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## FOREWORD

The decision to start a law review by the students of NALSAR is a good augury, and a welcome step. Law is a science which requires long study and deep reflection. Law, as it has evolved, represents and encapsulates the wisdom and learning of wise and learned men who preceded us. Judges, lawyers, law teachers and students of law have all contributed to the evolution of legal principles which lie at the heart of our constitutional and legal system. These principles are common to the entire English speaking world that, by and large, follows the Anglo Saxon jurisprudence and legal system.

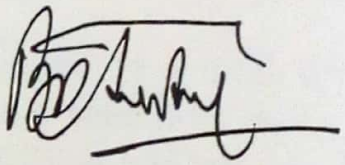
The doctrine of classification and the rule requiring the authorities to act fairly and without arbitrariness were evolved to give life and meaning to the rule of equality before law and equal protection of laws. The right to life and liberty enshrined in Article 21 of the Constitution has been interpreted liberally to encompass any number of rights which make life meaningful and enable human beings to lead a life with dignity. The supremacy of the Constitution in a federal polity which was enunciated for the first time by the United States Supreme Court in *Marbury v. Madison* has been given express recognition by our founding fathers in Article 13 of our Constitution. The principles of natural justice which were designed to govern the conduct of quasi judicial authorities have been extended to the acts and functioning of the administrative authorities as well. This was done with a view to ensure fair hearing and to prevent failure of justice.

The law has also helped to make the governance of the country more responsible and fair. The very concept of rule of law implies that the governing power should not only be distributed among the various organs of the State, but it must also be ensured that those organs of the State act within their bounds, with reasonableness and fairness. All these principles have to be studied, and studied in depth. I am sure that the students of NALSAR will make a name for themselves, and for the institution, in whatever walk of life they enter, hereafter.

I conclude with two quotations from two great judges. Chief Justice MC Chagla had this to say about the study of law, *"The study of law is not merely gaining of knowledge about the laws of one's country. It is a liberal education, a discipline of the mind. Law teaches us precision, lucidity of expression, the value of words, and, more than anything else, how to sift the wheat from the chaff, how to discard the irrelevancies that surround a subject and how to get at the root of the matter. It is because of this that a trained lawyer will make a success of any department with which he is entrusted."* ["Role of the Lawyer in the World Today", NYLJ, 25th May 1961]

Justice Oliver Wendell Holmes has this to say about the law schools, *"The business of a law school is not sufficiently described when you merely say that it is to teach law or to make lawyers. It is to teach law in the grand manner and to make great lawyers."* ["Speeches", Use of Law Schools, 30]

I wish NALSAR and its students a bright future and hope that this law review will be a grand success.



Justice BP Jeevan Reddy

19th March 2005

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**Prof. (Dr.) Ranbir Singh**
Director

## FROM THE DIRECTOR'S DESK

It gives me great pleasure to commend the efforts of the students of NALSAR in bringing out this inaugural issue of the NALSAR Student Law Review. This marks the launch of a scholarly initiative by the students aimed at fostering an interest in legal research and writing. Student edited reviews are characteristic of all leading law schools and represents a significant milestone in the academic growth of an educational institution.

The NALSAR Student Law Review is a periodical Review, conceived, managed, edited and contributed to, entirely by the students of NALSAR. The Editorial Board has been constituted pursuant to a selection process organized by the Academic Committee of the Student Bar Council. I wish to congratulate the Editorial Board as well as the Financial and the Design and Technical Committees for an excellent job in bringing out this Review. I also commend the contributors to the Review for their insightful articles, which having covered a wide range of issues and concerns, expand the dimensions of existing legal thought.

It is my sincere hope that this initiative will result in the inculcation of a culture of serious academic research and writing among the students of NALSAR and I wish the students all luck and success in this endeavour.

Prof. (Dr.) Ranbir Singh
Director
NALSAR University of Law, Hyderabad

19th March 2005

# EDITORIAL

The primary aim of the *NALSAR Student Law Review* is to encourage legal writing among students. It serves as a medium through which students can express their views on pertinent legal issues, supported by in-depth research on the same. We believe that this platform for student contributions will aid in not only enhancing their legal skills, but will also enable them to hone in on their writing and research abilities.

This being the inaugural edition, contributions were restricted to the students of NALSAR University of Law. The response received by the editorial board was indeed overwhelming. We are grateful to all the contributors for their enthusiasm and seriousness of purpose. The quality of the papers submitted was of a high order and the final list of papers emerged after several long discussions and hard decisions on the part of the Editorial Board.

In order to ensure impartial judgment and quality, each article submitted was sent to an external expert in the area of research for evaluation and critical comments. The comments by specialists were invaluable to the editorial board. Their vast experiences of the working of the legal system and the expertise they possess in their respective fields helped the student-researchers make their arguments more substantial and their writing sharper.

The *Review* is divided into two sections. The first consists of articles which extensively explore particular concerns of law and their interplay with society. The second, titled 'Notes and Comments', presents views on interesting points of law or brief comments on particular judgments which have sought to interpret, or even evolve law.

The present edition of the Review has articles and notes spanning a wide range of issues from poverty and suicide to emerging areas of concern in criminal jurisprudence on victim-offender mediation, the right to vote and those which raise questions about vagrancy within a specific legal structure. The notes seek to highlight issues like those of taxation of software imports, the rights of a guarantor, the two-child norm and the display of the national flag.

The Editorial Board expresses its immense gratitude to all those who contributed to this endeavour. Being the pioneer edition efforts were needed from several corners to make this exercise possible.

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# THE EMBARRASSMENT OF POVERTY - A CRITIQUE OF STATE RESPONSE AND RESPONSIBILITY

*Geetanjali Swamy, Pritam Baruah and Saurabh Bhattacharjee**

Legal institutions have the potential of being instruments of either empowerment or impoverishment. The legislative zeal in the early years of our republic and the judicial activism of the post emergency period have stamped their indelible imprint on the nation's strive towards the alleviation of the oppressed. At the same time, the politico-legal institutions have also demonstrated their vulnerability to majoritarian and socially entrenched pressures[1].

Laws on vagrancy are exemplar of this dualism inherent in the legal process. Enacted ostensibly with the goal of rehabilitation, they have wrought untold misery on their intended beneficiaries[2]. This is manifested in contemporary instances of societal and judicial hostility to vagrants and beggars in the form of the Delhi High Court Order in 2002[3] directing the Delhi Administration to clear the capital city of beggars and street-hawkers, along with the transportation of beggars during visits of foreign dignitaries.

These laws had their genesis in the colonial regime and were impelled by the socio-political imperatives of colonialism. In the light of the Constitutional ideal of socio-economic justice, their survival raises fundamental questions about the welfare character of the Indian State. This research paper endeavours to interrogate the legitimacy of such laws considering their import in the current socio-economic milieu.

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* V year students, B.A., B.L (Hons), NALSAR, University of Law, Hyderabad. This paper was first conceived for the Law and Poverty Course. The authors would like to acknowledge the suggestions and comments of Prof. Amita Dhanda, the course instructor.

[1] See Jerry L Mashaw, "The Economics of Politics and the Understanding of Public Law", 65 Chi.-Kent L. Rev. 123 (1989) and Daniel A Farber and Philip P Frickey, "Symposium on the Theory of Public Choice", 74 Va. L. Rev. 167 (1988); Jane S Schacter, "Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation", 108 Harv. L. Rev 592 (1995).

[2] Amulya Gopalakrishnan, "Poverty as Crime", Frontline, Nov. 9, 2002 at <http://www.flonnet.com/fl1923/stories/20021122004703000.htm>, last visited 20th September 2004.

[3] ibid.

## I.

A beggar is generally understood to be a person who engages in a positive act of begging or seeking alms. Vagrancy, on the other hand, is merely a state of existence and a vagrant need not participate in any overt act of seeking alms; mere indulgence in idle existence is sufficient[4]. In spite of this lexical distinction, both vagrants and beggars are perceived as 'social parasites' due to their dependence on society for subsistence.

'Social parasitism', however, is not new to Indian society. Through different eras, the act of feeding young brahmans and fakirs was reified. The spirit of collectivization of misery was the dominant social outlook. Giving alms also served the purpose of diffusing tension and frustrations generated by unequal distribution of resources in a feudal society[5].

With the advent of British rule, a capitalist system of production emerged, and those who could not contribute to the processes of production were considered to be impediments to the existing system. These *'idle and immoral people, reluctant to work'* set a bad example for the existing labour class and thus required regulation. This perception was reflected in the Government's approach towards the problem, founded on the idea of deterrence by means of criminalisation[6]. The adoption of this outlook was primarily motivated by the fact of increasing white vagrants- a fact which sought to undermine the proclaimed superiority of the European race[7].

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[4] BB Pande, "Vagrants, Beggars and Status Offenders", 119 in Upendra Baxi (ed.), "Law and Poverty- Critical Essays", (1988).

[5] ibid. at 118

[6] It must be stated here that the initial approach to alleviate the problem was by dissemination of funds. Some philanthropists did establish rehabilitation homes and institutions for the betterment of vagrants. This, however, was not to last long, and most institutions did not last the 19th century. It was increasingly felt that such an approach would only encourage more beggars and vagrants. Criminalisation was seen as the next and more promising solution to the increasing number of vagrants. See Aravind Ganachari, "White Man's Embarrassment: European Vagrancy in the 19th Century Bombay", Economic and Political Weekly, Vol. XXXVII No. 25, 22nd June 2002, 2477.

[7] The 'superiority of the white race' was seen as a legitimising factor in the British rule in India. Their superiority was sought to be questioned when there were increasing number of white beggars and vagrants, thus making the politico-economic structure of their rule questionable. The growing numbers

The first step in this direction was the enactment of The European Vagrancy Act, 1869, which provided for the deportation of the vagrant and a daily subsistence allowance of eight annas. This was followed by the enactment of The Code of Criminal Procedure, 1898[8], which provided that a Magistrate could attempt to ensure good behaviour by means of securing a bond with sureties from a person with no ostensible means of livelihood.

In the second quarter of the twentieth century, the problem increased multi-fold. Apart from the economic destruction caused by the British rule, famines and the Second World War cumulatively worked to create large numbers of beggars. The holocaust of partition also caused unparalleled displacement of people which only added to the already existing problem of large scale vagrancy in India. Despite the predominantly socialist overtones of the India Constitution, independent India chose to continue with the repressive approach of the colonial state towards the problem of vagrancy by enacting legislations on similar lines.

