre-1, written by Dr. Suman, Director of Legal Services Clinic of Law Centre-1 presents the historical background of Legal Aid as well as the detailed facts and function of the Legal Service Clinic in LC-1.

When the Legal Services Clinic of Law Centre-1 was inaugurated on 25 August 2012 by Hon'ble Justice S. Muralidhar, judge, High Court of Delhi, we took care to name it as "Legal Services Clinic" to emphasize that the Clinic is to provide 'services' as distinguished from 'aid'. Semantics do make a difference in the perception of what needs to be done. 'Aid' suggests a hierarchical power relationship between the giver and receiver of aid while 'service' converts this relationship and focuses entitlement in the receiver. We want our students to imbibe the value of service when they experience the powerlessness of ordinary persons before the might of law as well as the power of law to secure rights while interacting with community.

While the Legal Services Society has been functioning in Law Centre-1 for a long time conducting legal literacy programmes in various colleges of University of Delhi, its reach increased many fold with the establishment of the Legal Services Clinic. The students and teachers went out to various areas in Delhi to generate legal awareness about the various schemes of the government to which they were entitled after acquainting themselves about them through the Para Legal Volunteers Training. They conducted house to house surveys to find out if people had received the services they were entitled to and invited them to come to the Clinic if they were facing any problem in securing the benefits of various schemes or if they required any other legal assistance.

The Clinic saw regular stream of justice seekers on all Saturdays it opens for dealing with live clients during the semester and as long as students continued doing the outreach programmes. The number dwindled when the students got involved in their examinations and during summer vacation when they were away. It is back in full force with the students returning and going out to community once again. Since its opening, more than two hundred students have participated in various legal services activities and similar number of people have benefited from the Clinic. The students use skits, plays, speeches and written handouts to generate legal awareness.

The Clinic is supported by the Delhi State Legal Services Authority which has provided a legal aid lawyer on each working day as also some infrastructural support. The students work under the direct supervision of the legal aid lawyer, Mr. Bhawani Prasad. They are guided by teachers in all the outreach programmes in the community.

As we make our contribution to society, vast remains undone. We hope that our experience will inspire other Law Schools to open similar Clinics to provide students hands-on experience of legal aid and ground them in the stark realities of poor people's lives to create sensitive and aware lawyers, judges, law officers, and decision makers of tomorrow. Sensitization to issues of poverty, discrimination, domestic violence, access to justice, etc., is best done through experiential learning after the initial initiation in the classrooms.

The main articles in the current volume of JOURNAL OF LAW TEACHERS OF INDIA explore and critically examine various aspects of justice in different fields of law. The authors of various articles in the current volume of our journal include not only teachers of Law Centre-1 but many other scholars. It is with a sense of pride that we present to you this volume of JOLT-I that, within a short span of just two years of its existence, has attracted scholars from various institutions from India and abroad.

The notes and comments section in this volume of JOLT-I brings out many technical points of current importance in the fields of brands, copyrights, genetics, and cultural rights in the realm of Intellectual Property Rights. The 16 December Rape Case is also resonated in the comment on the Verma Committee Report bringing out Charter of Duties. This Volume also contains the usual Book Review section containing book reviews of some recent books.

I take this opportunity to thank all the teacher members of the Editorial Board who have worked hard in bringing out this volume. Dr. Sarbjit Kaur has successfully led the editorial team that has tirelessly pursued the authors, reviewers, and revisions. She and Mr. Chanchal Kumar Singh need special

commendation for having spent innumerable hours copy editing, editing, and ensuring that the footnotes are given in the format provided by the Bluebook as far as possible with necessary adaptation to include Indian scholarship. I would also like to thank Mr. Kuldeep for his help in formatting the articles.

We believe that articles, notes and comments included in this volume do value addition to the existing knowledge on the subjects and hope that they will generate more critical comments and thinking on various issues raised by the authors. We will be happy to receive your comments, rejoinders, and further articles on these and other legal issues of interest to you.

Prof. Ved Kumari

Professor-in-Charge

Law Centre-1

University of Delhi

24 August 2013

A Note on the Legal Aid Clinic, Law Centre-1

*Suman**

Free legal assistance to the economically and other disadvantaged citizens, is implicit in the fair, just and reasonable procedure under Article 21 of the Constitution of India, 1950. To quote Bhagwati, J.: "[A] procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would therefore, have to go through the trial without legal assistance, can not possibly be regarded as reasonable, fair and just".[1] The major objective of the legal aid programme is to bring justice within the reach of the marginalized sections of the society. The absence of an appropriate legal assistance may result in injustice, and can be destructive to the rule of law. It is, therefore, an obligation of the state to provide free legal aid to the poor, "if the rule of law were to receive vitality in its observance"[2]. V.R. Krishna Iyer, J. rightly observed: "Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law".[3]

The Legal Aid Movement in India, beginning in early 1970s and getting institutionalised through 1880s and 90s, has transformed the interface of law, legal system and access to the courts by the common citizenry. Legal Services Society and Legal Aid Clinics envisaged and established as part of the movement has proved to be immensely useful and effective instruments. The teachers, lawyers and the students working and running these societies and clinics are not only able to help the assistance seekers but also gain valuable insights into the issues surrounding the formidable objective of the movement.

Accordingly the paper is divided into two parts. The first part briefly analyses the legal aid movement in its historical perspective and highlights the role of judiciary in providing access to the needy. Whereas the second part is

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* Assistant Professor, Law Centre-1, Faculty of Law, University of Delhi.

1 *Hussainara Khatoon (IV)* v. *Home Secretary, State of Bihar*, 1980 SCC (Cri.) 40 at 45.

2 *Harishankar Rastogi* v. *Girdhari Sharma and Anr.*, A.I.R. 1978 S.C. 1019 at 1020.

3 *M.H. Hoskot* v. *State of Maharashtra*, A.I.R. 1978 S.C. 1548 at 1554.

devoted to the organization and functioning of the Legal Aid Clinic at Law Centre-1 as a vital instrument of legal aid movement in India.

Legal Aid Movement in India

The basic objective of law and the judicial institutions is to secure equal justice to all in a democratic polity. Equal access to justice is not only one of the peambular promises held out to the all Indian citizens but also form part of the Article 14 of the Constitution.

However, in practice, the objectives of the legal aid such as providing access to the justice by ensuring equality before the law, right to representation and the fair trial have proved to be elusive. Consequently for a vast majority of masses rights mean little thing. Article 22(1) of the Constitution makes it obligatory that a person arrested must be informed of the grounds for her arrest and be defended by a lawyer of her choice, has also been interpreted in a liberal way.[4] Section 304 of Criminal Procedure Code, 1973 (Cr.P.C.), provides that if the accused does not have the sufficient means to engage a lawyer, the court must provide one, for the defence of the accused at the expense of the state. In the case of *Bashira* v. *State of U.P.*[5], the Supreme Court held that compliance of the Section 304 of Cr.P.C. was mandatory and non-compliance constituted denial of the due process and the trial was, therefore, vitiated by the violation of the right to life guaranteed in Article 21 of the Constitution.

Nevertheless, the issue of the legal aid to the indigent still persists and frequently engages attention of governmental and other institutions in our country. This is also evident from the fact of formation of various committees and the commissions in view of the purpose. The contributions made by some prominent judges/jurists like P.N. Bhagwati, Krishna Iyer, M.C. Setalvad, etc. were significant in shaping the contours of legal aid programme. The Law Commission of India in its Fourteenth Report suggested that the legal aid programme could be made effective by providing the free legal service to the poor by the state.[6] Consequently, the Government of India in 1960 prepared a national scheme for legal aid by providing legal aids in all courts including

[4] In pre-constitutional era, the Criminal Procedure Code, 1898 which allowed the right to be defended by a counsel was only a statutory right and was not a fundamental right. It was only after the promulgation of the Constitution this statutory right was incorporated as a fundamental right.
[5] (1969) 1 S.C.R. 32 at 36.
[6] *Available at* http://lawcommisssionofindia.nic.in/1-50/index1-50.htm. (last visited May 15, 2013).

tribunals. But this scheme failed to survive due to the inability of the state governments to implement it, mainly on the financial grounds. Subsequently, attempts were made to revive the scheme when the Expert Committee on Legal Aid[7] headed by justice Krishna Iyer, suggested setting up of the legal aid committees at the district, state and central level. The Committee also suggested establishing the law clinics in the Universities.

The contribution of our judiciary, however, has been the most significant and decisive in establishing and promoting the legal aid programme in the country. Initially the Courts gave restrictive interpretation to Article 22(1) of the Constitution. In *Janardhan Reddy* v. *State of Hyderabad*[8], the Supreme Court held that it is the duty of the court to provide counsel at the state expense to the ignorant and illiterate defendant, only when requested. Further, in *Tara Singh* v. *State of Punjab*[9], the Court said that it is the duty of the accused to ask for a lawyer if he wants to engage one.

The subsequent decisions of the Supreme Court, however, gave a very wide interpretation to Article 22(1) of the Constitution which extended the scope and ambit of the right to legal aid. In *Suk Das* v. *Union Territory of Arunachal Pradesh*[10], the Apex Court held that it would be a mockery of legal aid if it were to be left to a poor, ignorant and illiterate accused to ask for free legal service. Above all, in a landmark judgment in *M.H. Hoskot*, the Supreme Court while interpreting Article 39(a) held that this Article made it mandatory for the state to provide free legal aid.[11] These court pronouncements gave an impetus to the legal aid programme, yet it remained ineffective in the real sense of the term as only the lip service was paid in terms of implementation and logistics.

It was only the Forty Second Amendment Act, 1976 which recognized the free legal aid as a constitutional imperative by inserting the Article 39-A.[12]

[7] In October 1972, the Ministry of Law and Justice, Government of India constituted an Expert Committee on Legal Aid under the Chairmanship of Justice V.R. Krishna Iyer, to formulate a workable scheme for legal aid. The Committee submitted its report in May 1973.
[8] A.I.R. 1951 S.C. 217 at 222.
[9] A.I.R. 1951 S.C. 441.
[10] (1986) 2 SCC 401 at 407-08.
[11] *Supra* n. 3 at 1556.
[12] *See* S. 8, The Constitution (Forty Second Amendment) Act, 1976. Art. 39-A reads: "State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity and shall, in particular, provide free legal aid by suitable legislation or scheme, or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

However, the Legal Service Authorities Act was enacted only in 1987 and was brought into effect as late as in 1995. The Act prescribed criteria for the legal aid entitlement. The Legal Service Authorities were set up at the national (National Legal Services Authority, NALSA), state (State Legal services Authority, SLSA), district and taluka/Mandal level. Further, with a view to making justice accessible to the various categories of people like the poor, disabled, sufferers of disaster, ethnic violence, undertrials etc., it provided steps such as accreditation of NGOs for legal literacy and Legal Awareness campaign, legal aid facilities in jails, publication of 'Nyaya Deep'as the official newsletter of NALSA, framing rules for refunding court fees, and appointment of the 'Legal Aid Counsel' and the 'Free Legal Aid Centres'.[13] This has helped the marginalised sections of citizens and poverty ridden people in a significant manner. According to the Government of India report submitted to the UN for Universal Periodic Review, until 31 March 2009, about 9.7 million people were benefited through legal aid out of which 1.4 million belonged to scheduled castes and 464,000 to Scheduled Tribes.[14] The Delhi State Legal Services Authority (DSLSA) settled 3,75,141 cases between 1987 and 30 June 2011.[15] As many as 1,63,437 persons have been provided legal aid and assistance by DSLSA, including 4,395 scheduled castes, 259 scheduled tribes and 75,613 persons in judicial custody.[16]

Establishment of the Legal Aid Clinic at Law Centre-1

A number of universities/colleges having 'Law' as a department have 'Clinics' to provide legal assistance to the indigent and backward sections of the society. The clinics have proved helpful in redressing the grievances of needy people in the vicinity whose problems remained unaddressed on the account of lack of awareness and the paucity of funds since long. They are aided and assisted by the concerned legal services authorities constituted at the national, state and the district level. The Delhi State Legal Services Authority (DSLSA) promotes and provides assistance to the Legal Aid Clinics in the Universities and colleges in the capital city of the Delhi.

The process of opening of the clinic was initiated when, the then Professor-in-Charge, Prof Ashwini Kumar Bansal, received a letter from DSLSA on 26 November 2011. Prof. Bansal established Legal Aid/Services Committee with

[13] *See* the provisions of the National Legal Services Act, 1987.

[14] WGHR, *Human Rights in India– Status Report* 2012, 92, *available at* www.wghr.org (last visited May 15, 2013).

[15] *Available at* www.dlsa.nic.in (last visited May 15, 2013).

[16] *Id*.

the author as co-ordinator and Dr. Anu as a member for working out modalities to comply with the letter from the DSLSA in consultation with Dr. P.B. Pankaja and Dr. Poonam Dass. On 25 January 2012, the Legal Aid/Service Committee unanimously decided to set up the Legal Aid Clinic at the Centre. The decision of the Committee was accordingly conveyed to the DSLSA. Following the decision, the selection and training processes of the Para Legal Volunteers (PLVs) were initiated. The process picked up momentum with the active co-operation and guidance of the new Professor-in-Charge, Prof. Ved Kumari. In all, 24 students received the training as PLVs in the first batch. The training was held in the Centre during 3 to 9 August 2012 in collaboration with the DSLSA under the leadership of Ms Asha Menon, the then Member Secretary, DSLSA and presently Additional Session Judge, Tis Hazari. The PLVs were trained for six days by the resource persons consisting of the judicial officers from the DSLSA. The resource persons during the course of deliberations covered a wide range of topics such as matrimonial law, law of inheritance, child marriage, domestic violence, civil and criminal law, redressal mechanism and enforcement of rights, rent and property law, matters of motor accident claims, public distribution system and issues relating to birth, death, income and caste certificates. After the completion of the training, the PLVs appeared for viva-voce which was conducted by the DSLSA in the centre. In all, 28 students, selected by the DSLSA, were awarded the status of PLVs in the second batch.

Organization and Various Activities undertaken by the Clinic

The clinic was inaugurated on 25 August 2012 by Hon'ble Dr. Justice S. Muralidhar, Judge, High Court of Delhi, in the presence of Mr. Siddharth Luthra, Additional Solicitor General. Justice Muralidhar highlighted that the endeavour was to provide free and competent legal service to the indigent and weaker sections of the society ensuring that the equal opportunity of justice was not denied to any citizen by reason of economic or other disabilities. In terms of organization, the Professor-in-Charge is the Patron-in-Chief of the Legal Services Society. The clinic is a part of Legal Services Society. Dr. P.B. Pankaja, Associate Professor, is convener of the Society and Dr. Poonam Dass, Assistant Professor, is co-convener of the Society with the author as the Director of the Legal Services Clinic. Mr Bhawani Shankar Sharma, the legal counsel appointed by the DSLSA provides free legal advice and assistance to persons who visit the Clinic. The payment to the legal counsel is made by the DSLSA. Nine other faculty members are actively associated with the clinic. The student PLVs are assigned various activities in the clinic under the leadership of a convenor, co-convenor, secretary and research co-ordinator selected from amongst the PLVs. Moreover, to channelize their activities, the PLVs are further divided into different committees such as the Clinical Services Committee, Community Outreach Committee, Skit and Play Committee, Poster and Charts Committee, Editorial Committee, Library Committee, Advertising and Publicity Committee and the Committee for logistics. In addition to the PLVs, the student volunteers of the Legal Services Society also work along with the PLVs in the aforesaid committees. The clinic remains open on every Saturday from 10.00 a.m. to 1.00 p.m. Each Saturday a faculty member and six PLVs on rotation basis remain present in the clinic to assist the clients. Besides legal advice and assistance, the clinic provides referral services, helps in drafting of applications, filling of forms, methods of approaching officials/ departments for various services.

In terms of activities, the clinic till date has attended 292 clients, including 83 who visited the clinic more than once. Out of the 292 cases, 41 were referred to DSLSA by the legal counsel. Out of 41, 25 cases pertained to women clients and 16 to males. The cases relating to females mainly sought legal assistance either for divorce or maintenance. Only few women had property disputes and just one had filed a criminal complaint against the landlord. In the case of the referred male clients, the disputes belonged to property, employment, harassment by the intelligence wing and matters relating to examination. Of the remaining cases, the clients were facing problems such as delay in pension, ration cards, caste certificate, voter identity card, property dispute, domestic violence and other gender related issues. Among the major problem faced by most of the clients, related to ration cards and caste certificates. Delhi is one of the states which have implemented the Right to Service Act, yet these problems persist. It is rightly observed by R. Krishnakumar: "Even decades after attaining independence, the common man in our country is unable to walk into a government office with confidence".[17] They need to be made aware about their rights which are above everything else. Our PLVs through their hard work in the field tried to generate confidence among the clients to assert for the justice. It is worth mentioning, that within a short span of five months of its opening, the DSLSA certified our Legal Services Clinic to be the Best clinic in the University of Delhi. Some of our clients including Nagma Begum, who got the relief through our clinic, have also inspired several clients to approach our team in the clinic. Sometimes the clinic gets overcrowded by clients confronting numerous types of cases seeking the legal

[17] *Right to Service*, Vol. 30 FRONTLINE 38 (23 March – 05 April 2013).

justice. Though the clinic remains open on every Saturday upto 1.00 p.m., the PLVs has been often working as late as 8.00 p.m. for the clients.

Apart from attending the clients in the clinic, the PLVs and other student volunteers have regularly visited the seven localities in the vicinity under the Community Adoption Programme to know about the legal problems of the clients and to educate and articulate them regarding their rights besides making them aware about the various channels or schemes of grievance redressal. The universe or area covered by the volunteers under the outreach programme include: Gurmandi and Sangam Park, Kabir Nagar, Shakti Nagar, Rana Pratap Bagh, Gopal Pur, Majnu Ka Tila and Dheerpur village.

The PLVs and volunteers have attended Lok Adalat at Tis Hazari and visited the Juvenile Justice Board (JJB) and Observation Home for boys at Sewa Kutir, Kingsway Camp, to understand the functioning of these institutions. Further, a group of PLVs and other volunteers visited Tihar and Rohini Prisons and took legal literacy classes in order to create awareness about the legal aid and to popularize the plea bargaining amongst jail inmates. They observed that many prisoners needed legal assistance. It is felt that these prisons visit should be more frequent.

At the initial stages, some volunteers visited a few slums in Delhi to know about the nature of the problems requiring the legal assistance. They came out with a long list containing the names of people, their contact numbers and the problems that needed to be resolved. Having gone through the list, we started calling them to our clinic for purposes of helping them resolving their disputes. It was through their visits that the volunteers could know the myriads of problems faced by people inhabiting these areas. The major grievances of people residing in these areas included delay in payment of pension, sanitation (toilets etc.), safe drinking water, schools for children, transport, voter identity card, caste certificates, electricity bills, ration cards, harassment, drug addiction, domestic violence, security, rape, exploitation etc. The volunteers also observed that poor people in general were afraid of going to courts mainly on account of paucity of funds, fear, lack of knowledge and the information about the free legal aid system.

It becomes imperative for the Legal Service Authorities, Clinics, Bars, NGOs, and the human rights activists etc., to launch awareness campaign and impart legal literacy to the needy and underprivileged who have always been on the receiving end. In this respect our PLVs and volunteers have tried to accomplish a bit and that too without any financial support. They need to be encouraged by providing some honorarium and involving them in projects relating to the legal aid. Now the DSLSA has agreed to bear some expenses of the PLVs going for outreach program. This happened because of the visit of Justice Sanjay Kishan Kaul, Judge in-charge of DSLSA, who was invited to visit the clinic on 2 March 2013. He took notice of wide variety of problems including lack of funds and the infrastructural facilities in the clinic.

The experiences from the field trips brings the realisation that the task of equal access to justice remains far from accomplished owing to several weaknesses in the free legal aid programme itself. With a view to achieving this goal, various stakeholders are required to address to tasks such as creating legal awareness among the poor, ignorant, dalits, juvenile, women, aged, undertrials, mentally and physically challenged. The basic problem is poverty and most of the other problems are rooted into it. The poor in slums, villages and work places would not know about the availability and benefits of the legal aid service without being properly made aware about it. According to a study conducted in seven states viz. Rajasthan, Chattisgarh, Madhya Pradesh, Jharkhand, Bihar, Orisha and Uttar Pradesh, only 20% of the litigants knew about the free legal aid services.[18] Consequently, as much as 52.2% of the surveyed litigants had to pay money to lawyers appointed by the SLSA.[19] Moreover the data obtained in response to an RTI application shows that there was an acute underutilization of funds meant for legal aid services during the year 2009-10.[20] For example, 87.33% of the funds remained underutilization in MP, 53.87% in Jharkhand, 44.8% in Uttar Pradesh and 35.16% in the state of Orissa.[21]

It will be interesting to mention that the fee payable to the legal practitioners tends to be too meagre to attract an experienced and competent lawyer for the legal aid programs. As an example, the legal counsel in our legal services clinic is paid merely Rs. 600 per visit which may hardly attract an experienced legal practitioner. Thus, the senior advocates do not find time to appear for legal aid services as it does not provide them adequate incentive and status. Such a small amount may not even cover the "conveyance and miscellaneous expenses"[22] spent by the counsel. Consequently, the juniors have become more numerous in the legal aid projects. Regarding this, it is observed "the absence of effective legal counsel is an important reason why common people are not able to access courts and use them as instruments of the constitutional vision of social change. The legal aid that pays low levels of fees to a private

[18] *Supra* n. 14 at 92.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] Sebastian D'Souza, *Legal Aid*, Vol. 29 FRONTLINE (25 August – 07 September 2012).

lawyer is not adequate to ensure that the poor have an access to courts.[23] Better incentives can also ensure effective representation which is a hallmark of the judicial process. The court, therefore, must ensure that the indigent accused has been properly consulted by the legal practitioner and effectively represented on the hearing. If the accused finds that his counsel is not fulfilling his obligation, the authorities must take necessary steps and find out a new counsel for the needy. The absence of effective representation on appeal in certain cases may amount to violation of Article 14(3)(b) of the International Covenant on Civil and Political Rights. In *Ramdeo Chauhan @ Rajnath Chauhan* v. *State of Assam*,[24] the accused minor had not had access to competent legal counsel. The objective of equal justice can be achieved only when the indigent gets representation in the true sense of the term.[25] Incidentally, the European Court of Human Rights in this connection has appropriately stated that the essence of legal aid does not end with nomination but extend to replacement or substitution in case the lawyer is not able to fulfil his duties.[26]

Conclusion

As far as this clinic is concerned the committee looks back at it with satisfaction. The smooth and effective functioning of the clinic may be attributed to factors such as active cooperation of the faculty members involved in the activities of the clinic, hard work put in by the PLVs and student volunteers, guidance and direction of the Prof-in-Charge and Patron-in-Chief, Prof.Ved Kumari, proper handling of cases by the legal counsel, Mr. Bhawani Shankar Sharma and the needed assistance by the DSLSA. The young PLVs and other volunteers deserve encouragement and recognition for maintaining the tempo to accomplish the strenuous tasks ahead. It is because of their passion for work that we were able to handle such a large number of cases, which otherwise would not have been possible within a short period of 35 days as the clinic effectively functions only for a day in week on Saturday. They can further be encouraged by converting the clinic into an evaluated course and the volunteers should be granted some projects, material incentives (stipends etc.) and professional opportunities. Regarding their

[23] G. Mohan Gopal, *The Supreme Court and the Aam Aadmi*, Vol. 30 FRONTLINE 13 (20 April – 03 May 2013).
[24] 2012 (12) SCALE.
[25] Ved Kumari, *Advocacy for Deliquent Children through Courts*, *in* Ved Kumari and Susan L. Brooks (eds.), CREATIVE CHILD ADVOCACY: GLOBAL PERSPECTIVES 87 (2004).
[26] Tenzing Choesang, *The International Position – Judgments on the Right to Legal Aid*, Vol. 21, No. 10, LAWYERS COLLECTIVE 13 (November 2006).

training, I feel that the volunteers, in addition to class room lectures, must also be exposed to the actual functioning of the judiciary by way of visiting to the courts for two to three days. Moreover, the period for the training be extended to ten days. This would obviously increase their knowledge in the realms of judicial process to a considerable degree. Furthermore, some trips of PLVs to prisons would also prove helpful in knowing the legal problems of inmates lodged in jails. According to some "in Tihar jail alone, 73.5% of the prisoners are undertrials"[27]. Further, it is also acknowledged that lack of an adequate legal aid and a general lack of awareness about the rights of arrestees are principal reasons for the continued detention of individuals accused of bailable offences, where bail is a matter of right and where an order of detention is supposed to be an aberration.[28] The aforesaid improvements appear to be imperative for making the free legal aid movement and working of the legal aid clinics a success.

[27] *See* Editorial, *Aberration as the Norm*, Vol. XLVII No. 17 ECO. & POL. WEEKLY 7 (27 April 2013).

[28] *Id.*

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CONTENTS

BOOK REVIEWS

Human Rights Obligations of Business: Appraising the Potency of John Ruggie's UN Framework of "Protect, Respect and Remedy" by States and Corporations

Ogwezzy Michael, C[*]

Introduction

Human right issues have pervaded much of the legal and political discourse since the Second World War. While the struggle for freedom from oppression and misery is probably as old as humanity itself, it was the massive affront to human dignity that perpetrated during the War, and the need felt to prevent such horror in future, which brought the issue of human rights at the centre and led to the codification of principles and rules at international level concerning human rights and fundamental freedoms. Article 1 of the Charter of the United Nations declares "promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion", as one of the purposes of the Organization. Human rights therefore are the most fundamental rights of human beings. They define relationships between individuals and power structures, especially the state and entities like business corporations. Human rights delimit state powers and, at the same time, require states and business concerns to take positive measures in ensuring an environment that enables all people to enjoy their human rights without impediments.[1] In the past, when human rights were still regarded as a country's internal affair, other states and the international community were prevented from interfering, even in the most serious cases of human rights violations, such as genocide. That approach, based on national sovereignty, came to be challenged in the twentieth century, especially due to the actions

* Lecturer, Faculty of Law, Lead City University, Lagos-Ibadan Expressway, Ibadan, Oyo State-Nigeria, ogwezzym@yahoo.com.

1 Manfred Nowak et al., HUMAN RIGHTS: A HANDBOOK FOR PARLIAMENTARIANS, INTER-PARLIAMENTARY UNION iii (UNHCR 2005).

of Nazi Germany and the atrocities committed by other states during the Second World War. Today, human rights promotion and protection are considered a legitimate concern and responsibility of the international community. This paper proposes, therefore, to examine briefly the international attempts to develop rules and standard for protection and promotion of human rights in relation to business corporations and primarily focuses on the recent United Nations (UN) endeavour by way of John Ruggie Framework to addressee human rights obligations of states and corporations in their business activities.[2] The paper is divided in six sub-headings. The first three deal with the general exposition on 'Corporate Social Responsibility' and human rights, a survey of international attempts to develop law on the subject and chief impediments posing to such international efforts. The later three sub-headings attempt to critically examine the origin of John Ruggie Committee, its mandate, major principles on which the recommendations of the Framework report are based, and finally summarises the work.

CSR and Human Rights

Unbound extent and effect of globalisation has made Corporate Social Responsibility (henceforth CSR) an important theme around the world. Companies are confronted with this theme from various angles. The issue of corporate responsibility is finding more and more space in the press. Consumer organisations increasingly demand information about production conditions and routes to the market. Non-governmental organisations (NGOs) and trade unions approach companies with requests and demands regarding their commitment to society. Lastly, politicians have also discovered CSR as an area for policy-making and international organisations such as the European Commission are considering standardisation and regulation. CSR describes companies' responsibilities vis-à-vis society in the areas of environment, social issues and economy. It emphasises the contributions that companies must make in areas where they interact with wider society in the framework of their business activities.[3]

Until recently, human rights have played a rather marginal role in and for the conceptualisation of Business and Corporate Social Responsibility.[4] In 2003,

[2] *Id.* at 8.

[3] Confederation of German Employers' Associations (BDA), INTERNATIONAL ASPECTS OF CORPORATE SOCIAL RESPONSIBILITY (CSR): PRACTICAL ADVICE FOR COMPANIES 4-5 (European Union and International Social Policy Department, Berlin, Feb. 2006), *available at* www.bda-online.de or www.csrgermany.de (last visited Oct. 11, 2012).

[4] "Corporate Social Responsibility (CSR) is associated with the conduct of contd...

Mary Robinson stated: "it remains the case that virtually all of the corporate social responsibility debates around the world made no reference to international human rights standards."[5] Similarly, Campbell observes that for a large part, CSR codes and policies have avoided the terminology of human rights in the past. Such a dubious position appears, to have changed especially with the publication of the two reports of UN Secretary-General's Special Representative on business and human rights (SRSG). In 2008, the UN through its special agency the UN Human Rights Council published the report titled *Protect, Respect and Remedy: A Framework for Business and Human Rights*, popularly known after the name of its principal author as John Ruggie's Framework. The Framework caught the attention of scholars concerned with CSR and has led to a noticeable increase in human rights related literatures in the field.[6] The so-called "business and human rights debate"[7] is now on the CSR radar.[8] The Framework introduced a tripartite framework consisting of a corporate responsibility to respect human rights,

corporations and in particular whether corporations owe a duty to stakeholders other than shareholders. Whilst the phrase "Corporate Social Responsibility"' may be gaining momentum, the concept itself is not new. A single globally-accepted definition of CSR does not exist, as the concept is still evolving. Though, CSR can be defined in the following manner: 'the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life'; 'operating a business in a manner that meets or exceeds the ethical, legal, commercial and public expectations that society has of business'; 'a set of management practices that ensure that the company minimises the negative impacts of its operations on society while maximising its positive impacts'; 'the integration of business operations and values whereby the interests of all stakeholders including customers, employees, investors, and the environment are reflected in the company's policies and actions", *see* Kim Kercher, *Corporate Social Responsibility Impact of Globalisation and International Business*, CORP. GOV'T. eJOUR. 3, 4 (Faculty of Law, Bond University 2007), *available at* http://epublications.bond.edu.au/cgej/4 (last visited Oct. 9, 2012).

[5] M. Robinson, the Forward in BUSINESS AND HUMAN RIGHTS: DILEMMAS AND SOLUTIONS 9-12 (R. Sullivan ed., 2003).

[6] *See generally* U.N. HRC, *Protect Respect and Remedy: A Framework for Business and Human Rights* A/HRC/8/5 (April 7, 2008), *available at* http://daccessdds.un.org (last visited Oct. 10, 2012). *See also* the Secretary General, *Report on Clarifying the Concepts of "Sphere of Influence" and "Complicit"* A/HRC/8/ (April 16, 2008), *available at* http://www.reports-and-materials.org/Ruggie-companion-report-15-May-2008.pdf (last visited Dec. 10, 2012).

[7] G. Chandler, *Oil Companies and Human Rights*, 7/2 BUS. ETHICS 69-72 (2008). *See also* J.G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 839 (2007).

[8] Florian Wettstein, *C.S.R. and the Debate on Business and Human Rights: Bridging the Great Divide*, 2 BUS. ETHICS Q 739 (2012).

state's duty to protect human rights, and the need for more effective access to remedy in cases of human rights abuse. The debate on "business and human rights", today predominantly revolves around Ruggie's Framework.[9] But before we take up the Framework for any systematic evaluation, attempts made in this direction prior to the publication of the report must be analysed.

Efforts to Protect Human Rights vis-à-vis Business Prior to John Ruggie's UN Framework

The impacts of activities of companies have slowly emerged as a human rights concern over the past 30 years. During the course of the 1990s and in early 2000, coinciding with a few major incidents involving large companies and human rights abuses by them, there were increasing demands for companies to operate in compliance with human rights standards, drawn from International Human Rights Law. Several companies began to study the framework aiming to understand human rights and their responsibilities. A small number of companies started to incorporate human rights into their codes of conduct and operational policies.[10]

From the historical point of view, International Law, has primarily focused on relations between states, but has been adapting to the new climate in the post war period. Human rights groups and others have long argued that states have an obligation not only to respect human rights themselves but also to enforce human rights against private actors, including companies. Several branches of international law have made great progress and developed rules relating to the subject. Remedies, however, available in International Law with relation to unlawful business are considered weak. This weakness is exacerbated when the domestic laws of the home state are incapable of holding businesses accountable for inappropriate conduct in other jurisdictions. This issue is further complicated when the national law in the country where the inappropriate conduct occurred is either inadequate or the judicial system or government is not motivated to commence action against the offending corporation. These issues have led to a common criticism that businesses, mostly transnational corporations operate, 'outside the law' and

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[9] *Id.*

[10] John Morrison and David Vermijs, THE "STATE OF PLAY" OF HUMAN RIGHTS DUE DILIGENCE: ANTICIPATING THE NEXT FIVE YEARS 5 (IHRB, 2011), *available at* www.institutehrb.org (last visited Oct. 14, 2012).

therefore no forum capable of holding them accountable for their inappropriate conduct exists.[11]

The increasing power of transnational corporations within the global economy has brought with it a corresponding awareness of the need for an international regime that places direct responsibilities on these companies.[12] When the global resources of a transnational corporation are substantially larger than those of the country where it is operating, the government of that country may not be in a position to enforce international, or even domestic, laws against the company; especially when the company often receives the diplomatic support of the 'first world state' where it has its corporate headquarters.[13]

As far back as 1948, the Universal Declaration of Human Rights, the founding document of international human rights law, called on "every individual and every organ of society" to promote respect for human rights.[14] In the 1970s, at the height of discussion about the establishment of a "new international economic order,"[15] and two other documents: the ILO's Tripartite Declaration[16] and the Organization for Economic Cooperation and

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[11] *Supra* n. 4 at 9.

[12] Due to their immense economic power and influence, transnational corporations would be able to contribute to a better social and political environment, but in reality not a small number of them are actually involved in human rights violations. *See* Jeffery D. Sachs, U.N. MILLENNIUM PROJECT REPORT 2005- INVESTING IN DEVELOPMENT–A PRACTICAL PLAN TO ACHIEVE THE MILLENNIUM DEVELOPMENT GOALS 110, 118 (2005); *See also* Nils Rosemann, THE U.N. NORMS ON CORPORATE HUMAN RIGHTS RESPONSIBILITIES- AN INNOVATING INSTRUMENT TO STRENGTHEN BUSINESS HUMAN RIGHTS PERFORMANCE 8 (2005).

[13] Bronwen Manby, SHELL IN NIGERIA: CORPORATE SOCIAL RESPONSIBILITY AND THE OGONI CRISIS, A CASE STUDY 10-11 (Carnegie Council on Ethics and International Affairs, Case Study #20, New York), *available at* www.cceia.org (last visited Oct. 14, 2012).

[14] Art. 29, *Universal Declaration of Human Rights*, G. A. Res. 217A at 71 3d Sess., 1st Plen. Mtg., U.N. Doc A/810 (Dec. 10, 1948); *See also* L. Henkin, *The Universal Declarations at 50 and the Challenge of Global Markets*, 1 BROOK. J. INT'L L. 25 (1999).

[15] "The New Economic order should be founded on full respect for the following principles: ... regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such corporations operate on the basis of the full sovereignty of those countries," *Declaration for the Establishment of a New International Economic Order* G. A. Res. A/RES/3201, ¶ 4 (May 1, 1974).

[16] *See generally* International Labour Organisation, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (2006), *available at* http://www.ilo.org/public/english/employment/multi/download/english.pdf (last visited Oct. 11, 2012).

Development (OECD) Declaration and Guidelines[17], adopted by international bodies, explicitly referred to companies. Subsequently more documents containing standards and rules emerged at various international forums.

In 1977, the International Labour Organization (ILO), a tripartite organization with representatives of governments, business, and labour having access to its decision-making organs, adopted a Tripartite Declaration of Principles Concerning Multinational Enterprises (MNE's) and Social Policy, which committed all parties concerned to "respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations[18] as well as the Constitution of the International Labour Organisation, its principles according to which freedom of expression and association are essential to sustained progress". The ILO's declaration of 1977 is reference framework for companies with international activities. It is an instrument, negotiated and adopted by governments, worker and employer organisations, and is therefore based on broad consensus.[19] The declaration also seeks to encourage the positive contribution of business corporations towards economic and social progress and states, inter alia, that business enterprises should obey national laws, respect international standards, honour voluntary commitments and harmonise their operations with the social aims of countries, in which they operate.[20] Governments should implement suitable measures to deal with the employment impact of Multinational Enterprises; and in developing countries, business should provide the best possible wages, conditions of work (including health and safety) and benefits to adequately satisfy basic needs within the framework of government policies. But this declaration could not suffice the need of the period.

In 1976, OECD adopted a Declaration and Guidelines on International Investment for Multinational Enterprises applicable only among the rich states i.e. members of the OECD. In the OECD Guidelines for Multinational

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[17] *See generally* O.E.C.D., *Guidelines for Multinational Enterprises* (2011), *available at* http://www.oecd.org/daf/inv/mne/48004323.pdf (last visited Oct. 16, 2012).

[18] *U.N. International Covenant on Civil and Political Rights*, G.A.R 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force on March 23, 1976) and *the U.N. International Covenant on Economic, Social and Cultural Rights*, G.A.R. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force on Jan. 3, 1976).

[19] *Supra* n. 3 at 8.

[20] Caux Round Table, *International Labour Organisation, available at* http://www.cauxroundtable.org/ILOTripartiteDeclarationofPrinciplesconcerningMultinationalEnterprisesandSocialPolicy.html (last visited Oct. 10, 2012).

Enterprises, the governments of OECD countries set out general recommendations for corporate social responsibility. They relate exclusively to foreign investments and are not as often claimed by trade unions and NGOs, to trade relations. The OECD guidelines are directed to all companies active abroad, and their subsidiaries. The guidelines explicitly do not give an impression to take the shape and force of national law. Rather, they encourage companies to contribute on a voluntary basis to the economic, social and ecological development of the host countries where they are active.[21] The OECD Guidelines for Multinational Enterprises are the longest standing initiative for the promotion of high corporate standards. The Guidelines contain voluntary principles and standards for responsible business conduct in areas such as human rights, supply chain management, disclosure of information, anti-corruption, taxation, labour relations, environment, competition, and consumer welfare. The Guidelines aim to promote the positive contributions of MNEs to economic, environmental and social progress.[22] The Guidelines express the shared values of thirty nine countries consisting of the thirty OECD members[23] and nine non-member countries.[24] The adhering countries are the source of almost ninety percent of the world's foreign direct investment and are home to most major MNEs.[25]

The UN Commission on Transnational Corporations, established in 1974, also developed over the period of time a draft UN Code of Conduct on Transnational Corporations that was finally submitted in 1990. It provides

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[21] *Supra* n. 3 at 7.

[22] *Supra* n. 4 at 8-9.

[23] O.E.C.D. countries are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, U.K., U.S. The governments of 36 industrialised countries have put in place "national contact points (N.C.P.)" which answer questions about the guidelines and help to solve problems. They also look into complaints about failure to comply with the guidelines and bring together the relevant partners to try and find an amicable solution. In Germany the "national contact point" is part of the Federal German Ministry for Economy and Technology, in the Foreign Investment Department. *See* Nils Rosemann., *supra* n. 12 at 18-20.

[24] The non O.E.C.D. countries; Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia has also declared their adherence to the Guidelines.

[25] *Supra* n. 5. The O.E.C.D. created complaint mechanisms called "National Contact Points" to which individuals may bring complaints against businesses subscribing to the O.E.C.D. Guidelines, and tasked its Investment Committee with overseeing N.C.P. performance.

that "transnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate". The Code was never formally adopted by the United Nations, because of opposition from rich countries to some of its provisions, especially those relating to treatment of transnationals by host countries. Efforts to place direct responsibilities on transnational corporations at the international level picked up in the late 1990s. The Sub-commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights, in 1998, established a working group on the relationship between 'human rights and the activities of transnational corporations'. The World Bank, often involved in financing large infrastructure projects in which transnational corporations are involved, set up a working group to develop guidelines on best international practice for investment in the oil sector.[26]

Various departments of the US Government have taken steps to impose obligations concerning human rights on US business corporations operating abroad. The most significant legislative initiative in this regard was the Comprehensive Anti-Apartheid Act (CAAA) of 1986, since repealed; it was designed to limit investment in South Africa under the apartheid regime. In 1996 the United States passed legislation, partially modelled on the CAAA, giving the President authority to prohibit new investment by US citizens or companies in Burma (Myanmar) if the Burmese military government physically harmed, rearrested, or exiled opposition leader Aung San Suu Kyi, or committed large-scale oppression against the political opposition. In May 1995, President Clinton announced a set of "model business principles," a voluntary code of ethics that are to be used by US based multinational companies, which supports respect for fundamental human and labour rights, though without sufficient detail to give clear guidance.[27]

The Global Reporting Initiative (GRI), convened in 1997, was established to improve sustainability reporting practices, while achieving comparability, credibility, timeliness, and verifiability of reported information.[28] The Guidelines, first released in June 2000, revised afterwards from time to time, seek to develop globally accepted sustainability reporting guidelines. These

[26] *Id.*

[27] *Supra* n. 13. The issue of C.S.R. and human rights is now also being discussed more intensively with Brazil, India, China, Mexico and South Africa, via the G8 Heiligendamm process. The aim must be to win over these countries to the two most important instruments, the O.E.C.D. guidelines for multinational enterprises and the I.L.O. Tripartite Declaration.

[28] *See Global Reporting Initiative Guidelines, available at* http://www.globalreporting.org /guidelines/2002/dannex1.asp (last visited Oct. 13, 2012).

guidelines are also voluntary and are used by organisations in reporting on the economic, environmental, and social dimensions of their activities. The Guidelines are increasingly becoming a universally accepted method of harmonising CSR being reported in various jurisdictions. Approximately one thousand organisations worldwide incorporate the GRI Guidelines into their reporting.[29]

The Global Sullivan Principles[30] (GSP) released in 1999 consists of eight principles. It is a voluntary code of conduct seeking to enhance human rights, social justice, and protection of the environment and economic opportunity for all workers in all nations. The GSP originated with suggestions made by Reverend Dr. Leon Sullivan, that a global code be derived from the original Sullivan Principles (which were instrumental in the fight to dismantle apartheid in South Africa). The GSP were developed in consultation with leaders of business, government and human rights organisations in various nations.[31] The Reverend Leon Sullivan, author of the "Sullivan Principles" on U.S. investment in South Africa, put forward a new set of "Global Sullivan Principles" in February 1999; this voluntary code commits those companies that signed it to a set of principles, including "support for universal human rights."[32]

The UN Global Compact was put in place in 2000 by UN Secretary General Kofi Annan with the objective of strengthening cooperation between the United Nations, business and other groupings in society and thus making a worldwide contribution to more sustainable growth. The companies involved in the UN Global Compact, sets out to give closer consideration to core values in the fields of human rights, labour rights and environmental standards by implementing its ten fundamental principles in their worldwide activities. The Global Compact involves business, labour, NGOs and governments. Its original nine principles were derived from the Universal Declaration of Human Rights, the ILO's Fundamental Principles on Rights at Work and the

[29] *Supra* n. 4 at 11.

[30] The G.S.P. was developed by Rev. Sullivan, an African preacher and United Nations Secretary General Kofi Annan, in 1999, to actively involve business corporations in securing and promoting human rights and social justice.

[31] *See also* F.A.Qs. about the G.S.P., *available at* http://www.unpri.org/files/pri.pdf (last visited Oct. 15, 2012).

[32] *Id.* Within the European Union, the European Parliament Committee on Development and Cooperation adopted a report in December 1998 proposing the establishment of an independently monitored E.U. Code of Conduct for Multinationals. Although these initiatives have yet to place legally binding responsibilities.