## II.

In order to understand the law relating to beggars and vagrants in India, the enactments in Andhra Pradesh[9], Bombay[10] and Delhi[11] have been studied. These laws, on a comparative analysis, highlight the following features:

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of vagrants in the 19th Century were due to: the daily discharge of workers in the railways, the fleeing of workers from the Lancashire cotton industry due to the stoppage of the imports from America and the inability for of young men to find berths in the Indian Navy, necessitating immediate redressal of the problem. This urgency is reflected in the words of BH Ellis a North Division Police Commissioner who opined, "*...they [European vagrants] go from house to house begging, often get intoxicated in the bazaar, and in fact are becoming quite a nuisance. Something should be done to make these men return to Europe, as they bring great disrepute on the European character. Many of these men are old soldiers, who took their discharge when the Indian army was transferred to the Crown...they have become quite a pest to the community at large.*" See ibid. for a detailed discussion on the challenge of vagrancy to the white man's superiority.

[8] The new Code of Criminal Procedure, 1973, has repealed this provision, but the absence is of little consequence, as the same provision has been re-enacted in different state legislations, which will be analysed subsequently.

[9] The Andhra Pradesh Prevention of Begging Act, 1977 (hereinafter referred to as A.P. Act).

[10] The Bombay Prevention of Begging Act, 1959 (hereinafter referred to as Bombay Act).

[11] The Delhi Prevention of Begging Rules, 1960 (hereinafter referred to as Delhi Rules).

- The definition of a 'beggar' is wide and includes within its fold, not only persons who solicit alms for their own survival or for the subsistence of their dependents, but also persons who act in any manner which may be seen as a pretext for obtaining alms. These acts include dancing, singing, fortune telling, performing tricks or offering any article for sale etc. Furthermore, any person found wandering around, creating the impression that they may be begging is also a beggar. The enactment in Bombay expressly excludes religious mendicants from the definition[12].
- Having defined a beggar, the act of begging then is an offence under the law. An authorized officer may, therefore, arrest any person caught in the act of begging without a warrant.[13]
- The arrested beggars are put on trial according to the procedure of summary trial as laid down in The Code of Criminal Procedure, 1973.[14]
- The enactments prescribe the punishment as imprisonment for a period between one to three years. If the beggar is above sixteen years of age and is able bodied, such person is to be detained in a work house.[15]
- Keeping the rehabilitative object of the enactments in mind, it will be interesting to note the role and functioning of these institutions. The enactments in Bombay and Andhra Pradesh provide for certain facilities, such as the training and education of inmates. These facilities are, however, subject to the discretion of the administrative authorities. Thus, the language of the enactments is more discretionary than mandatory with respect to providing the rehabilitative measures.[16] It is also pertinent to note that the Delhi Rules do not even make a mention of any rehabilitative measure.
- Inside these institutions, the inmates are made subject to rules, the violation of which leads to the imposition of punishment.

The above features of the enactments which regulate beggars clearly reveal that the act

[12] See Sections 2(b) of the A.P. Act and 2(1)(i) of the Bombay Act.

[13] Sections 4 of the A.P. Act and the Bombay Act, authorize the police officer to make an arrest of any person found begging as per the definition in the enactments. Rule 5 of the Delhi Rules is of the same import.

[14] See Sections 5 of the A.P. Act and the Bombay Act.

[15] Provision for punishment is made in Section 27 of the A.P. Act. In the Bombay Act, provision for punishment is made in Section 6.

[16] See Sections 12 of the A.P. Act and 9 of the Bombay Act.

of beggary or vagrancy is a criminal offence and any person who is arrested for it, is subject to confinement either in jails or in certified institutions, which are similar to prisons. The enactments, thus, seek to curb the act of begging through the use of coercion and force.

The enactments make nominal salutations to the objective of prevention of beggary through detention, training and employment of beggars and their dependents. However, the philosophy of criminalisation permeates the existing provisions. Therefore, it is exceedingly pertinent to examine the theories that postulate criminalisation of vagrancy. For this, three strands of thought on criminalisation may be used:

**Morality** - It has been asserted by many proponents of this theory that an act should be criminalised if it is immoral. Devlin stands as a vociferous proponent and takes the view that not all immoral acts call for criminal sanctions but only those which evoke from people, feelings of intolerance, indignation and disgust[17]. This argument of immorality may be extended to the act of begging, as it may be perceived to be immoral to depend on others for subsistence. It presumes that only idle persons refuse to work and thus turn beggars. It is submitted that such an argument does not justify criminalisation of the act. Besides, 'laziness' is not merely the prerogative of the poor, but is prevalent even among the affluent, though not observed as a social problem.

**Legal Paternalism** - According to this strand of thought, the State is justified in criminalising an act which could result in harm to the actor himself. Accordingly, beggary may be then criminalised to rehabilitate the poor and the unemployed, the logic being that beggars of their own volition do not work and thus lead a life of social exclusion. The enactments on the face of it, have envisioned a rehabilitative role of institutional confinement. However, if one were to analyse the provisions of the Acts, it will be ascertained that provisions for training and capability building measures are optional. For example, Section 12(3) of The A.P. Prevention of Begging Act, 1977 provides that every certified institution *may*, for the general upliftment of its inmates provide training in arts, crafts, agriculture, medical care, primary education etc. The language thus reveals

[17] See P Devlin, "The Enforcement of Morals", 8-9, (1965) in CMV Clarkson & HM Keating, "Criminal Law: Text and Materials" (1998); Andrew Ashworth; "Principles of Criminal Law" (1999).

that there is no mandatory obligation on the Government to provide these measures. Thus, rehabilitation has not gained any statutory priority, defeating the paternalistic purpose of the enactments.

Moreover, real life experiences show that people who are detained in these certified institutions view them as punishment rather than as rehabilitation homes.[18] Most of the detenus in these homes are not beggars, but people who had come to the cities to visit relatives or doctors and had lost their way. The 'beggars' or 'vagrants' are usually caught early in the morning at places like temples, mosques and railway stations. People who protest are often subjected to violence. They are usually taken to courts and after a hearing of sorts, are remanded to custody in the homes.[19]

The conditions in the remand homes are deplorable. Reminiscent of prisons, they are overcrowded and unhygienic, thus creating a conducive environment for spread of diseases such as cholera. Judges who preside over these cases are usually disinterested and the day's proceedings are, more often than not, determined by the mood of the judge.[20]

These findings clearly signify the failure of the rehabilitative justification of these criminalising laws. The inmates are confined within these institutions, thereby curtailing their freedoms. These institutions rarely provide any constructive training or employment and, therefore, the inmates are devoid of means of subsistence for themselves and their dependents. The institutions are thus, more punitive than rehabilitative.

**Harm** - The last and perhaps the most convincing justification for criminalisation is that the act will result in harming another person, thing or animal. Beggars are perceived as potential criminals and a law and order problem. They are also considered carriers

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[18] See Harsh Mander, "Surviving the Streets", Frontline, May 10, 2003 at <http://www.flonnet.com/fl2010/ stories/20030523003210300.htm> last visited 15th April 2004.

[19] ibid.

[20] supra n.18. These details have been drawn from the report of organizations that have studied the lives of beggars. The first report referred to was made in 1980's by a Committee constituted by the Peoples Union for Civil Liberties (PUCL) to study the working of Sewa Kutir, a beggar home in Delhi.
See further supra n.2, for living conditions in beggar homes.

of diseases and pose a threat to public health. In addition, they are a nuisance to others in society and serve as bad examples to other able-bodied individuals who may be influenced by their 'laziness' and 'social parasitism'. It is on the basis of this reasoning that the class of beggars is required to be eliminated because of the potential harm that they could cause. Criminalisation is the method through which the purpose of elimination is sought to be fulfilled.

By virtue of the above justification, the underlying issues of beggary i.e. unemployment, homelessness and absolute deprivation have been side-lined. In criminalising beggary thus, the State is in effect, criminalising unemployment and poverty. The absurdity of such a situation is elaborated below.

## III.

All the enactments referred to above, have included within the definition of begging, a provision where, people who have no ostensible means of livelihood wandering around in public places, may be arrested. This amounts to criminalisation of unemployment. Unemployment is not a product of volition, but a product of circumstances. It is essentially a result of poverty and iniquitous distribution of productive resources. Criminalisation of vagrancy, thus, is in essence, criminalisation of poverty. What is even more worrisome is the fact that certain attempts to overcome unemployment are also met with criminal sanctions, thus tying the poor to perennial impoverishment.

The above is exemplified by the fact that the definitions of vagrants in all these legislations include within their fold, a diverse set of people ranging from those engaged in singing, dancing, performing, and fortune telling in public places, to those who offer any article for sale in a public place. It also includes people who have no ostensible means of livelihood and are found wandering in public places. The underlying assumption is that such persons actually engage in begging and their proclaimed occupation is a mere façade. It is submitted, that, such an expansive definition is at odds with the spirit of the fundamental right to livelihood and the liberal jurisprudence that has been developed around it.

Article 19(1)(g)[21] of the Constitution of India accords to every citizen, the right to practice any profession in order that they may earn a livelihood. A profession may be described as 'an occupation carried on by a person by virtue of his personal and specialised qualifications, training and skill.'[22] Acts of singing, dancing and fortune-telling or selling wares in public certainly involve exercise of talent, skill and labour. These individuals carry them out in public places due to their inability to garner adequate financial capital. They are not in a position to afford a fixed establishment and thus are forced to profess their wares from the streets. These activities are inevitable consequences of poverty and their criminalisation would also be tantamount to criminalising poverty.

Further, the relationship between the performers and the people who witness and patronise their art, is that of an entertainer and his/her audience. Similarly, the relationship between those who offer articles for sale and those who transact with them is that of a buyer and a seller. Bracketing such relationships along with that of a beggar and an alms-giver is reflective of legislative myopia.

In addition, activities like street-singing, dancing and fortune-telling have been an integral part of our subaltern cultural ethos and practices. Their criminalisation would be destructive of our indigenous and popular forms of entertainment.

The specific question of rights of street-hawkers has been agitated before the Supreme Court in a host of cases with diverse results. At one end of the spectrum lies the case of *Bombay Hawkers Union and Others v. Bombay Municipal Corporation*,[24] where it was held that certain provisions of The Bombay Municipality Act, 1888 which prevented the hawkers from carrying on business on public streets, were constitutionally valid. It was held that no individual has the right to trade or business, which causes nuisance, annoyance or inconvenience to the other members of the public. Public streets, by their very nomenclature and definition, are meant for the use of the general public. They are not laid to facilitate the carrying on of private trade or business.[25]

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[21] The provision reads as follows: "All citizens shall have the right to practice any profession, or to carry on any occupation, trade or business."

[22] *Sodan Singh v. New Delhi Municipal Committee,* AIR 1989 SC 1988.

[23] They are already in a precarious state due to the dangers posed by globalization.

[24] AIR 1985 SC 1206.

[25] ibid. at 1208, para 8.

A diametrically opposite view was taken in *Sodan Singh v. New Delhi Municipal Committee*,[26] where the Court held that individuals have a right to carry on trade or business on the streets. While recognising the fact that such activities result because of the problem of unemployment and poverty, the Court was of the view that the only solution to the problem would be a policy of full employment and development of the rural sector. Kuldip Singh, J. observed

> *"...even in London, street trading is recognized. This is so in spite of the fact that there is a complete social security in that country and as such, no compulsion on the citizen to be driven to street trading out of poverty and unemployment. On the other hand, abysmal poverty in India rejects outright the argument that nobody has a right to engage himself in street trading. Justice; social, economic and political; and citizens, men and women equally, have a right to an adequate means of livelihood which the Constitution of India promises. This Court in various judgments has reminded the Government of its constitutional obligation to ameliorate the lot of poor in India. Nothing much has been achieved. There are an alarming number of people below the poverty line and are also unemployed. The Government cannot provide employment for them, but when, by gathering meagre resources they try to employ themselves as hawkers or street traders, they cannot be stopped on the pretext that they have no right; rather the Government should render all help to rehabilitate them."* [27]

It is submitted that the latter decision of the Supreme Court is on a stronger footing since it is in consonance with the constitutional prescription of Article 19(1)(g). The extensive horizons of the definition of vagrancy, which result in criminalisation of fortune-telling, singing, dancing, hawking on the streets among other activities, curtail the substantive content of this right.

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[26] AIR 1989 SC 1988.

[27] ibid. at 2001, para 29.

In addition, it has rendered a significant part of the deprived sections of the society vulnerable to the continuous spectre of persecution and harassment by the law-enforcement machinery.

## IV.

The preceding sections of this paper have served to highlight the fact that criminalisation fails to address the principal causes of the problem of vagrancy. It is submitted that vagrancy cannot be understood merely in legal terms and that it necessitates a holistic redressal. This requires a proper appreciation of the causes of vagrancy.

The fundamental cause of beggary lies in the inequities associated with the existing economic relations. The distributional crises of our economic relations have several manifestations in the form of landlessness, malnutrition, unemployment, underemployment, etc. which lead to poverty. In light of this crisis, it becomes imperative to examine the policies of the Indian State, which has enjoined upon itself, the responsibility of steering the country to economic progress. This responsibility of the State has to be fulfilled within the constitutional contours of fundamental rights and directive principles.

Thus the State must, unequivocally recognise the rights of vagrants. The recognition must not be nominal. People must be empowered with the capability to enjoy these rights. The State is under an obligation to provide a conducive atmosphere for the full and unconstrained exercise of these basic rights. Henry Shue, in his seminal formulation on correlative duties, argued that a right enjoins three important duties on the State.[28]

- Avoiding deprivation - The State has the negative duty to refrain from depriving the citizens of their basic rights and means of subsistence.

- Protection against deprivation - Citizens are deprived of their basic rights by several agencies other than the State. The State, therefore, ought to perform the positive act of protecting the vulnerable sections from deprivation and exploitation by other citizens.

[28] Henry Shue, "Basic Rights Subsistence Affluence and U.S Foreign Policy", 54-63, (1980).

- Providing aid - This concerns people already deprived of their basic means of subsistence. The State has the positive obligation of providing means of rehabilitation of such people through food, shelter, health services, etc. In addition, it is incumbent on the State to empower them so that they are able to contribute to the processes of production and thereby provide for themselves.[29]

An appraisal of the role of the Indian State on the above-mentioned touchstone portrays a dismal picture. Compliance with these duties has been, at best, sporadic. In fact, the policies of the State have been completely antithetical to the above-discussed postulates. The social and economic policies of the State have actually contributed in a significant manner to the deprivation of large masses. The development strategy based on large scale projects and ceaseless mechanisation has displaced[30] and rendered a large number of people unemployed. Several economists have documented the rise in unemployment[31] in the aftermath of the liberalisation of the economy.[32] The west-inspired beautification programmes that have been initiated in a number of metropolises, have further constricted the urban space available for vagrants and have imperiled low-skilled and minimal investment professions like street-hawking.

The State has also failed to protect its citizens from deprivation by others. It seems to have abdicated its constitutional obligations and acquiesced with the unscrupulous elements in impoverishing them.[33] The vestiges of colonialism that play a significant role in impoverishment, have been left untouched. Marginal farmers and landless labourers have been left at the mercy of landlords and money-lenders.[34] The sheer

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[29] ibid.

[30] Arundhati Roy, "The Greater Common Good", Frontline, May 22, 1999 at <http://www.flonnet.com/fl1611/ 16110040.htm>, last visited 21st April 2004.

[31] Traditional weavers in Karimnagar district of Andhra Pradesh were displaced by the introduction of powerlooms. See Asha Krishna Kumar, "Weavers in Andhra Pradesh: Despair and Death", Frontline, April 27, 2001 at *<http://www.flonnet.com/fl1808/18080050.htm>,* last visited 21st April 2004.

[32] Mark Weisbrot and Dean Baker, "The Relative Impact of Trade Realization on Developing Countries", at <http://www.cepr.net/relative_impact_of_trade_liberal.htm>, last visited 21st April 2004.

[33] Devinder Sharma, "The Kalahandi Syndrome: Starvation In Spite of Plenty", at <http://www.dsharma.org/ hunger/kalahandi.htm>, last visited 21st April, 2004.

[34] Venu Govindu, "The Great Betrayal: Indian Land Reforms", at <http://www.indiatogether.org/2003/apr/pov-landref50.htm> and Regional Node: Association for Land Reform and Development, Regional Report: South Asia at <http://www.landcoalition.org/KP_rep_sas_2.htm>, last visited 21st April 2004.

numbers of beggars today, proves that there has been a dereliction of duty on the part of the State to avoid deprivation and to protect these persons from being deprived. The economic policies have been oriented towards aggregate growth without giving adequate attention to the distribution of this growth among the different sections of society.

The problem has been further intensified by the State's dereliction from its third duty as well. The State has not only consented to the deprivation of basic means of subsistence, but also refrains from providing these deprived persons with basic necessities. With the onset of liberalisation, there has been a constant reduction in social expenditure and a gradual retreat of the State from the social security sector.[35] The mechanism of the Public Distribution System has constantly been weakened due to the exigencies of fiscal deficit.[36] To make matters worse, the 'Welfare State of India', then criminalises the last option of these deprived persons! Under such circumstances, one begins to question the very notion of a welfare state. In absence of proper aid from the State; philanthropy, charity and giving alms, act as a system of private aid towards the deprived masses. Criminalisation of begging imperils this system and further compounds the miseries of the deprived people.

The crisis is exacerbated by the foundational imperatives of neo-liberalism. It has been argued, that the creation of pools of unemployed labour serving as reserve for the relocated industries of the First World, is one of the primary objectives of structural adjustment and other neo-liberal reforms. Perpetuation of unemployment and consequently idle labour, thus, is a prerequisite for the maintenance of the capitalist economy.[37]

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[35] There has been large inter-sectoral reallocations and reduction of funds meant for poverty alleviation which have resulted in increase in unemployment and poverty; Abu Saleh Shariff, P Ghose, SK Mondal, "State Adjusted Public Expenditure on Social Sector and Poverty Alleviation Programmes", Economic and Political Weekly, 23rd February 2002, <http://www.epw.org/showArticles.php?root=2002&leaf=02&filename=4148&filetype=pdf>, last visited 21st April 2004.

[36] See Madhura Swaminathan, "A Demolition Job", Frontline, March 18, 2000 at <http://www.flonnet.com/ fl1706/17060980.htm>; R Krishnakumar, "Public Distribution System: A System in Peril", Frontline, September 16, 2000 at <http://www.flonnet.com/fl1719/17190970.htm> last visited 21st April 2004.

[37] Michel Chossudovsky, "The Globalisation of Poverty", 75-81, (1997).

Another deleterious effect of the advent of neo-liberal economic philosophy and the transition towards a market economy has been the dilution of the State's endeavour towards the realization of our constitutional goal of socio-economic justice. The withdrawal of the State from the economy has resulted in a marked decline in its social expenditure. Veneration of consumption, inherent in a market-based economy, has spawned a new set of values and attitude that perceives marginalized and peripheral groups, not part of the league of consumption, but as deviants.[38] The concept of a welfare state has started losing its sheen and is increasingly being collapsed with charity. Questions of right to livelihood and development of the marginal classes of people have taken a backseat in this new worldview of consumption.

To conclude, an analysis of contemporary socio-economic history demonstrates the colossal failure of the State in addressing the systemic and structural factors behind poverty. Its policies have failed to live up to its pro-poor rhetoric and very often have been unabashedly repressive. The neo-liberal reorientation of the State and the social elite in the nineties has increased social hostility towards vagrants and other marginal groups. It is submitted that long-term amelioration of vagrants would necessarily entail resolution of structural causes of poverty and exploitation, thus requiring the State to fundamentally reorient its economic policies and priorities.

## V.

Societal dependence for subsistence was a widely accepted practice throughout different phases of Indian history. The necessities of colonialism changed this perception and this departure culminated in the criminalisation of beggary. The prevalent economic philosophy required a cloak of invisibility over its pernicious effects for the sustenance of legitimacy. The failure of the State to radically alter its socio-economic policies in independent India has led the State to persist with its repressive policies. Market liberalisation further entrenches this approach. This is particularly anomalous in light of the fact that the cherished values and ideals of the State have been fundamentally

[38] Ironically, the present pre-occupation of contemporary observers with vilification of beggars and vagrants does not prevent them from marveling about the possibility of street-hawkers being used by multinational companies for marketing. See Arvind Rajagopal, "Violence of Commodity Aesthetics: Hawkers, Demolition Raids and a New Regime of Consumption", Economic and Political Weekly, Vol. XXXVII No.1, 5th January 2002, 65.

altered by the adoption of a 'socialist' Constitution geared towards the goal of realisation of 'justice- social, economic and political'. Criminalisation and the social exclusion of vagrants and beggars, stand as anachronisms in a rights-oriented Constitution.

The problem of beggary and vagrancy is essentially a problem of unemployment and inequity. The key to the problem lies not in its criminalisation but in addressing its causes and interrogating the economic relations and developmental priorities of the State.