Rio Declaration on Environment and Development. Critics have pointed to a tendency for the Global Compact Office to see the promotion of Foreign Direct Investment (FDI) in developing countries as an important objective and even to regard it as a manifestation of corporate responsibility.[33]

In August 2003 a sub-commission of the UN Commission on Human Rights presented the so-called "draft norms" on the responsibilities of corporations with regard to human rights. These draft norms took the approach that the duty of governments to enforce human rights could be transferred to companies, sometimes in a binding manner. At the sixtieth meeting of the UN Commission on Human Rights in April 2004, the draft norms were rightly thrown out.[34] The UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (UN Norms) ordinarily was an attempt to establish a comprehensive legal framework for the human rights responsibilities of companies. The Norms which endeavoured to standardize existing standards were based solely on existing International Law regarding human rights and labour standards and dealt with issues such as workers rights, corruption, security and environmental sustainability. It stated that MNEs had an obligation to 'promote, secure the fulfilment of, respect and protect human rights recognised in International and National Laws'. The UN norms were not a formal treaty under International Law and therefore had no legally binding effect.[35]

Impediments Prior to John Ruggie's Framework

Over the course of the past decades, and with increasing frequency, non governmental organizations (NGOs) and activists have publicized instances of business conduct that have hindered the ability of individuals to enjoy universally agreed upon human rights. In response to the ensuing protest and resistance on the part of the human rights community, investors, consumers, international entities, and businesses themselves have developed a variety of

[33] Rhys Jenkins, *Globalization, Corporate Social Responsibility and Poverty*, 81, 3 INTERNAL AFFAIRS 530-31 (2005); *see also* A. Zammit, DEVELOPMENT AT RISK: RETHINKING U.N.–BUSINESS PARTNERSHIPS 74 (UNRISD 2003).

[34] Confederation of German Employers' Associations (BDA), *Human Rights and Multinational Enterprises Possibilities and Limits of What Business Can Do*, 11 BDA: Berlin (May 2008), *available at* http://www.arbeitgeber.de/www/arbeitgeber.nsf/res/7F023D2C865B93F7C12574EF00544F88/$file/Menschenrechte_engl_WEB.pdf (last visited Oct. 12, 2012).

[35] *See* Nils Rosemann, *supra* n. 12.

initiatives to respond to the calls of the Business and Human Rights movement for better business conduct worldwide.[36]

As originally conceived, the human rights obligations codified in the Universal Declaration of Human Rights and core human rights treaties were intended to serve as limitations on state power alone. Non-state actors such as business entities were not considered as direct subjects of International Human Rights Law. However, the increasing power and flexibility of businesses, particularly transnational corporations, has led many scholars to seek the progressive development of human rights law so that it can effectively address businesses as well.[37]

According to David Kinley and Sarah Joseph, the legal duties of business within the various domestic laws of states can readily be clarified in most instances. Such duties may arise, for example, in the context of criminal laws, civil rights laws, and consumer protection laws. The legislative sources of human rights pressure may be on occasion encouraging. For example, trade practices laws prohibiting misleading and deceptive conduct can perhaps be used to restrain a company from portraying itself as an ethical entity when the contrary is true.[38] Unfortunately, domestic laws have proven an inadequate means for controlling the human rights excesses of certain business. In some instances, business corporations are more powerful, economically and de facto politically, than the state in which it is operating, particularly when that state is a developing nation which perceives the foreign direct investment as necessary in order to achieve satisfactory levels of economic development.[39] Business corporations may threaten disengagement if a state tries to increase its regulation of their activities, particularly if other states offer greater deregulation. For example, in the context of labour rights, this phenomenon has led to what is often called a *race to the bottom*, whereby states compete for foreign direct investment by offering the cheapest labour forces. Business corporations are therefore in a uniquely powerful position to resist attempts by states, especially the developing nations, to control their domestic operations. Hence, there is a need for other

[36] Christen Broecker, *Better the Devil You Know: Home State Approaches to Transnational Corporate Accountability*, 41 INT'L L. POL. 160, 165-67 (2008).

[37] *Id.* at 167-68.

[38] David Kinley and Sarah Joseph, *Multinational Corporations and Human Rights: Questions about their Relationship*, 27 ALTERNATIVE L.J. 8-9 (2002).

[39] *Id.*, *see e.g.*, the Ok Tedi Mine Continuation Act, 2001 passed by the Papua New Guinea Parliament on Dec. 12, 2001. The Act indemnifies B.H.P. Billiton from damages for environmental pollution at its Ok Tedi copper mine, A.A.P., Press Notice, (Dec. 12, 2001).

sources of business human rights obligations. The direct legal human rights duties of business corporations in International Law are particularly opaque, despite the existence of numerous relevant international documents. Most International Law documents regarding corporate human rights duties are not strictly legally binding, though it is possible that some soft law provisions may have hardened into legal obligation. Furthermore, the indirect duties imposed via the doctrine of horizontality have rarely been clarified in international human rights case law, with only a few cases, mainly before the European Court of Human Rights, addressing the issue of a states' alleged failure to control private sector human rights abuse.[40]

The Ruggie's Mandate as UN Secretary General's Special Representative on Business and Human Rights

In the wake of the controversy surrounding the 'draft norms' 2003, the Commission on Human Rights decided to pursue an alternative approach for addressing the intersection between business and human rights.[41] In 2005, the Commission requested that the UN Secretary General appoint a Special Representative (SRSG) on the issue of "human rights and transnational corporations and other business enterprises."[42] The Secretary General did so later that year, selecting John Ruggie, a former Assistant Secretary General of the UN and the chief architect of the Global Compact, 2000.[43] Ruggie's Mandate, which began in July 2005, obliged him in part "to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights" and "to elaborate on the role of states in effectively regulating and adjudicating the role of transnational corporations and other business enterprises.[44]

This special representative, a Harvard Professor John Ruggie, firmly rejected the UN 'draft norms' since they would not only transfer human rights, which are addressed to states, to companies in a binding manner and without justification, but they would also under some circumstances undermine

[40] *Id.*
[41] *Supra* n. 12 at 176.
[42] H.R. Res. 2005/69, 1, U.N. Doc. E/CN.4/RES/2005/69 (April 20, 2005).
[43] Ruggie's Mandate originally extended from July 2005 through July 2007.
[44] U.N. ECOSOC, *Promotion and Protection of Human Rights: Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, U.N. Doc. E/CN.4/2006/97 at 2 (Feb. 22, 2006).

efforts to reinforce states' responsibility for human rights. John Ruggie's exact words were:

> The rejected UN Norms exercise became engulfed by its own doctrinal excesses. Even leaving aside the highly contentious though largely symbolic proposal to monitor firms and provide for reparation payments to victims, its exaggerated legal claims and conceptual ambiguities, created confusion and doubt even among many mainstream international lawyers and other impartial observers.... What the Norms have done, in fact, is to take existing state-based human rights instruments and simply assert that many of their provisions now are binding on corporations as well. But that assertion itself has little authoritative basis in international law hard, soft, or otherwise... . Indeed in several instances, and with no justification, the Norms end up imposing higher obligations on corporations than on States by including standards binding on corporations instruments that not all States have ratified or have ratified conditionally and even some for which States have adopted no international instrument at all. Far more profound is the fact that corporations are not democratic public interest institutions and that making them, in effect, co-equal duty bearers for the broad spectrum of human rights and for "the obligation to promote, secure the fulfilment of, respect, ensure respect and protect" those rights, as the General Obligations of the Norms put it, may undermine efforts to build indigenous social capacity and to make Governments more responsible to their own citizenry.[45]

Emergence of the UN Framework for Business and Human Rights

In June 2008, after three years of extensive research and consultations with governments, business and civil society on five continents, the Special Representative concluded that the major reason for the cumulative failure and difficulty in making progress in the business and human rights area, had been due to the lack of an authoritative focal point around which actor's expectations could converge a framework that clarified the relevant actor's responsibilities, and provided the foundation on which thinking and action could build over time.[46]

The Special Representative presented such a framework to the Human Rights Council in June 2008. The *"Protect, Respect and Remedy" Framework* rests on three pillars: one, the state's duty to protect against human rights abuses by

[45] *Supra* n. 3 at 11.
[46] *See supra* n. 5.

third parties, including business, through appropriate policies, regulation, and adjudication; two, the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others, to address adverse impacts that occur; and, three, greater access to victims for effective remedy, both judicial and non-judicial.

The Human Rights Council unanimously welcomed what is now referred to as the *UN Framework*, marking the first time that a UN inter-governmental body had taken a substantive policy position on the issue of business and human rights. The Council also extended the Special Representative's mandate until 2011 with the task of "operationalizing" and "promoting" the framework. The main sponsor of the resolution authorizing the Special Representative's mandate is Norway, with Argentina, India, Nigeria and Russia as co-sponsors one country from each UN regional groups.

In June 2011, the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights presented to it by Professor John Ruggie. This move established the Guiding Principles as the global standard of practice that is now expected of all states and businesses with regard to business and human rights. While they do not by themselves constitute a legally binding document, the Guiding Principles elaborate on the implications of existing standards and practices for states and businesses, and include points covered variously in international and domestic law.[47]

The UN Framework has been well received by key stakeholder groups: a number of individual governments have utilized it in conducting their own policy assessments; several major global corporations are realigning their due diligence processes based on it; civil society actors have employed it in their analytical and advocacy work; and major international organizations have drawn on it in adapting their own business and human rights policies and standards.[48]

[47] U.N. Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide*, HR/PUB/12/02, 1 (2012).

[48] In June 2011, John Ruggie, United Nations Special Representative on Business and Human Rights, presented to the U.N. Human Rights Council his *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, the result of his six-years study on business and human rights. Building on his *"Protect, Respect and Remedy" Framework*, released in 2008, the Principles outlined the state's duty to protect human rights, the corporation's responsibility to respect human rights, and the need for access to remedy. On June 16, 2011 in an unprecedented step, the U.N. Human Rights Council unanimously contd...

The State Duty to Protect as the First Pillar of John Ruggie's UN Framework

The first pillar of John Ruggie's UN Framework is the States' "duty to protect" against human rights abuses committed by third parties, including business, through appropriate policies, regulation and adjudication. It highlights that States have the primary role in preventing and addressing corporate-related human rights abuses. The Special Representative has documented the legal foundations of this duty, policy rationales and scope in his 2008 and 2009 reports to the Council. Although States interact with business in numerous ways, many States currently lack adequate policies and regulatory arrangements for effectively managing the complex business and human rights agenda. While some states are moving in the right direction, overall state practice exhibits substantial legal and policy incoherence and gaps, which often entail significant consequences for victims, companies and states too. The most common gap is the failure to enforce existing laws. Legal and policy incoherence arises because the departments and agencies which directly shape business practices including corporate law and securities regulation, investment, export credit and insurance, and trade typically work in isolation from, and uninformed by, their government's own human rights obligation. In his reports to the Council, the Special Representative has proposed five priority areas through which states can try to promote corporate respect for human rights and prevent corporate related abuse. They include: (a) striving to achieve greater policy coherence and effectiveness across departments working with business, including safeguarding the state's own ability to protect rights when entering into economic agreements; (b) promoting respect for human rights when states do business whether as owners, investors, insurers, procurers or simply promoters; (c) fostering corporate cultures respect for human rights at home and abroad; (d) devising innovative policies to guide companies operating in conflict-affected areas; and (e) examining the cross-cutting issue of extraterritoriality.[49]

endorsed the Principles. The full text of the Principles is *available at* http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf. (last visited Oct. 11, 2012).

[49] *Supra* n. 47.

Corporate Responsibility to Respect as the Second Pillar of Ruggie's UN Framework

The corporate responsibility to respect human rights according to John Ruggie's report means acting with due diligence to avoid infringing on the rights of others, and addressing harms that do occur. The use of the term "responsibility" rather than "duty" is meant to indicate that respecting rights is not currently an obligation that international human rights law generally imposes directly on companies, although elements of it may reflect in domestic laws. It is a global standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Human Rights Council itself. A company's responsibility to respect, applies across its business activities and through its relationships with third parties connected with those activities such as business partners, entities in its value chain, and other non-State actors and State agents. In addition, companies need to consider the country and local contexts for any particular challenges they may pose and how those might shape the human rights impacts of the company activities and relationships.[50]

Companies can affect virtually the entire spectrum of internationally recognized rights. Therefore, the corporate responsibility to respect applies to all such rights (although some rights typically will be more at risk than others in particular contexts).[51] Many companies say that they respect human rights. In order to "know and show" that they are meeting this responsibility, companies need a human rights due diligence process, whereby they become aware of, prevent, and address their adverse human rights impacts. Drawing on well established due diligence practices and combining them with what is unique to human rights, the UN framework describes the core elements of human rights due diligence as: based on a statement of commitment of respecting rights and supporting policies, human rights due diligence should include assessing human rights impacts, integrating respect for human rights

[50] *Id.*

[51] *Id.* For an authoritative list of internationally recognized rights, companies should look to the Universal Declaration of Human Rights, 1948, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, 1976 and the core conventions of the International Labour Organization, 1919. The principles, these instruments embody, are the most universally agreed upon by the international community, and comprise the human rights benchmarks by which other social actors judge companies.

across relevant internal functions and processes, and tracking as well as communicating performance.[52]

Access to Effective Remedy as the Third Pillar of UN Framework

Access to effective remedy forms the third pillar of John Ruggie's Framework on Business and Human Rights. This is because even where institutions operate optimally, adverse human rights impacts may still result from a company's activities. The victim(s), therefore, must be able to seek redress. Effective grievance redressal mechanisms play an important role in both, the state duty to protect and the corporate responsibility to respect. As part of their duty to protect against business-related human rights abuse, states must take appropriate steps within their territory and/or jurisdiction to ensure that when such abuses occur, those affected have access to effective remedy through judicial, administrative, legislative or other appropriate means. Currently, access to judicial mechanisms for business-related human rights claims is often most difficult where the need is the greatest as a result of both legal and practical obstacles. There is currently an uneven patchwork of non-judicial mechanisms, including mechanisms at the company level, national level such as national human rights institutions, or National Contact Points in states that have signed the OECD Guidelines on Multinational Enterprises, and at the international level such as the Compliance Advisor Ombudsman for the International Finance Corporation. Non-judicial mechanisms, whether state-based or independent, should conform to principles of legitimacy, accessibility, predictability, rights-compatibility, equitability and transparency. Company level mechanisms should also operate through dialogue and engagement rather than the company itself acting as adjudicator of its own actions.[53]

Conclusion

The potency of the UN tripartite framework to protect, respect and remedy as proclaimed by John Ruggie, if complied with by states, corporations and other stakeholders, will serve as a remarkable tool and the benchmark in ensuring that human rights obligations of States and the guiding principles for business are fulfilled.[54] It will help in advancing the course of human

[52] *Id.*

[53] *Id.*

[54] They are based on 47 consultations and site visits in more than 20 countries; an online consultation that attracted thousands of visitors from 120 countries; and voluminous research and submissions from experts from all over the world- *U.N.* contd...

rights as a veritable component of corporate social responsibility in the business world, curbing corporate greed and will put states and corporations on guard towards issues of human rights promotion and protection as it relates to their business activities. The framework will further fill the gap that existed in other mechanisms developed by governmental, inter-governmental organisations, NGOs and other stakeholders in the corporate world to advance human rights in business but could not succeed because of lack of commitments or impending gaps in their enforcement procedures. Furthermore, framing of policy challenges can have profound consequences for assigning responsibilities to relevant actors and determining whether the combination is capable of meeting the overall policy objectives. The business and human rights agenda remains hampered because it has not yet been framed in a way that fully reflects the complexities and dynamics of globalization and provides governments and other social actors with effective guidance. The Ruggie Framework has been able to achieve it. Insofar as governance gaps are at the root of the business and human rights predicament, effective responses must aim to reduce those gaps. But individual actions, whether by States or firms, may be too constrained by the competitive dynamics of business, as explained earlier. Therefore, more coherent and concerted approaches are required. The tripartite framework of "protect, respect, and remedy" can assist all social actors, governments, companies, and civil society to reduce the adverse human rights consequences of these misalignments, now and may be in future.

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1 O.H.C.H.R.: *News Release: New Guiding Principles on Business and Human Rights* endorsed by the U.N. Human Rights Council, (June 16, 2011), *available at* http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf (last visited Oct. 21, 2012).

Post-conversion Legal Hurdles in Matrimonial Relations–Issues and Interpretations–Settled and Unsettled Law

*P.B. Pankaja**

Introduction

India is constitutionally recognized as a secular country[1] wherein religions are permitted to thrive and establish their inherent worth and intrinsic values. Even at the time of making of the Constitution, the founding fathers have acknowledged the significance of religious freedom as one of the fundamental freedoms in the context of historical, cultural and political developments of the country and adorned it both in the Preamble[2] of the Constitution and in the part on Fundamental Rights.[3] Voluntary conversion from one religion to another religion is one of the constituents of the religious freedom.

Religion, truly speaking, is a matter of personal faith and belief and is believed to be a link between the Man and Divinity and a source of internal refinement. Religion shapes the way of life of an individual, his outlook and his social relations. Faith in religion is exhibited through religious practices, most of which are followed according to one's own convictions. Though religious status is attributed to an individual by birth on the basis of his or her parents' religious status, on attaining majority one may opt to come out of the religion and embrace another religion of one's own choice. This process of abandoning one's faith in one's religion and embracing another religion is popularly known as 'Conversion', whether the process is voluntary or allured

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* Associate Professor, Law Centre-1, Faculty of Law, University of Delhi.

1 The Constitution (42nd Amendment) Act, 1976.

2 Preamble to the Constitution of India, 1950: "We the people of India, having solemnly resolved ... to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship... ."

3 Art. 25 guarantees freedom of conscience and free profession, practice and propagation of religion.

or forced one. Conversion results in change in the religious identity and the consequent changes in the legal status.

Family relations, in most cases, derive their strength from the religion because, marriage, the foundation of family, comes into existence by rituals, though they are varied in nature and modalities depending on the religious status of the parties to the marriage.[4] The Hindu Marriage Act, 1955, the Muslim Law of Marriage, the Dissolution of Muslim Marriage Act, 1939, the Indian Christian Marriage Act, 1882, the Indian Divorce Act, 1869[5] and the Parsi Marriage and Divorce Act, 1865 are some of the matrimonial laws regulating the matrimonial relations of the parties who marry under their respective personal laws.

On one hand, the Constitution of India, 1950 recognizes freedom of religion as one of the fundamental rights of the individuals and on the other hand, personal laws treat conversion as a matrimonial guilt having the potential not only to destabilize matrimonial status quo but also to impact other dimensions of family relationship such as guardianship, succession and adoption. Conversion from one religion to another has far reaching legal consequences. As religious status of a person is a major determining factor for entering into a matrimony, post-marriage change of religion by one spouse unilaterally has all the potentials of wrecking the marriage and bring in un told misery to the non-converted spouse, who is left with no other option except to leave the converted spouse or to get along with him or her compromising to the situation. Legal hurdles are to be faced by the converted spouse also, in case he or she wants to obtain any matrimonial relief. They, quite often, pose a great challenge to the administration of justice as between the spouses, due to absence of certain express provisions in certain personal laws to address the situations. This impels the judiciary to fill the lacuna through judicial interpretations. However, taking into consideration the limitations of judicial interpretations, there is a need to strengthen the existing legislations to address the dismal situations. This paper is an attempt to bring out various legal hurdles that the converted spouse has to face and to look into the adequacy of law to address the situations in the light of judicial interpretations. This paper also limits its analysis to the matrimonial relations only and not to the entire range of family relations.

4 The Special Marriage Act, 1954 is an exception under which two persons, irrespective of their religious status, can marry and the marriage takes place as a civil ceremony.

5 The Indian Divorce (Amendment) Act, 2001 renamed it is as the Divorce Act, 1869.

Approach of different Religions towards Conversion

According to *Sastric* Hindu law, it was believed that 'a Hindu is born and not made'. This means no one could claim to be governed by Hindu law simply by professing Hinduism if he was not a Hindu by birth. Hinduism initially did not contemplate conversion of non-Hindus into Hindu fold. The *Dharma Sastras* did not prescribe any ceremony for conversion to Hinduism. One of the reasons was that till the advent of Muslims in India, India was inhabited by Hindus only. Later on historical evidences throw light on the fact that many foreigners called *Gujjars* and *Hunas* converted to Hinduism for political reasons. During the reign of Mughals,[6] conversion from Islam to Hinduism was not tolerated but conversion from Hinduism to Islam was welcomed. Advent of Britishers into India further made the process of conversion from Hinduism to Christianity very easy and the main legal hurdle of forfeiture of property rights standing in the way of conversion was removed by passing the Caste Disabilities Removal Act, 1850. Thus as time passed, conversion 'from' Hinduism and 'to' Hinduism started taking place and now in modern context 'a Hindu is not only born but also made'. Conversion and reconversion are legally recognized[7] as modes of becoming Hindus.

Islam forbids conversion of Muslims to other religions and converts are called as apostates and apostasy is regarded as treason, an offence against God and legally punishable.[8] However, non-Muslims are allowed to convert as Muslims and get their names changed. A newly converted Muslim is called a *Mullah.*

Christianity also forbids conversion to other religions but freely allows non Christians to embrace Christianity.[9] During colonial period, legal protection

6 Emperor Akbar was an exception known for his religious tolerance.

7 The common provision under S. 2 of the Hindu Marriage Act, 1955; the Hindu Succession Act, 1956; the Hindu Maintenance and Adoptions Act, 1956 and S. 3 of the Hindu Minority and Guardianship Act, 1956 recognize that a person can be a Hindu by conversion or by reconversion.

8 Most of the Muslim countries like Iran, Egypt, Yemen, Saudi Arabia, Afghanistan and Pakistan prescribe death sentence to apostates. The legal precedent stretches back to the 7th century when Prophet Mohammed ordered a Muslim to death who joined the enemies of Islam at the time of war. *See generally* Lionel Beehner, *Religious Conversion and Sharia Law, available at* www.cfr.org (last visited Nov. 25, 2012).

9 There are many controversial events of induced mass conversion of Hindus into Christianity and Buddhism for social reasons, not relevant for the present discussion, resulting in communal riots such as Nagpur conversion of 1956 wherein half a million Hindu Dalits became Buddhists under the leadership of Dr.

contd...

was given to converts to Christianity in the form of Caste Disabilities Removal Act, 1850.[10]

Parsis in India belong to Zoroastrian faith and it is judicially regarded as a non-proselytizing faith and conversion to the Zoroastrian religion is against their usage and customs.[11]

Legal Implications of Conversion on Matrimonial Relations

As the approach to conversion is different under different personal laws, and quite often it becomes a source of conflict of laws. As the safety nets provided to converted spouse under the new religious law is not uniform, the legal hurdles faced by the converted spouse also vary from religion to religion.

Position under Hindu Law

Continuity of marriage: Under Hindu law conversion of a spouse does not automatically put an end to the marriage. Neither the converted nor the non-converted spouse can validly marry another person without dissolving their marriage.

Remedies for the non-converted spouse: Under the Hindu Marriage Act, 1955, conversion is a ground for judicial separation or dissolution of marriage. A marriage may be dissolved[12] or a decree of judicial separation[13] may be

Ambedkar; Mass conversion of Hindus in Gurgaon, Andhra, Delhi and Rajgarh in 2002 and in Rajasthan in 2006 are other instances of conversion at the instance of Christian Missionaries because of which many state governments are cracking down upon forced or lured conversion by enacting relevant laws. *See* Niyogi Committee Report (1956) and Wadhwa Commission of Inquiry Report (1999), *available at* http.www.hvk.org/specialrepo/wadhwamail.html (last visited Nov. 25, 2012).

10 It has abolished the customary law of Hindus and Muslims which entails forfeiture of rights to inheritance consequent upon conversion.

11 *Sir Dinshaw M. Patel* v. *Sir Jamsetji Jiji Bhai*, (1909) 11 L.R. 25 *as quoted* in Paras Diwan, *Family Law* 8 (9th ed. 2010). The case is popularly known as *Parsi Panchayat* case, wherein the issue raised was whether Mrs. Tata, a French Christian lady married to Indian Parsi and had undergone *Navjyot* ceremony would be entitled to the privileges of Parsi faith, as objected by Parsi *Panchayat* of Bombay. The judges after hearing the elaborate arguments of both sides upheld the objections as valid and in case of any undesirable conversion made, the alien convert would be segregated from the privileges of the Parsi faith like entry to Fire temple, burial in the Tower of Silence *etc.* Parsi religion never attempts to convert others into its fold so as to maintain its distinct characteristic features.

12 S. 1(ii), the Hindu Marriage Act, 1955.

obtained, on a petition by either the husband or the wife, if the other party has ceased to be a Hindu by conversion. These reliefs are provided only to the non-converted spouse against the converted spouse. This ground is also exempted from the operation of Section 13A[14] whereby in case of petition for divorce, the court cannot pass a decree for judicial separation as an alternate relief which is generally considered as a lesser remedy to see whether there is any chance for reconciliation and the marriage is not hastily dissolved.

A Hindu wife has the exclusive right to separate residence and maintenance from her husband, on the ground of his conversion.[15] Likewise, a Hindu wife who is a maintenance holder and residing separately forfeits her right to separate residence and maintenance if she converts to another religion.[16]

Thus, a husband has to opt for conversion at the risk of losing the spousal status or being separated judicially or paving the way for wife's separate residence with an obligation to maintain her. A wife has to opt for conversion at the same risk of losing her spousal status or being separated judicially. If she is a maintenance holder with a right to separate residence, her conversion lands her into losing those legal entitlements.

Remedies for the converted spouse: The question whether the converted spouse can not have the remedy of divorce or judicial separation and if he or she can, then whether he or she would be governed by his or her pre-conversion law or post-conversion law has always remained a matter of debate in the legal field. The answer to this question depends on to which religion he or she had converted.

Situation 1: Two Hindus married under the Hindu Marriage Act, 1955. Husband becomes a Muslim. Whether he can pronounce *talaq* under Muslim law as he is a Muslim? Or whether he can or he has to file a petition for divorce under Hindu Marriage Act?

Hindu Marriage Act does not expressly provide an answer to address this situation. The matter is settled through judicial decision in *Vilayat Raj* v. *Sunila*[17]. It was a case wherein the parties were married under Hindu Marriage Act but the husband became a Muslim later on. When he filed a

13 *Id.* S. 10(1).

14 *Id.* S. 13A provides for court's discretion to grant alternate relief of judicial separation in a petition filed for divorce.

15 S. 18(2)(f), the Hindu Adoptions and Maintenance Act, 1956.

16 *Id.* S. 18(3).

17 A.I.R. 1983 Del. 351.

petition for Divorce under the Hindu Marriage Act, 1955 on the ground of cruelty, the wife challenged his right to file under the said Act since he was no more a Hindu. The important issue evolved in that case was whether the petitioner can be a non-Hindu under Hindu Marriage Act? In the instant case the Delhi High Court clarified the position by holding:

> A marriage performed under the Hindu Marriage Act can be dissolved only in accordance with the provisions of that Act because Section 2(3) of the Act[18] contemplates a person who was a Hindu at the time of Marriage but has since ceased to be a Hindu at the time when the petition is presented... . It is necessary to notice that in Section 5 it is mentioned that "a marriage may be solemnized between any two Hindus... . But Section 13 does not speak of Hindus. It says "on a petition presented by either the husband or the wife" i.e., the legal requirement to be the petitioner is not whether he is a Hindu but he should be 'the spouse'... . Moreover what is sought to be dissolved under the Act is a Hindu marriage and the relevant date on which both the parties must be Hindus, is the date of the marriage.[19]

Situation 2: Two Hindus married under Hindu Marriage Act. Both convert to Islam. Whether Muslim Husband can pronounce *talaq* against Muslim wife? Or he has to take recourse to Hindu Marriage Act? Whether she, being a Muslim wife, can seek divorce or judicial separation against Muslim husband under Hindu Marriage Act or can have recourse to the Dissolution of Muslim Marriage Act, 1939?

The Hindu Marriage Act does not expressly provide an answer for this situation. The Delhi High Court in the same case[20] further extended the same logic and observed:

> If the Act is to be interpreted to imply that both the parties must be Hindus or atleast the petitioner must be a Hindu, this would make nonsense of the Act in certain cases. For instance, both the parties embraced Islam, could the Hindu marriage be repudiated according to the Islamic tenets? It would appear not; for it is only a Muslim marriage which can be repudiated in that manner. A unilateral

[18] S. 2(3) of the Act reads: "The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section."

[19] *Supra* n. 17, ¶ 23.

[20] *Id.*

> dissolution by the husband saying "talaq", "talaq", cannot be permissible manner of breaking the bonds of a Hindu marriage.[21]

This explanation will hold good even for the converted wife and the Dissolution of Muslim Marriage Act, 1939 does not provide any remedy to her. A reference was made in that case[22] to *Andal Vaidyanathan* v. *Abdul Allam Vaidya,*[23] in which the Madras High Court observed that a statutory marriage can only be dissolved in accordance with the statute and a person married under the Act cannot escape from its provisions by merely changing his religion.

Situation 3: Two Hindus marry under Hindu Marriage Act. Husband converts to Christianity. Whether he has to seek divorce under the Hindu Marriage Act, 1955 or under the Convert's Marriage Dissolution Act, 1866?

The answer to the question whether the same logic applied in situation 1 will apply to this situation also is to be looked into in the light of existing law. The case of Hindu convert to Christianity receives a differential treatment. A Hindu convert to Christianity, either husband or wife, is permitted to file a petition for Restitution of Conjugal Rights under Sections 5 and 6 of the Convert's Marriage Dissolution Act, 1866 in case the non-convert spouse deserts the other or lives separately on account of conversion. If restitution is not complied with by the Hindu spouse, the converted spouse may ultimately seek dissolution of marriage.

This express provision of law has contributed for legal anomaly in three ways. Firstly, in case of husband being the converted Christian, there will be a conflict of law situation wherein the Hindu wife's statutory right of Judicial Separation under Section 10 of the Hindu Marriage Act or Right to separate residence and Maintenance under Section 18(2) of the Hindu Adoptions and Maintenance Act, 1956 on the ground of husband's conversion will come into conflict with his right under post-conversion law. Secondly, by this provision, restitution against wish and divorce are thrust upon the Hindu wife unjustly. Thirdly, this enables the converted husband to take advantage of his own matrimonial wrong of conversion in the form of restitution and then divorce.

For seeking divorce on any other ground, still he has to go under the Hindu Marriage Act, 1955. But as the marriage can be easily dissolved unilaterally under his post-conversion law merely on the ground of non compliance with

[21] *Id.* ¶ 28.

[22] *Id.* ¶ 35.

[23] A.I.R. 1946 Mad. 446.

Restitution of Conjugal Rights, there is no need for him to seek divorce under the Hindu Marriage Act by going through a tough task of proving any matrimonial guilt against the non converted spouse.

Apart from this anomaly, there exists another anomaly in the form of Indian Divorce Act, 1869 which says that this Act is applicable if the petitioner or the respondent is a Christian. In *Pramilla Khosla* v. *Rajnish Kumar Khosla*[24] the parties were Hindus and married as Arya samajis. Later the wife changed her religious identity as a Christian and sought divorce under the Indian Divorce Act. The Delhi High Court held that as per Section 2(2) of the Indian Divorce Act,[25] a Hindu marriage can be dissolved under the Indian Divorce Act as the Petitioner was a Christian at the time of presenting the petition though marriage was not performed according to Christian rites. Here it is to be submitted that the Indian Divorce Act will apply only if the marriage is solemnized under the Christian Marriage Act, which requires that either party to the marriage shall be a Christian; whereas the Convert's Marriage Dissolution Act, 1866 is applicable to a converted Christian, whose marriage took place under the Hindu Marriage Act, 1955.

It is to be noticed here that the decision rendered in *Pramilla Khosla* and the judicial interpretation in *Vilayat Raj* by the same Delhi High Court in 1979 and 1983 respectively, not settled by the Apex court, drive us to a conclusion that relief can be had either under the Hindu Marriage Act by virtue of former interpretation or under the Indian Divorce Act by virtue of later decision. No doubt such an anomaly has potentials of conflicting decisions if one spouse resorts to one Act and the other to the other Act. In the absence of clear and express provision under the Hindu Marriage Act to address the situation, anomalies are certain to continue. It also brings to the forefront the fact that a Hindu's conversion to Islam and his conversion to Christianity have different legal consequences. A Hindu convert to Christianity has two options whereas a Hindu convert to Islam has no option except to seek remedy under his pre-conversion law.

Situation 4: Two Hindus marry under the Hindu Marriage Act. Both become Christians. Under which law either can seek divorce?

[24] A.I.R. 1979 Del. 78.

[25] S. 2(2) the Indian Divorce Act, 1989 reads: "Nothing hereinafter contained shall authorize any court to grant any relief under this Act except where the petitioner or the respondent professes the Christian religion."

The analogy made in situation 3 will hold good here also. They cannot seek divorce on the ground of conversion of either party either under the Hindu Marriage Act, 1955 or under the Convert's Marriage Dissolution Act, 1866. For remedy on any other ground, if we go by judicial decision in *Vilayat Raj*, the law that governs them is the Hindu Marriage Act, 1955 only and if we go by legislative provision, the law that may be opted by them is the Convert's Marriage Dissolution Act, 1866.

Situation 5: Two Hindus marry under Hindu Marriage Act. Husband becomes a Christian and wife becomes a Muslim.

It is a strange but not a rare situation. As there is express provision under Christian law the spouse converted to Christianity can seek the remedy under post-conversion law. As there is no such similar provision in Muslim law, the spouse converted to Islam has to limit herself to pre-conversion law.

Thus Hindu Marriage Act, 1955 by default contributes for these anomalies and it is high time that the legislators identify this lacuna and make the law crystal clear to address the various situations.

Position under Muslim Law

Continuity of marriage: The impact of conversion on the continuity of marriage is not uniform but tri-dimensional.

(a) Where a Muslim husband renounces Islam, his marriage with his Muslim wife is automatically dissolved. Marriage does not continue. Both are free to remarry anybody else.

(b) If the wife renounces Islam it shall not by itself operate as dissolution.[26] Both continue to be husband and wife. She would be committing Bigamy if she remarries anybody without dissolving her Muslim marriage as per the Dissolution of Muslim Marriage Act, 1939.

(c) If a non-Muslim woman converted to Islam and marries under Muslim law and re-embraces her original religion, then her marriage will be automatically dissolved as in the case of husband's conversion.[27]

Remedies for the non converted spouse: In situation (a) the wife is left with no remedy except to compromise to the situation. Even if the parties **desire** to

[26] First *Proviso* to S 4, the Dissolution of the Muslim Marriage Act, 1939.

[27] *Id.* second *Proviso* to S. 4.

live together as husband and wife, the law does not permit it. However she is entitled to all the benefits available to her as a divorced woman.

In situation (b) the husband may opt to live with her or may divorce her through his prerogative of *'talaq'* for no reason provided under Muslim law.

In situation (c) even if the husband wants to live with her, Muslim law does not permit.

Remedies for the converted spouse: In situation (a) on husband's conversion, as marriage is automatically dissolved, if the converted husband wants to remarry the same woman, he, as a converted Hindu, can do so under the Special Marriage Act, 1954, or as a converted Christian he can remarry her either under the Special Marriage Act or under the Indian Christian Marriage Act, 1872.

In situation (b) on wife's conversion, if the husband prefers to continue the matrimony and wife wants to seek divorce, on a ground other than her own conversion, she, as a non-Muslim, is still protected under Section 2 of the Dissolution of Muslim Marriage Act, 1939, irrespective of the religion which she embraced, provided she proves any of the ground mentioned for divorce under the Act. The words used in Section 2 of the Act are "a woman married under Muslim law", and not a "Muslim woman". Even though she is no longer a Muslim, she can get her marriage dissolved under the said Act because her marriage took place under Muslim law and she is a 'woman married under Muslim law'.

In situation (c) on wife's reconversion to her original religion, as marriage is automatically dissolved, question of divorce does not arise and in case of willingness to remarry the same husband, the remedies discussed in situation (a) will apply to her also.

Classical Muslim law made a distinction between conversion to Islam of one of the spouses taking place in a country subject to the laws of Islam and in a country where the law of Islam is not the law of the land.[28] In the first case, when one of the parties embraces Islam he or she must offer Islam to the other spouse; and if the latter refuses to adopt Islam, then the judge should separate the couple. In the later case, after the lapse of three months after adoption of Islam by one spouse, the marriage is automatically dissolved. In *Aiyasabib* v.

[28] *See Robasa Khanum* v. *Kodadad Bomanji Irani,* A.I.R. (34) 1947 Bom. 272: (1946) 48 Bom. L.R. 864.

Subhash Chandra[29] parties were Hindus married according to Hindu ceremonies. After some time the wife converted to Islam and thrice offered Islam to her husband. On his refusal, she sought dissolution of marriage as per old Muslim law and this was the case where the Court granted divorce observing that the law applicable would be law of the converted spouse.

But this classical rule has been given a go bye by virtue of the Dissolution of Muslim Marriage Act, 1939 as referred to in *Robasa Khanum* case[30]. It was a case where both the parties were Zoroastrians married under Zoroastrian law. Wife became a Muslim and filed a suit for declaration of dissolution of their marriage on the ground of husband's refusal to become a Muslim and that the requisite period had passed. Bringing out the apparent conflict in two personal laws the Court observed:

> We have a Muslim wife according to whose personal law conversion to Islam, if the other spouse does not embrace Islam, automatically dissolves the marriage. We have a Zoroastrian husband according to whose personal law such conversion does not bring about the same result... . It is difficult to see why conversion of one party should automatically result in dissolution of marriage if the other party does not want it. It would be tantamount to permitting the wife to force a divorce upon her husband... Moreover, Section 4 of the Dissolution of Muslim Marriage Act, 1939 provides that renunciation of Islam by a Muslim woman shall not by itself operate to dissolve her marriage. This is a very clear and emphatic indication that the Indian legislature has departed from the rigor of the ancient Muslim law and has taken a more modern view.[31]

Position under Christian law

Continuity of marriage: Conversion of a spouse does not dissolve the marriage ipso facto. Neither the converted nor the non-converted spouse can validly marry another person without dissolving their marriage.

Remedies to the non-converted spouse: Christians who marry under the Christian Marriage Act are, for the purpose of matrimonial remedies, governed by Indian Divorce Act, 1869, as amended as the Indian Divorce (Amendment) Act, 2001.

[29] 49 C.W.N. 745.
[30] *Supra* n. 28.
[31] *Id.* ¶ 4

Prior to 2001, the Act did not provide uniform grounds for husband and wife for Divorce.[32] The only ground on which the Christian husband could seek divorce was adultery of the wife. Conversion of wife was no ground for either divorce or judicial separation for the non converted husband. On the other hand, wife had more grounds and if husband had left Christianity and had gone through a form of marriage with another woman she could seek divorce.[33] However, mere conversion of husband, as a single ground, was no ground for divorce to the wife.

Under the Indian Divorce (Amendment) Act, 2001 the grounds under Section 10 are equalized and conversion of either spouse is a ground for divorce for the other spouse.[34]

Remedies to the converted spouse: (a) The spouse converted to Hinduism or Islam will be governed by pre-conversion law only i.e., Indian Divorce Act for divorce on grounds other than one's own conversion or for judicial separation[35] on the grounds of adultery, cruelty or desertion for two or more years (b) If both convert as non-Christians, then too, the law applicable will be only the Indian Divorce Act for getting divorce as the new religion, whether Hindu law or Islam law, does not provide remedy for those who are not married under the respective law.

Position under Parsi Law

Continuity of marriage: Conversion of a spouse does not ipso facto dissolve the marriage. The marriage continues to subsist till the non-convert spouse opts out from marital bond.

Remedies to the non-converted spouse: Under the Parsi Marriage and Divorce Act, 1936, change of religion by one spouse is a ground for divorce or judicial separation to the non-converted spouse, provided the petition for divorce is filed within two years after the plaintiff came to know of the fact.[36] Prior to the Amendment of the Act in 1988, the ground was that the "defendant has ceased to be a Parsi". The words "by conversion to another religion" have been added in 1988.

[32] S. 10, the Divorce Act, 1869.

[33] *Id.*

[34] *Id.* S. 10(ii) runs: "[I]f the respondent has ceased to be a Christian by conversion to another religion."

[35] *Id.* S. 22.

[36] SS. 32(j) and 34 respectively, the Parsi Marriage and Divorce Act, 1936.

Remedies to the converted spouse: Whether one spouse converts or both the spouses convert and conversion is to either Christianity or to Islam or to Hinduism, the law is very clear in saying:

> A Parsi who has contracted a marriage under the Parsi Marriage and Divorce Act, 1865 or under the Parsi Marriage and Divorce Act, 1936, even though such Parsi may change his or her religion or domicile, so long as his or her wife or husband is alive and so long as such Parsi has not been lawfully divorced from such wife or husband or such marriage has not lawfully been declared null and void or dissolved under the decree of a competent Court under either of the said Acts, shall remain bound by the provisions of this Act.[37]

Thus, the converted spouse can seek divorce under his pre-conversion Parsi law not on the ground of his own conversion but on other grounds.

Position under the Special Marriage Act, 1954

Continuity of marriage: The Special Marriage Act, 1954 provides for marriage between any two persons, irrespective of their religious affiliation.[38] As it permits inter-religious marriages, conversion of one spouse will in no way affect the continuity of their marriage.

Remedy for converted spouse: Converted spouse cannot seek any matrimonial remedy on the ground of his or her own conversion because conversion is not a ground mentioned in the statute for any matrimonial relief. But the doors are open on any other ground specified therein.[39] Even after conversion, the converted spouse is governed by the Special Marriage Act, 1954 only and not by new law as the Act does not attach importance to the religious status of the parties.

Remedy for non-converted spouse: As religious status of the parties and any further change in it do not have any legal relevancy, the non-converted spouse is not entitled to matrimonial remedy on the ground of conversion of the other spouse. The doors are open on any other ground specified therein under the Special Marriage Act, 1954.

[37] *Id.* S. 52(2).

[38] S. 4, the Special Marriage Act, 1954.

[39] *Id.* S. 27 provides grounds for divorce and S. 23 for judicial separation.

Impact of Motivated Conversion to Reap the Benefits of another Religion

Sometimes a person may resort to conversion to reap the benefits of another religion taking into account the conflicting provisions of law. Such conversions do not reflect the genuine faith in the new religion. They are generally resorted to by a few Hindu males who adopt Islam so that they could marry a second woman because bigamy is permitted under Islam, which is otherwise not permitted under Hindu law and is treated as an offence as well.. Such cases invited judicial scrutiny in *Sarala Mudgal, President, Kalyani* v. *Union of India*[40] in which a writ petition was filed by a woman's organization 'Kalyani' who was terribly perturbed over this growing menace and increase in a number of desertions of the lawfully married wives under the Hindu law and splitting and ruining of the families, even where there are children and when no grounds of obtaining a divorce successfully under the Hindu Marriage Act are available, to resort to conversion as a method to get rid of such lawful marriages. The Supreme Court held that the second marriage of a Hindu husband after conversion to Islam, without having his first marriage dissolved under law, would be invalid. The second marriage would be void in terms of Section 494 IPC and the apostate husband would be guilty of the offence under Section 494 IPC.