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# TOWARDS A RESTORATIVE CRIMINAL JUSTICE SYSTEM: VICTIM OFFENDER MEDIATION

*Bhavya Sriram and Maheshwari S**

The criminal justice system that has been adopted in India is modelled largely on the lines of retributive justice.[1] Our current system indulges in an exercise of quantifying crime in terms of monetary and physical punishment. As a result, the focus primarily is on the offender, disregarding the need for victim participation. Victims of crime, therefore, feel increasingly frustrated and alienated[2] as the criminal justice system represents prosecution by the State.

Braithwaite, an eminent scholar on the issue puts it rather innovatively, "*the State, under the guise of caring for its citizens, steals their conflicts and hands them over to the courts.*"[3] The crime is against the *State* and State interests drive the process of doing justice. Victims of crime are left on the sidelines of justice, with little or no input and thus feel twice victimized – first, by the offender and second, by the disregard of their interests by the criminal justice system.[4]

In this context, the need for a dilution of the existing offender driven approach to construct a system more sensitive to needs of victims, should be addressed. This may be achieved by adopting the restorative justice paradigm, which has emerged to combat the failings of the retributive system, by its recognition of crime as being directed first and foremost against an *individual* and not the State. Victim-offender mediation (VOM),

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[1] Mark Umbreit characterises retributive justice as focusing on punishment. The restorative paradigm on the other hand, emphasizes the importance of elevating the role of crime victims and community members. It also stresses upon accountability, holding offenders directly accountable to the people they violate, and restoring the emotional and material losses of victims. It is in this sense that the term *"retributive system"* has been used in this paper. Mark S Umbreit, "Restorative Justice Through Victim-Offender Mediation:A Multi-Site Assessment", <http://wcr.sonoma.edu/r1n1/umbreit.html>, last visited 21st October 2004.

[2] Report of the Committee on Reforms of Criminal Justice System, Vol. 1, Government of India, Ministry of Home Affairs, at 75 – 78 (2003).

[3] John Braithwaite (et al), "Restorative Justice and Civil Society", 114 (2001).

[4] supra n. 1.

a process that allows victims of crime to meet face-to-face with the offender to talk about the impact of the crime and develop a restitution plan, is the oldest and most empirically grounded restorative justice intervention.[5] This model therefore allows interested victims the opportunity to meet their offenders in a safe and structured setting.

The goal of VOM is to hold offenders directly accountable and to impress on them the full impact of what they have done, while providing important support and assistance to victims. The idea of bringing together a victim of a crime and the person who committed that crime is based on age-old values of justice, accountability, and restoration.[6] VOM is primarily *dialogue-driven*, with emphasis upon victim empowerment, offender accountability, and restoration of losses. This dialogue addresses emotional and informational needs of victims that are central to both the empowerment of the victims and the development of victim empathy in the offenders.[7]

It is important to note here that VOM differs from other forms of mediation in four significant aspects. Firstly, in VOM, the involved parties are not *disputants*. This model covers cases where one party has committed a criminal offence and has admitted to doing so, whereas the other has clearly been victimized. Therefore, the issue of guilt or innocence is not in question. Secondly, there is no expectation that victims of crime compromise or request less than what they need to restore their losses. Thirdly, VOM, unlike other forms of mediation, is not *settlement driven* and emphasises on *dialogue*. Lastly, the mediator's role is distinct from that in a mediation process; the responsibility falls on the victim and offender to arrive at a solution acceptable to both, with the mediator playing a minimal role. The process and the solution are thus both crucial.

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[5] ibid.

[6] The principles of restorative justice are consistent with those of many indigenous traditions, including Indian, Native American, Hawaiian, Canadian First Nation people, Aborigines in Australia, and the Maori in New Zealand. These principles are also consistent with values emphasized by nearly all of the world religions, supra n. 1.

[7] Mark S Umbreit refers to this *"dialogue-driven"* mediation as Humanistic Mediation. It is a nondirective style of mediation in which the parties primarily speak to each other with minimal intervention by the mediator. The mediator maintains an attitude of unconditional positive regard and concern for all parties while remaining neutral, Mark S Umbreit, "Creating a Safe, if not Sacred, Place for Dialogue", <http://www.ojp.usdoj.gov/ovc/publications/infores/restorativejustice/96517_gdlines_victims_sens/guide9.html>, last visited 21st October 2004.

As a general rule, VOM is used prior to sentencing, where a successful outcome can subsequently be used to justify leniency in the same. Cases are also referred to VOM after a formal admission of guilt has been accepted by the court, or after conviction, with the mediation being a part of the sentence or the term of probation, if the victim is interested.[8] VOM is thus commonly not an *alternative* to more conventional sentences, but a *supplement* that allows greater participation, and potential for reduced sentences.

VOM is clearly not appropriate in all cases, as it may not be possible or plausible to bring victims of all types of crimes in direct contact with the accused, particularly in violent crimes. Consequently, a majority of cases handled by VOM are property offences and minor assaults. For young offenders and first or second time offenders, mediation through VOM may provide diversion from prosecution. In these cases, charges may be dismissed if the offender mediates an agreement with the victim and complies with its terms.

Some violent cases, however, are referred to VOM, although this is not commonplace. In a growing number of victim-offender programs, victims and survivors of severely violent crimes, including murder and sexual assault, find that confronting their offender in a safe and controlled setting, with the assistance of a mediator, returns the stolen sense of safety and control in their lives.[9] Illustrations of these are instances when parents of murdered children have participated in VOM and have expressed their sense of relief after meeting the offender and communicating their grief.[10] A study conducted in the United States of America found that a mediated dialogue session in a severely violent case such as a sniper shooting, was very beneficial to the victims, offenders, and community members or family members.[11]

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[8] Where a defendant maintains a plea of not guilty in contemplation of a genuine defense - self-defense, diminished capacity, etc. - there is no place for mediation until such issues are resolved. Where a defendant maintains a pro forma not guilty plea only to preserve the possibility for plea negotiations, a restorative justice process may be appropriate. See Marty J.D Price, "Personalizing Crime: Mediation Produces Restorative Justice for Victims and Offenders", <http://www.vorp.com/articles/justice.html>, last visited 21st October 2004.

[9] ibid.

[10] supra n. 1.

[11] ibid.

As for the situation in India, restorative justice finds little place in our criminal jurisprudence. Much of the progress made in the sphere of victimology is yet to pervade the penal mechanism in India. The reason for this is perhaps that the procedural law here does not provide much scope for these practices. The victim is still largely restricted to the role of a witness. The criminal justice system, as a means of formal social control, is still steeped in the retributive model, and centres on the State. This is the *"vertical dimension model"* of the criminal justice system,[12] which persists to a great extent in India, based on an outdated colonial model. Relief from this retributive focus appears in the form of provisions for compounding of offences. It is also important to note that we may well be in the midst of a shift in judicial articulation, insofar as reformation and rehabilitation are finding emphasis in judgments in recent times.[13]

There is undoubtedly a need to have new laws and institutions for the incorporation of restorative justice. A beginning had been made under the existing provisions of The Criminal Procedure Code, 1973 (CrPC). For instance, the compounding of offences under Section 320 of the Code has been provided in an effort to incorporate restorative justice into the prevailing system.[14] Under this provision, the victim may opt to compound the case, thus providing an opportunity for the victim to effect a compromise or to mediate with the accused. This ostensibly brings the victim to the forefront. Though, it is required that the Court be satisfied with the terms of the proposed compromise or mediation, there is no guarantee that this will in fact be effectuated. That is to say, the compounding of offences need not necessarily result in mediation at all, and the victim may be left bereft of a remedy. This is particularly due to the fact that the victim and the offender are often not placed on an equal footing, with coercion

[12] S Muralidhar, "Rights of Victims in the Indian Criminal Justice System", National Human Rights Commission Journal, Vol. 1, 2004 at 88.

[13] Reform should be the dominant object of punishment, and during incarceration, every effort should be made to recreate the good man out of the convicted prisoner. Reformation and rehabilitation of a prisoner are of great public importance. The reformative approach is now very much intertwined with the rehabilitative aspect, *State of Gujarat v. Hon'ble High Court of Gujarat*, AIR 1998 SC 3164 at 3172.

[14] Under Section 320 of The Indian Penal Code (1860), the offences that may be compounded have been listed along with the persons by whom they may be so compounded. The section makes a distinction between offences for the composition of which, the permission of the Court is to be sought [Section 320(2)] and those for which such permission is not necessary [Section 320(1)].

and corruption being rampant. This renders the entire exercise a mere means to dispose off cases in the name of restorative justice, the result of composition being acquittal.

In the opinion of the authors, there is only one basic difference between the compounding of offences and VOM. While compounding results in an acquittal, VOM, being a supplement to the sentence, does not absolve the offender of his liability to the State. In the event the compromise remains unfulfilled in a case of compounding, the victim would be left remediless. Thus, the entire objective of restorative justice is defeated. In VOM, on the other hand, the non-observance of the restitution agreement by the offender will not leave the crime unaddressed, as the offender will still be liable to the State, and punishment will be exacted.

With regard to victim compensation, Section 357 of the CrPC provides for compensation that may be awarded, irrespective of whether the offence is punishable with fine and whether the fine is actually imposed.[15] This payment by the offender to the victim as a consequence of the court's order may be viewed as a form of restitution. However, the above stated provision is invoked sparingly and inconsistently by the courts,[16] due to a variety of reasons such as lack of awareness and indifference on the part of the judiciary.[17]

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[15] Under Section 357(1) of the CrPC when the Court imposes a sentence of fine or, one of which a fine forms a part, the Court may order that the whole or any part of it may be paid as compensation to the victims in certain circumstances. In addition, sub-section (3) of Section 357 provides that the Court may order the payment of such compensation even in the imposition of a sentence of which fine does not form a part.

[16] In 1960-61, out of 182 cases of violence tried in Pune, compensation was awarded to the aggrieved party only in 13 cases. A study conducted in 1980 found that no compensation was given to victims of dacoit gangs, but limited ex gratia assistance was provided in about 15 percent of the cases; D R Singh, "Victimological Studies in India", Paper Submitted for the 11th International Symposium on Victimology, South Africa, (2003) <http://www.victimology.co.za/new%20papers/singh_3.doc>, last visited 21st October 2004.

[17] Kumaravelu Chockalingam, "Evaluation of the Implementation of the Victims Assistance Fund in Tamil Nadu", <http://www.aqpv.ca/diffusion/abstracts/abc_a/chockalingam_nk.html>, last visited 21st October 2004. The Government of Tamil Nadu created a Victims Assistance Fund in 1995 under which for the first time in India, the State Government has allocated ten million rupees to provide relief to three categories of victims of violent crimes viz., dependents of murder victims, victims of rape and grievous injury.