This decision was sought to be reviewed, set aside, modified and quashed by way of writ petitions filed by various persons and *Jamat-e-Ulema* in *Lily Thomas* v. *Union of India*[41]. The Apex Court, reiterating its decision in *Sarala Mudgal*, observed: "[P]rosecution under Section 494 in respect of a second marriage under Mohammedan law can be avoided only if the first marriage was also under the Mohammedan law and not under any other personal law where there was a prohibition on contracting a second marriage in the lifetime of the spouse."[42]

Further referring to the contention raised by the petitioner in *Sarala Mudgal* case that making a convert liable for prosecution under the Penal Code would be against Islam, the Apex Court observed:

> [R]aising of such a plea demonstrates the ignorance of the petitioners about the tenets of Islam and its teachings. The word "Islam" means "peace and submission"... . Even under the Muslim law plurality of marriages is not unconditionally conferred upon the husband. It would therefore be doing injustice to Islamic law to urge that the convert is entitled to practice bigamy notwithstanding the continuance of his marriage under the law to which he belonged before conversion... . The progressive outlook and wider approach of Islamic law cannot be squeezed and narrowed by unscrupulous litigants, apparently indulging in sensual lust sought to be quenched by illegal means, who apparently are found to be guilty of the commission of the offence under the law to which they belonged before their alleged conversion.[43]

[40] A.I.R. 1995 S.C. 1531.

[41] A.I.R. 2000 S.C. 1650.

[42] *Id.* ¶ 36.

S. Saghir Ahmad, J. concurring with the view taken in *Lily Thomas*, added his views while discussing the writ petition filed by Smt. Sushmita Ghosh for similar relief[44] and said: "Religion, faith or devotion are not easily interchangeable. If the person feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry."[45]

The Law Commission of India also while making a proposal to give effect to the Supreme Court's ruling pointed out that what married Hindu men do and are helped by ill educated religious functionaries and misinformed lawyers, is a fraud on Hinduism, a disgrace to Islam, a cruel joke on the freedom of conscience clause in the Constitution of the country and a criminal scheming against the law of the land.[46]

While these observations are related to feign conversions, the position would be the same even if the conversion is a genuine one because the converted spouse will be governed by his pre-conversion personal law only for the purpose of matrimony and marrying a second woman when his first marriage is subsisting will attract the penal consequences of bigamy.

Suggestions

An overview of the impact of conversion on matrimonial relations under various personal laws in India drives the author to conclude the discussion with the following important suggestions.

[43] *Id.* ¶ 62.

[44] Her petition no. 509 of 1992 was pending before the Apex Court when the review petition in *Lily Thomas* case was also filed before it. Both were heard jointly by the court and decision was rendered.

[45] *Supra* n. 41, ¶ 38.

[46] The Law Commission of India, *227th Report of* on *Preventing Bigamy via Conversion to Islam*, 34 (2009).

Suggestions Relating to 'Conversion Simpliciter': The legal impact of conversion is made clear under the Parsi Marriage and Divorce Act, 1936 by stipulating a specific provision to the effect:

> A Parsi who has contracted a marriage under the Parsi Marriage and Divorce Act, 1865 or under the Parsi Marriage and Divorce Act, 1936, even though such Parsi may change his or her religion or domicile, so long as his or her wife or husband is alive and so long as such Parsi has not been lawfully divorced from such wife or husband or such marriage has not lawfully been declared null and void or dissolved under the decree of a competent Court under either of the said Acts, shall remain bound by the provisions of this Act.[47]

Such a provision is not made under any other personal law in India. Such a lacuna is covered either by implication or by judicial interpretation whenever relevant cases come before the court. Hence there is a need for the legislature to bring an amendment in the Hindu Marriage Act on the same lines of the Parsi Marriage and Divorce Act, 1936 and it will indirectly resolve the ambiguities found in other personal laws in India.

The dual remedies available to a Hindu convert to Christianity, one under Hindu law and another under Christian law exhibit conflict between judicial decision on one hand and the legislation on the other hand because remedy under Hindu law is recognized by the judiciary and that of under Christian law is recognized by legislature. This anomaly can be removed by deleting the relevant provision under the Convert's Marriage Dissolution Act, 1866.[48]

In spite of the fact that religion is a matter of faith for every individual, there is a need for a law to make all conversions necessarily registered. It will go a long way to thwart voluntary false conversions and involuntary forced conversions because it has been already discussed how conversions have far reaching legal consequences. In the interest of the society as a whole and particularly of women, the State should come forward to enact a law for registration, in spite of probable opposition from vested interests. The political will should be tested on the touch stone of its commitment to good legal governance. The constitutional ideal of Secularism will not be lost sight of with mandatory registration of conversions because the advantages outweigh the adversities. The authority, under which the Parliament could bring about codification of Personal laws and relevant amendments from time

[47] *Supra* n. 36, S. 52(2).

[48] *See* Situation 3 under the sub topic 'Position under Hindu Law'.

to time, could be exercised for bringing about a law on registration of conversions too.

People should be educated about the impact of conversion on family relations, so that they do not fall prey to forced or fraudulent conversions and get entangled in unnecessary legal problems. They should realize that freedom guaranteed under Article 25 of the Constitution is such freedom which does not encroach upon a similar freedom of other persons.[49]

Suggestions to have legislative clarity in cases of bigamy via conversion to Islam: It is high time that the legislature takes steps to give effect to the most important recommendation of the Law Commission of India that in Hindu Marriage Act, 1955, after Section 17, Section 17-A is to be inserted to the effect that a married person whose marriage is governed by this Act cannot marry again even after changing his religion unless the first marriage is dissolved or declared null and void in accordance with law and if such a marriage is contracted it will be null and void and shall attract application of Sections 494-495 of IPC.[50] Till this amendment is brought in, the decision of the Apex Court in *Lily Thomas* will rule the situation.

In sum, though religion is a matter of one's own faith and freedom to renounce one's own religion and embrace another religion is one of the dimensions of freedom of religion guaranteed under the Constitution of India, it is not a blessing in toto without any legal repercussions. Ignorance or indifference to such legal consequences, quite often lands a person into legal dilemmas, more so when the law is deficient and judicial intervention is required to fill up the gap. It is high time the legislature makes up its mind to strengthen the laws to address the dismal situations in cases of conversion.

[49] *Supra* n. 41, ¶ 62.

[50] *Supra* n. 46, Recommendation (i).

Restraints on Media Freedom and Open Justice: Post *Sahara* Reflections

Meena Panickar[*]

Introduction

Free speech, an essential component of vibrant democracies, faces challenge in the contemporary Indian society. Contestations of media freedom are integral to this debate. The Freedom of press enshrined within the scope of the freedom of speech and expression is part of Article 19(1)(a) of the Constitution. Today's media spans a number of modes like the electronic and print media, internet, etc. The freedom of press includes to the freedom of media through all its modes. The expanding horizons and all intruding nature of media draw our attention to the issue and the need of its regulation. Whether media needs the regulation, if so, who shall regulate the media or should it regulate itself; what ought to be the mode and extent of regulation; who can decide whether the regulation is excessive or unreasonable; what happens in the event of the excessive regulation? These are some of the concerns expressed from the different quarters. It is worth looking at the path taken by the Supreme Court of India in *Sahara* case[1] re-emphasising its earlier decision in *Mirajkar* case [2]. Recently, the High Court of Delhi also followed a similar trend in the *Delhi Gang Rape* case.[3] An analysis of these cases indicates the perspective of the judiciary on the media regulation. However, these cases centre on the coverage and the publication of the judicial proceedings by the media. They suggest the modalities to be followed while imposing restrictions on the media in reporting the judicial proceedings. Any institutional mechanism devised to regulate the media freedom may use the indicators like

* Assistant Professor, Law Centre-1, Faculty of Law, University of Delhi.

1 *Sahara India Real Estate Corporation* v. *SEBI*, 2012 Indlaw SC 289; C.A. No. 9813 of 2011 and C.A. No. 9833 of 2011 judgment delivered on Sept. 11, 2012, *available at* http://indiankanoon.org/doc/182016928/ (last visited Nov. 21, 2012).

2 *Naresh Shridhar Mirajkar* v. *State of Maharashtra*, A.I.R. 1967 S.C. 1.

3 *Vijay Singhal* v. *Govt. of NCT of Delhi* , 2013 Indlaw DEL 743; WP(C) 195/2013 judgment delivered on March 22, 2013, *available at* http://indiankanoon.org/doc/88417446/ (last visited Nov. 21, 2012).

the ones evolved by the judiciary. The paper analyses the judicial approach in the *Sahara* case that reiterated the position of *Mirajkar* and which the Delhi High Court followed in the *Delhi Gang Rape* case. The analysis of these judgments has the potential of furnish principles developed by the judiciary while imposing restrictions on the media, which may eventually set a benchmark in the media regulation.

The Supreme Court of India had an occasion to address the issue of media regulation on *sub-judice* matters in the *Sahara* case. The Court held that an accused/aggrieved person would be entitled to approach the appropriate writ court and seek an order of postponement of the offending publication or broadcast or postponement of reporting of certain phases of the trial including the identities of the victims, witnesses or the complainants. In such cases, the court may grant relief, balancing the right to fair trial and the right under Article 19(1)(a), taking into account the principles of the necessity and proportionality. On the request of the parties, the court may use its inherent jurisdiction and postpone the publication of the proceedings/orders for a short duration where alternate means are not available. While acknowledging the role of the media in a democracy and open justice as an essential requisite, the court considers such postponement orders in appropriate cases as indispensable for the administration of justice.

The judgment raises a number of issues: is open justice, the hallmark of the administration of the justice, vitiated by the media freedom? Can there be scope for laying down the guidelines for the media regulation in judicial proceedings? Does it give an unfettered discretion to the courts for deciding on the media regulation?

The Law Commission of India in its 200th Report[4] proposed the media regulation in the 'criminal trials'. The report argued that the fair trial is a guaranteed right of the accused under law and therefore trial by the media may result in the distortion of the justice. In *Sahara* the Court does not limit discussion to the criminal trials, but takes into account the judicial 'proceedings in general'. While upholding the need to regulate media in some circumstances, the Court tried to balance the freedom of media with the requirement to maintain the fairness in the judicial proceedings.

The author argues that the Court attempted to balance the fairness in the administration of justice and the principle of open trials. It gives primacy to

4 *See generally* The Law Commission of India, *200th Report of on Trial by Media: Free Speech and Fair Trial under Criminal Procedure Code, 1973* (Aug. 2006).

the administration of the justice and in order to facilitate this goal attempting to establish that an otherwise highly acclaimed media freedom could be subjected to the regulation and restriction. This paper critically examines the Supreme Court judgment in *Sahara* case in the context of the media freedom under Article 19(1)(a) of the Constitution.

Analysis of the *Sahara* Case

Background: The case arose in the course of hearing an appeal filed by Sahara against an order of SEBI (Securities and Exchange Board of India). As per the Court's suggestion, the parties tried to reach a compromise to resolve the dispute. The Sahara e-mailed SEBI from the Delhi to Chennai the details of its proposal. On the same day, Sahara's Counsel sent an official communication incorporating the proposal to the SEBI Counsel. The day before the date of hearing, a news channel aired the details of the proposal. The Sahara attributed the leak of the document to the SEBI which the latter denied. After hearing both the parties, the Court passed an order directing them to file an application in writing; the Court would then pass appropriate orders on reporting of matters which are sub-judice. The Court found that such news leaks were happening repeatedly, thereby unfavourably affecting the business interests and the administration of justice by the courts.

The Sahara made the following requests: appropriate guidelines for the electronic and print media on reporting the sub-judice matters including the public disclosure of the documents which form part of the ongoing court proceedings; appropriate directions with respect to the manner and extent of publicity that the media gives to pleadings and the documents filed by the parties in the pending proceedings. SEBI also asked the Court for appropriate directions to frame regulations applicable in suitable cases. In this case the concerned document was communicated only inter-parties and was not meant for the public circulation, but somehow the details reached the media channel.

Issues: The Court limited itself to the following questions- whether guidelines for the media need be laid down. If yes, whether the media should be left to regulate itself, or the Court should restate and declare the law under Article 141 balancing principles under Article 19(1)(a) vis-à-vis Article 21, and the scope of Article 19(2) in the context of law regulating the contempt of court and the scope of Articles 129 and 215 of the Constitution. The issues therefore were of two types: First, framing of guidelines for the media; second, to decide about extent of the regulation and declaration of law by the Court itself.

Verdict: The Court decided to declare the law on the reporting of court proceedings by the media. The Court has done a comparative study of other legal systems to understand the position of law on imposition of prior restraints on the media. After examining its own earlier decisions, the Court held that the prior restraint per se is not held as constitutionally impermissible. In other words, the Constitution does not prohibit the imposition of prior restraints on the media. The Court referred to the *Reliance Petrochemicals*[5] wherein it restrained the press from publishing any article, comment or the report questioning the legality of the debenture issue. The Court placed restraint orders based on the 'real and imminent danger test'.[6] In that case, the injunction was lifted after closure of subscription to the debentures.

Having laid the foundation for placing prior restraint orders oe3r n the media, the Court proceeded to establish its constitutional legitimacy. The legitimacy of the order was explained on various counts. To begin with, the Court brought in the discussion about the role of media in keeping alive the democratic traditions in Indian society. In a series of judgments, the Court had already upheld the claims of the press on the circulation, volume of production, and the dissemination of information based on inter-alia, the citizen's right to know. In each of these cases the court underlined that democracy bases itself upon the consent of the governed. Healthy democratic traditions require consent to be built on the information, discussions, and the opinions from a variety of sources. The freedom of speech and expression includes the media freedom. The governed have a right to receive the information and the ideas, from all types of the sources. While appreciating and acknowledging the valuable contribution of the media in a democratic society, the Court indicated some of the restraints to be kept in mind by them. For instance, *In re P.C. Sen*, 1970[7] the Supreme Court stated that it is no longer necessary to retain a distinction between the trials by jury and that by the judge; any comment on a pending case or abuse of a party may amount to the contempt.

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5 *Reliance Petrochemicals* v. *Proprietors of Indian Express Newspapers Bombay*, A.I.R. 1989 S.C. 190.
6 *Id.* at 202, ¶ 35.
7 A.I.R. 1970 S.C. 1829.

Similarly, in *M.P. Lohia* v. *State of West Bengal*,[8] the Court while granting interim bail to the accused warned the publisher, editor, and journalist against indulging in the trial by the media when the issue is sub-judice.

The question arises: in which context could the freedom of media be regulated? Justice Cardozo of the US Supreme Court wrote about sub-conscious elements influencing judicial process thus: "the great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by".[9] This warning can be of great help to the judges of the apex Court attempting to evolve and declare the law on a subject such as the media freedom which has the greatest influence in moulding the 'citizen's sense of justice'.

In the instant case the Court proceeded to examine the grounds on the basis of which regulation/restriction of the media freedom can constitutionally be valid. One way of permitting the regulation is to perform the balancing exercises, viz., the balancing of values. Our Constitution incorporates values fundamental in ensuring the liberties. It is necessary, however, to balance different values. The freedom of speech and expression under Article 19(1)(a) is to be balanced with the fair trial. The latter is an equally important right of the accused/aggrieved. The fair trial is a part of right to life under Article 21. The two Articles in Part III of the Constitution (Fundamental Rights), in the present context, are competing values: one spells out the media freedom and the other is a guarantee of the fair trial in the justice delivery system. Accordingly, the Court observed: "the constitutional protection under Article 21 which protects the rights of the person for a fair trial, can entail, in law, a source of valid restrictions, operating on the right to free speech under Article 19(1)(a), by virtue of its being a constitutional provision".[10]

What did the fair trial demand in this case? The Court recognized openness and transparency as the foundations of the fair trial. All participants, including the judges were under scrutiny.

People get to know the court room proceedings through the media. While media freedom ensures that public is kept informed about the proceedings. It may engage in the prejudicial publicity too. Would media freedom prevail over the right to fair trial? The Court had to strike the right balance between equal rights of the different stakeholders. Postponement of the publication of the proceedings served the purpose accordingly. Equally relevant were the

[8] (2005) 2 S.C.C. 686.
[9] Benjamin Cardozo, THE NATURE OF THE JUDICIAL PROCESS 168 (1921).
[10] *Supra* n. 1 at 289, ¶ 59.

presumptions of the open justice and the presumption of innocence and the fact that these competing claims formed parts of rule of law under Article 14.

The Court found the nine-judge Bench decision in *Mirajkar* as binding on them. In this case, the maintainability of writ of certiorari issued by the High Court was questioned before the Supreme Court. Among other issues, it also dealt with the violation of the petitioner's right (reporter from Blitz Magazine) under the Article 19(1)(a). While discussing the issue, the Court narrated the scope and objective of the public trial in an open court. As per the Court, such trials enhance the chances of the fair and objective administration of the justice on account of the fact that the proceedings would take place under the watchful eyes of the public.

In the *Mirajkar*, the Court held that all cases whether civil, criminal or others must be heard in an open court. Healthy, objective and fair administration of the justice requires a public trial in an open court. In the words of the Court: "trial held subject to the public scrutiny and gaze naturally acts as a check against the judicial caprice or vagaries, and serves as a powerful instrument for creating the confidence of the public in the fairness, objectivity, and impartiality of administration of the justice".[11] The Court quoted from *Scott* v. *Scott* thus:[12]

> In the darkness of secrecy sinister interest, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the judge himself while trying under trial (in the sense that) the security of securities is publicity.

Are there any exceptions to this universal rule? In *Mirajkar*, the Court held that exceptions are necessary to justify the primary duty of the court which is 'administration of the justice'. If the universal rule remains inflexible, the notion of justice will suffer. For that reason the Court upheld the inherent power of the court to hear a case in camera. Is this inherent power of the court discretionary in nature? The Court observed that there needs to be great care and caution while granting the orders for trials to be held in camera. It has to satisfy the requirement that the justice will be defeated otherwise. The Court applied the *means and end test* to justify the reasoning. The Public trial forms the means to ensure the administration of justice which is the end. Alternate

[11] *Supra* n. 2.
[12] *Scott* v. *Scott*, 1911 All. E.R. 30 *quoted in Mirajkar* case at 8, ¶ 20.

means need to be worked out in order to secure the end. Where the judge reasonably believes that justice can be secured only when trial is held in camera, little option is there but to order so. It is not at the cost of public trial. Rather the judiciary is expected to dispose of its primary duty, namely, the administration of justice.

The Court evolved the logic that if the administration of justice is the objective for holding the open trials, the same objective can justify the trial in camera in the cases where perversion will be the result otherwise. Ultimately, the court is bound by the primary duty of doing the justice to the parties. Modalities by which restraints on the public trials can be placed vary from case to case. In *Mirajkar,* the Court referred to the observation of Lord Viscount Haldane in this respect to the effect that, "the power of an ordinary court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private"[13]. If there is any exception to the broad principle which requires the administration of justice to take place in an open court, that exception must be based on the application of some other and overriding principle, which defines the field of exception and does not leave its limits to the individual discretion of the judge. By way of illustration Lord Haldane referred to the cases of wards and lunatics where the court assumes the parental and administrative role. Then public trial gives way to the trial in camera to ensure the care of the lunatic or ward. The trial in camera does not depend on the consent of the parties nor does it mandates that the whole trial necessarily take place in camera. Depending on the circumstances, a part of the trial may be held in camera. In cases of conflict between the requirement of the administration of justice and that of public trial, the former will prevail over the latter.

Does a restraint order vitiate the right of media under Article 19? According to the Court in *Mirajkar,* such a proposition is based on misconception about the true nature and character of the judicial process and the judicial decisions. It emphasized the primary duty of the court to ensure the justice. As seen from the above discussion, the public trial is the general rule subject to exceptions wherein the general rule could give way to a trial in camera. The judge takes such a decision when circumstances warrant it and varies from case to case. This in turn depends on the facts of the case and the position of the parties to the dispute. When the given circumstances justify such an order, the impact it may have on the fundamental right of a citizen under

[13] *Supra* n. 2 at 9, ¶ 23.

Article 19(1)(a), is not a reason to challenge the Court's order. The Court observed thus:

> When a judge deal with a matter brought before him for his adjudication, he first decides questions of fact on which the parties are at issue and then applies the relevant law to the said facts. Whether the findings of fact recorded by the judge are right or wrong, and whether the conclusion of law drawn by him suffers from any infirmity, can be considered and decided if the party aggrieved by the decision of the judge takes the matter up before the appellate court. But it is singularly inappropriate to assume that a judicial decision pronounced by a judge of competent jurisdiction in or in relation to a matter brought before him for adjudication can affect the fundamental rights of the (other) citizens under Article 19(1) (emphasis added).[14]

In cases where the judge prevents the publication of trial proceedings, can it be argued that the decision of the judge is in violation of liberty of speech? In *Mirajkar,* the Court held that power to prevent publication of proceedings is a facet of the power to hold trial in camera and that it stems from it. In such cases, the citizen does not have a right to hear the proceedings. There is no fundamental right to hear and therefore there is no violation of his liberty of speech. Here liberty of speech is taken away on the ground of public interest to promote the administration of justice. This is permissible under Article 19(1). In addition, the court is not a public place to which every member of the public has a fundamental right of access. It is a right given to the public at large in the interest of the administration of justice. When trial in camera is demanded in the interest of justice, the public right is forewent. The right to be present in a court must be subject to the control of the judge administering the business of the court.[15]

The power to prevent publication of judicial proceedings originates from the inherent power of the High Court. When a trial is held in camera, the public is prevented from accessing the court. It means the media cannot publish something which they are prevented from accessing. They cannot publish what they cannot hear. The prohibition of the media in the court would mean trial in camera. If a person publishes such a proceeding, the Court said, he is committing a wrong. The Court asked can there be a fundamental right based on a wrong?[16]

[14] *Id.* at 11, ¶ 38.
[15] *Id.* at 21, ¶¶ 72-74.
[16] *Id.* at 22, ¶ 75.

The Court discussed the nature and the object of postponement of the judicial proceedings in the *Sahara* case by distinguishing Article 19(1)(a) of the Indian Constitution from that of the US Constitution. In India, the freedom of speech and expression are subject to reasonable restrictions laid down in the Article 19(2). The Court suggested various neutralizing devices to protect the press from the contempt proceedings and also to prevent the perversion of the administration of justice. The Court observed:

> [I]n most common law jurisdictions, discretion is given to the courts to evolve neutralizing devices under contempt jurisdiction such as the postponement of the trial, re-trials, change of venue and in appropriate cases even to grant acquittals in cases of excessive media prejudicial publicity. The very object behind empowering the courts to devise such methods is to see that the administration of justice is not perverted, prejudiced, obstructed or interfered with.[17]

Interestingly, the Court struggled further to justify the postponement orders with the help of the ruling in the *Maneka Gandhi* v. *Union of India*[18]. The test of reasonableness has to satisfy not only Article 19 but also the Articles 14 and 21. In cases involving substantial risk to the administration of justice or the fair trial, the postponement orders would satisfy the test of reasonableness under the Articles 14 and 19(2); this is in compliance with the necessity and proportionality tests.

The Court acknowledged the presumption favouring the open justice. The presumption of open justice is to be balanced with that of the innocence. Postponing publicity is a method of maintaining the balance between both the presumptions. Such postponement is possible when alternative measures are not available. While deciding postponement, the principles of necessity and proportionality are imperative considerations. The postponement shall be for a limited period. The Court shall have due regard not only to the administration of justice but also the rights of the individuals to be protected from the adverse publicity, specifically under the Article 21. While evaluating the necessity of the postponement, due consideration shall be on the extent of prejudice, effect on individuals involved in the case, the overriding necessity to curb the right to report judicial proceedings conferred on the media under the Article 19(1)(a), and the right of the media to challenge the order of postponement.[19]

[17] *Supra* n. 1 at 289, ¶ 46.
[18] (1978) 1 SCC 248.
[19] *Supra* n. 17.

The Court while permitting postponement orders also stated that it will only be appropriate in cases where the balancing test otherwise favours non-publication for a limited period. Evaluating the content and context of the offending publication is the responsibility of the Court. The High Courts and the Supreme Court can issue postponement orders, 'being courts of record under their inherent jurisdiction'. It would then qualify as reasonable restrictions while also satisfying 'societal interest'.[20]

The Contempt of court is a ground for imposing the reasonable restriction under the Article 19(2) to counter an interference with the administration of justice. It aims at regulating and controlling the administration of justice. A reading of Article 19(2) with the second part of Article 129 and Article 215 shows that contempt action does not exhaust the powers of a Court of Record. Here, the contempt action is used in a dual sense: firstly, in the form of a reasonable restriction under Article 19(2); and secondly, as a safeguard clause whereby the media is benefitted from prior restraint orders and therefore saved from the contempt proceedings.

The Court acclaimed the role of media in disseminating information and therefore held that postponement orders will be subject to challenge before the Court.

Law-making by the Court: The parties before the Court, in *Sahara*, questioned the exercise of law making by it on the following grounds: there is no lis; there is a difference between law-making and framing guidelines; and under Article 141 the Court cannot assume to itself and invest other courts or authorities with the powers which they do not possess. The Court justified its position by saying that Article 141 refers to law declared by the Supreme Court. Here, the law refers to that made by the Court in the course of the interpretation of the Constitution or Statutes. In the words of the Court, its directions did qualify as law-making under Article 141 of the Constitution. The Court did so through the interpretation and expansion of meanings of open-textured expressions like the contempt of court under the Article 19(2), the freedom of speech, equal protection of laws, and the administration of justice.

Reflections on *Sahara* Holdings

The decision of the Court allows all the High Courts and the Supreme Court itself to issue the postponement order in any pending proceeding before itself

[20] *Id.* at ¶ 60.

or any other court on an application moved by a party to that case. One of the main criticisms is that more and more gag orders may be passed affecting the freedom of the press. The parties in high profile cases will now get a chance to file a writ and have an order from the High Court or Supreme Court. The Court, however, maintained that the media can challenge such postponement orders.

Public trials enable scrutiny on judges to see that they do justice. Lack of information about the happenings inside the court room may affect the faith of public in the judicial system, particularly at a time of proliferating scandals.

Though, the Court specifically spelt out the limitations within which a postponement order must be passed, the High Courts and the Supreme Court will be exercising the powers as Courts of Record using the inherent jurisdiction. These are constitutional bodies bound by the constitutional limitations. It is a matter of concern to ensure that the orders passed in the appropriate case satisfy the tests of necessity and proportionality when the media challenges their validity.

The Court favoured the postponement orders on the ground that the administration of justice is of utmost priority and is to be safeguarded at any cost. The Law Commission supports this proposition.[21] According to the Commission, the Article 19(2) does not refer to the administration of justice. But Sections 2 (criminal contempt) and Section 3 of the Contempt of Courts Act, 1971 refer to the interference in the administration of justice. Analysing the various High Court decisions, the Commission stated that the liberty of press does not mean interference with the administration of justice. The freedom of press carries with it a higher level of responsibility because it has a wider audience. The Press does not enjoy any special privilege.

It leaves open the role of media in protecting the public interest. At times, disclosures by the media may positively contribute to the development of law and the delivery of justice. This point is well illustrated by the cases of *Jessica Lal*[22] and *Pryadarshini Mattoo*.[23]

The Court declared the law under Article 141 and refrained from framing the guidelines on reporting. However, the sum and substance of the decision sounds like a regulation imposed by the Court. Has it made a law? The *Mirajkar* decision dealt with the topic extensively in 1967. The Court in 2012

[21] *Supra* n. 4.
[22] *Sidhartha Vashisht @ Manu Sharma* v. *State (NCT of Delhi)*, 2010 Indlaw SC 296.
[23] *Santosh Kumar Singh* v. *State Through CBI*, 2010 Indlaw SC 822.

used it and placed the Contempt of Court Act, 1971 provisions within the context of Article 19(2). Can the Court make laws on the media reporting? It claims it can do so under the Article 141. It brings us back to the chronic debate whether the judges declare or make law.

This case occurred under a particular circumstance where the confidentiality of a business deal was breached. It is unclear whether the Court could have used this opportunity to regulate media in general.

Media Restrictions in *Delhi Gang Rape* Case

In the *Vijay Singhal*[24] case, the High Court of Delhi addressed the following issues: Is open trial a rule? Does Section 327(2) of the Code of Criminal Procedure, 1973 (Cr.P.C.), which provides for an in camera trial in rape cases, envisage media access? If so, in what manner could a court proceed? What are the factors to be kept in mind, when a court decides to exercise its power under Section 327(2) of Cr.P.C.?

In the words of Rajiv Shakdher, J., the *Delhi Gang Rape* case shows the increasing awareness of the citizenry to know how the principal organs of the State function. It therefore requires a surrogate in the form of media to communicate to them the health status of the State organs, and to report whether they are operating in their respective jurisdictional space.[25]

The courts in India have consistently accepted the universal rule on the public trials. In this context, Shakdher, J. referred to the observation by Jagannath Shetty, J. in *Kehar Singh*:[26]

> It may now be stated without contradiction that jail is not a prohibited place for trial of criminal cases. Nor the jail trial can be termed as an illegitimate trial. There can be trial in jail premises for reasons of security to the parties, witnesses and for other valid reasons. The enquiry or trial, however, must be conducted in open court. There should not be any veil of secrecy in the proceedings. There should not even be an impression that it is a secret trial. The dynamic of judicial proceedings should be thrown open to the public at every stage. The public must have reasonable access to the place of trial. The Presiding judge should have full control of the

[24] *Supra* n. 3.
[25] *Id.* at ¶ 19.
[26] *Kehar Singh & Ors.* v. *State (Delhi Admn.)*, A.I.R. 1988 S.C. 1883; 1988 Indlaw SC 47.

Court house. The accused must have all facilities to have a fair trial and all safeguards to avoid prejudice.[27]

The observation conveys the idea that public trial does not mean that every person shall have the access to the court. It does not mean that the courtroom shall be large enough to accommodate all persons. The court may restrict the public access for the valid reasons depending on the particular case and situation. In criminal trials, public trials are important because the crime is committed on the society and therefore the public would like to know whether the justice delivery system is adequate or not. In addition, when the state prosecutes the offender on behalf of the society, the state shall do it openly.

The Criminal Procedure Code, 1973 has clear provisions allowing trial in camera. The judge has to exercise discretion while excluding the public or a section of the public. However, the Court clarified that while an open trial is a sword and shield available to the court to protect itself from the baseless and scurrilous rumours of having done a hatchet or a shoddy job based on extraneous influence, it is a weapon which only the court can wield.[28] While exercising discretion, the court shall have due regard to the concerns of the victim and the family (wherein the victim is dead), of the accused and of the witnesses. The court should be least concerned about the status of the parties.

Conclusions

The *Sahara* case provided a platform for the Court to question the role of media in the administration of justice. The Court faced a situation of breach of confidentiality committed by the media on a case pending before it. The Court then found it appropriate to deal with the action of the media. It did a balancing act of prioritizing the primary duty of the judiciary, viz., the administration of justice. For that purpose, the Court allowed postponing the publication of proceedings for a limited period. The Court recognized the power of High Courts and the Supreme Court to do this. However, the Court required all writ courts to exercise such power only after testing the necessity and proportionality for such an order and when no alternate means existed. It also recognized the right of media to challenge such orders. The Court thus placed a restraint on the media freedom to ensure the justice.

This decision came at a time of many rising voices on the media regulation. The ambit and power of the media in moulding the public opinion is of

[27] *Supra* n. 3, ¶ 22.
[28] *Id.* ¶ 23.

serious concern for many stakeholders. Discussions are on, within the media circles about the self regulation and its efficacy. We cannot underestimate the power of media, especially the electronic media. Anyone can access information. Everyone can supply the information. Such a powerful medium indeed will have to go through the regulation to channelize for its own better growth that would immensely contribute to the health of our democracy.

Statutory enactments in India incorporate the provisions for the trial in camera. For instance, Section 53 of the Divorce and Matrimonial Causes Act, 1869; Section 14 of the Official Secrets Act, 1923; Section 22(1) of the Hindu Marriage Act, 1955; Proviso to Section 352 of the Code of Criminal Procedure, 1973; and Section 151 of the Code of Civil Procedure, 1908 provide for deviation from the requirement of open justice. To that extent, it may be true to hold that our legal system appreciated exceptions to the public trial in appropriate cases.

The moot question is- whether media freedom interferes with administration of justice? As far as judicial proceedings are concerned, a court has the discretion to decide with the prime goal of securing justice for the parties. No freedom is absolute. Media freedom is not an exception. At the same time, a court's discretion is not unfettered. The Courts shall have sufficient grounds to restrain the media from accessing and publishing proceedings. In the *Sahara* case, the Court qualified this discretion with the principles of necessity and proportionality. In *Mirajkar,* the Court explained the need to be cautious while imposing restrictions on the media. In *Vijay Singhal,* the Delhi High Court emphasized the surrogate role of the media.

The following points emerge from the judicial response:

- Open trials form the universal rule.
- Exception to open trial is permitted under a statute or otherwise.
- Exception may include trial-in-camera, partial trial-in-camera, exclusion of some sections of the public and postponement of media publication.
- Exception to open trial is at the discretion of the particular court.
- Discretion needs to be exercised with caution.
- The Media can challenge postponement orders.
- Restriction on the media freedom by the court may be an outcome of the trial in camera and in that sense there is no violation of the media freedom under the Article 19(1)(a) of the Constitution. In fact, the contempt of court is one of the grounds for imposing restriction under the Article 19(2).
- Media freedom takes the form of public good in a democracy. However it must be exercised responsibly.

The Judiciary while appreciating the role of free media, expressed concern about the unethical practices by the media in *Sahara* and other subsequent cases. In the UK, a series of instances led to the appointment of an enquiry committee with Lord Leveson at its head. The recent incident involving *Zee News* again raises questions about the media freedom. It is worthwhile to consider the path that the Indian judiciary had taken in order to keep the media freedom the desired value of Indian democracy.

Responsibility to Protect: Debating an Emerging International Norm

*Ashish Kumar**

Introduction

In recent years 'Responsibility to Protect' (henceforth R2P) has emerged as a new norm under International Law. Adopted in 2005 World Summit[1], R2P was included in its Outcome Document[2]. Currently, it is not a binding rule of International Law, but since its adoption, it has received increasing international attention while simultaneously generating a lot of controversies over its content and scope.

This emerging norm is based on the idea that sovereignty is not a right but a responsibility[3] and accordingly casts a responsibility on member states of UN to protect the citizens from genocide, war crimes, ethnic cleansing and crimes against humanity. In cases where national authorities are manifestly failing to protect their population in respect of four crimes, an international collective may undertake punitive action against that State. So the classical concept of sovereignty[4] stands obliterated in terms of R2P. The State cannot raise the bar of sovereignty if it has failed in its responsibility to protect. There is an on-going great debate happening on the issue internationally. The votaries of R2P base their stand on the need to intervene in a state for preventing

* Assistant Professor, Law Centre-1, Faculty of Law, University of Delhi, ashish.k@email.com .

1 The 2005 World Summit, Sept. 14–16, 2005 was a follow-up summit meeting to the United Nations' 2000 Millennium Summit. Representatives of member states met in New York City for what the United Nations described as "a once-in-a-generation opportunity to take bold decisions in the areas of development, security, human rights and reform of the United Nations". For the detailed background and Summit Outcomes, *see* World Summit Outcome 2005 (Document), G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005), *available at* http://www.un.org/summit2005/ (last visited Dec. 15, 2012).

2 *Id.*

3 *See* Sheri P. Rosenberg, RESPONSIBILITY TO PROTECT: A FRAMEWORK FOR PREVENTION 442–77 (2009).

4 The traditional notion of state sovereignty rests on the premise of non-interference in the domestic affairs of one State by another State(s). *See e.g.* U.N. Charter Art. 2, ¶ 7.

rampant violations of human rights. To this end, they argue that punitive force may be employed for such prevention. Nonetheless, the biggest criticism of this emerging norm comes from small and militarily weaker nations who fear that under the pretext of R2P their sovereignty will be repeatedly undermined and violated, and that the strong and powerful nations will use R2P for achieving their ends. Many States fear that R2P might provide a sort of international legitimacy to the neo-imperial designs[5] of Super Powers like USA, EU, Russia, China etc. Their fear is not without factual veracity as the recent interventions in Libya and Syria depict such a scenario. The only difference which the R2P will make is that such interventions will be internationally rationalised in advance with the help of R2P. Therefore, there is a widely felt necessity for generating consensus on R2P, especially with respect to its content and scope. In this connection, the present paper first discusses the developmental path of R2P and then focuses on the on-going debate over the emerging norm. It deals with the raging controversies and criticisms of R2P, and tries to check the international legal status or character of it.

Background: Development and Content of the Norm

'Failure of responsibility to protect its own citizens by a particular state' has been time and again used as a paradigm in several cases of war whereby a state or an international coalition of States justified humanitarian interventions. Most of the historical wars including World Wars and contemporary international armed conflict have seen such justifications. In recent memory, genocides in Rwanda[6], Bosnia[7], Darfur[8] etc. evoked a strong international response for characterising R2P as an international legal norm, so that legitimate humanitarian intervention could be made possible in

[5] *See generally* F. Megret, Beyond the *'Salvation' Paradigm: Responsibility to Protect v. (Others): The Power of Protecting Oneself*, 40 SECURITY DIALOGUE 575-95 (2009).

[6] In 1994 Rwanda witnessed mass slaughter of an estimated 800,000 people. See generally Alexander Zahar, Focus on Rwanda, 3 J. of GENOCIDE RESEARCH 293-300 (2001).

[7] The events in Srebrenica in 1995 included the killing of more than 8,000 Bosnian Muslims as well as the mass expulsion of other 25,000–30,000 Muslim civilians, in and around the town of Srebrenica in Bosnia and Herzegovina. *See generally* Hannibal Travis, *On the Original Understanding of the Crime of Genocide*, GENOCIDE STUDIES AND PREVENTION (2012), *available at* http://dx.doi.org/10.2139/ssrn.1975137 (last visited Sept. 9, 2012).

[8] The "Darfur Genocide" refers to the current mass slaughter of Darfuri men, women and children in Western Sudan. The killings began in 2003 and continue still today, as the first genocide in the 21st century. *See generally* Beth Van Schaack, *Darfur and the Rhetoric of Genocide*, 26 WHITTIER L. REV. 1101, 1123 (2005), *available at* SSRN: http://ssrn.com/abstract=1007788 (last visited Sept. 9, 2012).

appropriate and emergent situations. However, in a sense of synthesized norm, for the first time, R2P was distinctly put forward by International Commission on Intervention and State Sovereignty (ICISS)[9], established by Canada in September 2000 with the backing of UN. The Commission in its Report[10], published in December 2001, inter alia, formulated concept of "humanitarian intervention and democracy-restoring intervention" under the name of "Responsibility to Protect".[11] The Report which culminated into R2P discussed and analysed the question as to when, if ever, it is appropriate for States to take coercive and in particular military action, against another State for the purpose of protecting people at risk in that other State. The Report shied away from giving any clear cut answer[12] to the above question. It did, however, popularized the concept of R2P in the international arena. Its central theme, reflected in the title, "Responsibility to Protect", conveyed the idea

[9] At the U.N. Millennium Assembly in September 2000, Canadian Prime Minister Jean Chretien announced that an independent International Commission on Intervention and State Sovereignty (ICISS) would be established as a response to Secretary General Kofi Annan's challenge to the international community to endeavour to build a new international consensus on how to respond in the face of massive violations of human rights and humanitarian law. Kofi Annan formulated his question as: "If humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica- to gross and systemic violations of human rights that offend every precept of our common humanity?" The question summarises the ongoing debate between those who value the norm of humanitarian intervention above state sovereignty and vice versa. The mandate of the Commission was to promote a comprehensive debate on the R2P issues, and to foster global political consensus on how to move from polemics towards action within the international system, particularly through the United Nations.

[10] *See* Report of the International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, (Dec. 2001), *available at* http://responsibilitytoprotect.org/ICISS%20Report.pdf (last visited Dec. 9, 2012).

[11] *Id.*, the Forward.

[12] *Id.*, ¶¶ 4.18-4.21 show an eagerness to approach the issue of what scale of atrocity necessitates humanitarian intervention. However the ICISS Report shied away from committing to any concrete definition. This is reflected in ¶ 4.21: "In both the broad conditions we identified - loss of life and ethnic cleansing - we have described the action in question as needing to be "large scale" in order to justify military intervention. We make no attempt to quantify "large scale": opinions may differ in some marginal cases (*e.g.*, where a number of small scale incidents may build cumulatively into large scale atrocity), but most will not in practice generate major disagreement. What we do make clear, however, is that military action can be legitimate as an anticipatory measure in response to clear evidence of likely large scale killing. Without this possibility of anticipatory action, the international community would be placed in the morally untenable position of being required to wait until genocide begins, before being able to take action to stop it".

that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe, i.e., mass murder, rape and starvation; but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.[13] It stressed that sovereignty also encompasses a state's responsibility to protect the population within its borders.[14] If it fails then an international responsibility arises to protect civilians under threat from its own government. Thus, the Report struck a severe blow on the traditional notion of state sovereignty. It spoke for collective international actions, ranging from pacific to punitive/military, in situation of atrocious crimes against humanity committed in a state. It stressed that sovereignty of a state should not be allowed to be a hindrance in taking action in emergent and pressing situation.

Again in 2004, the UN Secretary-General's High Level Panel[15] recommended acceptance of the responsibility to protect as an 'emerging norm' exercisable in the event of genocide and other large scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or are unwilling to prevent.

Further, in 2005, as stated before, at its World Summit, the UN unanimously adopted "Responsibility to Protect" as a guiding principle for the prevention of 'atrocity crimes'.[16] In this connection, the then Secretary-General Kofi Annan stated: "it cannot be right, when the international community is faced with genocide or massive human rights abuses, for the United Nations to stand by and let them unfold to the end."[17] The approval of R2P by UN happened in less than four years of ICISS Report. This is relatively a very short period for any concept to gain international attention for being transformed into an international norm.[18]

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[13] *Id.*

[14] Thomas G. Weiss, R2P *After 9/11 and the World Summit*, 24 WIS. INT'L L.J. 743 (2006).

[15] Secretary General, *Report on A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004) (prepared by Anand Panyarachun), *available at* www.un.org/secure-world (last visited Sept. 19, 2012). This report, commissioned by the United Nations Secretary-General, puts forward a bold new vision of collective security that stresses the need for effective, equitable action in preventing and responding to all major threats to international peace and security.

[16] *Supra* n. 1.

[17] Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. Doc. A/59/2005, ¶ 134, *available at:* http://www.refworld.org/docid/4a54bbfa0.html (last visited Sept. 21, 2012).

[18] Gareth Evans, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL 31 (2008).

The World Summit Outcome Document (henceforth the Summit Document) in its Paragraphs 138 and 139 formulated R2P as follows:

> *Paragraph 138* –Each individual State has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.[19]
>
> *Paragraph 139*–The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect population from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their population from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect population from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and International Law. We also intend to commit ourselves, as necessary and appropriate, to helping states build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.[20]

From a careful analysis of the above paragraphs, the following points about the content of R2P will crystallize:

- The responsibility of each individual state to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity, and their incitement.

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[19] *Supra* n. 1.

[20] *Id.*

- The responsibility of the international community to encourage and help states to exercise this responsibility and to help states build capacity to protect their population, as appropriate.
- The responsibility of the international community to be prepared for collective action, in a timely and decisive manner in accordance with the UN Charter, on a case-by-case basis, and in cooperation with relevant regional organizations as appropriate, should the above preventive means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.

Thus, we see that Summit Document has brought R2P from the realm of academia and civil society into the actual day to day affairs of world politics. The endorsement, adoption and formulation of R2P by General Assembly[21] in 2005 have proved a turning point in the brief history of this emerging concept.

In the words of Alex Bellamy:

> The Summit Document has led to the transformation of Responsibility to Protect from a 'concept'—an idea—to a 'principle'—a 'fundamental truth' based upon a 'shared understanding' and having 'sufficient consensus'—thus making the right of intervention no longer subordinate to the other key international principle—the right of sovereignty.[22]

The commitment to the R2P in the Summit Document was regarded as the cardinal achievement of the World Summit, and has been hailed by both Kofi Annan and his successor, Ban Ki-moon as a "historic breakthrough". Current Secretary-General Ban Ki-moon has since called for the operationalization of R2P and has pledged to translate it "from words to deeds".

Key Developments on R2P since the 2005 World Summit

Security Council Resolution on the Protection of Civilians

The next important development in the Responsibility to Protect was its inclusion in Security Council Resolution 1674 in April 2006. In operative Paragraph 4 of that Resolution, "on the protection of civilians in armed conflict", the Security Council 'reaffirmed' the provisions of Paragraphs 138 and 139 of the 2005 the Summit Document regarding 'the Responsibility to

[21] *Id.*
[22] Alex Bellamy, RESPONSIBILITY TO PROTECT: THE GLOBAL EFFORT TO END MASS ATROCITIES 6 (2009).

Protect' populations from genocide, war crimes, ethnic cleansing, and crimes against humanity."[23] This is the first explicit endorsement of the R2P by the Security Council. As a political matter, this recognition is significant. Members of the Security Council were willing to join the General Assembly's endorsement and the five permanent members of the Council did not exercise their veto powers to block its adoption in the Assembly. Yet, the Security Council's endorsement followed after six months of difficult negotiations in which Algeria, Brazil, China, the Philippines, and Russia argued that it was premature for the Security Council to endorse R2P.[24] Ultimately, the reaffirmation by the Council required a watering down of the language in the resolution to merely "reaffirm" the relevant paragraphs of the Summit Document. This more limited result, however, generated political momentum for the further development of the Responsibility to Protect. The Council's reaffirmation thus strengthens the claim that member states have legal duties to advance the political commitment contained in Paragraphs 138 and 139 of the Summit Document.

Security Council Resolution on Darfur

On 31 August 2006, the UN Security Council passed Resolution 1706[25] authorizing the deployment of 17,300 UN peacekeeping troops to Darfur. Although the mandate met resistance by Sudanese Government, which prevented its deployment, the resolution referred to Paragraphs 138 and 139 on R2P in the Summit Document and Security Council Resolution on the Protection of Civilians in Armed Conflict.

Security Council on the situation in Burma/Myanmar

On 12 January 2007 the UN Security Council met to discuss the situation in Burma (Myanmar). The members of the Council voted on a draft resolution presented by the United Kingdom and the United States. The resolution called for a cession of all attacks against minorities, access to humanitarian organizations, cooperation with the International Labour Organization, political dialogue and progress towards democracy, the release of all political prisoners and support for all UN "good offices" in Burma. China and Russia

[23] S.C. Res. 1674, U.N. Doc. S/RES/1674 (April 28, 2006).
[24] Alex J. Bellamy, *The Responsibility to Protect—Five Years On*, 24 ETHICS INT'L AFF. 143-45 (2010).
[25] Secretary-General, *Report on Sudan*, U.N. Doc. S/RES/1706 (Aug. 31, 2006), *available at* http://www.unhcr.org/refworld/docid/453786b60.html (last visited Sept. 24, 2012).

vetoed the resolution resulting into its collapse. It was argued that Burma did not pose a threat to peace and security in the region, and that the internal affairs of the State did not have a place within the Security Council. UK and US insisted that there is an imminent R2P situation arisen in the military governed Burma.[26]

UN Secretary-General's Report on Implementation of the R2P

Secretary-General Ban Ki-moon released on 12 January 2009 the first comprehensive UN document on R2P. The Report tried to clarify some of the misunderstandings on how to understand R2P and outlined measures and actors involved in rendering the norm operational. It translated Paragraphs 138-139 of the World Summit[27] into a 'three-pillar approach', namely (a) the protection responsibilities of the state, (b) international assistance and capacity building, and (c) timely and decisive response to prevent and halt genocide, ethnic cleansing, war crimes and crimes against humanity. The Secretary-General recommended that the General Assembly should meet to consider, based on this report, the possible ways and means of taking forward the commitment made in the Summit Document.[28]

General Assembly Debate on the R2P

The General Assembly Debate on R2P started on 23 July 2009 and continued for next two full days. The 192 Member States which spoke on R2P, demonstrated strong interest in the norm and made an important show of support for implementing the 2005 commitment to prevent and halt genocide, war crimes, crimes against humanity and ethnic cleansing. Many members argued that the R2P is rooted in existing international human rights, humanitarian and criminal law. However some members like Mexico, India and Egypt raised fears that the application of R2P would legitimize unilateral and coercive measures, pointing to past cases of abuse and violations of sovereignty. However, some members rather took the view that R2P will in fact prevent the unilateral intervention and will be more based on multilateral and united response as mandated under the UN Charter.[29]

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[26] Details of the failed SC resolution are *available at* http://www.un.org/News/Press/docs/2007/sc8939.doc.htm (last visited Sept. 25, 2012).

[27] *Supra* n. 1.

[28] *See* the Secretary-General, *Report on Implementing the Responsibility to Protect*, A/63/677, (Jan. 12, 2009), *available at* http://www.unrol.org/files/SG_reportA_63_677_en.pdf (last visited Sept. 25, 2012).

[29] *See Report on the General Assembly Plenary Debate on the Responsibility to Protect*, Sept. 15, contd…

Second Security Council Resolution on the Protection of Civilians

On 11 November 2009 the Security Council for the second time at its debate on the Protection of Civilians (POC), through Resolution 1894, reaffirmed its commitment to prevent the victimization of civilians in armed conflict and ending on-going violence against civilians around the world.[30] The resolution recognized that states have the primary responsibility to protect their population and reaffirmed the provisions in Paragraphs 138-139 of the Summit Document regarding the R2P. Several states in their statements recognized that sovereignty came with the responsibility to protect population from mass atrocities, and that it was the responsibility of the international community to assist these national governments in fulfilling their protection obligations.

Security Council Resolution on Libya

The recent Libyan crisis presented a tough challenge to Security Council in terms of characterising the situations in Libya as fit for calling R2P. Following a range of earlier attempts to implement peaceful measures, such as diplomatic incentives, asset freezes, arms embargo, and ICC referral, the UN Security Council finally adopted Resolution 1973[31] approving a no-fly-zone, calling for an immediate cease-fire and tightening sanctions on the then Muammar Qaddafi regime in Libya.

This was a follow-up to Resolution 1970[32], which first called upon Libya's "responsibility to protect" by referring the matter to the International Criminal Court and imposing initial financial sanctions as well as an arms embargo. The Resolution condemned the Libyan government for failing to comply with International Law and for allowing gross violations of human rights that may amount to crimes against humanity.

2009 (issued by International Coalition for the Responsibility to Protect, New York), *available at* http://www.responsibilitytoprotect.org/ICRtoP%20Report-General_Assembly_Debate_on_the_Responsibility_to_Protect%20FINAL%209_22_09.pdf (last visited Sept. 27, 2012).

[30] S.C Res. 1894, U.N. Doc. S/RES/1894 (Nov. 11, 2009), *available at* http://unispal.un.org/UNISPAL.NSF/0/A4E2352BFDF75FF08525766C00588264 (last visited Sept. 27, 2012).

[31] S.C. Res. 1973, U.N. Doc. S/RES/1973 (March 17, 2011), *available at* http://www.un.org/News/Press/docs/2011/sc10200.doc.htm#Resolution (last visited Sept. 27, 2012).

[32] S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011), *available at* http://www.icc-cpi.int/nr/rdonlyres/2b57bba2-07d9-4c35-b45e-eed275080e87/0/n1124558.pdf (last visited Sept. 27, 2012).

Security Council Resolution on Côte d'Ivoire and Yemen

In yet another recent instance, in response to the escalating, post-election violence against the population of Côte d'Ivoire, the UN Security Council unanimously adopted Resolution 1975.[33] The resolution cited "the primary responsibility of each State to protect civilians," and called for the immediate transfer of power in Côte d'Ivoire to President-elect Alassane Ouattara by incumbent president, Laurent Gbagbo. Further, in an effort to protect the people of Côte d'Ivoire from further atrocities, a military operation began on 4 April 2011 leading to an end to Gbagbo's hold on power on 11 April 2011.[34]

Security Council on 21 October 2011 adopted resolution 2014[35] thereby condemning human rights violations by the Yemeni authorities, and encouraged an inclusive Yemeni-led political process of transition of power, mandating the holding of early Presidential elections. This resolution explicitly recalled the Yemeni Government's "primary responsibility to protect its population".

Security Council Resolution on Syria

Following the recent Syrian crisis, Security Council took up the matter, but it failed to adopt a resolution that would have threatened sanctions on Syria, owing to the negative votes of permanent members Russia and China.[36] Critics have pointed out that R2P in the context of Syrian humanitarian crisis has failed in addressing the worsening situation in Syria. Lack of consensus among the permanent members of Security Council hence has created a big challenge to R2P.

The series of steps taken by the General Assembly and Security Council, as discussed above, has indeed given new impetus to the further development of R2P at the global level. The emerging contents of R2P fundamentally focus on what is now described as Protection of Civilians or PoC.[37] Overall at the

[33] S.C. Res. 1975, U.N. Doc. S/RES/1975 (March 30, 2011), *available at* http://www.un.org/News/Press/docs/2011/sc10215.doc.htm (last visited Sept 28, 2012).

[34] *See Crisis in Côte d'Ivoire*, (International Coalition for the Responsibility to Protect, New York), *available at* http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-ivory-coast (last visited Sept. 28, 2012).

[35] S.C. Res. 2014, U.N. Doc. S/RES/2014 (Oct. 21, 2011).

[36] *See generally* U.N. News Centre, *Security Council fails to adopt resolution on Syria*, (July 19, 2012), *available at* http://www.un.org/apps/news/story.asp?NewsID=42513&Cr=Syria&Cr1#.ULYYtYYsHXU (last visited Sept. 28, 2012).

[37] *See* Secretary-General, *Report on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2007/643, ¶ 11 (Oct. 28, 2007).

moment R2P, even though not a binding international law, has acquired a normative character which is now shaping the foreign policies and actions of several countries.

Criticisms Surrounding R2P

The developments at international level through the UN and its Agencies, inter-governmental organisations/commissions in respect of R2P has received praise,[38] nonetheless, it continues to face the task of defending itself from an array of insistent criticisms. Many of the criticisms referred to, are actually derivatives of two main claims: that R2P dangerously undermines sovereignty, and that it represents an imposition of the will of the powerful states against that of the powerless.[39]

As pointed out earlier, militarily small and weaker states are staunchly opposed to R2P in the sense that the concept legitimizes the military intervention by powerful and developed nations. Critics have said that R2P concept conflicts with the principles in the UN Charter relating to the use of force, sovereignty, territorial integrity and non-interference in the internal affairs of states.[40]

These States base their stand on the traditional notion of state sovereignty which calls for non-intervention by any outside state in the internal affairs of a nation. If R2P is made a part of the binding International Law, it will lead to subversion of international rule of law. Super powers do not hesitate when it comes to taking military actions, as was seen in several instances including

[38] *See* W. Andy Knight, Frazer Egerton (ed.), THE ROUTLEDGE HANDBOOK OF THE RESPONSIBILITY TO PROTECT 57 (2012) observing: "More than a decade after the International Commission on Intervention and State Sovereignty (ICISS) published its report, and seven years after the UN endorsed the R2P, there is much to be celebrated about a concept that offers real advance in dealing with one of the gravest problems in world politics mass atrocities committed within a state's borders."

[39] It is commonly believed that sovereignty concerns have been held largely by smaller developing countries that are potentially vulnerable to interventions from more militarily powerful developed countries. *See generally* Edward C. Luck, SOVEREIGNTY, CHOICE, AND THE RESPONSIBILITY TO PROTECT 15 (2009).

[40] U.N. Charter Art. 2, ¶ 4 reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations"; U.N. Charter Art. 2, ¶ 7 proclaims: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

Iraq, Georgia, Sudan, etc. There will be further escalation in the number of wars around the world if R2P becomes a binding norm as strong states will more frequently use it for achieving political, strategic and economic ends.

As the responsibility to protect is still an emerging concept, not yet defined by any binding International Instrument, there is a risk for the doctrine to be given inaccurate interpretation by states wishing to justify unilateral action in the another State. The controversial military intervention in Iraq in 2003 further reinforces such concerns.[41] Statements made by the United States and British Governments to justify the intervention ex-post-facto as humanitarian provide an example of the real risk of manipulation of the doctrine.[42]

The Secretary-General report[43] and the Summit Document[44] frame the contours of the responsibility to protect and specify that any action should be taken through the Security Council. However, the conflict between Georgia and Russia in 2008 illustrated that this has not eliminated the risk of the misuse of the doctrine. In his explanation of Russia's military intervention in Georgia, the Russian Foreign Minister stated that in the circumstances, 'Russia had to exercise its responsibility to protect', as a concept enshrined in the Russian Constitution and 'agreed upon by the UN and the international community'.[45]

Such distortions exemplify a dangerous interpretation of R2P. If Russia had evidence of serious crimes potentially being committed in Georgia, it should have worked through the UN and first use diplomatic measures. The use of military force should have only been envisaged as a last resort and not without approval of the Security Council.

The Libyan crisis has given dubious name to R2P. For many, the UN and NATO action in Libya has been a validation of the R2P doctrine. In response to a strong global consensus on the imminence of a major attack on the civilian population, the international community came together with unprecedented speed to support a United Nations Security Council

[41] Legality of Iraq War of 2003 will remain questionable. Security Council did not explicitly authorize the use of force, but showing complete disregard to the International Law, U.S. and U.K. invaded Iraq which resulted into massive casualties. *See* Noel Cox, *International Law after Iraq: An Ethical or Historical Approach to Justification of Self-Defence*, 4 TILBURG FOREIGN L. REV. 21-42 (2006).

[42] *Id.*

[43] *Supra* n. 28.

[44] *Supra* n. 1, ¶¶ 138 and 139 of the Summit Document.

[45] R. Allison , *The Russian Case for Military Intervention in Georgia: International Law, Norms and Political Calculation*, 18 (2) EUR. SECURITY 174 (2009).

Resolution[46] authorizing the use of force to protect civilians from harm in Libya. In the end, NATO forces effectively removed the threat to the civilian population. However, the military intervention in Libya has been criticised for being an instance of selective application of R2P doctrine. Swift UN decision making and robust NATO military action in oil rich Libya only highlights the disparity in international responses to on-going violence elsewhere, particularly in Syria.[47] There seems to be absolutely genuine points when critics ask: Why Libya and not Syria? After all, civilians in both countries appear(ed) to have been the victims of one of the four delineated crimes of R2P – crimes against humanity, war crimes, genocide, and ethnic cleansing. The Libyan experience also caused apprehensions about regime change in the name of R2P, apart from being criticized for legalizing pre-emptive strike against a sovereign nation.[48]

There are many circumstances in which external military intervention, regardless of exigent circumstances, will not be a viable option. For example, if China were to crack down aggressively with military force against some form of separatist uprising in Tibet or Xinjiang Provinces, the international community could condemn it, but there would be no real military options for a response. For that matter, there would be no major military option if any one of a number of major powers committed R2P-delineated crimes.

In nutshell, it may be said that there are vocal opponents to R2P initiatives, particularly within the Non-Aligned Movement and the G-77, who believe that R2P will codify a system of coercion and intervention providing a tool of powerful governments to judge weaker states.

[46] *Supra* n. 32.

[47] Paul R. Williams, et al., *Preventing Atrocity Crimes in Syria: The Responsibility to Protect*, Sept. 10, 2012 Atlantic Council, *available at* http://www.acus.org/new_atlanticist/preventing-atrocity-crimes-syria-responsibility-protect (last visited Sept. 30, 2012).

[48] The legality of pre-emptive strike is indeed one of the most controversial questions in contemporary international law. At the core of this controversy stands the temporal dimension of self-defence: When and for how long can a state defend itself against an armed attack? Can it resort to armed force before such an attack occurs? How does one define anticipatory action? Is anticipatory action covered by the rules of self-defence or should it be treated as a different concept? Such questions have generated ample discussion among legal scholars and public officials alike. Claims of self-defence have often been criticized or condemned for transgressing the perceived limits of their temporal dimension. This was blatantly reflected in the 2003 Iraq war, when U.S. and U.K. resorted to pre-emptive strike against Iraq. For details on the legality of pre-emptive measures, *see generally* Kinga Tibori Szabo, ANTICIPATORY ACTION IN SELF-DEFENCE: ESSENCE AND LIMITS UNDER INTERNATIONAL LAW (2011).

Arguments in support of R2P emphasize that R2P is intended to ensure that the international community does not remain a bystander to genocide, crimes against humanity and other large scale human rights abuses. The proponents believe that R2P can provide a way out of the deadlock in the debate on humanitarian intervention by reframing the debate in terms of "responsibility" rather than "rights".[49] First, it defines state sovereignty as implying the responsibility of every state to protect its population from human rights abuses, a definition that carries with it the implication that a state's failure to exercise its sovereign duty to protect leads to a corresponding diminution of its right to non-interference by outside forces.[50] Second, it asserts 'responsibility' on the part of the international community to support the State to provide protection and, ultimately, to intervene when it fails to provide the necessary protection. Thus, in response to the impact on the norm of non-interference, proponents note that the state sovereignty implies not only rights but duties, and that R2P addresses circumstances when the state is unable or unwilling to fulfil its duties and that force be used only as a last resort. Supporters of the R2P concept include the African Group and the European Union.[51]

The Legal Nature of the R2P

There are grounds to doubt whether the R2P by its nature can be considered a legally binding norm. The Summit Document which formalized the R2P was endorsed by a resolution of the General Assembly and is therefore a non-binding *recommendation*. As such, resolutions of the UNGA often function as a starting point for discussion on establishing International Law. It follows from Article 38 Statute of the ICJ that UNGA resolutions are not enumerated among the sources of International Law which includes treaties, custom and general principles of law. Though UNGA resolutions do not create new rules of Customary International Law by themselves, they can constitute evidence of it or contribute to its formation, if accompanied by general practice or an *opinion juris*. According to the ICJ, UNGA resolutions can provide evidence for the existence of a certain rule or the emergence of *opinion juris*.[52] In very rare cases, states might have had the clear intention to lay down a legal

[49] *Supra* n. 3 at 456.
[50] *Supra* n. 18 at 113.
[51] *See generally* Damien Helly, *Africa, the EU and R2P: Towards Pragmatic International Subsidiarity?*, Internationale Politik und Gesellschaft/IPG 45-58 (Jan. 2009), *available at* http://library.fes.de/pdf-files/ipg/ipg-2009-1/05_a_helly_us.pdf (last visited Oct. 5, 2012).
[52] The Legality of the Threat or the Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 254 (July 8, 1996).

provision in a resolution of the UNGA. However, those exceptional circumstances could only be considered if those states with particular interests in the issue agreed to the rule in question. Ekkerhard has captured this nature of resolutions of International Institutions aptly:

> It turns out that a review of the history of negotiation of the Summit Document does contradict such an assumption. When they negotiated the paragraphs on the R2P, member states had actually no intention to create a new legal obligation. Yet again, little evidence can be found in the subsequent practice of the UNGA and the UNSC to support the existence of an exceptional intention on the part of the member states to establish a new binding norm of R2P.[53]

Therefore, the principle of R2P is not a legal one. Nonetheless it is based on, and reconfirms, pre-existing international norms. The existence of legal norms prohibiting and punishing genocide, war crimes, ethnic cleansing and crimes against humanity as international crimes cannot be questioned. In this respect, the R2P does nothing more than re-stating the positive binding obligations enshrined in the 1948 Genocide Convention[54]; the Four 1949 Geneva Conventions[55], the UN Charter, the body of International Human Right and Humanitarian Law as well as in UN Security Council Resolutions[56]. As of now, R2P is therefore best understood as a political commitment to act upon shared moral beliefs much of which is embedded in already existing International Law.[57]

[53] S. Ekkerhard, THE EMPEROR NEW CLOTHES–THE UNITED NATIONS AND THE IMPLEMENTATION OF THE RESPONSIBILITY TO PROTECT 48-49 (2009).
[54] The primary legal foundation for R2P is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Art. 1 states: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under International Law which they undertake to prevent and to punish"; Art. 8 further states: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide."
[55] First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1864; Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1906; Third Geneva Convention relative to the Treatment of Prisoners of War, 1929; Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949. The whole set is referred to as the "Geneva Conventions of 1949" or simply the "Geneva Conventions".
[56] *See* Alex J. Bellamy et al., THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW 1-8 (2011).
[57] *Id.* at 83.

Conclusion and Suggestions

The concept of R2P has emerged as a progressive mechanism for eliminating the legal and political constraints of sovereignty in regards to intervention for humanitarian purposes. As a principle, R2P formed the basis of the Security Council Resolutions which supposedly constituted the legal ground for a military intervention in the case of Cotè d'Ivoire and Libya in 2011. It thus constitutes a new and innovative norm through which the international community is authorized to intervene in cases where a state fails to protect its citizens from 'Mass Atrocity Crimes'. Military intervention however is seen as a last resort after diplomatic efforts and subsequently more coercive measures have clearly failed. Nevertheless it is also argued that this new concept is a challenge/threat to the territorial sovereignty or to the norm of non-interference in the affairs of other nations as outlined in the UN Charter. Some countries perceive the concept of R2P as a major tool of Western countries legitimizing the intervention in other states' domestic affairs. Lastly, the question of who is going to decide when the so called "international community" has to intervene is disputable. The decision as to which crises the R2P principle would apply is criticized due to the fact that the five permanent members of the Security Council have the option of using their veto when they are somehow affected politically, economically or strategically by the implementation of a resolution based on the norm of R2P. Further, whether R2P would be equally made applicable to big powers themselves, remains doubtful.

Nevertheless, the R2P concept should be celebrated and recognized for what it is: progress towards developing an international legal norm or policy which focuses on international protection, international accountability, and the prevention and deterrence of future occurrences of mass atrocities and serious crimes. If used properly, this doctrine has the potential of creating a real collective responsibility to prevent serious violations of human rights. It is crucial that the UN's message regarding the definition, content and the use of the responsibility to protect be clear and consistent so as to safeguard the credibility of the doctrine and its acceptance among the international community. In this connection, the pressing need of the hour remains to build a global consensus on the real scope and content of this emerging international norm, which may, then qualify R2P as a binding international legal principle.

Trustworthiness of the Public Trust Doctrine: *Judicial* (In)-Consistencies

*Niraj Kumar**

Introduction

The fact that the environment requires conservation and preservation is no longer a contested premise. The current debate concerns the finding and defining an appropriate mechanism to be deployed in pursuit of the environmental goals. There are numerous international and domestic instruments attempting to establish suitable mechanism(s). These instruments have recognized various components to be taken care of as integral to any mechanism to protect and preserve the environment. One such concept is that of 'Public Trust Doctrine'.[1]

The doctrine of public trust had been in existence[2] prior to it was judicially acknowledged and the courts attempted to shape and define its content, and extent of application, in India. The contribution of the judiciary has been appreciable, however, the haphazard application and the lack of understanding of the doctrine has downplayed its potential and efficacy in seeking the environmental objectives. The present study is an attempt to find out the causes and the consequences of such judicial processes. The emphasis of the paper is on the judicial dictum(s) through analysis of the relevant set of court judgments. The paper would show two hard facts as genesis of the confounding state of the doctrine: one, the lack of specific statutory regime and, two, the expansive role played by courts in the common law system. The

* Assistant Professor, Law Centre-II, Faculty of Law, University of Delhi, nirajynsindri@yahoo.co.in .

[1] For a comparative history and incorporation of Public Trust Doctrine in various national and international legal documents, *see* David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the future of private property*, 16 N.Y.U. ENVTL. L. 711 (2008).

[2] Under Roman law these resources were either *res nullius* or *res communes* or under English common law, the sovereign could own these resources but the ownership was limited in nature. *See e.g.* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

paper will firstly identify certain norm creating judgments vis-à-vis public trust doctrine. Secondly, it will look into the positives and pitfalls of the judgments and, lastly, as an ex-hypotheses exercise, the study will try to provide certain possible future course of actions.

Basis of Scrutiny of the Various Judgments on 'Public Trust Doctrine'

Any concept is as good as its practical utility across the spectrum. If the concept fails to do so it loses its significance as a general principle. There lies the relevance of scrutinizing various judgments. The scrutiny will be at two levels: (a) the external validity of the judgments, and (b) the internal validity of judgments.

External validity is about establishing the strong correlation between the judgments and the constitutional and statutory laws, whereas internal validity relates to examining the element of consistency through various judgments. External validity ensures the acceptability of the judgments, whereas internal validity ensures the reliability of the judgments and enhances its *precedentiary* value. The former helps the judiciary to command respect in the eyes of citizenry and latter allows a legal mind to find a coherent *ratio*. Any good judgment, therefore, must pass both the tests.

External and Internal Validity of Concept of 'Public Trust Doctrine' as Applied by the Supreme Court

Divan and Rosencranz aver that, "in the United States, the public trust doctrine as an environment protection theory developed over several years. The Indian Supreme Court, untroubled by the absence of any Indian precedent in this field, simply imported the doctrine and declared that it was a part of the law of the land".[3] The authors raise the question: "what are the implications of this approach on the rule of law, especially on the tenets of predictability and certainty?" The question, though, was raised in the aftermath of *Kamal Nath* case [4], and still remains unanswered under the Supreme Court jurisprudence.

The courts in India have primarily relied upon the work of Prof. Joseph L. Sax to initiate an understanding of the public trust doctrine, of course, with necessary and sometimes unfathomable adaptations in the doctrine. Prof Sax

[3] Shyam Divan and Armin Rosencranz, ENVIRONMENTAL LAW AND POLICY IN INDIA 171 (2d ed. 2001).

[4] (1997) 1 SCC 388.

in his Article[5] propounded that the doctrine imposes three types of restrictions on governmental authority. They are inter alia:[6]

- The property subject to the trust must not only be used for a public purpose, but it must also be made available for use by the general public;
- The property may not be sold, even for fair cash equivalents;
- The property must be maintained for particular types of use: (i) either traditional uses, or (ii) some uses particular to that form of resources.

The main stakeholder in environmental concern is private citizen. Once we accept that natural resources are held in 'trust' by state on behalf of citizens, the onus to exploit it for public benefit follows as natural corollary to it. The *locus classicus* on public trust doctrine in India is *M.C. Mehta* v. *Kamal Nath*[7] (henceforth referred as *Kamal Nath* case), in which the Supreme Court asserted:

> *Our legal system-based on English common law-includes the public trust doctrine as part of its jurisprudence. The state is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The state as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership* (emphasis added).[8]

The Court while parting with the case observed: "The public trust doctrine, as discussed by us in this judgment is a part of the law of the land".[9] The problem with the statement is that the court has discussed the history of doctrine in Anglo-American legal system with juristic opinion without clearly indicating the core of doctrine.

The full significance of the above judgment can be realized only after considering the observations of the Supreme Court in *Intellectuals Forum, Tirupathi* v. *State of A.P*[10].:

> Formulated from nugatory angle, the doctrine does not exactly prohibit the alienation of the property held as public trust. However, when the state holds a resource that is freely available for

[5] Joseph L. Sax, *supra* n. 2 at 477.

[6] *Quoted* in *Intellectual Forum, Tirupathi* v. *State of A.P.*, A.I.R. 2006 S.C. 1350 at ¶ 76.

[7] *Supra* n. 4.

[8] *Id.* ¶ 34.

[9] *Id.* ¶ 39.

[10] *Supra* n. 6, ¶ 76.

> the use of the public, it provides for high degree of judicial scrutiny on any action of the government, no matter how consistent with the existing legislations, that attempts to restrict such free use.... .

Both the judgments are two-judge Bench decisions. In *Kamal Nath*, it appears that Court prohibits private ownership completely. Whereas, in *Intellectuals Forum*, the Court asserts that doctrine does not exactly prohibit the alienation of the property. How the Court in latter of two cases came to such a conclusion has neither been explained nor does it become clear by the reading of the text of the judgement. It also appears that there was no need for the Court to delve in the issue because as found by the Court itself in *Intellectuals Forum* there was no such alienation by the government. The government itself was found to be the developer. In the light of above the moot point is that, can the proposition be treated as the *ratio* of the case?

If we scratch the surface it can safely be assumed that the doctrine basically ensures 'inter-generational equity' and 'intra-generational equity' by excluding the possibility of the natural resources being cornered by advantageously situated section of society for their exclusive benefit to the detriment of the entitlement of deprived section of the society and the rights of future generations to receive the environment as rich as it is today.

The Supreme Court in *Kamal Nath*[11], indicates that the doctrine is an effective check against the arbitrary executive action but the balancing, if done by the legislature itself, leaves little scope for courts to intervene. On the other hand in the *Intellectuals Forum*, the Court suggests that mere consistency with legislations can not be a saving grace. But the judgments fail to elaborate in such cases whether it is an issue of bad action by government or validity of legislation itself. In relation to latter a higher degree of judicial review on the basis of the subject matter of law, attracts the American concept of 'suspect legislation', which so far the Supreme Court has refused to recognize in very certain terms in the Indian context.[12]

The doctrine has been extended in a very interesting manner in the recent case (*2G Spectrum* case)[13] to 'air-waves'. Let us consider the following:

> The important questions which arise for consideration in these petition....are: whether the Government has the right to alienate, transfer or distribute natural resources/national assets otherwise

[11] *Supra* n. 4 at 35.

[12] *See Ashoka Kumar Thakur* v. *Union of India*, (2008) 6 SCC 1 at ¶ 184.

[13] *Centre for Public Interest Litigation and Ors* v. *Union of India*, (2012) 3 SCC 1 at ¶ 1.

> than by following a fair and transparent method consistent with the fundamentals of the equality clause enshrined in the Constitution?[14]

The Court, by visiting various constitutional principles in reference to understanding and ownership of natural resources, answered the question as follows:

> At the outset, we consider it proper to observe that even though there is no universally accepted definition of natural resources, they are generally understood as elements having intrinsic utility to mankind. They may be renewable or non renewable. They are thought of as the individual elements of the natural environment that provide economic and social services to human society and are considered valuable in their relatively unmodified, natural, form. A natural resource's value rests in the amount of the material available and the demand for it. The latter is determined by its usefulness to production. Natural resources belong to the people but the state legally owns them on behalf of its people and from that point of view natural resources are considered as national assets, more so because the state benefits immensely from their value. The state is empowered to distribute natural resources. However, as they constitute public property/national asset, while distributing natural resources, the state is bound to act in consonance with the principles of equality and public trust (emphasis added) and ensure that no action is taken which may be detrimental to public interest. Like any other state action, constitutionalism must be reflected at every stage of the distribution of natural resources. In Article 39(b) of the Constitution it has been provided that the ownership and control of the material resources of the community should be so distributed so as to best sub-serve the common good, but no comprehensive legislation has been enacted to generally define natural resources and a framework for their protection. Of course, environment laws enacted by the Parliament and State legislatures deal with specific natural resources, i.e., Forest, Air, Water, Costal Zones, etc.[15]

It must be noted here that the provision which has been quoted is a part of the 'Directive Principle of State Policy' and hence the issue that whether it can be mandated as compulsory part of state action arises. It is desirable but can not be enforced.

The interesting part in *2G* case, however, is that the Court has talked about the public trust in a context which has no direct relation with the environmental pollution. In the light of the above discussion, can we assume

[14] *Id.*

[15] *Id.* ¶ 63.

that the public trust doctrine is not only about the checks on the environmental degradation but also about the entitlement of the public at large over the natural resources? If affirmative, the public trust doctrine can become a crucial parameter to judge the state action in myriad situations.

In the instant case the court undertakes elaborate journey into international regime with respect to ownership of natural resource in following words:

> The ownership regime relating to natural resources can also be ascertained from International Conventions and Customary International Law, Common Law and National Constitutions. In International Law, it rests upon the concept of sovereignty and seeks to respect the principle of permanent sovereignty (of peoples and nations) over (their) natural resources as asserted in the 17th Session of the United Nations General Assembly and then affirmed as a Customary International norm by the International Court of Justice in the case opposing the Democratic Republic of Congo to Uganda. Common Law recognizes states as having the authority to protect natural resources insofar as the resources are within the interests of the general public. The state is deemed to have a proprietary interest in natural resources and must act as guardian and trustee (emphasis added) in relation to the same. Constitutions across the world focus on establishing natural resources as owned by, and for the benefit of, the country. In most instances where constitutions specifically address ownership of natural resources, the sovereign state, or, as it is more commonly expressed, 'the people', is designated as the owner of the natural resource.[16]

In the very next paragraph the Court come to the specific issue of spectrum in following words:

> Spectrum has been internationally accepted as a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient utilization. It has a high economic value in the light of the demand for it on account of the tremendous growth in the telecom sector. Although it does not belong to a particular State, right of use has been granted to states as per International norms.[17]

This paragraph implicitly accepts that it has been thought prudent by the 'community of nations' to leave it to the discretion of states to decide the manner in which the natural resources of that country may be exploited. Perhaps the reason for the same is that different nation states are at different stages of development at a particular point of time and any uniformity of

[16] *Id.* ¶ 64.
[17] *Id.* ¶ 65.

norms will result in great dis-service to the needs of the nation. The spirit has been very aptly caught by statement of Prof. Weiss: 'conservation, however, always takes a back seat in times of economic stresses'.[18]

The concept of 'sustainable development' also recognizes the fact of taking into consideration the stage of development of the country before balancing the environmental concerns with the needs of economic development. The issue of the development of the country can be measured either in terms of the immediate gain to the economy or as the long term gains to economy. The foresightedness of a policy also becomes a factor in the process. For example, a capital intensive industry may not bring the immediate monetary gains but can be good for the economic development of the country. The issue comes down to the question that, whether the development is all about monetary gains or it is also about increasing the accessibility to disadvantaged or less advantaged sections of the society?

Consider the statement of the Court in *2G Spectrum* case:

> As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the state in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects: first, it regulates the rights and obligations of the state vis-à-vis its people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and second, it regulates the rights and obligations of the state vis-à-vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties.[19]

The problem arises in operative part of the order. Unlike the above paragraph, the Court in the operative part appears to have forgotten the first aspect of paragraph quoted above and harps upon the second aspect only. If we try to take into consideration the first aspect as enumerated by the Court, we can very safely argue that the equitable access can be ensured by awarding licenses at cheaper rates or it can be ensured by subsidies. The former option is gone because in the Court's opinion auction is the only way. Keeping in view the decision taken by the Central Government in 2011, TRAI shall make fresh recommendations for the grant of license and the allocation

[18] *Supra* n. 6, ¶ 84.
[19] *Quoted in supra* n. 13, ¶ 69.

of the spectrum in 2G band in 22 Service Areas by auction, as was done for the allocation of the spectrum in 3G band.[20]

The latter i.e. subsidy option will require the identification of targeted people and given the fate of subsidies and entwined pilferages and the corruption it will be a nightmarish proposition for the policy framers. Therefore it won't be an exaggeration to say that the unintended effect of the Supreme Court's order is to exclude the bottom of the population from reaping the benefits of spectrum.

This leads us to reflect upon whether the judgments of the Supreme Court cater to the interests and sensibilities of the outspoken urban middle class? Although, it should not be taken as sweeping statement, in many cases they had championed the cause of poor. The second apparent problem with the order is mixing apples with oranges. General rule is that only the comparable are compared, so comparing 2G policy with 3G policy can only produce wrong premises and results.

All natural resources are held as trustee by the state and hence the public trust doctrine is applicable to air waves as well. The real problem arises when we want to extend the option of auction to the other natural resources example, minerals, use of water etc. The problem is here firstly, the nature of all natural resources is not same, some are renewable and others are non-renewable. The option of auction with respect to non-renewable resources will lead to exhaustion of these resources in much shorter period, by reason of more competitive exploitation. There has to be, therefore, other considerations while granting licenses. Secondly, even in respect of the same natural resource, the policy cannot be same in perpetuity. In the light of the judgment quoted above where only option is auction does it mean that any deviation from suggested policy will require either setting aside of order by larger Bench or else the deviation amounts to the 'contempt of the Court'?

The problem with the approach taken by the Court is that in spite of quoting extensively the public trust doctrine from previous cases, it ultimately falls upon the concept of distribution of state largesse on the touchstone of Article 14 of the Constitution of India, 1950. These are the traits of the Court which sits in Panel, Benches; you never know how the previous judgments should be employed for the later situations.[21]

[20] *Id.* ¶ 81.

[21] For more on polyvocality of Court *see* Nick Robinson, *Structure matters: The Impact of Court Structure on the Indian and U. S. Supreme Court,* 61 AM. J. COMP. L. 173-208 (2013).

It appears as if the Court in 2G case went for the scissors and paste job by merging *Secretary, Ministry of I & B* v. *Cricket Association of Bengal*[22] with *Kamal Nath*[23] case. Whereas, first case talks about 'Public Property' in the context of the rights under Article 19(1)(a) read with the Article 19(2), the second case discusses about public trust doctrine. These two cases were dealing with phenomena and the rights independent of each other. The Court in these two cases would not have imagined that their reasoning(s) can be combined by a future Court. But in legal systems governed by the precedents one is always uncertain about which nook or corner of the previous judgments a lawyer will ensconce and where the judge will agree with the logic.

The judgments like 2G are actually based on a fortiori reasoning that if the effect is bad so the previous steps leading to it must also be bad. It offers classic instances of throwing baby with bathwater. This order reminds of the prophetic words of Holmes, J. in *Northern Securities Co.* v. *U.S.*:[24]

> Great cases, like hard cases, make bad law. For, great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise kind of hydraulic pressure which makes what previously was clear seen doubtful, and before which even will settled principles of law will bend.

The Court in 2G case clearly relies on public trust doctrine and the proposition that public property must be used in a manner so that it benefits the public at large most. But somehow it comes to the conclusion that the maximization of revenue is the greatest public good. Whereas, it clearly forgets the other aspect of the public trust doctrine as enumerated by Joseph L. Sax[25]: "[T]he property subject to the trust must not only be used for a public purpose, but it must be held available for us by the general public...". The question arises, what do we mean by 'available for the general public'? Whether it means theoretical availability or to be made practically available? Does the cost, at which it is available, have to be factored in? Strange are the ways of justice!

It appears that there are many inconsistencies in the judgment. So there is a great probability that in the future the suggestion of court will be honoured more in giving lip service rather than in actual implementation because of its

[22] (1995) 2 SCC 161.

[23] *Supra* n. 4.

[24] (1903) U.S. 197 at 400-01.

[25] *Supra* n. 2.

inherent flaw. It is submitted that nature of the natural resource and the requirement of the society at a particular point of time must decide the policy rather than any water tight ratiocination. Environmentally benign approaches are more important than the monetary benefit to exchequer or at least the balancing of both is required. Sometimes a distinction is also made between 'weak' and 'strong' versions of sustainable development[26]. This distinction is also made on the basis of need and subject-matter only. It is also submitted that courts of law should avoid fishing in uncertain waters, where harvest not necessarily will be good. It can be seen that the order in *2G* case would require a continuing mandamus[27] and subsequent auctions are also appearing to be damp-squibs.

The issue of finding precedent becomes more complicated because of views of the Supreme Court in *Re Special Reference No.1 of 2012:*[28]

> *Regard being had to the aforesaid precepts; we have opined that auction as a mode cannot be conferred the status of a constitutional principle. Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximizing private entrepreneurs, adoption of means other than those that are competitive and maximize revenue may be arbitrary and face the wrath of Article 14 of the Constitution. Hence, rather than prescribing or proscribing a method, we believe, a judicial scrutiny of methods of disposal of natural resources should depend on the facts and circumstances of each case, in consonance with the principles which we have culled out above. Failing which, the Court, in exercise of power of judicial review, shall term the executive action as arbitrary, unfair, unreasonable and capricious due to its antimony with Article 14 of the Constitution* (emphasis added).[29]

Consequences of Deviation from the Doctrine

The question which arises more importantly is that what the consequences of non-compliance with the doctrine are? There appears to be inconsistency in the judicial pronouncement on this point also. In *Kamal Nath case* the Court ordered the remedial measures without cancelling of lease. It can be assumed that the Court treated it as a case of irregularity only, which does not go to the

[26] Bell and McGillivray, ENVIRONMENTAL LAW 61 (2008).
[27] For the concept of continuing mandamus *see Vineet Narain* v. *Union of India*, A.I.R. 1998 S.C. 889.
[28] (2012) 10 SCC 1.
[29] *Id.* ¶ 149.

root of the issue. Whereas, if we analyse *2G* case, it appears that the Court went full stretch and cancelled the licenses because it treated the executive action as void.

The great inconsistencies are because of the simple fact that in the 2G case the Court did not rely on the public trust doctrine for final basis of its decision. It basically fell upon the issue of arbitrariness to impugn the policy decision and thus violative of Article 14 of the Constitution. However, the question which becomes pertinent here is what should be the approach of the Court in case of violation of the doctrine? In the opinion of the author the doctrine should be one of the touchstones to test the executive action resulting in the alienation of the public resources. Any executive action, therefore, which does not take into consideration the doctrine, should be treated as bad because:

- it ignores a relevant consideration before making policy decision, and,
- it is an arbitrary action for it does not take identifiable factor into consideration before making policy decision and hence violative of Article 14.

The Supreme Court in *Ram Sethu* case has also given such indications that prior to making policy decisions it is imperative for the state to explore all options.[30]

Conclusion

Technically, though, the *2G* case has not been overruled yet because of *Presidential reference*,[31] the *ratio* of the case will have practically no *precedentiary* value in the future. But it appears that the basic proposition of *Intellectuals Forum*[32] with respect to the fact that the public trust doctrine can not be interpreted as a prohibition on the alienation of the property held as the public trust, has found favour in both, the2*G* and the *Presidential reference* cases.

The apparent inconsistency, although not clarified by the Court, arises because of the inherent possibility of uneven distribution of doctrine depending upon the nature of natural resource. The import of the above statement can be fully realised by a reference to Upadhyay and Upadhyay:[33]

[30] Dhananjay Mahapatra, *Look for alternative to proposed setu route: SC*, THE TIMES OF INDIA (May 9, 2008).
[31] *Supra* n. 28.
[32] *Supra* n. 6.
[33] Sanjay Upadhyay and Videh Upadhyay, 2 HANDBOOK ON ENVIRONMENTAL LAW 80 contd...

[T]wo points should be emphasised. First, certain interests, such as navigation and fishing were sought to be preserved for the benefit of the public, accordingly and property used for those purposes was distinguished from general public property which the sovereign could routinely grant to private owners. Second, while it was understood that in certain common properties such as the seashore, highways, and running water, perpetual use was dedicated to the public, it has never been clear whether the public had the enforceable right to prevent infringement of these interests... .

The Court clearly says in *Presidential reference* that alienation of natural resources is a policy decision and the choice of means for same is executive prerogative.[34] How far this understanding will skew the intra-generational equity aspect of public trust doctrine appears to be nobody's concern in the *2G* and the *Presidential reference* cases. Upadhyay further says[35], 'although the state apparently did protect public use, no evidence is available that public rights could be legally asserted against a recalcitrant government'. In any case, the Court in all the above cases had clearly indicated the doctrine is not a check against the legislature. The right to clean environment has been elevated to the fundamental constitutional principle but the public trust doctrine is not a binding code of conduct.