Further, the implementation of this provision is dependent entirely on the order of the court to that effect.[18]

This provision merely seeks to appease the victim by providing monetary relief, while continuing to exclude the victim from playing any significant role. Therefore, the redressal of individuated grievances does not feature to the same extent as it does in VOM. However, in so far as some sort of restitution is provided to the victims, this provision pays attention, although in a pecuniary manner, to the victim, and is still a step towards a restorative paradigm.

As a progressive step, the Malimath Committee Report,[19] has advocated the rights of the victim. It mentions the need to formulate a witness protection programme,[20] re-classify offences,[21] and involve the victim in all stages of the trial.[22] Another notable issue addressed by the Report is that of compensation to victims.[23] However, the Report does not empower the victim outside of the retributive system.

Although the Report remains silent on issues such as restorative justice and VOM, the Committee has recommended that the offence of cruelty under Section 498A of The Indian Penal Code, 1860 ("IPC") be made compoundable and bailable in order to facilitate mediation between the wife and the husband.[24] However, the Committee's insistence on reconciliation in this matter raises concern. A large percentage of women who approach the state or even non-governmental organizations for help are sent back into continuing violent situations following a process of "mediation" between husband and wife, in which the woman is at a severe disadvantage because of the

[18] In *Hari Singh v. Sukhvir Singh*, (1998) 4 SCC 551 at 558, the Supreme Court had to exhort the criminal courts to use this provision since *"this power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system."*

[19] supra n. 2.

[20] ibid. at 284.

[21] ibid. at 181, 289.

[22] ibid. at 75-89.

[23] ibid. at 80-81.

[24] ibid. at 191, 290-291.

patriarchal nature of the process. The Committee's recommendation would not only condone but also encourage such solutions. Thus, in our opinion the one prescription for mediation made by the Report seems a completely imprudent choice.[25]

Clearly, VOM is not a viable option for all offences. Prior to adopting VOM into the present system, a classification of offences to which it will be applicable, is imperative. As it has already been established that the only flaw in the current provision for compounding under the CrPC lies not in its substantive, but its procedural aspect, VOM may be applied to the same set of offences set out in Section 320 of the IPC, 1860. The authors are of the opinion that compounding of offences was an attempt towards the incorporation of restorative justice into the present system. Thus, the legislative application of mind with regard to classification of compoundable offences would suffice with regard to VOM as well. However, it is recommended that while referring cases to VOM, the Court should be allowed to exercise its discretion in determining whether the existence of power relations between the victim and the offender would adversely influence effective meditation.

In conclusion, restorative justice attempts to draw upon the strengths of both the offenders and the victims, rather than focusing upon their weaknesses. While denouncing criminal behaviour, restorative justice emphasizes the need to treat offenders with respect and to reintegrate them into the larger community in ways that can lead to lawful behaviour. Thus, it is the empowerment of affected stakeholders on both sides that is the crucial feature of restorative justice, the absence of which causes both conventional and retributive justice systems to fail.

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[25] The authors concur with Prof. Baxi's opinion in his critique of the Committee's reference to Section 498A as a "*heartless provision*" since it makes offences against married women non-bailable and non-compoundable. To quote Prof. Baxi, "*Curiously the Report assumes that for the Indian woman marriage is a sacred tie even in the context of matrimonial and domestic cruelty and violence, and the creation of the offence makes her fall from the frying pan into the fire. It goes so far as to aver that a less tolerant and impulsive woman may lodge an FIR even on a trivial act!*", Upendra Baxi, Introductory Critique in "The (Malimath) Committee on Reforms of Criminal Justice System: Premises, Politics and Implications for Human Rights", 38 (2003). Also available at, <http://www.interights.org/news/AI%20India%20Malimath%20Report.pdf>, last visited 6th February 2005.

In light of the existing system and its inherent deficiencies with regard to victim participation, the situation calls for a merger of the *"vertical criminal justice system"* with a *"horizontal line of justice".*[26] Although the terminology used by S Muralidhar has been borrowed, our suggestion is in contrast to his views in so far as he suggests the *replacement* of the vertical system by the horizontal system whereas we suggest VOM as a *supplement*, or at the most a combination, and not a replacement. where the penal mechanism is to be supplemented by a mediation system, empowering the victim within the retributive paradigm. The goal envisaged by the restorative paradigm may be achieved by inducting VOM into the existing model, thus furthering the interests of society without prejudicing the needs of the victim.

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[26]supra n.12. Although the terminology used by S Muralidhar has been borrowed, our suggestion is in contrast to his views in so far as he suggests the *replacement* of the vertical system by the horizontal system whereas we suggest VOM as a *supplement*, or at the most a combination, and not a replacement.

8. Upendra Baxi, Introductory Critique in "The (Malimath) Committee on Reforms of Criminal Justice System: Premises, Politics and Implications for Human Rights", Amnesty International, India, (2003) at <http://www.interights.org/news /AI%20India%20 Malimath %20Report.pdf>.
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# A CRITICAL ANALYSIS OF STATE RESPONSE TO SUICIDE: AGRARIAN DISTRESS IN ANDHRA PRADESH

*Parvathy R. Menon**

## I. Introduction

It was only a few weeks preceding the completion of this paper that a massive wave of farmers' suicides struck the front pages of all newspapers and magazines. This wave claimed the most number of lives in Andhra Pradesh, a State which had seen something similar only a few years before. By the time this paper was completed, the media coverage had died down in its intensity. It had ceased to be front page news.

Suicides in general, are an indication that *society* has reached a crisis point. Most of the suicides are, in fact, caused by strong and overpowering forces, which are beyond individuals and rob them of their choice '*to be or not to be*'. This is why suicides are social ills and not just the problem of an individual.

Emile Durkheim, one of the pioneers in the study of suicides, argues that suicide rates are social facts. The 'suicidogenic impulse' is socially determined, that is, it depends on the nature of modern societies and the relationship between the individual and the collectivity. The phenomenon of suicides has extraordinary force, since on the face of it, nothing is considered more supremely individual than the fact of taking one's own life. However, Durkheim takes the position that

> "*When an individual is alone and desperate enough to kill himself, it is still ... society which is present in the consciousness of that unhappy man; it is society, more than individual history, which governs this solitary act*".[1]

Taking off from Durkheim's theory, the author seeks to use the Andhra Pradesh agrarian distress to show that the causes for suicide are rooted much beyond the individuals' control in the first part of this paper. In the second part, it is argued that the farmers

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[1] Raymond Aaron, "Main Currents in Sociological Thought", 35 (1991).

in India have a right to livelihood, which ought to be protected and enforced. The correlative duty of the State to do so and its consequent neglect has been discussed thereafter. Finally, the paper examines the interface between suicide and the law and what choices the law has made in this regard.

## II. Agrarian Distress and Suicide

This section seeks to show that suicides of farmers are not merely isolated incidents but are symptomatic of a larger and more pervasive crisis in agriculture.

### The Andhra Pradesh Scenario

The Telangana region; Warangal, Medak and Karimnagar districts in particular, have had the dubious distinction of being in the limelight for the epidemic of suicides by cotton farmers. Between 1997 and February 1998, 174 farmers had taken their lives.[2] The immediate causes were bad weather and severe pest attacks. The pesticides, which were ineffective against the pests, were effectively used for suicides. Probing further, it was found, that the real reason for the loss of those lives, was severe indebtedness.

Between 14th May and 26th June, 2004, 245 suicides were reported in Andhra Pradesh again. Officials claim that only 126 out of these were farm related deaths.[3] On the first day of the new session of the Lok Sabha (2nd June, 2004), eight farmers took their lives; by the end of the session (10th June, 2004), this number had risen to 69.[4]

Thus, Andhra Pradesh has witnessed two massive waves of suicide. The second wave of suicides was distinguished by the fact that it cut across almost all the districts of the State. Whereas the first wave was restricted to the drier areas of the State, such as Anantapur, Karimnagar and Warangal, the second wave has reports of suicides even from the Krishna and Godavari delta areas. This shows that within a space of a few years, agrarian distress has intensified and spread throughout the state.

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[2] G. Parthasarathy & Shameem, "Suicides of Cotton Farmers of Andhra Pradesh", Vol XXXIII No.13, Economic and Political Weekly, Mar 26 - Apr 3, 1998, 720.

[3] "Ryots Suicide Toll Put at 126", The Hindu (Hyderabad), 28th June 2004, at <http://www.hindu.com/2004/06/28/stories/2004062805360400.htm>, last visited 22nd March 2005.

[4] P Sainath, "When Farmers Die", The Hindu (Hyderabad), 22nd June 2004 at 16.

The following are the main causes of the agrarian distress:

**The increased use of hybrid seeds**

The difference between hybrid seeds, and the 'indigenous strain of seeds and variety seeds', is that the former can be used only once, whereas the latter can be used repeatedly. Private manufacturers market the former while farmers themselves develop the latter. The use of hybrid seeds means that the farmers have to buy seeds from private seed companies every year. These hybrid varieties promise greater yields, but the crops are far more prone to pest attacks. Another problem is that the seed- certification process takes about seven to eight years. Therefore, the private seed manufacturers have been allowed to market their *uncertified seeds* under the label of 'truthful seeds' to avoid delays in the launch of such seeds in the market. 'Truthful seeds' are sold on the basis of the farmers having confidence in the company's claims. There is no regulation on the marketing of these truthful seeds. This has caused a tremendous increase in the availability of spurious and sub-standard seeds in the market – a major cause of crop failure.[5]

**Increased use of pesticides**

The use of hybrid seeds is predicated on an aggressive use of pesticides.[6] For the pesticide industry, more the pests, more lethal the pesticides used and, therefore, greater the profit margins. As a consequence, pests become resistant to all kinds of pesticides. In Andhra Pradesh, within a week to ten days from sowing of cotton seeds, farmers first spray pesticides, whether pests are present or not.[7] This only goes to show the persuasive power of the 'miracle spray culture'.

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[5] The Andhra Pradesh State Seed Certification Agency (APSSCA) Officers and Joint Action Committee has appealed to the Government to either abandon the system of self- certification by seed companies (i.e. truthful seeds) or merge the APSSCA with the parent Agricultural Department. "Self Certification by Seed Firms Must Go", The Hindu (Hyderabad), 13th March 2002, at <http//www.hinduonnet.com/thehindu/2002/03/13/stories/2002031304210400.htm>, last visited 22nd March 2005. It is ironic that the main reason cited for this demand is not that it may result in the flood of sub- standard seeds into the market, but that this system leads to loss of prominence and revenue by the APSSCA.

[6] In 1987-88, the Guntur district of Andhra Pradesh used more pesticides than the entire state of Uttar Pradesh - information from an interview with Dr. Ramanjaneyulu, the Director of Oil Seeds Research, Hyderabad. It is based on his book (in Telugu) on farmers' suicides titled "Who Killed the Cotton Farmers?"