It is high time the legislature must move in to create concrete parameters given the fact that every day we hear about demands for the privatization of resources. The executive are not best suited to take into consideration the views of deprived and uneducated. We all know the fate of requirement of 'public hearing' in project clearances. It is neither in the interest of industry or citizen that every issue must ultimately land in a court of law. The public trust doctrine requires to be given a legislative mandate and the way to discharge the trust must also be provided. There is a view that even if not specifically mentioned in a Statute it must be read in the Statute, as Blum and Doot argue:

[A]lthough the state can authorize private rights in these resources, all private rights are subject to the state's sovereign ownership, a public easement requiring the state to maintain these resources as trustee for the public. Like the Statehood Act's declaration of public ownership of waterways, *courts should interpret the public trust*

(2002).

[34] *Supra* n. 28 at ¶ 149.

[35] *Supra* n. 33.

doctrine to be implicit in other statutory declarations of public ownership of natural resources (emphasis added)... .[36]

The concerns for environment now-a-days have taken a back seat because of economic meltdown, as also predicted by Prof Weiss.[37] The present day's pathos should be taken care of before it becomes too late. Ramachandra Guha very aptly catches the prevalent position:[38]

India today is an environmental basket-case; marked by polluted skies, dead rivers, falling water-tables, ever increasing amounts of untreated wastes, disappearing forests. Meanwhile, tribal and peasant communities continue to be pushed off their lands through destructive and carelessly conceived projects. A new Chipko movement is waiting to be born.

[36] Michael C. Blum & Erika Doot, *Oregon's Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches*, 42 ENVTL. L. 376 (2012).

[37] *Supra* n. 6.

[38] Ramachandra Guha, *The past & present of Indian Environmentalism*, THE HINDU (March 27, 2013).

Judges' Integrity and Judicial Governance: Making the Standards Work

*P.C. Harigovind**

Introduction

> The Court of Justice is a sacred temple, the Judges presiding over it are, tough men, the humble instruments in the interest of truth... .[1]

The role of judiciary as the sole guardian of justice and the saviour of fundamental freedoms is well realized and recognized under the International Law.[2] For a long period judiciary was glorified as the most reliable for every evil in the society. The growth of Indian Constitution as a living organism is made possible through the endeavours of many great judges. The contribution from the Indian judiciary was remarkable in the last century. Most of the International Human Rights were introduced into Indian legal system by the judicial activism. A judge is the real protector of the rights of the citizens and the noble judges will be the watchdog of the constitutional ambitions. Thus, the justice has a fundamental nexus with the judges' integrity. The entire programme behind the 'judicial governance' is to further and ensure justice. The law aims ultimately at the justice and the task is on the shoulders of judges. This task is the factor that makes the nexus between judges' integrity and judicial governance. As in the case of every profession, there would be a code of ethics for judges too. The rules of the code either written or unwritten are highly influential upon the virtue of judicial integrity. The sacredness of judiciary is ultimately in the hands of judges and the legal systems have to preserve the same. In India, the laws addressing the judges' conduct is in a very infant state. The objective of the discussion herein is to analyze the workability of the standards prescribed for regulating

* Research Fellow, School of Legal Studies, Cusat, Kochi-22.

1 Sir Muthusami Ayyer- the first Indian to be a judge of a High Court, in his Convocation Address to the Madras University in 1882 *quoted in* M. Hidayatullah, A JUDGE'S MISCELLANY 61(Second Series 1979).

2 "Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens", *see* Preamble, *United Nations Basic Principles on the Independence of the Judiciary* (1985). *See also Shingvi Declaration,* Principle 8 (1989).

judges' conduct. This is to be made in the recent context of Indian judiciary and its significance in enhancing the justice.

Indian Judiciary: Recent Trends and Tensions

Judges were understood once as an exception for the Acton's rule of *power corrupts*. Poverty, illiteracy, favoritism etc. were identified as the cause for corruption and the possibility of the same was believed to be far off from any court room. Of late, even the judges of the higher courts of the land are suspected to be of corrupted hands. If the judge goes influenced then what will be the fate of natural justice? The rule against bias is one of the basic aspirations of the natural justice. Impartial judiciary acts like a divine province for the common man. Several incidents recently recorded inverse images about the judiciary. There is presence of corruption in the Indian judiciary. There were only a few occasions in which the impeachment proceedings were initiated in India but this will not account for fairness of the Indian judicial system.

The gone era of judicial activism in India was so glorious to explain the heritage of Indian judiciary. After *Kesavanada Bharathi* v. *State of Kerala*[3], the constitutional scheme changed essentially and it expanded massively to accommodate almost all the rights recognized by the international community. Undisputedly, such a revolution in the Indian constitutional jurisprudence was realized through the prudent judges of the time. This judicial brilliance is now lost and from activism the court turns back to an inactive mode. For common man courts are no longer a guardian of the justice. Certain remarkable judgments from the past still operate as the legal barriers. This now prevents the present judiciary from making the justice system upside down for the vested interest of the few. Most of the judges are now using the realist tendencies to spoil the worth of judicial excellence. All these tensions are really attributable to the unethical practices in judicial system. Judges' integrity can be rule to cure the situation. This rule should be incorporated from the very root of judicial appointments to the retired life of the judges. The analysis demands a strict scrutiny of the issues that lead to anarchy in judiciary, before intending to mend a solution for it.

Corruption can be called as an inherited inclination or a part of human nature. *Kautilya* remarked in his *arthasasthra* that it is impossible for a government servant not to taste a bit of the king's revenue. The Indian courts

3 A.I.R. 1973 S.C. 1461.

had beaten the instances of corruption too hard. In *State of M.P.* v. *Ram Singh*,[4] it was remarked:

> Corruption in a civilized society is a disease like cancer, which if not detected in time, is sure to malign the polity of the country leading to disastrous consequences. It is termed as plague which is not only contagious but if not controlled spreads like a fire in a jungle.

The Supreme Court in *K. Karunakaran* v. *State of Kerala*[5] also observed that the menace of corruption cannot be permitted to be hidden under the carpet of legal technicalities. Question that remains is who can tame the judiciary when it gets swamped by corrupt hearts and minds? Neither the judges like Gajendragadkar, Bhagwati, Chinnapa Reddy, H.R. Khanna are to be found there nor can the Dworkin's *'Hercules'* be a reality.[6] We are taught that even retired judges are immune in respect of actions which were out of their official sphere. Judges will never disclose their possessions and will not try their colleagues.

There must be some norms to preserve the credibility of the judiciary in reality, not merely in the eyes of public. Acceptance of every decision lies in the science of trust made over by the judges. It will take a long time to re-establish the old image that the Indian judiciary had. Recently there were numerous instances which down casted the credibility of the Indian judiciary.[7] Independent judiciary is one of the basic features of justice and good governance.[8] The rule of law and the need for judges' integrity in assuring good governance is of supreme importance in any democratic society. The integrity of a judge and its importance in the rule of law reveals the impact of judicial corruptions over the Indian society. The Indian Parliament recently looked into this matter and remarked that the people's faith in the independence and integrity of judiciary is a crucial element in the functioning and maturing of the judiciary.[9] The Rajya Sabha made such

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4 A.I.R. 2000 S.C. 870 7.

5 A.I.R. 2000 S.C. 3381.

6 Ronald Dworkin, TAKING RIGHTS SERIOUSLY 105-30 (1996).

7 S.P. Barucha, former Chief Justice admitted that nearly 20% of judicial officers to be corrupt, *see* Rajeev Dhavan, *Judicial Corruption*, THE HINDU DAILY (Feb. 22, 2002); M. N. Krishnamani, *Law Day*, 2004 (I) S.C.J. 1, 7.

8 Art. 1, *Universal Charter of Judge* (1999) observes: "The independence of judge is indispensable for impartial justice by law." *See also Shingvi Declaration*, *supra* n. 2.

9 Shri. Sitaram Yechuri, a Rajya Sabha M.P. from West Bengal made a motion in the Upper House of the Parliament for impeaching Justice Soumitra Sen of High Court of Calcutta. The impeachment proceedings were against the corrupt practices done by the judge when he was a practicing advocate. The most logical question arises is that how did he enter the post of a High Court Judge. It clearly illustrates the short

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interference during the discussion of motion for the impeachment of Justice Soumitra Sen from the Calcutta High Court. The role play of a judge in every society was put by the Parliament as: "judge is not a judge only in the court, but a judge is judge everywhere else in the society and that his acts, inside or outside the Court, are reflection on the judiciary as a whole." [10]

The motion against the judge was identified by the Parliament as an attempt to salvage the integrity of judiciary from 'being besmirched by a single judge'.

Rule of Law, Judicial Independence and Corruption

Judicial corruption is now identified as an international problem.[11] Corrupt and biased judicial officers will cut at the base of conventional judicial principles in any democracy. The rule of law is identified as the principle that runs through the entire fabric of the Constitution.[12] The judiciary free from the clutches of executive will only succeed in accomplishing the public confidence.[13] In the golden era of the natural law jurisprudence itself, the independence of judiciary was a well accepted rule.[14] The present day allegations towards the corrupt practices of the judges have raised much diffidence among public over judiciary. It is not proper to confine any discussion of the independence of judiciary, to the principle of the 'separation of powers', which keeps the three organs of a government apart. The independence of judiciary is about a judiciary which is free from any kind of pressures and prejudices. The Indian Supreme Court in *C. Ravichandran Iyer* v. *Justice A.M. Bhattacharjee*, observed:[15]

> The independence of judiciary is not limited only to the independence from the executive pressure or influence; it is a wider concept which takes within its sweep independence from any other pressure and prejudices. It has many dimensions, *viz.*, fearlessness of other power centres, economic or political, and freedom from the

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comings in the procedure of selecting judges. The verbatim record of the Parliament proceedings is *available at* http://164.100.47.5/newdebate/223/17082011/15.00pmto16.00pm.pdf (last visited Nov. 1, 2012).

10 *Id.*

11 *Judicial Integrity and its Capacity to Enhance the Public Interest*, Report of Global Programme against Corruption, Centre for International Crime Prevention, Office of Drug Control and Crime Prevention, U. N. Office at Vienna 2 (2002).

12 *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87, ¶ 27.

13 L.M. Singvi (ed.), JAGDISH SWARUP'S CONSTITUTION OF INDIA 1935 (2007).

14 Harold Potter, THE QUEST FOR JUSTICE 30 (2006).

15 (1995) 5 SCC 457 at 469.

prejudices acquired and nourished by the class to which the judges belong.

This gives an impression that the judicial independence means 'to be independent of his colleagues too'.[16] The principle of the independence of judiciary becomes more crucial when the fundamental right of a citizen gets infringed. It is the jurisprudentially accepted role of the judge to act independently in all situations and to assure the constitutional balance.[17] Even the political philosophy one admires is to be left apart on taking the seat of justice.[18] Impartiality, which makes a part of the judicial independence, is understood as part of the definition of a good judge.[19] All these values preserve the concept of the rule of law in its dominion.

The judicial independence and the impartiality were recognized rules from the ancient times.[20] The rule of law still remains as one of the most important indices of a civilized society.[21] The rule of law has a fundamental obligation to afford protection to all against the abuse of public or private power.[22] This can be one facet of the rule of law and it cannot be laid down as an exclusive and precise principle. Krishna Iyer, J. observes: "the content of rule of law cannot be determined for all times and all circumstances. It is a matter not for lament but for rejoicing".[23]

Krishna Iyer, J. also narrates the right role of judge in handling the rule of law.[24] The primary role of judge is to do justice between the parties and for that if the rule of law causes any hindrance then the judge can either avoid it or even change it. The rule of law can be hence compromised only in the sake of the greater justice. The matter becomes more serious as the role of a judge in so making the rule of law gets exposed. The rule of law to its core includes contributions by the judges made in the course of administration of the

16 *Id.*
17 Neil MacCormick, INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY 181 (2007).
18 Kuldip Nayar, *The 13th Chief Justice, in* Kuldip Nayar (ed.), SUPERSESSION OF JUDGES 37 (1973). *See also* H.M. Seervai, THE POSITION OF THE JUDICIARY UNDER THE CONSTITUTION OF INDIA 122 (1970).
19 Arthur T. Vanderbilt, JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS AND SELECTION 19 (1958).
20 Patrick Olivelle, MANU'S CODE OF LAW: A CRITICAL EDITION AND TRANSLATION OF THE MANAVA-DHARMASATRA 167-69 (2006).
21 H.R. Khanna, JUDICIARY IN INDIA AND JUDICIAL PROCESS 20 (1985).
22 V.R. Krishna Iyer, A JUDGE'S EXTRA- JUDICIAL MISCELLANY 278 (2001).
23 *Id.*
24 *Id.* at 272. *See also* Julius Stone, HUMAN LAW AND HUMAN JUSTICE 101-03 (2000).

justice.[25] Judges in higher judiciary need to be creative, especially in judicial review. S.P. Sathe opines:[26]

> A judge, who wants to do justice to his work of justicing, particularly if he is participating in judicial review of legislative action, is bound to be creative... . A judge who interprets a bill of rights has to expound the philosophy and ideology that underlies such a bill of rights.

The role of judge, therefore, in preserving and advancing the constitutional aspirations is very high. The scenario created by corrupt judiciary is to be looked upon from such dimensions. It is recognized internationally that the actions to clean up corruption in judiciary is still unmet.[27] Hence, the unworthy and corrupt judiciary causes threat to rule of law.

Rule of Law and Good Governance

Good governance is called 'the king of human rights'[28] as it is a pre-requisite for attaining all other human rights internationally respected. The good governance is not something that evades the corruptive practices from the administrative domain.[29] In every democratic society for the realization of human rights and other fundamental freedoms, there should be an unbiased administration of power. The issues of corruption and related illness are always a concern about the executive wing of the government. In such cases the judiciary becomes the last resort to saves the public from such executive menace. If the judiciary, however, runs into the corrupt hands; then the social threats get doubled. It is now a well settled principle that the independence of judiciary is a vital part of good governance.[30] In every democratic polity, for ensuring good governance there is a requirement of a forward looking

25 *Supra* n. 22 at 14.
26 JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS 30 (2d ed. 2008).
27 *Supra* n. 7 at 9.
28 V.M. Peshwa & Mandakini Peshwa, *Good Governance and Human Rights, in* J.L. Kaul & Manoj K. Sinha (ed.), HUMAN RIGHTS AND GOOD GOVERNANCE 145 (2008).
29 *Id.*
30 *Commonwealth (Latimer House) Principles on the three Branches of Government* (Commonwealth Secretariat, April 2004), *available at* http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=37744 (last visited Dec. 25, 2012).The principles were coined for the promotion of good governance, rule of law and human rights. It also makes emphasis over the inter-relation between good governance and independence of judiciary.

constitutional framework and the independent judicial system.[31] By the ongoing unhealthy practices in the judiciary every legitimate desire of countrymen is spoiled. The good governance is well recognized right under the international law and still the Indian judiciary seems hesitant to be acquainted with. The United Nations has made good governance, a reinforcing factor of the human rights.[32]

The end of twentieth century visualized the emergence of the concept of good governance into the province of human rights jurisprudence. The honest, effective, equitable, transparent and accountable exercise of power by various branches of the government can be a definition for good governance.[33] The definition of good governance diverges from person to person as it depends on various elements such as political identity, social values, and the democratic values. Even the political inclinations of the administrators are read as violations of the good governance. But this can be agitated by taking two sides. As mentioned earlier some argues the complete freedom for the judges from political philosophies[34] while others call such judges as apolitical.[35] On deciding case, the social philosophy of a judge will get reflected[36] and it in turn shows the judges' political signature. This illustrates the difficulty in coining a well defined proposition for good governance. Accountability and transparency, though, can be called as the fundamental norms of good governance.

The Supreme Court through, its decisions has approved the concept of good governance in many instances. The Court emphasized on the doctrine of good governance mainly to invoke fairness and transparency in the executive actions.[37] Likewise the court can use 'public reason' and thereby protect the constitutional norms from the legislative actions and such actions of the court will not be counted as anti democratic. It will, in turn, preserve the values of

31 Madhav Godbole, *Good Governance: A Distant Dream*, 39 EPW 1103, 1106 (March 13-19, 2004).

32 *See Good Governance Practices for the Protection of Human Rights*, HR/PUB/07/4 (Office of United Nations High Commissioner for Human Rights), *available at* http://www.ohchr.org/Documents/Publications/GoodGovernance.pdf (last visited on Dec. 25, 2012). The Document asserts that good governance and human rights were mutually reinforcing and that the former was a precondition for the realization of the latter.

33 Manoj Kumar Sinha, *Human Rights and Good Governance*, 46 IND. J. INT'L 539 (2006).

34 *Supra* n. 14.

35 *Supra* n. 22 at 293. *See also* V.R. Krishna Iyer, *Politics and Performance of Our Courts*, A.I.R. 2010 (J) 175 at 176.

36 *State of Madras* v. *V.G. Row*, A.I.R. 1952 S.C. 196 at 200.

37 *Dev Dutt* v. *Union of India*, (2008) 8 SCC 725 at 737.

the rule of law and good governance.[38] In the above two instances, the court stood for preserving good governance and the rule of law through its decision making process. But the concept of good governance itself is not noted as a constitutional concern. The Supreme Court in some instances has directly observed good governance as a part of the rule of law. The Court in *M.J. Sivani* v. *State of Karnataka*[39] commented that: "Fair play and natural justice are part of fair public administration; non arbitrariness and absence of discrimination are hallmarks for *good governance under rule of law* (emphasis supplied)".

The same principle must be applicable in the case of judicial conduct. Hence clean, efficient and benevolent administration is the essential to good governance and for the promotion of the rule of law.[40] At times the court also lacks clear perception about the concept of good governance and interprets in the vaguest terms.[41] These instances indicate the need for a proper admiration of the above anomalies from the judiciary for establishing the primacy of good governance under the rule of law.

The Norm of Judge's Integrity

The integrity of judge is felt as the backbone of the fairness and authenticity of the judiciary.[42] Observing the judges' conduct, in many instances it hoards suspicion into the minds of public about its reliability. Is there a norm of judges' integrity? How far the state can monitor and regulate such integrity? These questions will help to analyze the lapses in the Indian law in preserving the judges' integrity.

Earlier the law granted much immunity to a judge for his unbiased performance in rendering justice. These immunities really kept the judge out of many positive social obligations. Internationally there are numerous instances which tampered with the external accountability of a judge. Integrity as such is a condition for democratic accountability. The public cast

38 *State of U.P. and others* v. *Jeet S. Bisht*, (2007) 6 SCC 586 at 591, 618.

39 (1995) 6 SCC 289 at 307.

40 *Patangrao Kadam* v. *Prithviraj Sayajirao Yadav Deshmukh*, (2001) 3 SCC 594 at 605.

41 For example the Court in *Ashoka Smokeless Coal India Pvt. Ltd.* v. *Union of India*, (2007) 2 SCC 640 at 697 opined: "[G]ood governance would mean protection of weaker sections of the people." This is very vague in the sense that the wholesomeness of the concept of good governance is lost. The principle does not have any poverty dimension in particular. Thus it is submitted that the above quoted opinion of the Court about good governance is to be opposed respectfully.

42 *Supra* n. 31.

its trust directly to the public office but in fact the trust will be invested in the person who holds such office.[43] Thus, entire expectation for justice will be made from the person who occupies the seat of justice.

The above version of the integrity is an institutional one; alongside integrity can also be of a professional character. It is observed that the rule of law requires the office holders to possess the professional integrity.[44] The professional qualities will enable the person to identify and appreciate the right institutional values. From both this premise and as a prerequisite for the rule of law, judicial integrity is to be regarded as a well identified norm. Dworkin through his jurisprudential theory had identified a role model judge called *Hercules*. Dworkin remarked: "[J]udge named *Hercules*, who is endowed with superhuman skill, learning and patience. *Hercules* has, in the highest measure; both the traditional legal skills associated with interpretation of statutes and precedents, and also the wisdom of ages to be derived from political philosophy".[45]

Here Dworkin actually prescribes certain professional qualifications for a judge to meet his institutional quality of the *right answer thesis*.[46] Similar designs can be drawn from the other jurisprudential theories.

Even from the time of Aristotle, the role of a judge and his qualities were remarked as too sensitive. Aristotelian perception equated a judge with a medical professional who had to offer the right treatment to his patient. Correspondingly every judge has to make the right decision using his prudent attitude between the disputing claims.[47] Every proposal on an active judge insists on creativity; even at trial stage. The US Supreme Court remarked on such judges' duty as:[48]

> Judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge remaining inert. These assertions raise only one concern about the judge, the integrity that he holds in the business of rendering the justice. The above reminiscence on the judicial responsibilities itself

43 Jonathan Soeharno, THE INTEGRITY OF THE JUDGE: A PHILOSOPHICAL INQUIRY 43 (2009).
44 *Id.* at 39.
45 J. W. Harris, LEGAL PHILOSOPHIES 183 (1980).
46 *Supra* n. 5. *See also* Wayne Morrison, *Jurisprudence: From the Greeks To Post-Modernism* 225-27 (1997); Richard A. Posner, THE PROBLEMS OF JURISPRUDENCE 197-203 (Indian Reprint, 2010).
47 *Supra* n. 43 at 54-55.
48 *United States v. Marzano*, 149 F.2d 923, 925 (2d Cir. 1945) as *quoted in* Stephen A. Saltzburg, *The Unnecessarily Expanding Role of American Trial Judge*, 64 VA. L. REV. 1, 9 (1978).

> presents judges' integrity as ever ruling norm for the good governance.

Enforcing the Judges' Integrity: Indian Scenario

Every nation has to march forward and keep their judicial mechanism free from corruption and within the domain of public confidence. Judiciary is not only regulating the public affairs of a nation but the globalised private intrusions are also under the judicial check and balance system. The role played by judiciary becomes, therefore, as the guarantor of fundamental freedoms, more spirited. Normally decisions taken by courts are institutional. It rarely conveys the identity of judges and his social philosophies to the public at large.[49] This usual position has changed a lot and now there are devotees for judges. Similarly there are communist and commercialist judges. Even lawyers and clients can wait for their favourite bench to come for presenting their cases. It cast dark shadow over the judicial dependability. The experiences from India are not special. Now there is a high demand from the society for regulation of the judiciary by the state laws.[50]

There can be multiple methods to retain the integrity and the most favourable one is to make the norm of judicial integrity into the legislative one. By codifying those norms, it will make much stringent applicability without departing from the age old principle of the judicial immunity. The judicial immunity is needed to a greater extent for the sake of unfettered application of judicial wisdom. To make law so as to tame corruption in judiciary without sacrificing its inherent independence is an internationally accepted principle.[51] The following aspects have been identified by the Council of Europe, to be inculcated into the judicial system:[52]

49 *Supra* n. 39 at 284.
50 Introduction of *Lokpal* Bill in 2011 and in relation to that there was high demand from the Indian society to include higher judiciary in the purview of present Bill. However, it is submitted that it would not be much advisable to bring the higher judiciary within the purview of *Lokpal* as it treats judiciary similar to that of legislature and executive. It may also cause inconsistency to the functioning of judiciary as there is frequent chance for malicious interference by agitated litigant.
51 Art. 11, *United Nations Convention Against Corruption* (2003) reads: "Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary... ."
52 *See Report on Judicial Corruption*, Council of Europe Parliamentary Assembly contd...

- to ensure that the judges are aware about the dignity of their office and providing them enough human and financial support;
- to develop ethical standards for judges and to constitute better monitoring mechanism;
- to constitute a monitoring mechanism for the review of judges' pecuniary position;
- ensuring the recruiting, retirement and expulsion procedure of a judge is purely subjected to meritorious considerations; and
- providing every judge proper training in connection to matters of corruption and ethics.

These European principles can also be a primary premise for the assessment of Indian legal measures promoting judicial integrity.

Indian Law Regulating Judges' Conduct

India lacks proper code of conduct for the judges from top to bottom level. Apart from the 'well recognized and non practiced principles of the integrity' the legislature is only bothered about the expulsion of the judges on the proved misbehaviour. This actually raised the social demand for including the judges under the purview of *Lokpal Bill*. The existing law in India is only concerned about the inquiry into judges' misconduct.[53] This old legislation cannot be criticized as the principle then was of judicial immunity. Judges at the time were believed to be of high moral and ethical values. Only the higher judiciary is in concern of the 1968 Act.[54] It is not good to leave open the lower courts from the norm of judge's integrity. There should be some unique standard that is to be observed by the judiciary irrespective of their ranks; but graveness of the misconduct increases with the rank. The committee constituted and the procedural requirements to be complied under Section 3 of the Act are less effective and appreciable.[55] Especially in the present century, the old law is not even fit to be argued.

The need for a new legislation on the subject was strongly felt by the Parliament and consequently a Bill was introduced to try the judges'

Committee on Legal Affairs and Human Rights, Draft Resolution Principle 9 (Doc. 12058 Nov. 6, 2009).

53 Judge's (Inquiry) Act, 1968 in its Preamble prescribes it as: "An Act to regulate the procedure for the investigation and proof of the misbehaviour or incapacity of a judge of the Supreme Court or of a High Court and for the presentation of an address by Parliament to the President and for matters, connected therewith."

54 *Id.* S. 2(c) says: "Judge means a Judge of the Supreme Court or of a High Court and includes the Chief Justice of India and the Chief Justice of a High Court."

55 *Id.* S. 3.

misconduct.[56] Comparing to the old legislation the Bill contained two major improvements. It envisaged constitution of a National Judicial Council[57] and defined the notion of 'misbehaviour'[58]. The sanctity of this Bill has been evaluated thoroughly by experts and many improvements were suggested.[59] The scrutiny of the new Bill has been made by the Law Commission with reference to the prior instances of the judicial misconduct in India along with the legal positions on the subject in the different countries.[60] One of the major suggestions by the Commission was to introduce *minor measures* if the misconduct was of trivial nature.[61] The composition of the Council included only the judicial members and the same was justified by the Commission referring from the international experiences.[62] The exhaustive amendments were recommended by the Commission including the introduction of the whistleblower provision and provision to take action in the public interest.[63]

The report of the Commission might be the sole reason behind the new Draft Bill on the judicial accountability.[64] The new Bill is more transparent and it encompasses many values of the judges' integrity like accountability, transparency, standards of judicial conduct and so on. The Bill devotes a complete chapter to address the standards of the judicial conduct.[65] Nearly fourteen principles are enshrined as part of the good judicial values. Legislatively set rules of this kind will be of real help for the public to analyze the right and wrong from a judge. Unfortunately this Bill also confines its application to the judges of the higher judiciary.[66] It is difficult to set some differences for a trial judge from that of a High Court judge in terms of the integrity. The expectation from the higher justices can only make them more responsible but does not make the lower court less answerable. The proposed Bill also make the judges to disclose their assets and liabilities and it is also a

56 The Judges' (Inquiry) Bill, 2006 intend to inquire about judges' misconduct at higher judiciary. Preamble of the Bill clearly mandates that its application is confined to the High Court and the Supreme Court Judges.

57 *Id.* S. 3.

58 *Id.* S. 2(j).

59 *See* The Law Commission of India, *195th Report of on the Judge's (Inquiry) Bill, 2005* (2005).

60 *Id.*at 5.

61 *Id.*at 7.

62 *Id.*at 10.

63 *Id.* at 507.

64 The Judicial Standards and Accountability Bill, 2010.

65 *Id.* Chapter II.

66 *Id.* S. 2(g).

the part of external integrity of a judge.[67] There is a two tier mechanism to oversee the complaint; an 'Oversight Committee' and another 'Scrutiny Panel'. The complaint can be filed by any person before the Oversight Committee and the same will be forwarded by them to the Scrutiny Panel to find out the reasons for such complaint.[68] The Oversight Committee is also having a non judicial member which can add some more fairness to the system.[69] The comprehensive scheme for conducting investigations and inquiries are provided in the Bill and it can be taken as a step forward from the existing Act. The only question left is that of non-inclusion of trial courts under the legislation and the reason for Parliament to keep the Bill in abeyance.

In addition to the regulations set forth by the Bill, selection process of the judges is also needed to be changed. The existing practice of selecting judges seems to be less reliable as there involves all kinds of favouritism. The constitution of a national level commission is felt as the need of the day.[70] The commission should be more appropriate body to be consulted in case of appointment and the transfer of judges. The commission can also monitor and even amend the code of conduct for judges. The constitutional provisions will give enough backing for the creation of the All India Judicial Service which will work as strong substitute for the existing method of recruiting the judges.[71] Performance can be a criterion for promotion to the higher judiciary and in that respect the impartial monitoring can be done by the national commission. The All India service for the appointment of judges is not an innovative idea to the Indian legal system. There were recommendations in this respect in very olden days itself.[72] It is true that there are undesired

67 *Id.* Chapter III.

68 *Id.* SS. 8-10.

69 *Id.* S. 18(1)(e).

70 V.R. Krishna Iyer, *National Judicial Bill Falls Short*, PUCL Bulletin (Jan. 2004), *available at* http://www.pucl.org/Topics/Law/2004/judicial-commission.htm (last visited Dec. 29, 2012).

71 *See* Part XIV, Chapter 1 of the Constitution of India, 1950. *See also* B.P. Jeevan Reddy, *A Consultation Paper on All India Judicial Service*, National Commission to Review the Working of the Constitution (2001), *available at* http://lawmin.nic.in/ncrwc/finalreport/v2b1-15.htm (last visited Dec. 29, 2011).

72 "14th Report of on *Reforms of the judicial administration* (1951) prescribes for the constitution of All India Judicial Service. 80th Report of the Law Commission on *Appointment of the Judges* (1979) while examining the problem of arrears in trial courts, recommended formation of an All India Judicial Service", The Law Commission, *77th Report of on Delay and Arrears in the Trial Courts* 32 (1978), Chapter IX, ¶ 9.6.

persons in the office of a judge[73] and to escape such situation it is good to resort to an all India service for recruiting officers to the judiciary.

Conclusion

Good governance is an art of administration by improving the standard of living in a society in a progressive manner.[74] It is also propounded that the rule of law is an Aristotelian necessity for good governance.[75] The Indian nation affirms good governance as one of the bedrock values of the democracy and is intensely imperative to improve the right of its citizen.[76] There was some hesitation from the side of the Supreme Court to identify good governance as a fundamental right.[77] The proper administration of a governmental mechanism is not at all confined to the legislative and executive functions; judiciary is well inside the concept of good governance. It will not be a bad argument if one strongly contends that the judiciary has to observe more ethical values than the other branches of the government. It is true that a dishonest judge will not be traced or suspected as easy as a dishonest public official.[78] But the judge being the sole protector of rule of law can never even have a chance of being dishonest. The integrity of a judge will run with him even after his retirement and with his judgments even after his death. All proposed laws on the judge's integrity should soon be a reality prescribing the basic norms for good governance.

The value of being a judge should be felt by every judge. The norms for their appointment should be strict and only the quality should be assessed for the judge's appointment. Post retirement commitments should not be allowed

73 *Supra* n. 7.

74 "Good governance signifies the way an administration improves the standard of living of the members of its society by creating and making available the basic amenities of life; providing its people security and the opportunity to better their lot; instil hope in their heart for a promising future; providing, on an equal & equitable basis, access to opportunities for personal growth; affording participation and capacity to influence, in the decision-making in public affairs; *sustaining a responsive judicial system which dispenses justice on merits in a fair, unbiased and meaningful manner; and maintaining accountability and honesty in each wing or functionary of the Government (emphasis supplied)*", Y.K. Sabharwal, *Role of Judiciary in Good Governance, available at* http://www.highcourtchd.gov.in/right_menu/articles/goodgovernance.pdf (last visited Dec. 30, 2012).

75 V.R. Krishna Iyer, THE DIALECTICS AND DYNAMICS OF HUMAN RIGHTS IN INDIA 93 (1999).

76 *See* The Preamble of Lokpal Bill, 2011.

77 *Supra* n. 28.

78 J. Warren Madden, *Is Justice Blind?*, 280 ANNALS AM. ACAD. POL. & SOC. SCI. 60 (March 1952).

and there should be sufficient pension for the judges. Most of the members from the higher judiciary submit themselves to the political inclinations as to fulfill their post retirement dreams. It is also advisable to extend their service periods. There should be an identifiable code of conduct for the judges that enable the common man to adjudge their do's and don'ts. There should also be a scheme to analyze the performance and ability of a judge to continue in his seat once they get into the system. The pending Bill on the judicial accountability should think of introducing all these provisions into its scope.

Verma Committee Report: A Charter of Duties

*Kanwal DP Singh** & *Aditya Parolia***

Introduction

The 16 December 2012 *Delhi Gang Rape* case shook the conscience of the country. The Government responded by constituting a Committee, headed by Justice J.S. Verma (Retd.), for recommending changes in 'the present laws so as to provide for speedier justice and enhanced punishment in cases of aggravated sexual assault'.[1] The Committee, popularly called as Verma Committee, submitted its Report on 23 January 2013. This Paper analyses the recommendations made by the Committee in its Report on 'Amendments to Criminal Law'. The paper finds that the Report is best understood as a Charter of duties rather than a set of amendments to criminal law. A broader characterization of the Report does greater justice to the Report's holistic and comprehensive nature. It shifts the focus from the debate on the absence of law to a discussion on the mutual failure of the State and the society in fulfilling their respective duties. Arguably, therefore, the root cause of rape and violence against women in India is not the absence of strict laws but a tardy implementation of those laws and a selective amnesia of duties. Accordingly, most of the Report's recommendations are in the areas such as police reforms, medico-legal examination systems, electoral reforms, and education and perception reform. In short, it can be said that, just as the Constitution is a dead letter without constitutionalism, stricter laws are superfluous without the State's promise of their faithful implementation and the society's responsibility to create normative structures nurturing individual and institutional virtuosity.

One of the conclusions of the Verma Committee Report is illuminating:

> The existing laws, if faithfully and efficiently implemented by *credible law enforcement agencies*, are sufficient to maintain law and

* Professor of Law, GGSIP University, Delhi.

** LL. B. student, Amity Law School, Noida.

[1] *The Gazette of India*, Ministry of Home Affairs Notification No. SO 3003 (E) (New Delhi, Dec. 24, 2012).

order and to protect the safety and dignity of the people, particularly women, and to punish any offenders who commit any crime. This is not to say that the necessary improvements in the law, keeping in mind modern times, should not be enacted at the earliest.[2]

One begins to wonder then, do we really need *tougher laws* against rape and sexual assault or a *tougher implementation* of the existing laws should suffice? The above question is not without merit. Indeed, the intent underlying the question is not to raise doubts as to the necessity for improving existing laws. Refining and upgrading laws in response to changing circumstances and needs of the society is always welcome. Not the least because detailed and nuanced laws reduces arbitrariness by limiting the discretion of personnel in-charge of implementing those laws. In fact, the question is a way to revert to the *fundamental causes* of violence and discrimination against women in India.

The Ordinance and the Bill

Subsequent to the Committee's Report, the government hammered out an Ordinance within a week, by 01 February 2013.[3] The establishment of the Verma Committee and the passage of the Ordinance by cabinet approval was the State's frantic response to the ignominious and barbaric *Delhi Gang Rape* case[4]. The show of swiftness and seriousness showed by the Government was to assuage the rising anger among India's more politically assertive and civic-minded youth for whom *Nirbhaya* (rape victim) had become a symbol of the failure of the State in ensuring the safety and security of women. People demanded immediate action. Having been cornered and put on the defensive, the Government responded with an equal sense of urgency and purpose. As a result, the State achieved at least one goal through the Ordinance i.e., political calm, even though the Ordinance failed to deter continued instances of rape and abuse. Even though it is beyond the scope of this paper, it must be noted that experts criticized the Ordinance on the grounds of poor drafting, archaic language and verbal ambiguities.[5] In the larger scheme, the Ordinance was a political tool rather than an attempt at serious law reform. The Ordinance had

2 J.S. Verma et al., *Report of the Committee on Amendments to Criminal Law*, 411 (Jan. 23, 2013).

3 *Cabinet clears Ordinance, makes anti-rape laws stricter*, THE TIMES OF INDIA (1 February 2013), *available at* URL: http://articles.timesofindia.indiatimes.com/2013-02-01/india/36683249_1_verma-committee-penalty-ordinance (last visited March 08, 2013).

4 *Vijay Singhal* v. *Govt. of NCT of Delhi*, 2013 Indlaw DEL 743; WP(C) 195/2013 judgment delivered on March 22, 2013.

5 Damayanti Datta, *Law still defeats the Victim*, INDIA TODAY 39 (Feb. 18, 2013).

been promulgated almost in a jiffy after effecting only some ad hoc and hurried changes in the Committee's recommendations.

Generally, a State responsive to the concerns of its citizens and self-conscious of its image in the eyes of the people signifies the existence of a vibrant and healthy democracy. However, the problem with our State is that it more often acts *reactively* than it does *proactively*. Prior to the shameful and outrageous Delhi Gang Rape, there was no serious policy initiative in the pipeline for improving the security and safety of women in public places. The truth is that the impetus for tougher laws came from the public and perforce the government had to act. This fact is duly acknowledged in the report.[6] In the words of women's rights lawyer Flavia Agnes: "the vigorous public discourse following (the Delhi Gang Rape) is a positive sign but hopefully the demand for quick solutions will not ignore the complexities involved in dealing with all forms of violence against women."[7] In the run up to the Parliamentary vote on the Criminal Law (Amendments) Bill, even a leading newspaper editorial advised patience in the face of delay in the Bill approval.[8] Delay was considered to be good, being in the interest of a wider discussion and scrutiny of a crucial piece of legislation. Even now after the passage of the Criminal Law (Amendments) Act, 2013, there is a lingering impression that provisions relating to age of consensual sex, voyeurism, stalking and the definition of rape fall prey to the expediencies of legislative politics. An opportunity that could have remarkably altered public attitudes towards women through genuine debate and reason was squandered.

The Report: A Positive Commitment Contract

Coming back to issue at hand, the Ordinance and the Criminal Law (Amendments) Bill must not be seen as the limited extent of the Verma Committee Report. The Report is much more comprehensive and holistic in its approach and recommendations. It intends to achieve more than just an Ordinance or an amendment to the criminal law. The latter are only stopgap measures in achieving real progress. After all, letter of law can do only that much. When dealing with offences like rape and sexual assault against women in a country where necessary laws already exist, stricter laws have diminishing marginal returns. Therefore, harsher laws will not bring us closer to the ultimate goal of eliminating rape and sexual assault from our midst.

6 *Supra* n. 2 at 17.

7 Flavia Agnes, *No Shortcuts on Rape: Make the legal system work*, Vol. xlviii, No. 2 ECO. & POL. WEEKLY 12-15 (Jan. 12, 2013).

8 *Delay is Good*, THE INDIAN EXPRESS 12 (March 13, 2013).

The essence of Verma Committee Report is best understood as a *Positive Commitment Contract* founded on the ideas of Republicanism, Constitutionalism and Gender Equality. And until we see the report in these broader and philosophical terms, we will be failing in acknowledging its true import and legacy. As compared to the Hobbesian Social Contract (or a Negative Commitment Contract), a *Positive Commitment Contract* is one where, on one hand, the State has a duty to ensure the security of its citizens whilst also creating a climate of opportunity and progress for every person, on the other hand, citizens are expected to do more than just surrender some of their freedoms in exchange for security and public order. They too have duties.

Unlike the Hobbesian Social Contract, the *Positive Commitment Contract* is not a fiction of the Age of Enlightenment. It is a contract inspired by and rooted in the Constitution of India. No amount of stricter laws can effectively curtail the incidence of rape and sexual assault against women in India until the State and the society give meaning through their actions to Articles 14, 15, 19 and 21 read along with Articles 38, 39, 39A and 51 A(e) of the Constitution of India, 1950.

Hence, the essential message of the Report is that *real* progress in creating a safe and secure environment for women requires reforming the attitudes prevailing in both the State and the society. Professor Upendra Baxi has expressed a similar view on the Report. According to Baxi, the report speaks against civil society and political rape cultures. Furthermore, he adds that a precious message of the Report is: "one may not take law reform seriously without taking human and social suffering equally seriously"[9]. In other words, we can give teeth to the law but it will not bite unless there is a sacred commitment on the part of the State to dutifully implement the laws and on the part of the society to conscientiously promote a normative structure that complements those laws. The Report must then be seen as a *Charter of Duties* of the State and the society. Approaching the Report purely as a Charter of Rights for Women or a list of proposed amendments to the law[10] is tantamount to evading our responsibility as citizens.

[9] Upendra Baxi, *Moving to the House*, THE INDIAN EXPRESS 10 (Feb. 04, 2013).
[10] As has been done by some commentators, *see* Albeena Shakil, *Protests, Justice Verma Committee and the Government Ordinance*, Vol. XLVIII, No. 06 (Web Exclusive) ECO. & POL. WEEKLY (Feb 09, 2013).

Obligations of the State

Although propounded in the context of economic reforms, Pratap Bhanu Mehta's thesis of the State being a "black hole of reforms" is equally apt here.[11] The analogy implies the State's impermeability to reason. Indeed, it has become a persistent "state of our State" and has led Mehta to suggest: "unless there are signs that we are re-inventing the State, all promises will prove illusory"[12]. The State has failed in fulfilling its duties on all three fronts: executive, legislative and judicial. These duties are not notional. Instead, they are codified in Articles 14, 15(1), 15(3), 21, 21A, 23, 24, 38, 39 and 39A of the Constitution and herein also lies the constitutional basis of the recommendations of the Verma Committee Report.[13] Not only is the State

[11] Pratap B. Mehta, *Black hole of the state*, THE INDIAN EXPRESS 10 (March 04, 2013).
[12] *Id.*
[13] Articles 14, 15(1), 15(3), 21, 21A, 23, 24, 38, 39 and 39A of the Constitution of India, 1950 provide: "**Art. 14. Equality before law** The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
Art. 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them; (3)Nothing in this article shall prevent the State from making any special provision for women and children
Art. 21. Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law
Art. 38. State to secure a social order for the promotion of welfare of the people (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life
(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.
Art. 39. Certain principles of policy to be followed by the State The State shall, in particular, direct its policy towards securing-
(a) that the citizens, men and women equally, have the right to an adequate means to livelihood;
(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
(d) that there is equal pay for equal work for both men and women;
(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
contd...

bound by the commitments made to its own people but also to the international community through numerous International Declarations and Conventions. Both substantive and procedural laws must satisfy the touchstone of the Constitution and the Constitution must not be let down for want of commensurate implementation.

The first breach of duty committed by the State i.e., the *executive* is that it has failed to implement the existing laws competently, leading to grave injustices against victims of rape and other gender-based offences. The chasm between legislating laws and implementing them is becoming wider. There are 48 laws to protect women in India, but none of them is being implemented properly.[14] Take the examples of Dowry Prohibition Act, 1961 and the Protection of Women from Domestic Violence Act, 2005. They were enacted to prevent dowry deaths and cruelty against women. However, in spite of these specific legislations, crimes against women have risen. The National Crime Records Bureau[15] suggests that Incidence of Crimes against Women increased from 1,43,795 in 2001 to 2,28,650 in 2011. In relative terms the hike between 2001 and 2011 was of seven per cent. Similarly, during 2001-2011, the incidence of Dowry Death increased from 6,859 to 8,618 and Cruelty by Husband and Relatives rose from 49,170 to 99,135. The spike in absolute numbers may well have been due to greater willingness among women to report cases of such violence. Nevertheless, the rising numbers are indefensible. Making matters worse, the 'conviction rate' – percentage of convictions to cases registered – in cases of crimes against women has drastically dropped from 19.4 per cent in 2004 to 13.2 in 2011. The judiciary is no less responsible for the worsening scenario. Therefore, it is not without reason that the Report observes: "one wonders why Parliament had to enact special legislation in respect of dowry

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment

Art. 39A. Equal justice and free legal aid The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

[14] *Law to Protect Women Against Sexual Harassment at Work Place Soon*, IBN Live (12 March 2013), *available at* URL: http://ibnlive.in.com/news/law-to-protect-women-against-sexual-harassment-at-work-place-soon/378263-3.html; (last visited March 12, 2013).

[15] National Crime Records Bureau, *Statistics: Crime against Women*, Vol. xlviii, No. 4 ECO. & POL. WEEKLY 78 (Jan. 26, 2013).

and domestic violence if the provisions of the IPC were being effectively enforced."[16]

The preceding discussion is not to discount the significance of special legislations. It is only to drive the point that violence against women remains pervasive and unabated. Stricter laws have to be accompanied with effective implementation. An excerpt from the Report buttresses this point:

> The purpose of laws is to prescribe the standard of behaviour of the people and to regulate their conduct in a civilized society. Faithful implementation of the laws is of the essence under the rule of law for good governance. In the absence of faithful implementation of the laws by efficient machinery, the laws remain mere rhetoric and a dead letter.[17]

Building on Nobel Laureate Amartya Sen's concept of 'institutional virtuosity', the Report cogently articulates the challenge of implementation afflicting the law and order machinery in India. It states:

> 'Institutional virtuosity' by itself is not enough without 'individual virtuosity'. The most perfect laws also would remain ineffective without the efficiency and 'individual virtuosity' of the human agency for implementing the laws, namely, the law enforcement agencies. [18]

It is hardly surprising, therefore, that the Verma Committee Report has deliberated considerably on procedural laws and recommended reforms in the areas of policing[19], medico-legal examination of victims[20] and evidence law[21]. Women-friendly medical evidence gathering systems and the establishment of rape crisis centres have been longstanding demands of women's rights activists[22] and both have now been duly recommended by the report.

The second breach of duty is the farcical and half-hearted attempts of the State i.e., the *legislature* to provide for the universal human rights of equality and gender justice. Considerable time has passed since the Supreme Court

[16] *Supra* n. 2 at 69.

[17] *Id.* at 4.

[18] *Id.* at 5, 6.

[19] *Id.* at 312-39.

[20] *Id.* at 272-311 & 465-70.

[21] *Id.* at 70-118 & 451-52.

[22] Amita Pitre & Lakshmi Lingam, *Rape and Medical Evidence Gathering Systems: Need for Urgent Intervention*, Vol. xlviii No. 3 ECO. & POL. WEEKLY 16, 17 (Jan. 19, 2013).

observed in *Vishakha* v. *State of Rajasthan*[23] that the right to be protected from sexual harassment and sexual assault is guaranteed by the Constitution and is one of the pillars on which the very construct of gender justice stands. The guidelines in *Vishakha* were laid down in 1997 but the State has only now woken up to the urgency of passing the Bill against sexual harassment at workplace.[24] In addition to making workplaces safer for women, the State shall have to do more in the area of enhancing financial independence of women in rural India.

It is high time that women in the occupation of farming be given equal access to credit, extension services and other agricultural inputs. Currently, women are denied access to these resources, as they are not legally recognized as "farmers". As an illustration, only two to four per cent of women across the country have access to *Kisan* Credit Cards.[25] The Women Farmer's Entitlement Bill, 2011 that seeks to remove the constraint by recognizing women as "farmers"[26] in their own right is still languishing in the Parliament along with other important legislations like Women's Reservation Bill. Mindful of these deficiencies, the Report acknowledges the subjugation of women on account of lack of financial independence and security.[27]

Inspired by Amartya Sen and Martha Nussbaum's *capabilities-based* approach to rights, the Report advocates financial self-sufficiency as a means to empowering women in all walks of life.[28] The essential message is that *de jure* equality will not automatically bring about *de facto* equality in the absence of social, educational and economic empowerment of women. Moreover, by recommending the amendment of the Representation of People Act, 1951 the Report has acknowledged that no amount of legislative success in achieving gender justice and prevention of sexual offences can be achieved without altering the make-up of our Legislative Assemblies. The Report found that thirty one per cent of all members of Parliament and State Legislative Assemblies (the total Electoral College) have been either charged with or convicted of a criminal offence.[29] Furthermore, twenty per cent of the elected

[23] A.I.R. 1997 S.C. 3011.
[24] The Protection of Women against Sexual Harassment at the Workplace Bill has been in the making since 2007.
[25] Nitya Rao, *Rights, Recognition and Rape,* Vol. xlviii, No. 7 ECO. & POL. WEEKLY 18-20 (Feb. 16, 2013).
[26] The National Sample Survey of India categorizes women in rural India as "household helpers".
[27] *Supra* n. 2 at 7.
[28] *Id.*
[29] *Id* at 381-82.

candidates have a criminal record involving heinous crimes.[30] It is implicit in such an assessment that legislative indifference to women's issues is due to the prejudicial attitudes of lawmakers and such biases are likely to be more entrenched among members with criminal antecedents. Not only the reform of the Representation of People Act will raise public confidence in the credibility of the legislative process but it will also introduce a *balance of legislative opinion* that is more respectful to women.

The third breach of duty is the failure of an overburdened *judiciary* in conducting fast and fair trials in cases of rape and other sexual offences against women. This issue has featured prominently in the thinking of the members of the Verma Committee. In an interview with the Indian Express after the release of the Report, Justice Verma said: "If Article 21 has been interpreted to include the right to speedy justice within the right to life with dignity, then there is no reason why there should be any court which should not act speedily while of course balancing it with due process."[31]

Our justice delivery system is in an acute state of disrepair and the pendency of cases at every level of the system is at record heights. A recent Report released by the Ministry of Law shows that there are 24,127 cases related to rape and sexual harassment pending in various courts of the country, including the Supreme Court.[32] Uttar Pradesh (UP) has the highest pendency with 8,215 cases pending in the Allahabad High Court alone.[33] This statistics is particularly distressing given the fact that UP had the third highest 'incidence of crimes against women' in the country in 2011.[34] The two States that had a higher incidence of crimes against women than that in UP were West Bengal and Andhra Pradesh.[35] They currently have a pendency of 269 and 27 cases, respectively.[36] Even our national 'conviction rate' – percentage of conviction to rape cases registered – is an abysmal 16.8 per cent, which has been consistently declining since 2004.[37] The preceding numbers lead to the question as to why the rape conviction rate is so low in India?

[30] *Id.*
[31] *The Idea Exchange: Interview with Justice J.S. Verma (Retd.),* THE SUNDAY EXPRESS 10 (Feb. 03, 2013).
[32] *Over 24k harassment, rape cases pending,* THE TIMES OF INDIA 14 (March 05, 2013).
[33] *Id.*
[34] *Supra* n. 15.
[35] *Id.*
[36] *Id.*
[37] *Id.*

Social stigma of rape and institutional antagonism associated with providing medico-legal evidence in cases of rape often lead the victims to abandon testimony in the trial of their own cases. Besides, police inaction and hostility at the initial stages often compromises the judicial value of the available evidence. On 13 March 2013, the Delhi High Court acquitted a person accused of molestation on the grounds of late recording of the statement by the victim and the failure of police in getting her medical examination.[38]

The Report hypothesizes that police inaction is driven by the "shame and honour" mindset whereby policemen consider them the sole arbiters of morality in the society and often refuse to register FIRs and conduct preliminary investigations based on their own notions of a woman's chastity.[39] The Report condemns such mentality and recommends sensitization of police against the shame and honour theory.[40] Other causes of low conviction rate in cases of rape include deficiencies in inferring from the medical examination reports of victims. One of the most notorious medico-legal practices is the "two-finger test". The test is conducted to determine whether the woman was raped or not. As if it is not enough, the test results are read out in an open court and the victim is exposed to further shame and embarrassment when inferences as to her "loose morals" are drawn from such tests. Moreover, these tests are often enough to acquit the accused or commute his sentence.[41] The Verma Committee deems the "finger-test" as unscientific and unreliable.[42] Finally, delay in the judicial process also acts as an equally potent deterrent to victims and their families.

A Note on Capital Punishment

In view of the above deficiencies of the State, the Verma Committee highlights an urgent need for reforms at all three levels of the State: executive, legislature, and judiciary. The Verma Committee has made several recommendations to rectify the ills. However, it has equally unequivocally denounced death penalty as a solution.[43] It holds that a stronger case could have been presented against the same[44] and the present author fully agrees to

[38] *High Court acquits molestation accused,* THE HINDU 3 (March 14, 2013).
[39] *Supra* n. 2 at 93-94.
[40] *Id.*
[41] *Supra* n. 22.
[42] *Supra* n. 2 at 275.
[43] *Id.* at 234-59.
[44] For a more robust case against capital punishment in general, *see* Martha C. Nussbaum, *Fatal Error,* THE INDIAN EXPRESS 12 (Feb. 28, 2013); Pratap B. Mehta, *Our Humanity, and theirs,* THE INDIAN EXPRESS (23 November 2012); in cases of rape, *see* contd...

it. Although this is a separate debate, the essence of the argument against death penalty is the same– that the capital trials of rapists can neither fix our deeply dysfunctional State nor eliminate the attitudes prejudicial to women in our society.

Obligations of the Society

An evocative description of rape as a sociological and anthropological phenomenon is to be found in Susan Brownmiller's book:[45]

> Man's discovery that his genitalia could serve as a weapon to generate fear must rank as one of the most important discoveries of prehistoric times... . [R]ape's critical function is nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear.

While it may appear jarring to a person with modern sensibilities, the above portrayal accurately describes the underpinnings of rape in India. Justice Verma's explanation of rape, even though couched in the language of constitutionalism, resonates with Borwnmiller's. In an interview with the Indian Express, Justice Verma said:

> The focus must be to shift from the patriarchal mindset. We have founded our report mainly on the constitutional guarantee of equality for gender justice. We have said most often an offence of rape is not entirely a sexual activity. It is a power game to show the male is more powerful. They think they are superior and that is a negation of the constitutional right to equality.[46]

Understanding rape and violence against women through the lens of structural inequalities and patriarchal institutions is a widely accepted approach. Some authors have even begun to say that neoliberal development and individualization of the Society has intensified the causality. Nitya Rao has pointed out that rising job insecurity, urban migration, widening inequality between rich and poor and ghettoization are fuelling frustration among poor unemployed young men and a few of them resort to rape and violence to reassert their control on the opposite sex.[47] Rao supports her views with a recent study that identifies three emerging trends among poverty-

Franklin E. Zimring & David T. Johnson, *On Rape and Capital Punishment,* ECO. & POL. WEEKLY, *supra* n. 15 at 16, 17.
[45] *Against Our Will: Men, Women and Rape* (1975) *quoted in* Shombit Sengupta, *Women as Merchandise?,* THE SUNDAY EXPRESS 11 (Feb. 24, 2013).
[46] *Supra* n. 31.
[47] *Supra* n. 25.

ridden young men in North Delhi- growing indebtedness, engagement in illegal work as a last-ditch effort to survive and incapacity due to drug and alcohol abuse, all of which Rao believes is increasing the incidence of rape and violence in cities.[48]

Therefore, rape has deeper psychological, sociological and anthropological causes. The complexity and contradictions in the society is manifest when citizens are quick to blame the State for the shameful state of women's security in India but are only too reluctant as bystanders to provide evidence in cases of rape, sexual harassment, and trafficking. Mindful of these complex psycho-social inter linkages, the Report has made elaborate recommendations on electoral, educational and perception reforms.[49]

Indeed the citizens have a *right* to demand a more efficient and responsive State. And the protests and expressions of outrage all across the country in the aftermath of Delhi Gang Rape have been in exercise of that *right*. But citizens also have *duties*. Soli Sorabjee recently noted in a newspaper Article that a discourse on rights couldn't be divorced from duties or else we do disservice to both.[50] Likewise, in the words of Walter Lippmann, "for every right that you cherish you have a duty which you must fulfill". Part IVA of the Constitution dealing with 'fundamental duties' was inserted by 42nd Amendment in 1976. There have been misgivings that these *duties* are not justiciable. However on deeper reflection, the underlying philosophy of Article 51A would appear to be that there should be a co-relation between rights and duties. Article 51A enlists ten fundamental duties of every citizen one of which is, "to renounce practices derogatory to the dignity of women". According to recent jurisprudential thinking, fundamental duties, though not enforceable by a writ, provide a valuable guide and aid to the resolution of constitutional and legal issues.[51]

Therefore, society's duty is as crucial as the State's. Society nurtures "individual virtuosity", which is at the heart of "faithful implementation of laws" that Amartya Sen speaks about. Accordingly, the Report observes:

> The mechanism [of implementing laws] has to be supported by the complementary role of civil society as envisaged in the fundamental duties of the citizens under Article 51A of the Constitution.[52]

[48] *Id.*
[49] *Supra* n. 2 at 340-410.
[50] Soli Sorabjee, *Rights and Duties*, INDIAN EXPRESS (Mumbai, Dec. 16, 2012).
[51] *Id.*
[52] *Supra n.* 2 at 4.

The society's obligation is in many ways more profound and will be the hardest to fix, given the historically entrenched notions of patriarchy and subjugation of women in every walk of life. Appropriately then, the Report formulates rape and violence against women in the language of sociological and structural inequalities and calls upon the society to honour its obligations under Article 51A(e)[53] by forsaking its deep-rooted and subconscious prejudices.

Conclusion

In view of the above discussion, the failure of the State and society in fulfilling their constitutional duties is evident. In short, the State and the society both have to transform themselves to make India a more *just* and *equal* society for its womenfolk. To this effect, the Verma Committee Report candidly admits that while changes to existing law are *necessary*, they would not be *sufficient* to put an end to rape and sexual assault against women. We cannot write legislation (read *prescription*) for every ill afflicting our Society. Even if prescription drugs can treat physical ailments, they are insufficient to provide a healthy mind and body. The root cause of our problems is not lack of laws but their tardy implementation and a selective amnesia of our duties.

Accordingly, most of the recommendations in the Report are in areas such as police reforms, medico-legal examination systems, electoral reforms, and, last but not the least, education and perception reform. The emphasis of the report is on the State's duty to effectively *implement* existing laws. Additionally, the report also acknowledges that a genuine reform of the State couldn't be achieved without addressing the socio-economic inequalities in the Society that perpetrate and perpetuate crimes against women. In short, just as the Constitution is a dead letter without constitutionalism, stricter laws are superfluous without the State's promise of their faithful implementation and the Society's responsibility to create normative structures nurturing individual and institutional virtuosity. It is in this light, the present paper understands the Verma Committee Report as a *Charter of* [inalienable] *Duties*.

[53] Art. 51A(e) provides that it shall be the duty of every citizen of India to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women.

Building Brands through Geographical Indications

Anuradha Maheshwari[*]

Introduction

The mankind has for millennia experienced a plethora of developmental milestones across the social, political, economic, scientific and environmental spectrums in different geographical locations of the world. This human developmental saga has distinctly aspired for the recognition of its typical geographical ancestry and habitat. As a result the ethnicity of the people, including the arts, crafts, goods and trade coming from the typical region are unmistakably stamped with the distinctive style and attributes of their geographic origin, so much so that the goods, like the inhabitants acquire a reputation linked to the region.

Infact, historical accounts, stories, fables and folklore abound in references to myriad products that have been uniquely distinctive and are the proud hallmarks of the region in which they were produced like the *Mughal Meena bazaar, Mathura dairy products* or the *Greek feta cheese (recorded from the time of Byzantine Empire, was associated specifically with Crete and is made traditionally in Greece from ewe's milk; also finds mention in Homer's Odyssey).*[1] In each case, a geographic name became associated, far beyond the territory of that geographic location with a product known for highly desirable and seemingly unique characteristics[2] and with further passage of time got linked with certain skills, know-how, processes that could not be replicated independently of the region. Consequently a certain value, a price tag[3] got

* Partner, Lex Mantis, Advocates & Legal Consultants, Former Director, Institute of Intellectual Property Studies, Mumbai, anumahesh10@gmail.com

1 Justin Hughes, *The Spirited Debate About Geographical Indications*, 58 HASTINGS L.J. 299 (2006)

2 The definition of Geographical Indications under the TRIPS (Trade Related Aspects of Intellectual Property Rights) requires "a given quality and reputation linked to a territory". *See* Art. 22, TRIPS Agreement, 33 ILM 1197 (1994) adopted in Jan. 1995.

3 Renee Marlin Benett, KNOWLEDGE POWER: INTELLECTUAL PROPERTY, INFORMATION AND contd...

attached to these products that became a harbinger of the growth and well-being of that region and the nation.

The 14th and 15th century medieval Europe saw a surge in the development of regional trade linked to the promotion of local arts and crafts and process know-how through a system of rewards and monopolies. The monopolies were granted to a community of artisans and individuals as creators and as beacons of standards of the representative quality of artefacts coming from a region. Against this backdrop we find the genesis of the development of the modern day international intellectual property law system, in particular through the promotion of the beautiful and stunning "Venetian Glass" a prevalent art form then in Venice, Italy.[4]

Geographical Indications (GI).

As property in intellectual creations gained recognition as an exclusive right of the creator, Geographical Indications seeped into the arena of intellectual property to be protected as a much needed boost to the international trade. Though initially, at the time of the Paris Convention of 1883, they were recognized as *'appellations of origin'*[5] and *'indications of source'*[6]; today, they have acquired an individual identity and are one of the important revenue builders for a nation. As mentioned in the Trade Related Aspects of Intellectual Property Rights (henceforth TRIPS) they are known as Geographical Indications, and are defined as "any indication, name or geographical name, figurative representation, expression conveying territorial origin or source of goods and refers to the protection of only those products originating from a certain geographical area". The TRIPS Agreement of 1995 is said to be the first multilateral treaty dealing with the term 'geographical

PRIVACY 55 (2004)

4 *See History of Patent*, (Hourglass Research), *available at* http://www.hourglassresearch.com/patents/history-of-patents/ (last visited Jan. 15, 2013).

5 The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (Lisbon Agreement) was adopted in 1958 and revised at Stockholm in 1967. It entered into force on September 25, 1996, and is administered by the International Bureau of the World Intellectual Property Organization (WIPO), which keeps the International Register of Appellations of Origin and publishes a bulletin entitled appellations of Origin.

6 *See generally* Seth M. Reiss, *Commentary on the Paris Convention for the Protection of Industrial Property, available at* http://www.lex-ip.com/Paris.pdf (last visited Jan. 18, 2013); *Also see*, S. Nagarjan, *Geographical Indications & Agriculture Related Intellectual Property Issues*, 92 (2) CURRENT SCI. 169 (2007).

indications'.[7]

The term geographical indication includes any direct or indirect reference to the geographical source, characteristic or qualities of a product. In an effort to protect geographical names, three concepts were developed, from the all encompassing to the most specific: indication of source, geographical indication and appellation of origin. All appellations of origin are geographical indications and all GIs are indications of sources. An appellation of origin must necessarily indicate the specific qualities, reputation or other characteristics of the product that can be essentially or exclusively be attributable to the geography of production or its geographical environment, like *Nagpur Oranges, Darjeeling Tea, Sheffield Cutlery* etc. Names like *Basmati Rice, a Feta Cheese, a Taj Mahal* or *an Eiffel Tower* unlike appellations of origin would be mere geographical indicators of products or monuments, but without the attachment of geographic names.

Hence, not all GIs are appellations of origin. In fact, the use of an appellation of origin on dissimilar goods may be considered to be an usurpation of the appellation leading to its dilution, which was well demonstrated when Aramis Inc. the French company was successfully sued in 2000 by Cuba Tobacco, an association of '*Habanos*' (cigar) producers of Cuba, protecting the name Havana and that asked Aramis to refrain from using the name on its cosmetics and perfumes.[8] Likewise the Tea Board of India has managed successful injunctions on organizations using the Darjeeling name on their products.

As opposed to the private monopoly right of a trademark, GIs create collective[9] community rights benefiting a larger group and sidesteps the threat of unfair monopolistic trade practices. Registered GI products typically function like "club goods"[10] and do not belong to the realm of any one producer to be exploited by him exclusively. On the contrary it's a right to be collectively exploited by the community of craftsmen etc. involved in the production of the goods, stimulating thereby a healthy competition inter se, and generating a set of non-rivalrous rights[11] that do not diminish one producer's right over another. Typically, they articulate the obligations that must be complied with by all the users of a given indication and set out the rights to be protected against third parties.

These rights enjoy a far broader scope of protection primarily because they cannot be assigned or exhausted like other intellectual property rights; in the sense that they cannot be further sold or licensed commercially. The most fascinating attribute of the Geographical Indications is that though they function like a trademark; the rights remain with the community in perpetuity[12] (to be renewed periodically), while the knowledge underlying their status remains in the public domain. In other words while trademarks may be created and adopted immediately, geographical indications acquire recognition over a period of time.[13]

They perpetually benefit an entire community of producers, stimulate the economic growth of the region and the country and most importantly protect the goods that are already famous. In fact, a Geographical Indication status pre-supposes the existence of a certain reputation already enjoyed by the

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7 *Supra* n. 2.

8 *Societe Empresa del Tabaco Cubatabaco* v. *Aramis Inc Paris*, decided by French Court of Appeal, Paris (2000).

9 A collective trademark or collective service mark is a mark adopted by a 'collective' (*i.e.*, an association, union, cooperative, fraternal organization, or other organized collective group) for use only by its members, who in turn use the mark to identify their goods or services and distinguish them from those of non-members. The 'collective' itself neither sells goods nor performs services under a collective trademark or collective service mark, but the collective may advertise or otherwise promote the goods or services sold or rendered by its members under the mark. Thus, the members may use the collective mark to distinguish the geographical origin or other common characteristics of certain products. These marks are principally designed to guarantee certain product characteristics (quality, nature or origin) for consumers. The submission of regulations for the use of the mark is normally required for the acquisition of a collective mark. A well-known example of contd...

a collective mark is interflora, which is used worldwide by a flower ordering service. *See generally*, Prabuddha Ganguli, *Geographical Indications- Its Evolving Contours*, WTC RESEARCH STUDY REPORT published by Institute of Intellectual Property Studies (2009).

10 *See generally* Dwijen Rangnekar, *The Socio Economics of Geographical Indications- A Review of Empirical Evidence from Europe*, Issue Paper No. 8, UNCTAD-ICTSD Project on IPRs and Sustainable Development (2004), *available at* http://ictsd.org/downloads/2008/07/a.pdf (last visited Jan. 28, 2012). To qualify as club goods GIs must exhibit specific properties in particular the benefits of displaying the indication requires meeting certain conditions (excludability) and that allowing an additional agent to enjoy the benefits of the indication involves zero marginal costs.

11 *Id.* In economic terms, a good is non-rivalrous if it involves zero marginal cost in providing the benefits to an additional individual.

12 Perpetuity like trademarks, GIs as mandated by TRIPS, is protected by a system of registration for a period of ten years as provided under Geographical Indications Act, 2000 which can be renewed after every ten years. A particular indication is protected as long as good –place-quality link is maintained and the indication is not rendered generic.

13 *See generally* Latha Nair & Rajendra Kumar, GEOGRAPHICAL INDICATIONS (2005).

products and services they seek to protect legally.

However, it must be borne in mind that their specificity and distinctiveness is essentially born out of the territory of the produce, from the unique geographical characteristics such as soil, climate and traditional skills like process know-how, craft etc. At issue is whether a product with essentially similar characteristics can be produced in a different physical/human environment or not. It must be recognized therefore, that the GIs require more than the mere protection of the *geographical names* because of the triple association always between the product, its place of origin and quality related factors. Also, consumer acknowledgement/acceptance plays an important role in determining the eligibility of a product as a geographical indication. To qualify for a legal protection it is necessary that the name and reputation of the particular product has been established by pre- existing trade.

GIs and Consumer Protection

Once protected, a Geographical Indication has multiple advantages; it protects the interests of honest producers and traders, generally the economically backward traditional craftsmen by preventing unfair competition, cartelization, commercial abuses and specifically unauthorized use. Through the creation of internal competition and fair play protected geographical designations help to improve not only the quality and reputation of products in the domestic market but ensure a wider product access and greater prosperity through their exports into international domains.

More importantly Geographical Indications effectively serve as a guarantee and assurance of authentic quality products minimizing thereby consumer deception. In the battle for monopolistic conquests, the welfare of the consumers is usually overshadowed by the ambitions of the producers. The aspirations to supersede one another, leaves the consumer faced with the quandary of having to choose between varieties of products of barely acceptable quality.

The consumers not only have to overcome the issues of quality delivery, but also have to worry about the originality of the product. The promise of GI for the end users in fact stretches from the seal of origin guaranteeing the source to the quality indicators that point to goods with a definite history and traditional knowledge evoking a certain aura, mystique and exoticness

associated with the locale.[14]

A key factor in the growth of the brands and their legal regulation is the separation between the consumer and the producer. In the last century this distancing process accelerated rapidly for manufactured goods, but less for agricultural goods. Now however, with modern packaging, transport and global trade, the separation between consumer and the producer has rapidly increased in agriculture too.[15] In such circumstances, registered GIs provide means by which a small-scale producer, geographically far away from the consumer, can reach through to that consumer with a consistent quality message.

The GI registered goods are a huge draw with consumers also because of the traceability factor[16] (of the raw materials) and that it gives them the flexibility to develop preferences especially for the palate (aroma & appearances included with respect to food products, like say, a *basmati rice over Surti Kolam or a Dehradun Basmati over an Amritsari, a Kashmiri Zafran over Spanish or a Cabernet over Chardonnay (**wines**).*

Goods assume a value linked to the perceived exoticness of the locality of production, uniqueness of product and it being not commonly available like a commodity. In various studies conducted across The Europe some interesting consumer behaviours came to light, chief among them being that the consumers were willing to pay a premium price for GI products[17] as follows:

- 40% of European consumers ready to pay a 10% premium price for GI products like tea, champagne.[18]
- In case of special and unique geographical attributes, as in the case of

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[14] Sanjeev Agarwal & Michael J Baroney, *Emerging Issues for Geographical Indications: Branding Strategies*, 5 MATRIC RESEARCH PAPER (2005), *available at* http://www.card.iastate.edu/publications/dbs/pdffiles/05mrp9.pdf (last visited Feb. 5, 2013).

[15] Pradyot R. Jena, Ulrike Grote, *Changing Institutions to Protect Regional Heritage: A Case for Geographical Indications in the Indian Agri-food Sector*, 28 (2) DEV. POL'Y REV. 217-36 (2010).

[16] *See generally* B.K. Sen, *Whither Science in India*, 92 (2) CURRENT SCI. (2007). The traceability of the raw material that yields the GI produce is important and the details of the growers and their track record details are a matter of detailed documentation; *see also supra* n. 6.

[17] *See generally* Latha Nair & Rajendra Kumar, GEOGRAPHICAL INDICATIONS- A SEARCH FOR IDENTITY (2005).

[18] Anson C J, *Geographical Indications: A marketing Stance*, 2 INT'L J. ECON. COM. & RES. 11-17 (2012).

specialty salts, gourmet cooks are willing to pay $80 a pound for such varieties versus 30 cents for common table salt, e.g., the Indian black salt, Portuguese Algarve salt, Australian Murray River Pink Flake Salt, Il Buco Handcrafter Italian Wooden Sea Salt, French Fleur De Sel and Clay-tinged red Alaea Hawaiian Sea Salt.[19]

- History and tradition associated with production process command a higher price and value like in the case of Parmesan cheese[20] & Parma ham[21]. Parmesan Cheese is one of the oldest Italian Cheeses developed about 2000 years ago in the castled city of Parma, Italy, the same place which is credited with the delicious Parma ham. It is the culinary tradition of that location that has enabled it to build its reputation.
- Mystique elements like cooking recipes, spice mixes, process secrets with legends and folkore-intrigue the consumer more than regular products in the market place like a *'Surti Ghari'*[22] or a *'Rasagulla'* or the famous and expensive *'Kakaori Kebab'/'Galauti Kebab'*[23].

While the dynamics of the subject is intriguing, at heart of the GI debate lies issues surrounding the geography/territory, struggles about commercial linguistics, maintaining myths and their benefits and exploitations. This is what makes the geographical indications debate both so interesting and so parallel to conventional trademark law. Though like the trademark the distinctive function of a GI is to link the product and services to its origin and

[19] *See The Salts of the Seas*, Bloomberg Business Week (Dec. 5, 2004), *available at* http://www.businessweek.com/stories/2004-12-05/the-salts-of-the-seas (last visited Feb 6, 2013).

[20] *See The History of Parmesan Cheese*, *available at* http://www.parmesan.com/history/history-of-parmesan-cheese/ (last visited Feb. 6, 2013). In 2008, European Court of Justice in Luxembourg decreed that Parmigiano Reggiano is the only hard cheese that can legally be called Parmesan. In so doing, they acknowledged the historical fact that the word can be traced to Parma and that consumers associate the cheese with its origin in the Parma-Reggio region of Italy. These court rulings mean that a cheese cannot be called Parmesan unless it conforms to the Protected Designation of Origin (PDO) standards for Parmigiano Reggiano.

[21] G.E. Evans & Michael Blackey, *The Protection of Geographical Indications after Doha*, 9 (3) JOUR. INT'L. ECON. LAW 574-614 (2006).

[22] *See* Ashleshaa Khurana, *Chandi Padvo-Surti Ghari Story* (Oct. 4, 2009), *available at* http://ashindia-ashlesha.blogspot.in/2009/10/chandi-padvo-surti-ghari-story.html (last visited Feb. 10, 2013).

[23] *See* Sanjiv Khamgaonkar, *The 'Insulted' Nawab* v. *The 'Toothless' Nawab* (Dec. 12, 2010), *available at* http://sanjivkhamgaonkar.wordpress.com/2010/12/12/the-%E2%80%98insulted%E2%80%99-nawab-vs-the-%E2%80%98toothless%E2%80%99-nawab/ (last visited Feb. 10, 2013).

help identify the producer or artist who made the product, the overall advantages of a geographical indication far outweigh that of the former. This commercial value explains why GI names, designations and marks are so often copied like *Tequilla, Habanos, Darjeeling, Argan* etc.

Typically, strong brands/brand names allow producers to achieve market recognition, differentiate their offerings and gain legal protection not to mention the revenues they enhance through premium pricing of their products.

However, the power of branding has eluded producers of commoditized products[24] for long. The promising new development is the recent use of geographical origin as a basis for branding commodities. That explains why certain champagnes are more sought after than the others like a *Moet* or *Chandon*. A study of GIs reveals how diligently and consciously producers and governments are toiling to develop their products into brands and how building an image of quality leads to quick consumer acceptance that generates special value both for the producers and the consumers. A case in point would be the promotion of Colombian coffee and Havana cigars as one of the world's best coffee and cigar brands.

Colombian Coffee

Till 1959 public perception of the best coffee producer was the Brazil. The Colombia received almost no mention then though it produced 12% of the world's coffee and was second to Brazil. The National Federation of Coffee Growers of Consumers (FNC) undertook the branding exercise of their rich home-grown coffee through the use of a character manned Juan Valdez and his mule, and used the catch line –"Buy Colombian when buying Coffee". They went on to promote it as the "richest Coffee in the world" and used other tag lines like "fifty per cent tax bracket hundred per cent Colombian Coffee"- "No Colombian, no thank you". The campaign succeeded and was quite fruitful in securing them as one of the leading coffee producers; although in 1959. By eighties awareness about Colombian Coffee reached ninety six per cent, where sixty two per cent believed Colombia grows the best coffee and were willing to pay a fifteen per cent premium on the Colombian coffee. The marketing strategy of the FNC resulted in an increase

[24] Commoditized products have thin margins and are sold on the basis of price and not brand, *see Online Business Dictionary*, *available at* http://www.businessdictionary.com/definition/commoditization.html#ixzz2TEuT6x7L (last visited Feb. 10, 2013).

from 9.1 million USD to 13.2 million USD in revenue earnings.[25]

Havanas

Likewise, Cuba fought hard and long to save its world famous brand of '*Habanos*'- the premium quality cigars more commonly referred to as Havanas. Their origin can be traced to 1492 when Columbus arrived on the shores of Cuba and their quality can be attributed to the geo-climatic conditions of Cuba and a clever blending of five different varieties of tobacco leaves to produce the variant in the market place. However, over a period of time *Habanos* became a generic term to designate high quality cigars from all cigar producers in the world threatening the Cuban Cigar industry and market. Eventually the Cuban authorities took drastic steps to control the damage to the geographical name and along with various lawsuits, signing several bilateral agreements with other cigar producing and marketing countries, developed a marketing strategy in the eighties to support and complement the protection efforts. The first step was to establish a communication strategy based on the *Habano* appellation of origin. And the second started in 1991 by unifying the various versions of the logo and design for *Habano* that existed in other languages and using just one i.e. *Habanos*. From then on the *Habanos* logo has the same image all over the world and the *Habano* Cuban cigar trademark printed on the boxes of brand names is the guarantee that these cigars are backed by the *Habano* 'Denomination of Origin' Protection. This is a guarantee of quality and origin that is awarded to only the best cigars manufactured in Cuba under the strictest quality control measures, with the best leaves selected from the island's tobacco regions.[26]

One can appreciate then that a mere registration of a GI as such does not guarantee returns for either the community of producers or the economy itself. In order to facilitate the consumer awareness and investment returns, as a brand it is essential to adopt a certain regimen pre and post registration[27] as

[25] *Supra* n. 14.

[26] *See* Paper presented by Adargelio Garrido de la Grana on *Geographical Indications and Cuban Cigars* in an International Symposium on GIs, jointly organized by World Intellectual Property Organisation (WIPO) & the State Administration for Industry & Commerce (SAIC) of the People's Republic of China (June 28, 2007), details *available at* http://www.wipo.int/portal/en/news/2007/article_0019.html (last visited Feb. 18, 2013).

[27] U.N. Conference on Trade and Development, U.N.C.T.A.D. Report, *Strategies and Preparedness for Trade and Globalisation*, presented at the International Conference on Progress and Protection through Geographical Indications on Nov. 16-17, 2010 in

contd...

follows:

- Create associations or consortiums of bonafide producers to register and protect the GI name.
- Association must be directed to work to build this pseudo-trademark into a brand and maintain it at that.
- Develop to create an image of quality for a class of products made in a certain area/region in a certain way to achieve consumer awareness, acceptance and premium pricing.
- Unique and distinctive marks/logos/labels must be developed, as representations of that region, product (art, craft or agricultural produce) or folklores to help establish trade and as valuable symbols of the community intellectual property. The Tea Board logo of Darjeeling is a case in point.
- Monitoring systems and enforcement mechanisms must be put in place to protect against infringements of the GI mark.

Some regions have become synonymous with the high quality products like *Champagne in France, Cuban Habanos, Darjeeling Tea, Basmati rice, Swiss watches, knives and chocolates; Japanese electronics, German Auto* and the likes. That is why post 2000, India as a WTO member and a TRIPS signatory, has woken up to the merits of GI protection for an agro-based traditionally rich country. Apart from enacting the Geographical Indications Act, 2000 it is actively encouraging local producers of famous indigenous products to protect them through a process of registration at the Geographical Indications registry based in Chennai. Today we can boast of more than 220 applications and 178 registered Geographical Indications[28] strengthening the implications of GI policies, both nationally and internationally, for India.

While the most fundamental benefits of GI registration for the producers is to cash in on the reputation theory, the actual profitability of the GI product crucially depends on the size of the market for these products.

Without a sizable international market, a GI label and its expected price premium would fall short of the costs needed to be incurred to continue with the production, establishing thereby the need to focus on building strong GI brands through the creations of unique and distinctive marks. Among the

Delhi; The author Anuradha Maheshwari who was a Rapporteur for the Conference presented her Report at the concluding round up of the seminar.

[28] Geographical Indication Registry of Intellectual Property India, details *available at* www.ipindia.nic.in/girindia/ (last visited Feb. 27, 2013).

existing Indian GIs, Darjeeling tea and Basmati rice are the front runners in terms of international market and the exportability.

Indian Success at Brand Building: Darjeeling Tea

The first attempt on the part of the Tea Board of India (which was constituted in 1954 under the Tea Act of 1953), towards protection of the *Darjeeling* brand was undertaken way back in 1983, with the creation of the *Darjeeling* logo.[29] The Tea Board then obtained domestic protection for the *Darjeeling* logo as a "certification trade mark" under the Indian Trade and Merchandise Marks Act, 1958 (now the Trade Marks Act, 1999). In the same year, the logo was registered as a trademark in several other countries like the UK, the USA, Canada, Japan, Egypt, Germany, Austria, Spain, France, Portugal, Italy and Switzerland. Today it is a protected mark in 21 destinations with three more pending. In the absence of a separate law dedicated exclusively to GI's in India during that time, the word *Darjeeling* was initially registered as a trademark. When the Geographical Indication Act in India was enacted in September 2003, the Tea Board applied for GI protection of *Darjeeling* in October 2003 and in 2004 became the first application to be registered in India as a GI.

Further, in order to prevent the misuse of *Darjeeling* and the logo, the Tea Board has since 1998 hired the services of *Compumark*[30], a World Wide Watch agency that monitors and reports all cases of unauthorized use and attempted registration of the name and logo. From 1998 to 2002 the Board spent an equivalent of USD 200,000 to protect against infringement. The International disputes relating to *Darjeeling tea* have been settled through negotiations undertaken by the Tea Board of India with the foreign companies. For instance, Bvlgari -Switzerland agreed to withdraw the legend *Darjeeling Tea fragrance for men* pursuant to legal notice and negotiations by the Tea Board.[31]

Several cases of infringement and misuse of the word Darjeeling Tea worldwide have been fought against countries like Russia, USA, Japan, France, Germany, Israel, Norway and Sri Lanka etc.[32]

[29] *See generally*, Naba kumar Das, *Geographical Indications- The Experience of Indian Tea Producers: Protection of Darjeeling Tea* (2003), *available at* http://www.wipo.int/edocs/mdocs/geoind/en/wipo_geo_sfo_03/wipo_geo_sfo_03_8-annex1.pdf (last visited Mar. 1, 2013).

[30] *Id.*

[31] *Id.*

[32] *See* Rajendra Kumar & Vasundhara Naik, *Darjeeling Tea- Challenges in the Protection* contd…

The quality, reputation and characteristics of *Darjeeling tea* are essentially attributable to its geographical origin. It possesses a flavour and quality which sets it apart from other teas, giving it the stature of a fine vintage wine. As a result, it has won the patronage and recognition of discerning consumers worldwide for more than a century. Today as one of India's premier GI brands, production yields have also increased to 11.5 million kilograms of tea from its eighty seven tea gardens. Incidentally the activity has also played a major role in the empowerment of women of that region as nearly fifty per cent of the labourers in the tea gardens are women.

Consequently, *Darjeeling tea* that is worthy of its name cannot be grown or manufactured anywhere else in the world.

Dilution

However when a geographical name becomes a generic term for similar kinds of products or the same product is being produced in a different geography, the brand of the GI is said to be diluted. The exotic appeal of the product is lost and the product reputation suffers, becoming tarnished or blurred, leading to the genericide[33] of the brand. If the name of a place is used to designate a particular type of product, rather than to indicate its place of origin, the term no longer functions as a geographical indication. For example, *Dijon mustard*, a kind of mustard that originated many years ago in the French town of Dijon, has, over time, come to denote mustard of that kind made in many places. Hence, *Dijon mustard* is now a generic indication and refers to a type of product, rather than a place.[34] Likewise, the term *Cologne* now denotes a certain kind of perfumed toilet water, irrespective of the fact that it once originated from the region of Cologne and hence the name.

This is a common marketplace phenomenon and normally occurs when popular geographic designators are used by many, to the extent of registering them as trademarks. Pepsi Snacks attempted to usurp and register a

and Enforcement of Intellectual Property Rights (March 2004), *available at* http://www.wipo.int/sme/en/case_studies/darjeeling_tea.htm (last visited Mar. 3, 2013).

[33] For example Cheese, Dev Ganjee, *A Snapshot of Genericide through the Lands of Feta*, 22 EUR. INT'L. PROPERTY REV. 172 (2007)

[34] *See generally*, Dev Ganjee, *Protecting Geographical Indications as Collective Trademarks: The Prospects & Pitfalls*, 6 IIP BULLETIN (2006), *available at* http://www.iip.or.jp/e/e_summary/pdf/detail2005/e17_14.pdf (last visited Mar. 3, 2013).

geographical name "*Bikaneri Bhujia*"[35] (actually produced by hundreds of small producers) as a trademark in order to capitalize on the known geographic association and market appeal of the food product but was then forced to withdraw the application.

In similar instances we find the famous French Champagne brand being protected through a fierce watch against infringement worldwide, while the Scotch Whisky Association in the UK takes offenders passing off the "scotch" name to court, as they have done with *Khoday Distilleries* (*Peter Scot* case[36] and *Pravara Sahakara* (Indian Whisky-Scottish drumbeater wearing kilt) in India.[37]

Brand dilution also leads to large scale and unchecked commoditization[38] of products, jeopardizing thereby the interests of local artisans and craftsmen who lose out in the marketplace alongside the consumers who cannot ascertain the origin of the commoditized products. For example the famous Persian carpets are being imitated and produced by carpet weavers outside Persia, leading to confusion about their source and authenticity. The same is true of restaurants claiming to be Italian and beers German.[39]

Dilution Cases

Basmati Rice

This particular strain of rice is naturally grown in the northern part of India and south eastern parts of Pakistan and is a much in demand premium quality aromatic rice. However, there have been various imitations and modifications in many countries pertaining to the name Basmati, wherein rice was sold as *Texmati, Jasmati, Calmati, Kasmati*, etc. Due to this, the Government

[35] The *Bikaneri Bhujia* is a traditional snack produced in cottage industries in Bikaner, Rajasthan. It provides employment to around 2.5 million people in villages, the majority of them women who inherited the know-how and skills to produce this delicacy. The snack is prepared from the moth lentil which grows only in the deserts of Bikaner and Jodhpur and it has had a secure local market all these years. *See* N P Chekkutty, *The Whole World's Bhujia*, *available at* http://www.indiatogether.org /2005/jul/eco-bikaner.htm#continue (last visited Mar. 4, 2013).

[36] *Khoday Distilleries* v. *Scotch Whisky Association & Anr.*, Civil Miscellaneous Petition No. 4350 of 1999, Madras HC, Judgment delivered on Oct. 10, 2007, *available at* http://www.indiankanoon.org/doc/11416/ (last visited Mar. 5, 2013).

[37] *Scotch Whisky Association & Anr.* v. *Parvara Sahakar Karkhana Ltd.*, A.I.R. 1992 Bom. 295; *Dyer Meakins Breweries* v. *Scotch Whisky Association*, A.I.R. 1980 Del. 125.

[38] *Supra* n. 24.

[39] *Supra* n. 14.

of India has fought over 100 trademark cases in over 30 countries over the term Basmati.[40]

Parma Ham

The case is not only illustrative of the dangers of dilution of geographical brands but also serves as an outstanding example of maintaining a supply chain integrity, that helps protects and creates valuable geographical indicators. Asda, a UK supermarket owned by Wal-Mart was taken to court by the Consorzio del Prosciutto di Parma and Salumificio, the Italian Parma Ham Trade Consortium, claiming dilution of the *Parma ham* brand. They alleged that Asda sold the product sliced and pre-packaged in the UK, whereas the reputation of the brand and the protected designation was not merely based on the place of production but also on how thin the slices were and the way it was packed. The genuine way to slice it, as claimed by the Consorzio was to make sure it was done in *Parma* at the plants in the designated areas, approved by organization responsible for monitoring Parma ham production. On an appeal to the House of Lords Asda was restrained from the retail sale of *Parma ham* which had not been sliced, packaged, and labelled in accordance with the laid down specifications.[41]

Conclusion

As mentioned earlier, mere registration of a geographical indication does not provide producers with a business model nor ensures its visibility in the market place; nor is it a guarantee for lucrative markets. The Consumers ought to be made aware of the prominent position enjoyed by the registered GI products in the market place, necessitating thus, intellectual property awareness as well as information on the GI products. The encouragement to accelerate GI registrations can become meaningful only in the backdrop of aggressive promotional campaigns of the GI products.