[7] supra n. 2 at 722.

The problem of spurious pesticides has reached titanic proportions in Andhra Pradesh as well as other areas. Bottles are often relabelled to show higher concentration and, therefore, priced more. Inert materials are mixed with pesticides reducing their efficacy. Growth regulators are mixed in the formulations, which give the plants a fresh green look immediately after the spray, creating an illusion of health, in reality, only attracting more pests.[8]

**Credit crunch**

As co-operative and rural banks close down, rural credit dries up and farmers are driven to non-institutional credit sources, a euphemism for the infamous moneylenders of Indian villages.[9] The proportion of total bank credit, earmarked for agriculture has steadily fallen from near 18% in the mid-1980s to 10% in March 2003.[10] Scheduled commercial banks are reluctant to operate in rural areas. After the disbanding of branch licensing policy and the grant of freedom to the bank's Board of Directors, as part of the New Economic Policy followed since 1991, the number of rural branches has declined sharply.[11] At the same time, there has been no move to strengthen the rural credit system through Regional Rural Banks or co-operative banks. It is interesting to note the change in the nature of rural creditors. They are of two types – the first being the rich landlord who has benefited from the commercialization of agriculture. The second type is the pesticide dealer – the farmers' single source for all agricultural inputs – seeds, fertilizers, pesticides as well as credit. Since the chemicals are easily available on credit, the farmers have no hesitation in availing this source of credit. Once the debt becomes large enough, the farmers are often forced to sell their produce to these agencies, at prices below the market rates to clear their debt. In the establishment of such agencies in villages, there is little or no State regulation or supervision.

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[8] ibid. at 723.

[9] Withdrawal of low interest credit has been a key element of the World Bank led economic reforms. From 1987- 1992, the Reserve Bank of India has reduced credit availability to agricultural sector from 19.1% to 11.7%. A R Vasavi, "Agrarian distress in Bidar- Market, State and Suicides", Economic and Political Weekly, Vol XXXIV No. 32, Aug 7-13, 1999, 2265.

[10] "Doubling Rural Credit, But How?", Economic and Political Weekly, Vol XXXIX, No. 24, June 12-18, 2004 at 2415. The number of loan accounts with scheduled commercial banks has declined from about 27.74 million at the end of March 1992 to 20.84 million in March 2003.

[11] ibid. The number of rural branches has declined from 32,981 to 32,137. That is, the closure of roughly 840 branches instead of the opening of 8000 new branches under normal circumstances.

**Ecological crisis**

There is, on the whole, a mismatch between ecological specificity of the region and commercial agricultural practices. For instance, the model of agriculture followed in Bidar, Karnataka (mostly suited for dry agriculture) draws primarily from the model of agriculture followed in wet regions.[12] The increased use of fertilizers and pesticides results in depletion of soil fertility, which in turn, increases crop susceptibility to pests.

**Water shortage**

Drought is used as the oft repeated, self-explanatory, inescapable excuse for all problems of the farmers. But it has been increasingly brought to light that water shortage is indeed a man made problem. The farmers depend on bore wells for irrigation. Borewell after borewell is dug but they turn out to be dry because of depletion of ground water. There are villages in the State with more borewells than people.[13] The deeper the borewell, the more expensive it is. Therefore, the richer the farmer, the more access he has to water. Thus, there is a situation where water tables are now being owned by the rich, because only they can afford to dig deep enough to suck the aquifers dry, to the detriment of small and marginal farmers.

**Information Dissemination**

There is a gap in knowledge due to the limited contact between agricultural agents and small and marginal cultivators. Cultivators are seen to have integrated new techniques and methods simply by observing others. Advice from Government's staff is a rare sight unlike those of private companies, which are far more regular and accessible.[14] This haphazard knowledge dissemination poses acute problems at the times of crises like pest attacks. Cultivators lose not only a sizeable amount of crop, but also incur large sums of debt.

**Crash in World Prices**

In the 1990s, global prices of commercial crops, including rubber and cotton were rising. The price-sensitive Indian farmer reacted by switching from food crops to cash crops like cotton. The Government's policy was also to increase exports from the agricultural sector and so unregulated export of cotton was allowed. Three years prior

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[12] supra n. 9.

[13] "What Kills Andhra's Farmers?", Down to Earth, Volume 13, No. 4, July 15, 2004 at 16.

[14] ibid. at 18.

to 1990-91, 34,000 tonnes of cotton was exported. As soon as the sector was opened up, in a single year, there was more than a ten fold rise, a jump of 3,74,000 tonnes.[15] Towards the close of the decade, world prices started crashing. By 2001, the prices had come down to half the level it was in 1995. In the absence of any Government support, farmers despaired.

The above analysis displays a direct link between suicide and poverty. When suicide is caused by poverty, it ceases to be an individual misfortune; it becomes society's responsibility. In the face of such epidemic proportions of farmers' suicides in India, it is time for the State and the society to introspect. There is an internal conflict between the prevailing economic conditions and the subsistence of the farmer, which needs to be resolved.

## III. Right to Livelihood and its Correlative Duty

In innumerable cases, the Supreme Court has reiterated that the right to life does not mean mere animal existence, but the right to live with human dignity. One of such rights that have been read into Article 21 is the right to livelihood. In *Olga Tellis v. Bombay Municipal Corporation*[16], the Supreme Court held

> *"if the right to livelihood is not treated as the constitutional right to life, the easiest way of depriving his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such abrogation would not only denude the life of its effective content and meaningfulness, but it would make life impossible to live."*[17]

There is thus a close nexus between life and livelihood.

The farmers, who took their lives, also had a right to livelihood. *"To the tiller of the soil, livelihood depends on the production and return of the agricultural produce..."*[18] The cause of the farmers' suicides is the systematic removal of their means of subsistence, whereby

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[15] "Interview with Prof. Utsa Patnaik", The Frontline, Volume 21, No 13, June 19- July 2, 2004, 22.
[16] (1985) 3 SCC 545.
[17] ibid at 572.
[18] *Dalmia Cement (Bharat) Ltd v. Union of India,* (1996) 10 SCC 104 at 120.

they are caught in a trap of complete and wretched indebtedness. This trap was created by the current economic and agricultural policies followed by the State. *"...(I)f persons are forbidden by law from taking what they need to survive and they are unable within existing economic institutions and policies to provide for their own survival (and the survival of the dependants for whose welfare they are responsible)",*[19] it can be said that their right to livelihood and, thereby, their subsistence has been taken away.

As farmers have a right to livelihood, an examination of who had the correlative duty to protect that right and prevent their deaths needs to be undertaken. Fundamental rights are enforceable against the State and the State has the constitutional duty to protect them. According to Henry Shue, *"The complete fulfillment of each kind of rights involves the performance of multiple kinds of duties."*[20] He enunciates three basic kinds of duties:[21]

- Duties to *avoid* deprivation,
- Duties to *protect* from deprivation, and
- Duties to *aid* the deprived.

In the case of right to livelihood, we can analogically extend the above tripartite division:

- Duties not to eliminate a person's only available means of livelihood,
- Duties to protect from elimination of the only means of livelihood, and
- Duties to provide for relief to those whose livelihood have been taken away.

The author proposes to examine whether the Central and State Governments have fulfilled their duties to the farmers or not in the light of the above formulation.

The duty to avoid is a duty not to take actions that deprive others of means of subsistence. This obligation merely requires that, one refrains from actions destructive to others. When the State failed to give adequate credit to the rural and agricultural sector, it was in dereliction of its duty. By doing this, the State has virtually driven the farmers into the clutches of moneylenders and other non-institutionalized credit systems. Another example of its dereliction is the breakdown of public seed distribution

[19] Henry Shue, "Basic Rights and Subsistence: Affluence and the US Foreign Policy", 50 (1980).
[20] ibid. at 52.
[21] ibid.

systems. With an increasing demand for high yielding variety of seeds, along with the pressures of Structural Adjustment, the restrictions on private sector in seed manufacturing are being lifted. This has led to a decline in public seed manufacture. There is a great mismatch in the demand and supply of seeds. Of the total requirement of seeds in Andhra Pradesh, the public sector agricultural departments, State Seed Development Departments and Oil-fed supply only 20% of the demand.[22] Taking advantage of this, the private sector supplies spurious seeds, the consumers of which face a direct crop loss.

The duty to protect entails external enforcement of the duty to avoid. Within this, comes the duty of the State Seed Certification Agency to inspect the quality (germination percentage and purity) of the seeds and certify it accordingly. The presence of the 'truthful seeds' and its quality, is sufficient proof that the governmental enforcement agency has failed in this regard. There exists no regulation on the sale of spurious pesticides as well. The fact that the pesticide dealer doubles as moneylender and charges exorbitant rates of interest is also in dereliction of the duty to protect. The lack of agricultural extension, leading to cases of unsatisfactory information dissemination is another case in point. For example, when the heliothesis epidemic took place in Karnataka, the cultivators did not spray their fields with pesticides at the appropriate time (when the pests were in the larva stage) and then resorted to rampant and excessive spraying when the pests were no longer susceptible to pesticides. This, the farmers claim, is due to the absence of agriculture extension personnel in the field and the lack of instructions on how to handle such situations[23] – a clear cut instance of the failure of the duty to protect.

The duty to aid the deprived refers to the assistance that is necessitated as a result of cases of agrarian distress previously described, which could be a consequence of a failure to perform the previously mentioned duties. In the instant case, it is evident that the first two duties have been breached. The Government could have averted the suicides by providing a support mechanism, particularly where crop prices crash.

[22] supra n. 2 at 730.

[23] supra n. 13 at 18.

## IV. Suicide And The Law

Section 309 of the Indian Penal Code, 1860 (IPC), provides that an attempt to commit suicide is punishable with one year of simple imprisonment or fine or both. Votaries of individual liberty who think that such a stance by law is absurd, quote J S Mill as saying, "*the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.*"[24] Suicide being an act of self-destruction occurring in the private domain does not harm others. Mill is of the opinion that an individual "*cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others to do so would be wise or even right. These are good reasons for remonstrating with him, or entreating him, but not for compelling him, or visiting him with evil in case he does otherwise*"[25] (emphasis added). In other words, merely because suicide may not be the morally right way out of things, it does not give society the right to use criminal force against a person attempting suicide.

Section 309 of the IPC is the society's way of ensuring that an individual does not shirk his/her responsibilities towards it. That is, the society has a claim over an individual's life. Therefore, it has an interest in preventing suicide.