Further, it is of vital significance to provide due reference to the critical socio-economic developmental role that GI brands play in the progress and

[40] Dwijen Rangnekar & Sanjay Kumar, *Another Look at Basmati: Genericity and the problems of a Transborder Geographical Indication*, 14(6) THE JOUR. OF WORLD INTELL. PROP. 1747-96 (2011).

[41] *Consorzio del Prosciutto di Parma and Salumificio S. Rita Spa* v *Asda Stores Ltd. and Hygrade Foods Ltd.*, Case No. C-108/01, European Court of Justice; Judgment delivered on May 20, 2003, *available at* http://curia.europa.eu/jcms/upload/docs/ application/pdf/2009-03/cp0342en.pdf (last visited Mar. 10, 2013).

advancement of a community. It is now apparent that promotion of geographical products is bound to result in industrialization and standardization of production processes as is seen in the case of products like wine, ham, cheese etc. as opposed to homemade, backyard processes. So, without compromising on traditions, a greater degree of uniformity and mechanization of production processes have crept in the geographical identities are increasingly being recognized as a tool that the farming communities could use effectively to add value to agricultural produce, improve brand recognition and protect their product against the competitors.

Considering that the GIs generally draw upon products such as agriculture, fisheries, handicrafts and artisanal products; any trade advantage obtained from the GI status is basically pro-poor. This is in contrast with the other forms of intellectual property rights such as patents and trademarks where the gainers are mostly the wealthy.

Due to the community benefit endowed upon the producers of a geographical indication, there most obviously would ensue a competition for premier position within the community itself, stimulating further growth and development and a regular income flow in exchange of the guarantees it offers

The Geographical indicators therefore, are often looked upon as the ideal intellectual property rights due to their fundamental characteristics of benefiting multiple entities and various stakeholders involved in the promotion of a product, such as the producers/ organizations, Government, local communities and the regions in a collective and proactive way. The role they play in taking a nation forward both socially and economically, thus cannot be ignored.

Technological Developments and Scope of Exploitation of Reproduction Right by Copyright Owners in Collective Works

*Poonam Dass**

Introduction

The development of technologies like CD-ROM, DVD, Internet, etc. has made access to information easier. The copyright owners of the collective work in newspapers, magazines and other periodicals have started storing their printed volumes in digital medium. These printed works are the compilations which consist of original works of various persons viz. articles, photographs, images etc. Many freelance authors contribute their work to such compilations in form of an article or a photograph. Can such compilations be reproduced in electronic medium without the consent of freelance authors? The reproduction of work in electronic medium is generally accompanied by a search engine, new advertisements, blocking of some images, and use of animations, which are not there in the original works. Whether this amount to new work? This paper analyses the legal position in India by making a comparative study with United States of America's judicial and legislative approach.

American Position – Judicial Approach

Greenberg Case

In *Greenberg* v. *National Geographic Society*[1], the Plaintiff Greenberg was a freelancer. His photograph appeared in various issues of the National Geographic Magazine (the magazine) of National Geographic Society (Defendants). The Defendants in collaboration with Mindscape Inc. brought a

* Assistant Professor, Law Centre-1, Faculty of Law, University of Delhi.

1 Case No. 10510 United States Courts of Appeal, 11th Circuit decided on March 22, 2001, *available at* http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&case=/data2/circs/11th/0010510opn.html (last visited Aug. 29, 2012).

CD-Rom consisting of previous issues of its magazine known as 'Complete National Geographic' (CNG) which is 30 CD-ROM library from 1888 to 1996 in digital format. It was held that the CD-ROM consisted of the following:[2]

(1) *the moving covers sequence* (Sequence): The Sequence is an animated clip that plays automatically when any disc from the CNG library is activated. The clip begins with the image of an actual cover of a past issue of the Magazine. This image, through the use of computer animation, overlappingly fades (morphs) into the image of another cover, pauses on that cover for approximately one second, and then morphs into another cover image, and so on, until 10 different covers have been displayed. One of the cover images used in the moving covers sequence is a picture of a diver that was taken by Greenberg in 1961. The entire sequence lasts for 25 seconds and is accompanied by music and sound effects;

(2) *the digitally reproduced issues of the Magazine themselves* (Replica): The collected issues of the Magazine, which are, of course, the CNG's raison d'être, were converted to digital format through a process of scanning each cover and page of each issue into a computer; and

(3) *the computer program* that serves as the storage repository and retrieval system for the images (Program): Without the Program, the Replica could still be stored on a CD-ROM, but the individual "pages" of the Magazine would not be efficiently accessible to the user of the CNG.

The Defendants wanted to take protection of Section 201(c) of the (US) Copyright Act, 1976[3] which provides that copyright in each separate contribution to collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it the owner of the copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of

[2] *Id.*

[3] 17 U.S.C.A. § 201 reads: "**Ownership of Copyright-... (c) Contributions to collective works-** Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of **reproducing and distributing** the contribution as part of that particular collective work, and any **revision** of that collective work, and any later collective work in the same series", *available at* http://www.law.cornell.edu/uscode/text/17/201 (last visited Aug. 29, 2012).

that particular work, and any revision of that collective work, and any later collective work in the same series.

The Court decided that the animated opening sequence and the software were independently copyrightable elements not present in the magazine. It was therefore reasoned that copyright analysis compels the conclusion that the society, in collaboration with Mindscape Inc has created a new product, in a new medium for new market that transcends any privilege of revision or other mere reproduction envisioned in Section 201(c). New work forfeited any privilege that it might have enjoyed with respect to mere transformation of the print version of the magazine into a digital form. Hence the ratio of the case is if there is any independently copyrightable material in addition to previously published material, consent of the individual authors is required for such work as it is a creation of new work.

Tasani Case

Another case which came before US Supreme Court was *New York Times* v. *Tasani*[4] which was decided on 25 June 2001. In this case, the Respondents were freelancers who wrote articles for newspapers and magazines published by the Petitioners from 1990-1993 in the New York Company (New York Times), Newsday Inc (Newsday) and Times Inc (Times). These freelancers had not given consent for the placement of articles in electronic databases. The print publishers each licensed rights to copy and sell articles to LEXIS/NEXIS, owner of *Nexis*. *Nexis* is a computerized database containing articles in the 'text only' formats from hundreds of periodicals and newspapers. Subscribers accessing *Nexis* through a computer, may search articles using criteria such as author, subject, etc. and may view, print or download. The display identifies its original print publication, date, section, initial page number, title and author. However, each article appears in isolation – without any link to other stories published in the same periodical.

The *Times* also has licensing agreements with University Microfilms International authorizing reproduction of Times material in two CD-ROM: (i) New York Times on Disc (NYTO) which is a text only database containing Times articles presented in same manner as they appear in LEXIS/NEXIS; and (ii) General Periodical On Disc (GPO) which is a image based system that reproduces articles from over hundred publications. It reproduces Times Sunday Book Review and Magazine as they appeared on the printed pages,

[4] 533 U.S. 483 (2001), *available at* http://www.law.cornell.edu/copyright/cases/533_US_483.htm (last visited Aug. 30, 2012).

complete with photographs, captions, advertisements and other surrounding materials. The GPO article however appears without any material published on other pages of the original periodicals i.e. separately and not in context with other articles. The freelancers sought injunctive relief and damages for infringement of their right.[5] However the print publishers relied on the protection given under Section 201(c) of the Copyright Act.[6]

The District Court held that databases produced and distributed the author's work as part of revision of collective work in which author first contributed. The second circuit reversed the decision stating that the databases are not the collective works covered under Section 201(c).

The Supreme Court determined that the key factor was how the articles are presented to and perceptible by the user of the databases.[7] In other words the question is not whether a user can generate a revision of collective work from database, but whether the database itself perceptibly presents author's contribution as part of collective work.[8] Each article bearing marks of origin in a particular periodical suggests, that the article was previously part of that periodical, and not that the article is currently reproduced or distributed as part of that periodical. The databases reproduced and distributed articles standing alone and not in context as part of that particular collective work in the series. The Court considered the analogies pressed by the defendant of microfilm and microfiche. The Court observed:

5 17 U.S.C.A. § 106(1) gives exclusive right to reproduce the copyrighted work in copies or phonorecords. However § 121 limits the right of reproduction for blind or other people with disabilities in the specialized format. § 121 reads: "(a) Notwithstanding the provisions of Section 106, it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, non-dramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities; **(b)(1)** Copies or phonorecords to which this section applies shall—**(A)** not be reproduced or distributed in a format other than a specialized format exclusively for use by blind or other persons with disabilities; **(B)** bear a notice that any further reproduction or distribution in a format other than a specialized format is an infringement; and **(C)** include a copyright notice identifying the copyright owner and the date of the original publication; ... **(d)(4)** "specialized formats" means—**(A)** Braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities", *available at:* http://www.law.cornell.edu/uscode/text/17/201 (last visited Aug. 29, 2012).

6 *Supra* n. 3.

7 *Supra* n. 4.

8 *Id.* at 504.

> Microforms typically contain continuous photographic reproductions of a periodical in the medium of miniaturized film. Accordingly, articles appear on the microforms, writ very small, in precisely the position in which the articles appeared in the newspaper.... True, the microfilm roll contains multiple editions, and the microfilm user can adjust the machine lens to focus only on the article, to the exclusion of surrounding material. Nonetheless, the user first encounters the article in context. In the Databases, by contrast, the articles appear disconnected from their original context. In NEXIS and NYTO, the user sees the "Jane" article apart even from the remainder of page 26. In GPO, the user sees the article within the context of page 26, but clear of the context of page 25 or page 27, the rest of the Magazine, or the remainder of the day's newspaper. In short, unlike microforms, the Databases do not perceptibly reproduce articles as part of the collective work to which the author contributed or as part of any "revision" thereof.[9]

The Court ultimately concluded that the databases reproduce or distribute articles standing alone and not in context, in NEXIS, NYTO and GPO and not as part of that particular collective work in the same series. Accordingly the Court rejected the Defendant's Section 201(c) argument.

In *Tasani* case the Court took different approach as compared to *Greenberg* case where addition of work amounted to new work. The *Tasani* focused on whether individual contributions appeared in the same contexts as they appeared in the original printed collective works. However it referred to microfilm which was considered to be exact replica of collective work as the work appears in context with other articles. The test of whether a work is a replica or a new work is how the articles are presented to and are perceptible by the user of the articles.

Douglas Faulker Case

In *Douglas Faulker et. al.,* v. *National Geographic Society et al*[10], where the facts were somewhat similar to *Greenberg* case except the photograph of the Plaintiff did not appear in the moving cover sequence of CNG but was used in CD-Rom in replica of Magazine in the same way as it appeared in the original. The Plaintiffs were freelance photographers or writers who created images or text that originally appeared in the print version of the National Geographic Magazine. In late 1990's defendant produced and begin to market

9 *Id.* at 501.

10 294 F. Supp. 2d 523 (S.D.N.Y. 2003), *available at* http://www.asmp.org/pdfs/ntlgeographic.pdf (last visited Dec. 18, 2012).

various editions of "the Complete Geographic Magazine" (CNG), the digital archive of all past issues of the Magazine on CD-Rom and DVD. The Plaintiffs here claimed that the production and sale of the CNG infringed their copyright in and otherwise violated their rights with respect to contributions in Magazine. They argued that CNG contains material that never appeared in the magazine. These were the animated opening sequence and music; Kodak advertisements; and in some editions summary of each article and a closing montage; the software tools including the search engine with the advance search capabilities, save, print, bookmark features and a hyperlink to NGS's Internet Website.

The United States District Court of Southern District of New York observed that the Congress intended that Section 201(c) revision privilege extend to collective works, like the revision of encyclopaedia contain original contributions along with new updated material. The fact that the CNG contains elements that did not appear in the print editions does not foreclose Section 201(c) protection. The Court further stated that every revision is a new product, yet the protection of Section 201(c) is available. With regard to searchability software the court stated that it is difficult to see why this should take CNG out of Section 201(c) protection. The predominant differences between the magazine and the CNG are the CNG's convenient 'physical package' and the software that provides easy searchability, the animated opening, other such material and the search engine. Such technological advances have occurred before. The binding of individual issues of periodicals into more convenient stiff backed volumes and addition of printed indices are regarded as technological advances. The stiff binding improved the physical characteristics of the periodicals, and indices were search engines that improved their searchibility. Still no one suggested that the NGS's bound volume and its addition of indices infringed the copyright of individual contributors. In each case, the material fact is that the content of the product, whether the CNG or the indexed bound volumes, that user wish to see should be identical to the original print versions, that is the individual issues of the magazines. The Court held that CNG is a revision of the individual print issues of the magazine and the defendants were entitled to protection under Section 201(c) of the Copyright Act.

Greenberg (Appeal Case)

In 2008, the National Geographic Magazine filed an appeal against the 2001 decision in *Greenberg* case, due to the change in law made by *Tasani* decision

by the Supreme Court. The Appeal Court reversed the decision of District Court and agreed with the *Faulker* case.[11] Greenberg filed a writ of certiorari in Supreme Court which the Supreme Court denied thus ending the controversy altogether.[12]

Google Print Case

In *Author's Guild* v. *Google Inc.*[13], Google was charged with copyright infringement through a collective action by Authors Guild for digitizing their books for the purpose of preparing a collection of database of the books and providing Google book search service. The Google made available snippets of the book with a links from which physical book could be obtained as search results. The books were scanned from the collections of various State libraries. All this happened without the permission of authors. The Authors Guild complained the violation of their rights of reproduction, distribution and display. For providing the service, Google scanned whole of the books. There were some books which were out of print. Presently a settlement is going on between the Google and the Authors Guild.

There is a possibility that the proprietors of newspapers, magazines or periodicals may contract with Google for providing the search of articles in archives of newspapers or magazines for which the Google may do the scanning of whole of the newspaper and in turn provide the articles in isolated manner. Applying the *Tasani* judgment it will be copyright infringement of freelancer who has not consented for reproduction in digital format, if the article appears in isolation.

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[11] *National Geographic Society* v. *Greenberg*, Court of Appeal for the 11th Circuit dated 30 June 2008 Case No. 05-16964, D.C. Docket No. 97-03924-CV-AMS, *available at* http://www.ca11.uscourts.gov/opinions/ops/200516964.ENB.pdf (last visited Sept. 22, 2012).

[12] *See Greenberg* v. *National Geographic Comes to an End; Supreme Court Refuses to Hear Appeal*, National Press Photographers Association (10 December 2008), *available at* http://nppa.org/news_and_events/news/2008/12/greenberg.html (last visited Sept. 22, 2012).

[13] U.S. Court of Appeal Second Circuit Case, filed on September 10, 2012 Case No. 12-3200, *available at* http://docs.justia.com/cases/federal/appellate-courts/ca2/12-3200/17/ (last visited Dec. 18, 2012).

Legal Position in India -The Copyright Act, 1957

In Absence of any Written Agreement with the Author

According to the Copyright Act, 1957 a literary work includes compilations.[14] The newspapers, magazines and other periodicals are the compilations of the works of various individuals. The proprietors of newspapers, magazines or periodicals are the first owners of the works of contributors who are in contract of employment, for publication of the work and reproduction of work in the newspaper, magazine or periodicals. In all other respects author shall be the first owner.[15] The freelance individuals who have contributed to the compilation have the copyright in their individual work and are the first owner of the work, in absence of any assignment of their right as they are in contract for services. Section 14(a)(i) of the Copyright Act, 1957 gives exclusive right to authors in respect of their work, to reproduce the work in any material form including the storing of it in any medium by electronic means. By permitting his work to be published in newspaper, does the author give to the proprietor of newspaper implied right to publish his work in electronic form?

The first view can be that the words 'storing by any means in electronic medium' does not occur in Section 17 of the Act. The Copyright Act, 1957 even after the amendment in 2012, does not include the words 'storing in electronic medium' in the Section. However, if read with Section 14(a)(i) it can be presumed that the word 'reproduction' under Section 17 includes storing in electronic form. Hence proprietor of collective work can reproduce the work in electronic medium. Second view is that since no amendment was made in Section 17 for adding the words 'including storing in electronic medium', it can also be interpreted that the owner of collective work does not have the right to store in a electronic medium without the consent of author. Section 52(zb) of the Copyright Act, 1957 inserted vide 2012 amendments to the Act, reinforces this view as it permits reproduction of any work in any accessible format by any person only for facilitating the access of works to persons with disability and for nonprofit purposes.[16]

[14] S. 2(o) of the Copyright Act, 1957 provides that "literary work" includes computer programmes, tables and compilations including computer databases.

[15] *Id.* S. 17(a).

[16] *Id.* S. 52(*zb*) reads: "[T]he adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format, by—(*i*) any person to facilitate persons with disability to access to works including sharing with any person with disability of such accessible format for private or personal use, contd…

The collective work stored in electronic form such as on microfilm or micro fiche[17], the individual's contribution appears in the same manner as it appears in the printed form, being the microphotographs of those works. However, the CD-ROM, DVD, World Wide Web, is accompanied by content searching and retrieval software or animations. It may also contain advertisements other than those appearing in printed form. The use of software, animations, different advertisements of the archives of such collective works changes its view and sometimes the contributions of freelance individual appears as a separate database disconnected from original text. Whether scope of right of reproduction, permits incorporation of these changes in the compilation or it becomes a new work or revision of work; or is it adaptation of the work? Section 14(a)(i) of the Copyright Act, 1957 uses the word storing and the word "storing", does not suggest any modifications or additions in the work. Both revision and adaptation[18] requires modification of work. Hence, the author's permission is required to make any revision/adaptation in relation to collective work. Indian courts have not yet dealt with such matters however, when such a matter will come before the court, assistance can be taken from the American cases discussed above. The Indian courts may not permit reproduction in digital media if the articles of the freelancer is appearing in isolation from other material or if any alteration to work is made by including new advertisements or moving images etc.

educational purpose or research; or (*ii*) any organisation working for the benefit of the persons with disabilities in case the normal format prevents the enjoyment of such works by such persons: Provided that the copies of the works in such accessible format are made available to the persons with disabilities on a non-profit basis but to recover only the cost of production: Provided further that the organization shall ensure that the copies of works in such accessible format are used only by persons with disabilities and takes reasonable steps to prevent its entry into ordinary channels of business. *Explanation.*—For the purposes of the sub-clause, "any organization" includes an organization registered under Section 12A of the Income-tax Act, 1961 and working for the benefit of persons with disability or recognized under Chapter X of the Persons with Disabilities (Equal Opportunities, Protection or Rights and full Participation) Act, 1995 or receiving grants from the government for facilitating access to persons with disabilities or an educational institution or library or archives recognized by the Government".

[17] A card or sheet of microfilm capable of accommodating and preserving considerable number of pages, as of printed text, in a reduced form, *see* www.thefreedictionary.com.

[18] S. 2(a)(v) of the Copyright Act, 1957 provides that "adaptation" means the rearrangement or alteration of any work.

Written Agreement with the Author

The author may assign or license the work to be reproduced in collective works when only print media existed. Does it include the assignment or licensing in digital media? With regard to assignment in future works Section 18(1) Proviso to Proviso of the Copyright Act, 1957 inserted vide 2012 amendments to the Act, stipulated that such assignment does not apply to any medium or mode of exploitation of work which did not exist or was not in commercial use when the assignment was made unless specifically referred to that medium or mode.[19] Hence a specific permission of author is required if the medium did not exist at the time of assigning the work to be used in printed collected works. Similarly, licensing to reproduce the work in newspapers or magazines etc. cannot amount to an implied right to use the work in digital medium by the owners of newspapers or magazines etc. unless specifically permitted.

Conclusion

The American approach is clear that as long as the material appears in context with other material as appeared in printed work and is replica of it, the reproduction in CD-ROMs, or placement on World Wide Web doesn't amount to copyright violation of the individual authors with respect to their contributions in original printed compilations viz. newspapers and magazines.

In India under the Copyright Act, 1957, on the basis of first view one can presume that as long as there is no addition of any material in the original collective work and is replica of it, there is no violation of copyright of individual contributors by reproduction of the collective work in electronic medium. Hence, making microfilms of the collective works/compilations do not violate right of reproduction of original authors. On the basis of second view one can say that reproduction in electronic medium cannot be made without the author's consent except for the person with disabilities that too for non-profit purpose.

For easy search by users in electronic medium, it requires a software having a search engine, and use of animated cover for better appearance. The US

[19] *Id.* S. 18(1) Proviso to Proviso reads: "Provided further that no such assignment shall be applied to any medium or mode of exploitation of the work which did not exist or was not in commercial use at the time when the assignment was made, unless the assignment specifically referred to such medium or mode of exploitation of the work... ."

courts have held that such works are revisions of original collective work. Indian copyright law doesn't give any right of revision in case of compilations and require the consent of individual authors before incorporating their work in revision, as any alteration or rearrangement in the work would amount to adaptation thus requiring permission of author.

As regard use of different advertisements in the work stored in electronic medium, it changes the original collective work and will amount to revised or new work; it is not permitted under the Copyright Act, 1957 as the right of owners of collective work is limited to reproduction under Section 17. The placement of articles in electronic databases and not in context with other material in the newspaper or magazines etc. amounts to use of articles in new work and does not fall within the copyright protection. This requires the consent of individual authors who contributed to the work.

Regarding the assignment/licensing of right of reproduction for future works the Indian law is clear that it will not include right to use the work in any other medium which is not specified in the agreement , if the medium was not existing at that time. It is suggested that use of modern technology that makes the appearance of work better and also allows easy searchibility be permitted, so long the individual contributions appeared in same context as they appeared in original compilations, the consent of authors should become immaterial in absence of any agreement. The test should be of how it appears to an ordinary user as laid down in *Tasani* case. The copyright law should be amended for the benefit of owners of collective works either by allowing right of revision of collective works/compilations or by incorporating a provision with respect to that in the Section 52 (Certain acts not to be Infringement of copyright) of the Copyright Act, 1957. The caution is that while contacting with freelancers for contributing in the collective works in print like newspapers and magazines or similar periodicals, the proprietors of newspapers, magazines or similar periodicals should take consent of such individual contributors in writing to reproduce the work in digital medium in order to avoid litigation in future.

Critique of *Emergent Genetics India Pvt. Ltd.* v. *Shailendra Shivam and Ors.*

Tapas K Bandyopadhyay & Saurabh Bindal***

Introduction

Can a DNA sequence be copyrighted or can it be protected as confidential information? This question was addressed by the Honourable Delhi High Court in *Emergent Genetics India Pvt. Ltd.* v. *Shailendra Shivam*[1]. The Delhi High Court has written a new chapter in the development of jurisprudence related to intellectual property regime in India. The purpose of this paper is to critically examine the judgment of the High Court. Authors are of the view that the High Court failed to appreciate the Science of Genetics while adjudicating on the copyrightability of the impugned subject matter. The principle of minimal creativity, which is propounded by the Delhi High Court in the said judgment to address the issue of "originality" in copyright law, overlooks the ratio laid down by the Supreme Court in *Eastern Book Company* v. *D.B. Modak*[2]. Secondly, though the Protection of Plant Variety and Farmers Rights Act, 2001 was not in force when the dispute was brought before the Honourable Court, the Delhi High Court also rendered its decision on the presumption that the said Act was in force when the dispute was brought to the Court. In doing so, the High Court has gravely misinterpreted the legislative guidance behind the Act. Thirdly, this paper also sheds light on the aspect of confidentiality which was dealt by the Delhi High Court in the articulated judgment. Authors are of the opinion that the High Court has failed to recognize the principle of confidentiality. And fourthly, by reading

* Dr. Tapas K Bandyopadhyay, Assistant Professor, Rajiv Gandhi School of Intellectual Property Law, IIT Kharagpur, tapas@rgsoipl.iitkgp.ernet.in.

** Saurabh Bindal, Final Year Student, Rajiv Gandhi School of Intellectual Property Law, IIT Kharagpur, saurabhbindal13@gmail.com. The paper was presented at Advanced Level Workshop on Intellectual Property Law organized by Law Centre-1, Faculty of Law, University of Delhi on February 26-27, 2012.

1 2011 (125) D.R.J. 173.

2 (2008) 1 SCC 1.

interpretation of Article 39(b)[3] and Article 19(1)(g)[4] of the Constitution of India, 1950, the High Court has drawn an axe on the jurisprudence of development of intellectual property based monopoly rights. The object and purpose of each law is different and so is the reading of the general philosophy of patent law as to negate the philosophy behind protection of genes through copyright law or the law related to confidentiality, presents yet another speck to the rendered judgment. This paper stands as a heavy criticism of the judgment and tries to act as a lightening rod for all those who argue against the criticism. Leitmotif of this paper is not to divulgate on the scholarly writings related to intersection of science of genetics and copyright law. Instead, the paper tries to provide a step by step criticism of the rendered judgment.

Emergent Genetics case

Brief Facts

The High Court of Delhi recently for the first time has dealt with the issue of copyright protection of gene sequencing in the *Emergent Genetics* case.[5] The Plaintiff in the said case represented a private limited company involved in research, development, processing and sale of seeds in India. Three of the Defendants were former employees of the Plaintiff and one of the Defendants represented Seeds India, a partnership firm involved in past transactions with the Plaintiff. One company incorporated by the former employees was also made a party to the suit. The Plaintiff alleged that the varieties developed by the Defendants on their premise are having the same genetic makeup as that had been developed by the Plaintiff. They included test reports of DNA fingerprinting as evidence and tried to prove that the varieties named *Vidhata*, *Keshav* and *Amogh* are having identical genotype with the varieties christened as *Brahma*, *Krishna* and *Atal*,[6] the Plaintiff averred that this has resulted in infringement of the Plaintiff's copyright over the gene sequences. They submitted before the Court that a gene sequence is analogous to a computer programme and as a computer programme deserves protection under the

3 Art. 39 of the Constitution of India, 1950 states: "The State shall, in particular, direct its policy towards securing...(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good."

4 *Id.* Art. 19(1) reads: "All citizens shall have the right...(g) to practise any profession, or to carry on any occupation, trade or business."

5 *Supra* n. 1.

6 *Id.* ¶ 7.

copyright law so does the gene sequences should be accorded the same. The Plaintiff also alleged breach of confidentiality as a ground for asking injunction against the defendants. They also sought other appropriate remedies against the impugned conduct of the Defendant. The Defendant, on the other hand, argued that there can be no copyright over gene sequences. They also submitted before the Court that the gene sequences in question cannot be protected by confidentiality. The Defendant proposed that the test to determine similarity between plant varieties is the phenotypic test as laid down in the Protection of Plant Varieties and Farmers Rights Act, 2001 and not the genotype based test as averred by the Plaintiff. They also submitted that the method of breeding plant varieties or the plant varieties themselves fall under public domain. That being the case, the same cannot be protected under the umbrella of confidential information. The authors of this paper will provide for the Court's reasoning on the subject in subsequent sections and their views on the rendered reasoning. Each aspect of reasoning finds mention as a heading under the following sections.

Issue: Copyright on DNA Sequences

On the issue of copyright protection for gene sequences, the Delhi High Court said that gene sequences lack originality to qualify for protection under the Copyright Act, 1957.[7] The Court said that following the test as laid down by the Supreme Court in the case of *Eastern Book Company* case[8], it can be said that the gene sequences do not differ from how they are represented in nature.[9] Thus, as they fail to withstand the test of differentiability, essential to

7 "The sequences obtained from nature (*e.g.*, the sequence for a gene) cannot *per se*, be original. The microbiologist or scientist involved in gene sequencing "discovers" facts. There is no independent creation of a "work", essential for matching the originality requirement. Such a scientist merely copies from nature- genetic sequence that contains codes for proteins. Therefore there is no minimum creativity. So long as a researcher constructs a DNA sequence based on a sequence discovered in nature, there is no independent creation, no minimum creativity and thus no originality", *see id.*

8 *Supra* n. 2.

9 "The Indian Supreme Court rejected the sweat of the brow doctrine (which conferred copyright on works merely because time, energy, skill and labour was expended, that is, originality of skill and labour) and held that the work must be original "in the sense that by virtue of selection, co-ordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author". Pertinently our Supreme Court noticed that the two positions *i.e.* "the sweat of the brow" and "modicum of creativity" were extreme positions; it preferred a higher threshold than the doctrine of "sweat of the brow" but not as high as "modicum of creativity". Thus, our law mandates that not every contd...

categorize the work as original work, they fail to get a copyright protection. Without prejudice to the aspect of originality, the Court decreed that the gene sequences also fail to satisfy the obstacle raised by 'merger doctrine'.[10] The Court traced the genesis of the doctrine from *Baker* v. *Sheldon*[11]. It said that the idea behind a gene sequence is so intricately bound with the expression of the idea that as per the merger doctrine the expressed gene sequences cannot be accorded protection. The authors differ in their opinion on both the counts and in the following paragraphs lay a point by point remark on both.

Import of copyright in India is enunciated in Section 14 of the Copyright Act, 1957.[12] Copyright means the exclusive right in one or other of the works specified in the section.[13] Section 2(y) of the Copyright Act provides the definition of "work".[14] In India, Copyright is a statutory right[15] and consequently, there exists no copyright except as provided in the Copyright Act, 1957.[16] It may also be remarked that the central purpose of the Copyright Act is to protect authors and artists from being exploited.[17] Section 13 of the Copyright Act, 1957, enumerates works which can be protected under Copyright. The Copyright subsists in following classes of works: a) original

effort or industry, or expending of skill, results in copyrightable work, but only those which create works that are some what different in character, involve some intellectual effort, and involve a minimum degree of creativity", *supra* n. 1, ¶ 27.

10 "The judgment in *Baker* led to evolution of the "idea-expression merger" doctrine. According to it (the idea expression doctrine), when there is only one or there are very few ways of expressing a particular idea, then it (the expression) merges with the idea. *Also, ref. Morrissey* v. *Procter & Gamble Company*, 379 F.2d 675 (1st Cir. 1976). Since there can be no copyright of ideas, the merged expression/idea is incapable of copyright. Granting copyright protection to the sole (method of expression) or limited way of expression of an idea would mean no one can practice the idea or procedure expressed without being guilty of copyright infringement", *id.* ¶ **29.**

11 (1879) 101 U.S. 99.

12 S. 14 of the Copyright Act, 1957 reads: "For the purposes of this Act, "Copyright" means the exclusive right subject to the provisions of this act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof... ."

13 *Manoj Cine Productions* v. *A. Sundarshan & Anr.*, A.I.R. 1976 Mad. 22.

14 S. 2(y) of the Copyright Act, 1957 defines "work" to mean any of the following works, namely- (i) a literary, dramatic, musical or artistic work; (ii) a cinematograph film; (iii) a [sound recording].

15 *Id.* S. 16 reads: "No person shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise then under and in accordance with the provisions of this Act or any other for the time being in force."

16 *Kartar Singh Giani* v. *Ladha Singh*, A.I.R 1934 Lah. 777 (DB).

17 *Deepak Printery, Ahemdabad* v. *The Forward Stationary Mart*, (1976) 17 G.L.R. 338, *available at* www.indiankanoon.org/doc/147082 (last visited June 24, 2013).

literary, dramatic, musical and artistic works; b) cinematographic film; and c) sound recording.[18] The term literary work is defined in Section 2(o).[19] It provides an inclusive definition of works to be included in the category of literary works and is certainly not a source of an exhaustive list.[20] It is germane to note that the inclusive definition provided in Section widens the scope of the term "literary work".[21]

For a work to qualify for protection under the Copyright Act, it should be an original[22] expression and should find mention under the statutory definition of works, emblazoned under the Copyright Act. The term "original"[23] is not defined in the Act. In *D.B. Modak* case, the Indian Supreme Court laid the test for determining the threshold of originality in a work. The Court, while taking a middle path in the case, negating the "sweat of brow" and "modicum of creativity" test, said that to cross the landmark of "originality",

[18] S. 13 of the Copyright Act, 1957 reads: "(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say –
(a) Original, literary, dramatic, musical and artistic works,
(b) Cinematograph films, and
(c) Sound recordings... ."

[19] Section 2(o) of the Copyright Act, 1957 says that "literary work" includes computer programmes, tables and compilations including computer databases.

[20] *Fateh Singh Mehta* v. *O.P. Singhal & Ors.*, A.I.R. 1990 Raj. 8 ¶ 7.

[21] Some commentators have argued that the gene sequences can also be protected as picture or sculpture. *See* Dan L. Burk, *Copyrightability of Recombinant DNA Sequences*, 29 JURIMETRICS J. 469 (1988-89).

[22] "The word 'original' does not mean that the work must be the expression of original or inventive thought. The Copyright Act is not concerned with the originality of ideas, but with the expression of thought, and in the case of literary work, with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression trust be in an original or novel form, but that the work must not be copied from another work - that it should originate from the author; and as regards compilation, originality is a matter of degree depending on the amount of skill, judgment or labour that has been involved in making the compilation. The words 'literary work' cover work which is expressed in print or writing irrespective of the question whether the quality or style is high", *Ladbroke (Football) Ltd.* v. *Willim Hill (Football) Ltd.*, [1964] 1 W.L.R. 273 ¶ 9.

[23] "The term "Original literary works" referred to in Section 13 of the Copyright Act, 1957 is not confined to the works of literature as commonly understood. It would include all works expressed in writing, whether they have any literary merits or not. This is clear from the definition given in Section 2(o) of the Act which states that literary work includes tables and compilations", *Agarwala Publishing House* v. *Board of High School and Intermediate Education & Anr.*, A.I.R. 1967 All. 91 ¶ 5.

a work should involve skill, labour and judgment.[24] This was said by the Court in respect of the categorized derivative works which were the subject of dispute.[25] It is germane to note that "originality" is different from "novelty".[26] Being original means being created by the author independently. Being novel means different from what appears or what can be found or what has been used prior to the coming of the claimed work into picture.[27] It is the requirement of originality which binds the copyright law in a single thread. The test of differentiability, for determining originality, as laid down by the

[24] "[T]o be original under the Copyright Act the work must originate from an author, not be copied from another work, and must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. Creative works by definition are original and are protected by copyright, but creativity is not required in order to render a work original. The original work should be the product of an exercise of skill and judgment and it is a workable yet fair standard. The sweat of the brow approach to originality is too low a standard which shifts the balance of copyright protection too far in favour of the owner's right, and fails to allow copyright to protect the public's interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creative standard implies that something must be novel or non-obvious - concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard for copyright protection that is consistent with the policy and objectives of the Copyright Act. Thus, the Canadian Supreme Court is of the view that to claim copyright in a compilation, the author must produce a material with exercise of his skill and judgment which may not be creativity in the sense that it is not novel or non-obvious, but at the same time it is not the product of merely labour and capital...The copyright work which comes into being should be original in the sense that by virtue of selection, co-ordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author. On the face of the provisions of the Indian Copyright Act, 1957, we think that the principle laid down by the Canadian Court would be applicable in copyright of the judgments of the Apex Court", *supra* n. 2, ¶¶ 37, 38.

[25] When court has once laid down a principle of law as applicable to certain state of facts, it will adhere to that principle, and apply it to all future cases where facts are substantially the same. *See Krishena Kumar* v. *Union of India*, A.I.R. 1990 S.C. 1782.

[26] Originality is held to be not required to be novel but the work should not be copied from other work, that is, it should be original. *See University of London Press Limited* v. *University Tutorial Press Limited*, [1916] 2 Ch. 601.

[27] In order to obtain copyright production for literary, domestic, musical and artistic works, the subject dealt with need not to be original, nor the ideas expressed be something novel. What is required is the expenditure of original skill or labour in execution and not originality of thought. *See Cunniah Co.* v. *Balraj Co.*, A.I.R. 1961 Mad. 111.

Delhi High Court in the subject case, wrongly interprets the *novelty* requirement under the sought originality requirement. Further, it is germane to note that in one paragraph the judgment states the requirement of differentiability and in other the requirement of *minimum creativity*. Both the requirements as laid down by the Delhi High Court are based on a misinterpretation of the judgment laid down in *D.B. Modak* case. Moreover, if we still move with the dictum of the Delhi High Court and endorse the test laid down by the Court with respect to differentiability so as to claim originality, we will find that the gene sequences as claimed by the authors can certainly be differentiated from what is found in nature. The gene sequences claimed by the authors only represent a part or a fragment of the long sequences present in nature and already known as facts, as cited by the Delhi Court.[28] As Story, J. in *Emerson* v. *Davies*[29] stated: "In truth, in literature, in science and in art, there are and can be few if any, things which, in an abstract sense, are strictly new or original throughout. Every book in literature, science and art, borrows and must necessarily borrow, and use much which was well known and used before." The authors of expressed gene sequences employ skill, labour and judgment to come out with the work.[30] It is also important to note that a gene sequence cannot be debarred from claiming copyright protection because of the "Di-minimus rule" as laid down in *Exxon* case[31]. A gene sequence, if expressed, represents a considerable use of characters to get it qualified for protection.[32] The Court has in certain terms laid down the application of merger doctrine[33] in copyright law in the subject case. The authors do concur with the Courts reasoned approach in laying down the precedence behind the genesis of such a doctrine. But, the authors do not concede to the point that the merger doctrine[34] restraints the extension

[28] For details refer to the ratio laid in *Diamond* v. *Chakraborty*, 447 U.S. 303 (1980); *see also Myriad Genetics* v. *AMP*, 702 F. Supp. 2d 181, 185 (S.D.N.Y. 2010) (discussing the issue of the grant of patent rights to genes).

[29] 8 F. Cas. 615, 619 No. 4436 (C.C.D. Mass. 1845).

[30] Irving Kayton, *Copyright in Living Genetically Engineered Works*, 50 GEO. WASH. L. REV. 191 (1981-82).

[31] *Exxon Corpn.* v. *Exxon Insurance Consultants International Ltd.*, [1982] Ch. 119: [1981] 3 All E.R. 241.

[32] Laddie, Prescott and Vitoria, MODERN LAW OF COPYRIGHTS AND DESIGNS (2d ed. 1995) Chap. 21.

[33] When an idea is inseparable from its own expression, that idea is said to merge with the expression, and such expression, despite any originality, is denied copyright protection. *See* Andrew B. Hebl, *A Heavy Burden: Proper Application of Copyright's Merger and Scenes A Faire Doctrines*, 8 WAKE FOREST L.J. 128, 139 (2007-08).

[34] When the 'idea' and its 'expression' are thus inseparable, "copyright protection will not be extended" since protecting the 'expression' in such circumstances would contd…

of copyright protection to gene sequences[35]. Gene sequences can be expressed in numerous ways and so mere expression of them in one form does not restrict their expression in other forms.[36] That being the case, the idea behind the expression and the expression itself cannot be held to be so intricately bound to each other that no monopoly can be granted to the expression of gene sequences in light of the merger doctrine.[37] The Court, though right in laying down the legal principle, has faltered in appreciating the science of genetics while applying the doctrine of merger.

Issue of Confidentiality of Information

Dealing with the confidential nature of the information, the Delhi High Court in the subject case said that the information was present in the public domain. That being the case, the information or the method of performing a particular act cannot claim protection as a trade secret.[38] The High Court moved further and cited that if the sought information claimed by the Plaintiff is given protection as confidential information then the age old practice of farming will get affected. It said that the wider ramifications of granting such a monopoly outweigh the interest claimed by the Plaintiff.[39] After displaying

confer a monopoly of the 'idea' upon the copyright owner. *See Herbert Rosenthal Jewelry Corp.* v. *Kalpakian*, 446 F. 2d 738, 742 (9th Cir.1971).

[35] *See supra* n. 21, where the author argues that the applicability of doctrine of merger in cases related to copyrightability of gene sequences should be determined on case to case basis.

[36] Joseph N. Michelotti, *Genes as Intellectual Property*, 11 MICH. ST. U. J. MED. & L. 71 (2008); Stephen R. Wilson, *Copyright Protection for DNA Sequences: Can the Biotech Industry Harmonize Science with Song?*, 44 JURIMETRICS J. 409-463 (2004); *see also* Ray K. Harris and Susan Stone Rosenfield, *Copyright Protection for Genetic Databases*, 45 JURIMETRICS J. 225-50 (2005).

[37] Christopher M Holman, *Copyright For Engineered DNA: An Idea Whose Time Has Come?*, 113 W. VA. L. REV. 699, 717 (2010-11).

[38] "If the information and techniques are neither unique, nor novel, but are merely a documentation, or compilation of existing material, or existing techniques, freely available, or widely practiced, there is no question of confidentiality. The Plaintiff does not claim exclusivity in respect of any particular technique or process; it is the result, *i.e.*, the documentation of elimination, and the attributes of the different strains which are claimed to have been compiled. If such techniques were already available, and were practiced, they were capable of observation and similar documentation", *supra* n. 1, ¶ 35.

[39] "Another way of looking at this aspect is that if the Plaintiff's claims were to be accepted, without any significant substantiation, then, each hybridization development, so long as it is "documented" would qualify for exclusivity, thus reducing the millennia old practise of farming, subject to a residual and perpetual monopoly stemming from possession of so called "confidential information". This contd…

the canvas, in the following paragraphs the authors endeavour to sprinkle the colours of criticism on the well woven cloth which the High Court provided them to paint their understanding of the subject.

The authors believe that the High Court tried to strike the same chord in deciding on the issue of confidentiality. The same string of *novelty*, which the High Court has tried to play in demarcating the lines of copyrightability, was used for delineating the tracks of confidential information. For a plaintiff to succeed in a breach of confidence action, he has to address at least four matters:[40]

> (i) to identify clearly what was the information he was relying on; (ii) to show that it was handed over in the circumstance of confidence; (iii) to establish that it was information of the type which could be treated as confidential; and (iv) to show that it was used without his licence or there must be threat to use it.

It is first necessity that the claimant should absolutely make it clear and certain, what it was that he alleged to be confidential,[41] which he sought to protect.[42] What makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.[43] Four elements may be discerned which may be of some assistance in identifying confidential information or trade secrets which the court will protect. First, that the information must be information the release of which the owner believes would be injurious to him or of advantage to his rivals or others. Second, that the owner must believe that the information is confidential or secret[44], that it

Court has to pause to consider the wider ramifications of such an assertion", *id.*

40 *CMI Centers for Medical Innovation GMBH & Anr.* v. *Phytopharm PLC,* (1999) F.S.R. 235; *see also Talbot* v. *General Television Corporation Pvt. Ltd.,* (1981) R.P.C. 1.

41 Confidential information which is sought to be protected must be described by the plaintiff with a sufficient peculiarity to enable it to be identified and to be embodied in an order of the court granting an injunction. *See O'Brien* v. *Komesaroff,* (1982) 150 C.L.R. 310 at 326-28.

42 *See Thomas* v. *Mould,* 1968 Q.B. 913.

43 "The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody", *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.,* (1948) 65 R.P.C. 203 at 213.