The question that then needs to be answered is whether such a prohibition that denies a person the right to die violates the right to life guaranteed in Article 21. Justices Hansaria and Sahai from the Supreme Court of India were of the firm opinion in *P Rathinam v. Union of India*[26] that Section 309 should be "effaced from the statute book to humanize our penal laws". The main reason was that, since Article 21 means the right to live with human dignity, it also brings in its trail the right not to live a forced

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[24] V S Deshpande, "To Be or Not to Be"; (1984) 3 SCC (J) 10 at 10.

[25] ibid.

[26] AIR 1994 SC 1844. Three High courts have also discussed the issue. A division bench of the Delhi High Court in *State v. Sanjay Kumar*, 1985 Cri LJ 931, speaking through Sachar, J. observed that "*The continuance of Section 309 IPC is an anachronism unworthy of a human society like ours*". The Division bench of the Bombay High Court in *Maruti Shripathi Dubal v. State of Maharashtra*, 1987 Cri LJ 743 speaking through Sawant, J. took the view that this section is violative of Articles 14 and 21 of the Constitution. The Andhra Pradesh High Court dissented from this view in *C Jagadesswar v. State of Andhra Pradesh*, 1983 CriLJ 549. The Bench held that this Section is valid because it did not violate any of these Articles.

life.[27] A person cannot be forced to enjoy the right to life to his detriment, disadvantage or dislike. Just as the freedom of speech includes the freedom not to speak and the freedom of association includes the freedom not to associate, they say, the right to live includes the right to die.

The Supreme Court later in *Gian Kaur v. State of Punjab*[28] considered the same issue and found the 'right to die' construct very problematic. *"Article 21 is a provision guaranteeing protection of life and personal liberty and by no stretch of imagination can 'extinction of life' be read to be included in the 'protection of life'. Whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, we find it difficult to construe Article 21 to include within it the 'right to die' as a part of the fundamental right guaranteed therein. 'Right to life' is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life, and, therefore, incompatible and inconsistent with the concept of 'right to life'...The 'right to die', if any, is inherently inconsistent with the 'right to life' as 'death' is with 'life'."*[29] Further, they asserted that the analogy of the suspension of fundamental rights like speech and association cannot be extended to the right to life. The former just requires abstinence, but to exercise a right not to live, requires a positive or overt act. Thus, the analogy does not hold.[30]

Society, thus, has reacted to the phenomenon of suicide by criminalising it. There has been an increasing tendency to look at suicides as psychiatric disorders.[31] While this may be true in some cases, it is not always so. However, one must appreciate that the ramifications of both criminalising and *psychiatrizing* suicides are great. Through these two methods, we only highlight the individual agency of suicides. It is true that most suicides are caused due to socio-economic reasons. Emile Durkheim demonstrated with a careful use of statistics that suicidal tendencies had nothing to do with race or climate, which were the popular explanations at that time. He further argued that describing suicides as psychological maladies is to simply supply a new name for a

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[27] ibid. at 1854, para 35.
[28] (1996) 2 SCC 648.
[29] ibid. at 660, para 22.
[30] ibid. at 659, para 21.
[31] Emile Durkheim, a famous sociologist who studied suicides in the 19th century dismisses psychological explanations for suicide. He says that the force which determines the suicide is not psychological but social. Raymond Aaron, "Main Currents in Sociological Thought", Vol. 2, 35-36 (1967).

puzzling phenomenon, but not an explanation. His reasoning was that instead of examining the psyche of the person attempting suicide, a nearly impossible task, one should examine his or her group relation with the rest of society.[32]

Viewing suicides purely as a criminal offence or a mental disorder indicates a refusal to see the larger picture. Criminalising and *psychiatrising* suicide are convenient ways of placing the onus on the individual rather than the society.

## IV. The Varied Responses of the State

The usual reaction of the Government to a spate of suicides is that they are isolated incidents that arise out of an individual's personal problems. This is followed by the payment of ex-gratia compensation to the family of the deceased. The amount actually received by the families is, however, questionable. Ironically, in the State of Andhra Pradesh and Karnataka, even this practice of granting ex-gratia compensation was stopped[33] because it was believed to have encouraged more suicides. Thus the state has also failed in its duty to 'aid the living'.

Following the latest and most embarrassing spate of suicides in Andhra Pradesh, the Prime Minister, Dr. Manmohan Singh, has promised a 'new deal' for agriculture. The Finance Minister and the Union Minister for Agriculture have undertaken to double the availability of institutional credit in the next three years. When the Prime Minister visited the affected areas in Andhra Pradesh, he announced the release of Rs. 60 crores from the Calamity Relief Fund and 1.82 lakh tonnes of food grain for the Food for Work Programme. He declared that the Centre would bring about a new Seed Act to regulate and standardize the quality of seeds and provide a mechanism for penalties for violation of norms. He also declared that steps would be taken to strengthen the crop and livestock insurance and to simplify the drought assistance procedure.[34] What remains to be seen is how these promises translate into action in the coming years.

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[32] James A Glynn & Elbert W. Stewart, "Introduction to Sociology", 36 (1985).

[33] "Plight of Farmers moves Manmohan", The Hindu (Hyderabad), 22nd February, 2002 at <http://www.hindu.com/2004/07/02/stories/2004070207580 40.htm>, last visited 22nd March 2005.

[34] Dasu Kesava Rao, "Shocked by Realities, Manmohan Announces Aid", The Hindu (Hyderabad), July 2nd, 2004 at 1.

The new Government of Andhra Pradesh has not been too far behind in promising reforms. As an immediate reaction, the Government waived the dues of agricultural power bills to the tune of Rs. 1,280 crores and announced free power supply to the farming sector. In addition, it provided a relief package in the form of economic support to the families of the deceased. A certain sum of money would be deposited in a joint bank account of the family members and the Mandal Revenue Officer of that area, to be used for farm related expenditure. Moreover, another sum of Rs. 50,000 would be given as a one time settlement to lenders. This package has been made applicable to all those who had committed suicides between 1st July 1998 and 1st June 2004. The Government also proposes to enact a legislation which will fix a ceiling on interest rate at 12% as well as finalise a crop insurance scheme worth Rs. 208 crores. With respect to the regulation of the truant seed and fertilizer merchants, a warning has been issued to them to prevent further mischief. [35]

## V. Conclusion

This paper depicts that poverty is merely one of the many causes of suicides, when, in reality, there are often many other compelling reasons, such as marginalisation, powerlessness, violence and social prejudice which drive a person to take his/her life.

Suicides are usually termed as an individual problem and hence, criminalised to indicate that no person should be able to shirk his/her role to society and get away with it. Reactionaries to this, such as the Hon'ble bench in *Rathinam*, say that a person attempting suicide has psychiatric problems and therefore, needs counseling rather than imprisonment. However, it has been shown that farmers are more in need of state support to preserve their livelihood rather than psychiatric help. Other social groups seek integration into society, removal of prejudice and the freedom to live with dignity. It is not denied that timely psychiatric help would prove extremely helpful in some cases. At the same time, it must be recognised that suicides are more a symptom of the disease in *society* rather that the disease in the 'suicide seeker's' mind.

[35] Interview with Mr. N Raghuveera Reddy, Minister for Agriculture, Andhra Pradesh, in The Frontline, Volume 21, Number 13, June 19-July 2, 2004 at 17.

It is interesting to note that there is a historical parallel to the agrarian distress in Andhra Pradesh. During the American Civil War in 1861, the supplies of cotton from the traditional sources like Britain and Europe were cut off. India emerged as a new supplier of cotton and suddenly the global prices for cotton went up, just like in the 1990s. The Indian farmer lost no opportunity in switching to cotton cultivation from food crops, much like today. In order to do so, the money lenders were sought for the required amount of credit. The Civil War ended, and with it, the global prices of cotton crashed. The farmers found that they could not repay their debts to the money lenders, who hastened to foreclose the debts. This led to the Deccan Riots, where the farmers in unison, took on the money lenders, fought against them, attacked their homes and burnt the records. Instead of giving up hope, the farmers chose to attack their most visible enemy – the village moneylender.

It is, perhaps slightly inappropriate to compare the circumstances of the Deccan Riots to those of today. Without doubt, they are vastly different, as are the factors that, in the past, forced the farmers to revolt. However, it can be observed (without in any way justifying the Deccan Riots), that the psyche of today's farmer is indeed very different. What then caused farmers to stand up and fight is now causing them to cower down and die. Surely, there is some lesson in this for our society today!

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# THE 'FUNDAMENTALS' OF THE RIGHT TO VOTE AND ITS CONSTITUTIONAL STATUS

*Saurabh Bhattacharjee**

> *The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.*
>
> —Article 21, Universal Declaration of Human Rights, 1948

The right to vote has become a well-accepted part of international law[1] and Indian constitutional jurisprudence. The historical and the jurisprudential foundations of this right have been largely ignored by public discourse. As demonstrated by the controversies over the Presidential elections in the United States of America in 2000 and the subsequent judgment of the Supreme Court of United States in *Bush v. Gore*[2], the citizenry can ill-afford a sense of complacency over this valuable right. The precise status of the right to vote has serious ramifications in determining the future of a polity.

The verdict of the Supreme Court of India in *Peoples Union for Civil Liberties v. Union of India*[3] puts into perspective the status of the right to vote in India. The Apex Court struck down The Representation of the People (3rd Amendment) Act, 2002[4] on the

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[1] Alexander Kirshner, "The International Status of the Right to Vote", at <http://www.fairvote.org/private/ Kirshner.doc>, last visited 18th July 2004.

[2] 531 U.S. 9, 104 (2000).

[3] AIR 2003 SC 2363.

[4] This amendment was introduced in the aftermath of the judgment in *Union of India v. Association for Democratic Reforms,* (2002) 5 SCC 294, where the Election Commission was directed by the Supreme Court to ask for information on affidavit from each candidate seeking election to parliament or a State Legislature as a necessary part of his nomination paper on:

(a) Whether the candidate is convicted, acquitted or discharged of any criminal offence in the past – if any, whether he is punished with imprisonment or fine.

ground of the violation of the fundamental right of the voters to know the antecedents of candidates contesting elections to legislatures under Article 19(1)(a) of the Constitution of India. The Court reaffirmed its earlier ruling in *Union of India v. Association for Democratic Reforms.*[5]

A less highlighted facet of the judgment was the difference of opinion between the Judges over the constitutional contour of the right to vote, as distinct from the right to information of the voters. Though concurring on the operational part of the judgment, they had separate views on the status accorded to the right to vote in the Indian constitutional framework.