44 "There are three kinds of information available to employees. The first category contd...

is not already in the public domain[45]. It may be that some or all of his rivals already have the information; but as long as the owner believes it to be confidential, he is entitled to try and protect it. Third, that the owner's belief under the two previous heads must be reasonable. Fourth, that the information must be judged in the light of the usage and practices of the particular industry or trade concerned.[46] It is pertinent to note that the plaintiff company in the case at hand was arguing for protection of gene sequences as confidential information. The ratio laid down by the Delhi High Court, instead, comments on the method of agriculture and documentation of strains resulting from that method. It completely overlooks the aspect that the claim of confidential information was directed towards the gene sequences and not the plant or seed varieties or the documentation of essential characteristics of such varieties. For information to qualify as a trade secret, it should be kept as secret, reasonable methods should have been employed to keep it a secret and it should have a value.[47] The authors herein do not argue about the evidences submitted by the Plaintiff and its credibility to prove the stance taken by the Plaintiff. Instead, the authors are of the opinion that the Court's delineation of what all can be taken as confidential information and what all can be excluded from its ambit broaden the debate on a settled position of law. Moreover, the Courts stance on the effect of grant of monopoly to the claimant vis-à-vis farmer's rights presents an unsolicited move towards widening the jurisprudence related to confidentiality of information. It is germane to note that the protection granted to confidential information, creates rights, which bind people *in personam* and not *in rem.*[48]

includes information easily within the reach of any employee/interested individual. The next category includes information which is confidential in the sense that it is not available to every individual. Moreover post employment the use of such information is not prohibited. Finally, the only kind of information which qualifies the test of being confidential, having commercial value and which is prohibited from disclosure is categorized as trade secret", *Faccenda Chicken Ltd.* v. *Fowler,* [1987] Ch. 117, CA, at 137-38.

45 L Bently and B Sherman, INTELLECTUAL PROPERTY LAW 928-29 (1st ed. 2001).

46 *Thomas Marshal (Exports) Ltd.* v. *Guinel,* (1978) 3 All E.R. 193.

47 Confidential information when having commercial value and being reasonably protected, so as to derive benefit, takes the form of trade secret. *See* Robert Dean, THE LAW OF TRADE SECRETS 92 (1st ed. 1992).

48 Daniel Laster, *The Secret is Out: Patent Law Preempts Mass Market License Terms Barring Reverse Engineering For Interoperability Purposes,* 58:3 BAYLOR L. REV. 622-67 (2006); *see also Zee Telefilms* v. *Sundial Communications Pvt. Ltd.,* 2003 (5) Bom. C.R. 404; Neil R. Belmore, Kevin Sartoria, *Trade Secret Law in Canada and United States, available at* http://www.belmorelaw.com/pdf/10.pdf (last visited Dec. 20, 2012); http://www.law.gmu.edu/assets/files/publications/working_papers/1132Intellectual contd...

That being the case, the rights of farmers to use the seeds or varieties do not get hampered by mere grant of protection to gene sequences in the form of confidential information to the claimant. Neglecting this fact, the Delhi High Court has tried to encapsulate the term "confidential information" by looking at the repercussions of such a grant. The treacherous path, on which the High Court has taken recourse to, not only disturbs the well settled law related to confidential information, but also chains the unbridled growth of intellectual property regime.

Issue: Protection of Plant Varieties and Farmers Right Act, 2001

Though the Protection of Plant Varieties and Farmers Right Act, 2001 was not notified when the dispute was brought before the Court, the Court taking cognizance of this legislation, read the objective and purpose behind the legislation and said that the intention behind the Act was to provide protection to breeders and farmers.[49] The varieties, as claimed by the Plaintiff, based on the evidences produced[50], fail to cross the milestone of novelty, distinctiveness, uniformity and stability (DUS).[51] The Court said that the Plaintiff has to first prove that his variety satisfies the DUS criteria and then

Usufructs.pdf (last visited Jan. 20, 2012); http://ipmall.info/hosted_resources/jorda/Jorda%20Speeches/20090515_NYPatentTradeSecret_SynergySynop.pdf (last visited Dec. 20, 2012).

49 *Supra* n. 1, ¶ 31.

50 "In this case, apart from asserting the originality in the gene compilation, the Plaintiff has not shown what exactly is novel or distinct about the seeds it markets, or to what extent they are more efficient or what kind of improved efficacy they possess, such as the improvement in terms of pest resistance, greater yield, or claims towards sturdier strain (or variety) *etc.* The suit does not rely on any supporting document to establish the claim that the seeds are pest resistant or about the uniqueness which sets it apart from other seeds. Nor does the Plaintiff show, by any comparison or study, how and to what extent, its assertions are substantiated. It is not even shown whether the claim is distinct, in the sense that there is no other product containing similar qualities or characteristics. The Court is left to surmise that the Plaintiff spent some money and time, developing a new strain; however, significantly, the improvement effected through that strain, and whether the technique used was unknown, or even the process of arriving at the new variety was new, is not disclosed", *id.* ¶ 32.

51 "To qualify for plant variety protection, a crop or plant should produce the same type of plant/ crop each successive generation, should be distinct in appearance and distinguishable from others "by at least one essential characteristic from any other variety whose existence is a matter of common knowledge in any country at the time of filing of the application." The criteria of "novelty, distinctiveness, uniformity and stability" to confer protection, through registration has to be satisfied by each applicant seeking it", *id.* ¶ 31.

only he can move ahead with claiming infringement of his rights. The authors in the following paragraphs pen down their discontent over the said ratio.

It is the duty of the court to ascertain the facts and then find the applicable law for the adjudication of the dispute.[52] Every law has to be read in its own context. The Court tried to walk a tightrope by propping its ratio on the tenets of the Protection of Plant Variety and Farmer Rights Act, 2001. The Plaintiff in the present suit was not mooting for the protection of a variety or a seed. They were claiming protection of gene sequences.[53] Moreover, the reasoning given by the Court suffers from a fundamental flaw. When a variety gets registered, the registrant is accrued with certain rights.[54] The Courts approach

52 "The very expression "Judgment" discloses that the Court will have to take into consideration the facts pleaded in the plaint and to ascertain the provisions of law applicable to those facts in order to find out whether the relief claimed on the basis of those facts can be granted or not", *All India Central Bank Employees* v. *Central Bank of India*, 2007(4) All M.R. 217 ¶ 9.

53 The issues in the case point towards the fact that the matter was only restricted to copyrightability or confidentiality of the information claimed. The Court now proposes to discuss the rival contentions with respect to three aspects, *i.e.* whether copyright protection is granted under Indian law, in respect of the work, for which the Plaintiff claims reliefs; whether the Defendants used the Plaintiff's confidential information, unauthorizedly, and what should be the appropriate interim relief, if any. *See supra* n. 1, ¶ 25.

54 S. 28 of the Protection of Plant Variety and Farmers Right Act, 2001 states: "(1) Subject to the other provisions of this Act, a certificate of registration for a variety issued under this Act shall confer an exclusive right on the breeder or his successor, his agent or licensee, to produce, sell, market, distribute, import or export the variety: Provided that in the case of an extant variety, unless a breeder or his successor establishes his right, the Central Government, and in cases where such extant variety is notified for a State or for any area thereof under section 5 of the Seeds Act, 1966 (54 of 1966), the State Government, shall be deemed to be the owner of such right. (2) A breeder may authorise any person to produce, sell, market or otherwise deal with the variety registered under this Act subject to such limitations and conditions as may be specified by regulations. (3) Every authorisation under this section shall be in such form as may be specified by regulations. (4) Where an agent or a licensee referred to in sub-section (1) becomes entitled to produce, sell, market, distribute, import or export a variety, he shall apply in the prescribed manner and with the prescribed fees to the Registrar to register his title and the Registrar shall, on receipt of application and on proof of title to his satisfaction, register him as an agent or a licensee, as the case may be, in respect of the variety for which he is entitled for such right, and shall cause particulars of such entitlement and conditions or restrictions, if any, subject to which such entitlement is made, to be entered in the Register: Provided that when the validity of such entitlement is in dispute between the parties, the Registrar may refuse to register the entitlement and refer the matter in the prescribed manner to the Authority and withhold the registration of such entitlement until the right of the parties in dispute so referred to has been determined by the Authority. (5) The Registrar shall issue a certificate of registration under sub-section (4) to the applicant after such registration and shall enter in the certificate

contd...

towards reading conditions of distinctiveness, stability and uniformity as a prerequisite for initiating infringement litigation, denotes the misinterpreted treacherous course taken by the Court. The conditions of distinctiveness, stability and uniformity are necessary to get a variety registered. For an infringement action, the Court has to look at the rights of the plaintiff which

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the brief conditions of entitlement, if any, in the prescribed manner, and such certificate shall be the conclusive proof of such entitlement and the conditions or restrictions thereof, if any. (6) Subject to any agreement subsisting between the parties, an agent or licensee of a right to a variety registered under sub-section (4) shall be entitled to call upon the breeder or his successor thereof to take proceedings to prevent infringement thereof, and if the breeder or his successor refuses or neglects to do so within three months after being so called upon, such registered agent or licensee may institute proceedings for infringement in his own name as if he were the breeder, making the breeder or his successor a defendant. (7) Notwithstanding anything contained in any other law, a breeder or his successor so added as defendant shall not be liable for any costs unless he enters an appearance and takes part in the proceedings. (8) Nothing in this section shall confer on a registered agent or registered licensee of a variety any right to transfer such right further thereof. (9) Without prejudice to the registration under sub-section (4), the terms of registration– (a) may be varied by the Registrar as regards the variety in respect of which, or any condition or restriction subject to which, it has effect on receipt of an application in the prescribed manner of the registered breeder of such variety or his successor; (b) may be cancelled by the Registrar on the application in the prescribed manner of the registered breeder of such variety or his successor or of the registered agent or registered licensee of such variety; (c) may be cancelled by the Registrar on the application in the prescribed manner of any person other than the breeder, his successor, the registered agent or the registered licensee on any of the following grounds, namely:– (i) that the breeder of a variety or his successor or the registered agent or registered licensee of such variety, misrepresented, or failed to disclose, some fact material to the application for registration under sub-section (4) which if accurately represented or disclosed would have justified the refusal of the application for registration of the registered agent or registered licensee; (ii) that the registration ought not to have been effected having regard to the right vested in the applicant by virtue of a contract in the performance of which he is interested; (d) may be cancelled by the Registrar on the application in the prescribed manner of the breeder of a registered variety or his successor on the ground mat any stipulation in the agreement between the registered agent or the registered licensee, as the case may be and such breeder or his successor regarding the variety for which such agent or licensee is registered is not being enforced or is not being complied with; (e) may be cancelled by the Registrar on the application of any person in the prescribed manner on the ground that the variety relating to the registration is no longer existing. (10) The Registrar shall issue notice in the prescribed manner of every application under this section to the registered breeder of a variety or his successor and to each registered agent or registered licensee (not being the applicant) of such variety. (11) The Registrar shall, before making any order under sub-section (9), forward the application made in that behalf along with any objection received by any party after notice under sub-section (10) for the consideration of the Authority, and the Authority may, after making such inquiry as it thinks fit, issue such directions to the Registrar as it thinks fit and the Registrar shall dispose of the application in accordance with such directions."

got hampered by the said action.[55] Registration of a variety stands as a prima facie evidence of all the conditions being fulfilled, as prescribed under the Act.[56] Even if the authors try to uphold the Court's reasoning in the discussed case, the authors believe that the distinctiveness, stability and uniformity, which the Court has opinionated as a prerequisite, is essentially an outcome of genotype. This assertion can be corroborated from the definition of the term "essential characteristics"[57] present in the Protection of Plant Variety and Farmers Act, 2001. Identical genetic makeup results in identical phenotypic features.[58] Thus, in the present case, identical genetic make up between the compared varieties might have resulted in identical phenotypic features for the varieties. That should, under the reasoning given by the Court, stand as an infringement of the Plaintiff's rights.

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[55] *Id.* S. 64 reads: "Subject co the provisions of this Act, a right established under this Act is infringed by a person-- (a) who, not being the breeder of a variety registered under this Act or a registered agent or a registered licensee of that variety, sells, exports, imports or produces such variety without the permission of its breeder or within the scope of a registered licence or registered agency without permission of the registered licensee or registered agent, as the case may be; (b) who uses, sells, exports, imports or produces any other variety giving such variety, the denomination identical with or deceptively similar to the denomination of a variety registered under this Act in such manner as to cause confusion in the mind of general people in identifying such variety so registered."

[56] *Id.* S. 82 provides: "(1) A copy of any entry in the Register, or of any document issued under this Act purporting to be certified by the Authority or the Registrar and sealed with the seal of such Authority or Registrar, as the case may be, shall be admitted in evidence in all courts and in all proceedings without further proof or production of the original. (2) A certificate purporting to be under the hand of the Authority or the Registrar, as the case may be, as to any entry, matter or things that such Authority or Registrar is authorised by this Act or the rules to make or do shall be prima facie evidence of the entry having been made, and of the content thereof, or of the matter or things having been done or not done."

[57] *Id.* S. 2(h) says: "Essential characteristics means such heritable traits of a plant variety which are determined by the expression of one or more genes of other heritable determinants that contribute to the principal features, performance or value of the plant variety."

[58] *Id.* S. 2(za) states: "Variety means a plant grouping except micro organism within a single botanical tax on of the lowest known rank, which can be-- (i) defined by the expression of the characteristics resulting from a given genotype of that plant grouping; (ii) distinguished from any other plant grouping by expression of at least one of the said characteristics; and (iii) considered as a unit with regard to its suitability for being propagated, which remains unchanged after such propagation."

Issue of Indian Constitution vis-à-vis the Rendered Judgment

The Delhi High Court in the concerned case stretched the constitutional philosophies to negate the grant of monopoly rights to the Plaintiff. The Court said that the grant of rights over the claimed subject matter might go against the mandate of Article 19(1)(g) and Article 21 of the Constitution of India.[59] Moreover, the Court was of the opinion that Directive Principles of State Policy should act as a beacon for interpreting the Law and the Constitution. While doing so, the Court cannot lose sight of Article 39(b) and Article 47[60] of the Indian Constitution, which provide a roadblock to the grant of claimed rights of the Plaintiff.[61] The Court opined that the grant of rights to the Plaintiff over the claimed subject matter would result in wider ramifications for the society. The authors in the subsequent paragraph scribble their comments on the observations made by the Delhi High Court.

The authors are of the opinion that the Delhi High Court erred in taking note of the fact that the Plaintiff Company was not claiming rights over the seeds or the varieties. Instead the Plaintiff Company was claiming gene sequences as confidential information. The grant of confidential rights over gene sequences, would in no certain way, have harmed the wider conscience of the society. The rights granted to information, classified as confidential information, exist *in personam*. The rights *in rem* do not get affected by the grant of such rights.[62] It is also to be noted that the Court is right in reading the philosophy behind the inclusion of Section 3(j) of the Indian Patent Act, 1970. But, each law has to be read in its context. Though Section 3(j) debars monopoly over plant varieties or parts thereof or seeds in particular, it is germane to note that the gene sequences get a free walkover. Moreover, the Constitution is not a legal document.[63] The Courts interpret Constitution vis-à-vis law. The Constitution does not itself create any right. So bringing the constitutional mandate to define the periphery of a right, suffers from a fundamental flaw. It is also to be noted that though the Delhi High Court took cognizance of various international covenants to make its observation on the claimed rights of the Plaintiff, it overlooked the Basic human rights document.[64] The plaintiff's case for the grant of monopoly, in the form of copyright, gets buttressed by the perusal of this guaranteed freedom prescribed under the head of Universal Declaration of Human Rights read with Article 51 of the Constitution of India. The grant of copyright to gene sequences, in no way bridles the rights of the farmers to grow, sell and market their produce. Copyright only gets infringed by copying the copyrighted information.[65] Farmers cannot be said to be infringing the copyright in gene sequences by mere production, selling and marketing of their seeds. If the Court upholds the opinion that the farmers will get fettered by the grant of copyright on the claimed sequences, the authors believe, the first sale doctrine in copyright might come to farmers' rescue in such cases.

[59] "[T]here is a danger of imperilling the right to occupation, guaranteed by Article 19(1)(g) and the right to livelihood, so emphatically held to be an intrinsic part of Article 21 of the Constitution of India, by our Courts", *supra* n. 1, ¶ 37.

[60] Art. 47 of the Constitution of India, 1950 reads: "The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

[61] *Supra* n. 1, ¶ 38.

[62] *Id.* ¶ 52.

[63] "The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs", *M. Nagaraj* v. *Union of India*, A.I.R. 2007 S.C. 71 ¶ 16; *see also Government of A.P.* v. *Smt. P. Laxmi Devi*, A.I.R. 2008 S.C. 1640 ¶ 28.

Denouement

Ascertainment of facts and application of appropriate law, represent a two step approach in the justice delivery process. It is the duty of the court to apply the appropriate law to the appropriate facts. The authors are of the opinion that the Delhi High Court in this critical case failed to appreciate the facts. The Court also tried to draw unsolicited inferences from laws which were not applicable to the dispute. The authors in this piece have endeavoured to portray that the result would have been different if the Court would have treaded a guided path. This paper presents an argumentative approach towards the undeciphered tracts taken by the Court in the rendered judgment.

[64] Art. 27(2), *Universal Declaration of Human Rights, 1948* states: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

[65] Access to the copyrighted material is to be shown for showing infringement.

Protection of Traditional Cultural Expressions (TCEs/Folklores) in India within Intellectual Property Rights and Beyond

*Topi Basar**

Introduction

India's rich cultural diversity had always been the most fascinating aspect of her historical past and present. India is well known for her vast repositories of Traditional Cultural Expressions (henceforth TCEs) from times immemorial. It is a product of century old customary and traditional practices of the people, a legacy of the older generation passed on the next generation. It gets manifested in the form of folklores, epics, poetry, folksongs, folkdances, instrumental music, plays, rituals, games and traditional sports, sculpture, painting, engraving, masque making, architecture, handloom and handicrafts, carpet weaving, cane and bamboo furniture, carpentry, pottery, wood carving, basket making, oral healing, ornaments, designs and other artistic creations. The TCEs are distinctly unique and are traditionally preserved by the community by their skill and labour and is an integral part of its social existence. TCEs are generally transmitted orally by the elders to the younger. The TCEs generated over the ages by the contribution of innumerable and unidentified creators and are priceless and unique in its own way due to which the product of TCEs are valued highly in the market. Many of these tangible products such as tribal handlooms, artifacts, ornaments, etc. have reached the market through Government emporiums and private entrepreneurs and are hot attractions for tourists and others. They are easily identifiable with the community they belong. It mainly results from the creative intellectual activity of the community.

Indigenous art copied onto carpets, T-shirts and greeting cards; traditional music fused with techno-house dance rhythms to produce best-selling 'world music' albums; hand-woven carpets and handicrafts copied and sold as

* Assistant Professor, Law Centre-1, Faculty of Law, University of Delhi, topibasar@gmail.com

'authentic'; the process for making a traditional musical instrument patented; indigenous words and names trademarked and used commercially- are the kinds of examples that indigenous and other traditional and cultural communities cite when arguing that traditional creativity and cultural expressions require greater protection in relation to intellectual property.[1] Since TCEs origin can be traced to its community, there is a felt need for proper legal mechanisms to acknowledge the communities ownership over the TCEs with the help of Intellectual Property laws. The growing importance of TCEs in the modern times and the growth of commodity markets call for newer approaches in dealing with misappropriation of TCEs.

The author seeks to explore the possibilities of protection of TCEs under the current Intellectual Property Right regime and its limitations. The author's proposition is that the TCEs are the intellectual property of the people or community from where it has originated, being preserved and practiced and there is an urgent need for its protection and preservation.

Meaning of Traditional Cultural Expressions (TCEs/Folklore)

TCEs, also called "expressions of folklore", may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions. TCEs are integral to the cultural and social identities of indigenous and local communities, they embody know-how and skills, and they transmit core values and beliefs.

Their protection is related to the promotion of creativity, enhanced cultural diversity and the preservation of cultural heritage.[2] TCEs may be either tangible, intangible, or, most usually, a combination of the two. Indeed, in any material object, there is often a symbolic or religious element from which it cannot be separated. An example would be a woven rug (a tangible expression) that expresses elements of a traditional story (an intangible expression).

[1] WIPO Secretariat, *Intellectual Property and Traditional Cultural Expressions/Folklore*, WIPO publication No. 913(E), ISBN 92-805-1363-X, *available at* http://www.wipo.int/export/sites/www/freepublications/en/tk/913/wipo_pub_913.pdf (last visited May 23, 2013).

[2] *See The Traditional Cultural Expressions and Intellectual Property, available at* http://www.wipo.int/tk/en/folklore/ (last visited May 23, 2013).

The Copyright Act, 1957 as amended in 2012: From TCEs Standpoint

The elements and principles of the copyright system are particularly relevant to the protection of TCEs because many are literary and artistic productions and therefore already or potentially the subject matter of copyright protection. That is why many countries already protect folklore within copyright law. Rights related to copyright, particularly the rights of performers, are also directly useful.[3]

Contemporary original adaptations of TCEs, made by members of the communities or by third parties, may be copyrightable. Copyright protects the products of creativity against certain uses such as reproduction, adaptation, public performance, broadcasting and other forms of communication to the public. Performances of TCEs may come under international instruments, such as the WIPO Performances and Phonograms Treaty, 1996, which grants performers of folklore the right to authorize recordings of their performances, and the right to authorize certain dealings with those recordings. Article 15.4 of the Berne Convention for the Protection of Literary and Artistic Works (1886) provides a mechanism for the international protection of unpublished and anonymous works, including TCEs. Copyright can also provide protection against insulting, derogatory, offensive, demeaning or degrading use of a work, an issue that is often of concern in relation to TCEs which embody spiritual qualities and the very cultural identity of a community. Preventing such misuse, and promoting respect for cultural and spiritual values, may be the principal goal of protection for some.[4]

However, there is no express mention of TCEs or folklore in the Act even after the amendment made in 2012. The possibility of inclusion of TCEs would have been in Section 2(c) of the Act. The Section enumerates the meaning of "artistic work" such as painting, sculpture, drawing, engraving, architectural work and any other work of artistic craftsmanship.[5] However, TCEs is not expressly mentioned as a separate category although liberal interpretation of the section would seem to include TCEs within the meaning of "artistic work".

[3] *Supra* n. 1.

[4] WIPO Secretariat, *Intellectual property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions-an overview*, WIPO publication No.933E, ISBN 978-92-8-5-2252-5, *available at* http://www.wipo.int/freepublications/en/tk/933/wipo_pub_933.pdf (last visited May 23, 2013).

[5] S. 2(c) of the Copyright Act, 1957 as amended in 2012.

As per Section 2(d) "author" means in case of literary or dramatic work, the author of the work; in musical work, the composer; in artistic work, the artist[6] etc and thereby the Section indicates to include only those creations created by an individual or the concerned artist(s) as the creator or the source. So the meaning of author does not include the product of TCEs created and originated by a given community which cannot be attributed to a single creator or author. TCEs are held collectively and regarded as the common property of the particular tribe, community or village where it is situated. Where do we fit in the folklores, dances, songs and other traditional artistic creations of the communities? The focal point of Section 2(d) is on individual author or creator and excludes from its domain collective traditional artistic works or TCEs.

Let us see the possibility of utilizing the provisions, protecting performer's right, in relation to TCEs. Sections 38 to 39A deal with different rights of the performer in relation to its performance. Section 2(qq) defines "performer" as including an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance. It is noteworthy to mention that folk singers, dancers and musicians are not specifically included in the definition of performer. However, the folk artists may use these provisions in a general way to claim protection of its performance. But the efficacy of the law is always doubtful if it is not specially designed with particular sensitivity such as to deal with TCEs which requires a different approach. The Act gives a special right to the performers in relation to its performance. The performer's right shall subsist for fifty years.[7] The most complex issue that may arise in relation to TCEs is that how can an individual performer even if he or she is a folk artist enjoy performer's right for fifty years on a cultural product of the community as a whole. The idea of individual proprietary rights on TCEs goes against the notion of collective ownership of TCEs by the community. The exclusive rights of the performer are as follows:

- To make a sound recording or a visual recording of the performance, including right of reproduction, to issue copies of it to the public,

[6] *Id.* S. 2(d).

[7] *Id.* S. 38.

communicate it to public, sale or commercial rental, to broadcast the performance.[8]

- When a performer, by a written agreement consents to incorporation of his performance in a cinematograph film, he cannot in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer's right in the same film. But the performer shall be entitled for royalties in case of making of the performances for commercial use.[9]
- Besides these rights, the performer shall also enjoy moral rights independently of his other rights such as the right to be identified as the performer of his performance and to restrain or claim damages in case of any distortion, mutilation or other modification of his performance which would be prejudicial to his reputation.[10] However, all these provisions are mainly suitable for performers in a cinematograph film and how it can be creatively used to protect performances in the form of traditional folk songs; dances etc are yet to be seen. The biggest lacunae with the performer's right in the context of TCEs (e.g. folk song and dances) the right shall vest in whom? On the individual performer or the community who holds the particular TCEs. Two things that are inconsistent with TCEs are monopoly right of fifty years on performance by the performer and right of royalties in case of commercial use of the performances. The present framework is not adequate with regard to TCEs as they are regarded as a collective property of the community and the idea of private proprietary right on performances based on TCEs goes against the notion of community ownership which is the core of TCEs. What if any folk based performances get incorporated in to a cinematograph film? Often films contain varied aspects of folk culture and tradition whose authors are mainly community. But the Copyright Act is silent on this aspect and has no remedy for protecting TCEs in particular. It is imperative to obtain prior informed consent from the holders of TCEs and monetary benefits or compensation in commercial use of the TCEs which is completely ignored by the Act.
- It would be interesting to mention the Protection of Plant Varieties and Farmers Rights Act, 2001 (PPVFRA) wherein rights of village or local community are recognized in the evolution of any plant variety. This is an example to show how community stake on collective property can be legally protected. As per Section 41 of PPVFRA, any person, group of persons or any governmental or non-governmental organization may, on behalf of any village or local community in India file any claim attributable to the contribution of the people of that village or local community, as the case may be, in the evolution of any variety for staking a claim on behalf of such village or local community. If it is satisfied that such village or local community has contributed significantly to the evolution of the variety which has been registered under this Act, the Authority may grant such sum of compensation to be paid to a person or group of persons etc. which has made the claim.[11] Any compensation granted shall be deposited by the breeder of the variety in the National Gene Fund. Thus, the PPVFRA has not only a mechanism for the registration of farmer's variety but also a viable benefit sharing system in place. Similar approach is required in case of TCEs within the Copyright framework as the later has vast potential to protect TCEs which has been totally ignored.
- Even the Biological Diversity Act, 2002 includes folk knowledge in relation to plant vide Section 41 sub-section (b), "folk variety" means a cultivated variety of plant that was developed, grown and exchanged informally among farmers. The point is when an Act dealing with conservation of Biological Diversity, sustainable use of its components and fair and equitable sharing of the benefits also include folk variety within its scope, it is quite surprising that 'folk art and culture' is not specifically provided anywhere in the Copyright Act,1957 even after the major amendments in 2012. Is the omission deliberate on the part of the Government due to work of powerful film industry lobby or the Government is mulling over a sui generis law for TCEs?

Crisis of the Copyright Act in Protecting TCEs

The most important question is- does the Copyright Act give any measure of protection to TCEs in any manner? This is a pertinent question especially in the light of recent major copyright amendments in 2012. A complete revision of law of copyright is made and it introduces several new features. In the statement of objects and reasons for the new Amendment, it has been stated that adequate provisions have also to be made for fulfilment of international obligations in the field of copyright which India might accept. This statement

[8] *Id.* S. 38A (1).
[9] *Id.* S. 38A (2).
[10] *Id.* S. 38.

[11] The Protection of Plant Varieties and Farmers' Rights Act, 2001, S. 41(3).

is of particular importance since at the international level under the aegis of World Intellectual Property Organization (WIPO) a draft treaty on protection of TCEs is being negotiated in which India is an active member.[12] The answer to the question above is no because of the above stated reasons.

The Designs Act, 2000

Some tradition based products and items like handicrafts, jewellery, handloom products, potteries, utensils, artifacts, bamboo and cane products, hand-woven dresses and many other TCEs based/originated, tangible and marketable commodities could be given some protection by using the relevant provisions of the Designs Act. In the absence of a single comprehensive law on TCEs, the best possible way is to expand the scope of the available laws in the relevant field to cover TCEs, also by the key players and the stakeholders. A new synergic approach is the need of the hour.

At the outset it may be clearly stated that just as the Copyright Act as seen before has no express provisions on TCEs, directly same is the case with the Designs Act. However, the Act has some interesting features which could be useful to various stakeholders of TCEs particularly the provision pertaining to registration of "design".[13] Also, the broad definition of design is a good thing for TCEs. Many traditional features of designs held by the communities are being applied on handicrafts, jewellery, artifacts etc. can be legally registered in their name by applying for registration of such designs. If

12 The Inter-Governmental Committee on *Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions (IGC) at WIPO* was established by the WIPO General Assembly in October 2000. The mandate of the Committee is to develop legal mechanisms and practical tools for the protection of TK and TCEs against misappropriation and misuse and intellectual property issues relating to genetic resources (GR). The IGC for the past more than 12 years is involved in negotiating draft international instrument(s) on TK, TCE and GR which would provide effective protection.

13 S. 2(d) defines "Design" to means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of Section 2 of the Trade and Merchandise Marks Act, 1958 (43 of 1958) or property mark as defined in Section 479 of the Indian Penal Code (45 of 1860) or any artistic work as defined in clause (c) of Section 2 of the Copyright Act, 1957 (14 of 1957).

successful the registration would bestow copyright on their TCEs based designs and secure proprietary right for the communities. It is commonly seen that many TCEs on handicrafts and handlooms, jewellery, tribal handicrafts and designs are being increasingly used by the modern artistes by making minor cosmetic changes and reaping commercial benefits out of it without the prior informed consent and benefit sharing accruing to the real custodian of TCEs.[14] Thus, misappropriation of TCEs is a big challenge that needs adequate attention by law. The advent of modern technology and fashion is also posing a big threat to TCEs as it is found that many traditional designs is undergoing constant transformation by means of modern industrial processes and the handmade things are now easily available as machine made. Not only this leaves an adverse effect on preservation of TCEs but a deadly blow to the local self sustaining traditional industries at the village level.

The key features of the Designs Act, 2000 relevant to TCEs are as follows:

- As mentioned earlier, this Act does not provide for any positive rights as such for TCEs as a whole. However, it does give some negative rights in the form of Section 4 wherein grounds for prohibition of registration of certain designs are stated e.g., if the design is not new or original; has been disclosed to the public anywhere; not significantly distinguishable from known designs or combination of known designs; comprises or contains scandalous or obscene matter, shall not be registered. Any person interested may present a petition for the cancellation of the registration of a design at any time after the registration of the design to the Controller on these grounds.[15] This section indirectly gives protection to TCE based designs from being misappropriated illegitimately by others. But the practical implication of this is yet to be seen.
- Second important issue is the possibility of registration of TCE based designs applied on several products. Can the community themselves apply for registration of such designs under the Act? There is no express right as such but nothing stops the Controller from granting registration of TCE designs if the other legal parameters are fulfilled. As per Section 5 the Controller may on the application of any person claiming to be the proprietor of any new or original design not previously published in any

14 The principle of Prior Informed Consent and Benefit Sharing are two key components of the proposed draft on the legal protection of TCEs currently being negotiated under the leadership of World Intellectual Property Organization (WIPO).

15 S. 19, the Designs Act, 2000.

country and which is not contrary to public order or morality can grant registration. The author sees no reason why the Controller would not accept the application by the community/person representing the interest of the community for registration of TCE designs. Such a move will also help in the preservation and act as a defensive check on misappropriation of TCE by unauthorized persons. The best way is to legally empower the TCE holders by making express provisions through proper amendment of the law. The Act in the current form lack community perspective from the point of view of TCE.

The Patents Act, 1970

The most notable feature of the Patent Act significant for TCE is undoubtedly Section 3(p). It excludes an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components from being regarded as invention. Generally TCE is widely acknowledged as a sub-set of Traditional Knowledge (TK). In many cases both are inextricably linked with each other as it becomes difficult to segregate the two. For instance, many traditional communities have special colour dye techniques practiced as a part of cultural tradition and social beliefs that also forms a part of the wider TK of that community. Many indigenous tribes in India have rich knowledge on wild plants and its medicinal properties, folk healing which is closely associated with their TCE as this knowledge are passed down intra-generation for posterity. However, due to mostly intangible (or uncodified) nature of TCE there is limited scope of its protection under the patent regime. This is also one of the reason why the inter relationship of TCE and patent law is not much talked of.

The Geographical Indications of Goods (Registration and Protection) Act, 1999

Geographical Indication (GI)[16] in relation to any goods does not only denote the geographical origin of that good but carries with it the socio-religious and

16 The Geographical Indications of Goods (Registration and Protection) Act, 1999, S. 2(e) defines "Geographical Indication", in relation to goods, as an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality,
contd...

conditions of membership of association, conditions of use, sanctions against misuse and other matters.[19] The registered proprietor of collective mark can file a suit for infringement of collective mark.[20] The manner of infringement will be decided as per the conditions stipulated in the regulations. The registration of a collective mark may be removed from the register if the collective mark has been used by the proprietor or authorized user[21] in a manner that has caused it to become liable to mislead the public as a collective mark; the proprietor has failed to observe, or to secure the observance of the regulations governing the use of the mark.[22]

TCEs in the form of word, names and symbols can benefit a lot from collective trademark. This will also enhance the reputation and commercial value of the TCEs based commodities in the market as it is evident that foreign tourists attaches a great deal of significance to TCEs products. It will also help in the economic empowerment of the community having rich TCEs and help in development of marketing opportunities for tradition-based creations and innovations.

Conclusion

A multi pronged legal strategy is the need of the hour for TCEs protection. On the one hand it is important to preclude the grant and enforcement of intellectual property rights acquired by unauthorized parties over TCEs and adaptations thereof by suitably amending the relevant IP laws. But the other objectives of TCEs protection such as to promote respect, empower communities, safeguarding traditional cultures, to encourage community innovation and creativity etc., the IP laws are not adequate. It is found that IP laws help TCEs more in a defensive way rather than giving any positive rights which is a huge gap. A more comprehensive and holistic legal framework is needed for TCEs considering the large gamut of subject matter it covers.[23]

[19] *Id.* S. 63.
[20] *Id.* S. 67.
[21] *Id.* Explanation 1 to S. 68 provides that an "Authorized User" means a member of an association authorized to use the registered collective mark of the association.
[22] *Id.* S. 68(a) & (b).
[23] Recommendation endorsed unanimously at the *Third National Consultation on Traditional Knowledge and Traditional Cultural Expressions: Negotiations* in the World Intellectual Property Organization held by Government of India Ministry of Commerce & Industry Department of Industrial Policy & Promotion, December 15, 2012, Patent Office, Dwarka, New Delhi, India.

BOOK REVIEWS

THE PASSIONS OF LAW EDITED BY SUSAN A. BANDES. (Ist Indian Reprint 2012). By Anju Tikoo. Universal Law Publishing Co., New Delhi. ISBN- 978-9350351895. Pp xv+367. Price Rs. 525/-

> *The law, ..., is imbued with emotions. Not just the obvious emotions like mercy and the desire for vengeance but disgust, romantic love, bitterness, uneasiness, fear, resentment, cowardice, vindictiveness, forgiveness, contempt, remorse, sympathy, hatred, spite, malice, shame, respect, moral fervour, and the passion for justice......*[1]

Emotion pervades not only the criminal and the civil courtrooms but all the stakeholders in the practice and conception of law and justice viz. the appellate courtrooms, the legislature, the judges and lawyers, litigants and lay public. As per the conventional practice the role of emotion in law is finitely delineated so that emotion doesn't encroach on the true preserve of law: which is reason.[2] Even though the precincts of law are so portrayed to exclude any traffic in various facets of emotion, yet there is no denying the fact that emotions are so deeply ingrained and intertwined with law that they are invariably invisible.

It is this façade about impregnability of law with human emotions that the book under review, brings to the fore with much ease through a compilation of thirteen scholarly essays. The Passions of Law is an interdisciplinary endeavour and has brought together many of the most highly influential and, indeed, ground-breaking scholars of emotion theory, in fields that include philosophy, classics, psychology, religion, ethics, law, and social thought.[3]

Susan A. Bandes, the editor has facilitated the ongoing process of humanising law through lucid narrative giving the reader a glimpse of the various

[1] Susan A. Bandes, Introduction, THE PASSIONS OF LAW 2. Bandes is a Professor of Law at DePaul University, where she teaches criminal procedure, federal jurisdiction, and law and literature.
[2] *Id.*
[3] *Id* at 7.

spectrum of emotion including in its realm the *passion for justice* and the *commitment to principle.*[18]

Law cannot accommodate the endless subtleties and variations of emotions and hence there is an apparent conflict between the demands of emotion and law which value finality, predictability, accuracy, logic, rationality. The essays succeed in dispelling the notion of a neutral, emotionless baseline .establish beyond challenge that emotion pervades law, and always has.

The Passions of Law is a compilation of stimulating articles making it a reader's delight. The semantics of the volume reflects a passionate endeavour on the part of the editor who deserves all commendation for her craft of weaving a clear linkage in the widely disparate facets of emotion conspicuously presented in the articles and its interplay with law through a lucid and enriching introduction. The book is an invaluable source of reference for all the stakeholders not only in the field of penology, criminology but all those who are related with the justice dispensation at the theoretical as well as practical level. A prized possession for one and all, interested in issues of law and justice.

*Anju Vali Tikoo**

[18] Samuel H. Pillsbury, *Harlan, Holmes, and the Passions of Justice,* 330-62.
* Assistant Professor, Law Centre-1, Faculty of Law, University of Delhi.

INDUSTRIAL POLICIES IN INDIA– THE CONSTITUTIONAL VISION OF SOCIALISM (Ist ed. 2012). By P.B. Pankaja. Company Law Journal (India) (P) Ltd., New Delhi. ISBN-81-8553719. Pp xxxii+577. Price Rs.590/-.

Every country has its own sustaining value system and every Constitution has a philosophy of its own. They are reflected in the policies and programmes of the country. Basing on the past experiences, the founding fathers of Indian Constitution realized that Independence which ensured freedom from political slavery would not be meaningful unless it contributes for freedom from economic servitudes and social pathologies. Towards achieving Poorna Swaraj, the Constitution of India was framed with the vision of an egalitarian society wherein justice – social, economic and political will prevail. The Industrial Policies were formulated towards this end. The biggest metamorphosis in our economic and industrial climate came in 1991 in the form of New Industrial Policy, after which the whole edifice of socialist patterned industrial structure was uprooted. A paradigm shift took place in policy framework and legislative attitude, watering down the constitutional spirit of socialism. In this scenario, the book under review is a comprehensive work on the entire gamut of executive, legislative and judicial dynamics in the industrial policies tested on the touch stone of constitutional vision of socialism.

The choice of the title of the book is significant in three ways. Firstly it is a maiden attempt to analyze the concept of constitutional vision of socialism which is quite different from theoretical framework of socialism as an economic or political doctrine which is different from the various global perspectives on socialism. Secondly, it is also first of its kind in examining the constitutionally envisaged socialistic indicators, embedded in the industrial policies in India. Thirdly, the exercise is significant in making a contemporaneously relevant study which tries to address some of the important questions that surfaced on the present day politico-economic-socio-legal regime, in the wake of globalization.

The book has been divided into seven chapters. The introductory chapter spells out the significance of the study and the author says that the scope is restricted to policy analysis till 2001, a continuation of New Industrial Policy 1991 as the subsequent industrial policy measures are of the same genes.

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LAW RELATING TO INTELLECTUAL PROPERTY (5th ed. 2011). By B.L. Wadhera, Universal Law Publishing Co. Pvt. Ltd., New Delhi. ISBN-978-8175345888. Pp. lxiii+611. Price Rs. 395/-.

The book under review, in its 15th year of publication, makes a sincere effort to bring the major legal issues relating to Intellectual Property Rights in one concise compilation, for the better understanding of students of law and technology. The book is highly recommended by several universities to its students across India and relied upon by lawyers and academics.

The Fifth Edition is divided into VIII Parts: Patents; Trademarks; Copyright; Designs; Geographical Indications; Semi-Conductor Integrated Circuits Lay-Out Design; Protection of Plant Varieties and Farmers' Rights and TRIPS. Each part deserves to be examined in its own way.

Part I on *Patents* – deals with every provision of the Patents Act, 1970, including the newly amended provisions vide the Patent (Amendment) Rules, 2006 giving students a good read into the Legislation. Practical aspects like drafting specifications and the procedure for obtaining a patent have been explained fluidly. A dedicated chapter on case laws on the subject makes it easier to locate precedents and another chapter on summary of WTO Dispute Settlement Panel Reports makes it an interesting read, thus forming an aid in further research. The FAQs discussed at the end of each Part deserve commendation for summarily explaining the concepts to the reader. The author vividly discusses about Patents for Pharmaceutical and Agricultural Products. However, it is important to note at this point that no mention is made of the now settled *Novartis case*[1]. The Madras High Court pronounced its judgment rejecting Novartis's claim in 2007 against which the Corporation went in appeal to the Supreme Court. *'Cipla'* decision[2] also finds a place under the same head.

Part II on *Trademark* – more illustrative in nature – incorporates several examples for clear understanding of the reader. The treatment is much the same, giving a thorough of the Trademark Act, 1999, along with explanation of emerging trends, illustrative infringement cases and a dedicated chapter on other case laws. A mention of special variety of marks like, sound, colour, smell etc., would make the reader better aware of the boundless expansion of IPRs, especially trademarks.

1 *Novartis AG* v. *Union of India*, 2007 (4) M.L.J. 1153.

2 *F. Hoffmann – La Roche Ltd.* v. *Cipla Ltd.*, 2008 (148) D.L.T. 598.

Part III on *Copyrights* competently deals with every aspect of the Copyrights Act, 1957, deftly pointing out the lacunas in the 1957 Act, as it stood before the Copyright (Amendment) Act, 2012 was passed. The book delves deeply into what material is copyrightable. The scope of Section 57 and rights conferred on the owner of copyright under the Act along with a distinction between author and owner of copyright, are discussed separately, as is the issue of assignment of copyrights. The author has given intriguing situations in the chapter on Infringement of Copyrights and the same shall prove useful in opening up the mind of reader to the infinite possibilities in which an artistic work can be subjected to piracy. A dedicated chapter on International Copyright makes for an interesting read.

Coming to the present situation - the 2012 Amendment Bill itself had sparked many debates long before it got passed. An inclusion of salient arguments advanced, with a special reference of Sections 19, 19A and 57, would have made this book a more analytical study into the emerging trends on copyrights.

Part IV of the book makes a study on *Designs and the Designs Act, 2000*. Substantive provisions as well the procedural part of the Act are well covered by the author. Although not a complete code on law relating to Designs, the book addresses most essential questions like, subject-matter of designs; how novelty or originality is to be judged; whether the design must have a visual appeal and must be applicable to a particular area; rights granted on registration of a design; piracy of registered designs and remedies thereof, etc.

Author caps off the discussion with leading case laws on the subject. A small note here: the student would have benefitted more if the by-play of Designs and Copyrights were included in the last chapter.

Part V of the book is a small study on *Geographical Indications of Goods (GIs) and the Accompanying Act, 1999*. GIs, although a very interesting area in Intellectual Property Laws, has not yet been explored much in India. Some examples of Indian GIs are: *Basmati Rice, Darjeeling Tea, Kangra Tea, Feni, Alphonso Mango, Alleppey Green Cardamom, Coorg Cardamom, Kanchipuram Silk Saree, Kohlapuri Chappal*, etc. Perhaps that is the reason why the approach of the book to this form of intellectual property is not so elaborate. However substantive as well as procedural provisions of the Act have been discussed well.

Part VI deals with *Semiconductor Integrated Circuits and Layout-Designs* and how the Act of 2000 attempts to define them. The commercial exploitation of