M B Shah, J. observed (for himself and on behalf of D M Dharmadhikari, J.):

> *"there cannot be any dispute that the right to vote or stand as a candidate for election and decision with regard to violation of election law is not a civil right but is a creature of statute or special law and would be subject to the limitations envisaged therein."*[6]

In contrast, P Venkatarama Reddi, J., concurring with the invalidation of the impugned amendments, differed about the status of the right to vote in our constitutional structure. He remarked:

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(b) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the Court of law. If so, the details thereof.

(c) The assets (immovable, movable, bank balance, etc.) of a candidate and of his/her spouse and that of the dependants.

(d) Liabilities, if any, particularly whether there are any over dues of any public financial institution or Government dues.

(e) The educational qualifications of the candidate.

Though the amendment was purported to implement the aforesaid judgment, it significantly differed in its substance. The candidate was not required to disclose the cases in which he has been acquitted or discharged of criminal offence, his assets and liabilities and his educational qualifications. Section 33-B of The Representation of the People (3rd Amendment) Act, 2002 provided that:

"Notwithstanding anything contained in any judgment, decree or order of any Court or any direction, order or any instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under the Act or the Rules made thereunder."

[5] (2002) 5 SCC 294.

[6] supra n. 3, at 2390, para 59.

> *"..The right to vote, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Article 326..."*[7]

This research paper seeks to examine the status enjoyed by this right under international instruments and in various jurisdictions. It also explores the constitutional treatment of the right to vote in India, in light of the various positions taken by the Indian judiciary.

## I. Global View: A Tale of Heterogeneity

A citizens' right to vote and the affirmative obligation of the State to protect this right have become an integral part of the multitude of international legal instruments, both binding and non-binding.

Article 21 of the Universal Declaration of Human Rights, 1948 (UDHR), lays down the right of persons to participate in governance and enjoy universal adult franchise. Article 25 of the International Covenant on Civil and Political Rights, 1966 (ICCPR),[8] while reaffirming the substance of Article 21 of UDHR, restricts the incidence of this right to citizens. The Human Rights Committee (established under the ICCPR) reaffirmed that the treaty not only protects the rights of every citizen to vote, but also enjoins the states to take legal measures to ensure that citizens are able to effectively enjoy this right.[9] This duty of the state was further emphasised by Article 3 of Protocol No. 1 of the European Convention of Human Rights, 1950 states that:

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[7] ibid at 2401, para 101. He further stated that though "*...the right has been shaped by the statute...it is not very accurate to describe it as a statutory right*".

[8] Article 25 of the ICCPR states: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely-chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."

[9] Human Rights Committee, "The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25). 12/07/96. CCPR General comment 25. (General Comments)", at <http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR+General+comment+25.En?OpenDocument>, supra n.1.

> *"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."*

Initially there was uncertainty with regard to whether this provision contemplated an individual's right to vote and contest an election. This issue was settled, recognizing the individual's right to vote and contest an election, in *W, X, Y and Z v. Belgium*[10] in 1976 by the European Commission on Human Rights.[11]

While the right to vote of citizens is recognised almost universally, the status accorded to this right varies in different polities.[12] A number of Constitutions provide for a vibrant right to vote with a strong affirmative component guaranteed therein. For instance, the Constitution of Suriname establishes the positive obligations of the State to ensure public participation in the political process.[13] Others, like Peru[14], not only assert the right to vote but also explicitly delimit the power of the state to restrict those eligible to vote.[15]

Several constitutions also articulate a separate right to vote. For example, Article 49 of the Constitution of Portugal states:

> *"All citizens who are over eighteen years of age have the right to vote, except for the incapacities laid down in general law. The exercise of the right to vote is personal and constitutes a civic duty."*

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[10] (Nos. 6745 & 6746/74) (1975), 2 Eur. Comm. H.R. D.R. 110 at 116, 18 Y.B. Eur. Conv. H.R. 236 at 244.

[11] This was reaffirmed in *Mathieu-Mohin and Clerfayt v. Belgium* (1987), Eur. Ct. H.R. Ser. A, No. 113, 30 Y.B. Eur. Conv. H.R. 114.

[12] For an intensive examination of the diverse ways in which democratic constitutions treat the right of the citizens to vote, refer to the taxonomy drawn by Alexander Kirshner., supra n.1.

[13] Article 54 of Constitution of Suriname states that: "The State is obliged to register those with voting rights and to convoke them to participate in elections. The registration of the voters shall serve no other purpose. Those with a right to vote are obliged to co-operate with the registration of the electorate."

[14] Article 32 of the Peruvian Constitution states that: "Citizens enjoying their civil capacity have the right to vote. The vote is personal, equal, free, secret and obligatory until one is seventy years old. It is optional after this age. All Acts that limit or prohibit citizens from exercising their rights are null and punishable."

[15] supra n.1.

In others, the right to vote of individuals is derived by means of necessary implication as an individual is not guaranteed a separate right to vote. They only provide for elections to legislative bodies and public offices on the basis of universal adult franchise and secret ballot.[16]

Judicial interpretation has also aided in defining the contours of this right. For instance, the Supreme Court of Canada in *Sauve v. Canada*[17] recognised that even inmates serving sentences of two years or more have the right to vote and, therefore, invalidated Section 51(e) of The Canada Elections Act, 1970 which deprived them of this right.[18]

The Constitutional Court of South Africa while upholding the right of the prisoners to cast their vote in *August and Another v. Electoral Commissioner and Others*,[19] remarked:

> "*... the universality of franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts...Rights may not be limited without justification and legislation dealing with franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.*"[20]

On the other hand, a number of democratic countries accord merely a statutory recognition to the right to vote. Paradoxically, in the United States of America, which enunciated the principle of 'one person, one vote', citizens do not have a constitutional right to vote. In *Alexander v. Mineta*,[21] the Supreme Court of United States, in its majority

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[16] For example, Article 68 of Constitution of Spain states: "The House of Representatives is composed of a minimum of 300 and a maximum of 400 Deputies elected by universal, free, equal, direct and secret suffrage under the terms established by law." Similarly, Article 69 states: "In each province, four senators will be elected by universal, free, equal, direct and secret suffrage by voters of each of them, under the terms established by law."

[17] [2002] 3 SCR 519.

[18] The Supreme Court of Canada proceeded to observe that "*the right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features underpins the legitimacy of Canadian democracy...*", McLachlin, C.J.C., at para 34.

[19] 1999 (4) BCLR 363 (CC).

[20] ibid at para 17.

[21] 90 F. Supp. 2d 35 (D.D.C. 2000).

verdict stated explicitly that the US Constitution *"does not protect the right of all citizens to vote, but rather the right of all qualified citizens to vote."*[22]

Therefore, when the Republican-controlled Florida legislature in 2000 declared that it would simply select the State's Electoral College members if it considered the outcome of the popular vote still unsettled on December 12th, 2000,[23] the Supreme Court, in *Bush v. Gore,*[24] emphasized that the Florida legislature was acting well within its rights. The Court stated in stark terms that the

> *"...individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College."*

Thus, the Court reasoned that, since the *"individual citizen has no federal constitutional right to vote for electors for the President of the United States,"* whenever such a right is granted by state legislators, they can always revoke it and simply "*take back the power to appoint electors.*"

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[22] Jeff Milchen, "A Missing Foundation for Democracy: The Right to Vote" at <http://reclaimdemocracy.org/political_reform/right/right_to_vote.html>, last visited 2nd March 2005.

[23] This sordid story unfolded in the immediate aftermath of the very close and equally vicious presidential elections in the United States of America in 2000.
The results of the election were not known for more than a month after the polls as the counting and recounting of Florida presidential ballots, which swung the election, extended for more than a month. Under the Electoral College system prevalent in that country, each State votes for the President separately: a victor is then declared in each state, and the victor in the state wins a number of 'electoral votes'. At the end of the nation-wide ballot-count, the psephologic calculus was such that the 'electoral votes' of Florida would make either candidate victorious. Florida, however, did not have an official victor because the result was within the margin of error for machine counting. Further complications arose out of allegations of wrongful disqualification of minority voters due to felony and technical flaws with voting machines. Al Gore, the democratic candidate sought a manual recount of votes since the Florida state law provided for an automatic recount due to the small margins. The recount gave rise to a protracted series of litigation all the way up to the Supreme Court of the United States of America. Early in the afternoon of December 12th, the statutory deadline for declaration of results, the Republican-dominated Florida House of Representatives voted nearly on party lines to certify the State's electors for Bush since no constitutionally-valid recount could be completed by then. See "U.S. Presidential Election, 2000", Wikipedia at <http://en.wikipedia.org/wiki/U.S._presidential_election%2C_2000>, last visited 2nd March, 2005.

[24] supra n. 2.

Therefore, forms of protection for the right to vote that have been adopted are heterogeneous and disparate. The constitutional treatment of the right to vote in India must be examined in light of this diversity.

## II. The Constitutional Conspectus and Judicial Construction

The right to vote of citizens is dealt with in the Indian Constitution under Articles 325[25] and 326[26], which lay down the foundation for universal adult suffrage in India.[27] However, the Courts have emphatically held that they do not vest any extra-statutory right in the citizenry. This was enunciated in *N P Punnuswami v. Returning Officer,*[28] where Fazl Ali, J. observed:

> *"the right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it."*[29]

The Apex Court reiterated this proposition in *Jyoti Basu v. Debi Ghosal*[30] and pronounced that there is no common law right to elect and that such a right is purely statutory in character.

These pronouncements illustrate that the judicial dicta has fallen short of providing a constitutional protection to the right to vote in India and has made the right subservient

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[25] Article 325 states: "No person to be ineligible for inclusion in, or to claim to be included in a special electoral roll on grounds of religion, race, caste or sex.—There shall be one general electoral roll for every territorial constituency for election to either house of parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them."

[26] Article 326 states: "**Elections of the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage.**-The elections to the House of People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than [eighteen years] of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illeg al practice, shall be entitled to be registered as a voter at any such election."

[27] Conditions for exercise of the right to vote are enunciated in The Representation of the Peoples Acts of 1950 and 1951.

[28] AIR 1952 SC 64.

[29] ibid at 71, para 18.

[30] AIR 1982 SC 983.

to legislative will.[31] However, such interpretation appears to be based on a shaky jurisprudential foundation. An appraisal of Indian constitutional provisions along with global and historical experiences, reveals that it may not be entirely correct to hold that the right to vote is a mere statutory right in India.

Though the precise character and ambit of the right to vote did not attract much attention in the Constituent Assembly Debates, the concept of universal adult suffrage, which forms its cornerstone, occupied a central place in these debates. It was one of the long-standing demands of the Indian National Congress and had become a *sine qua non* of independence.[32] K M Panikkar observed that, "*adult suffrage, the 'acceptance of the fullest implication of democracy' was the most striking feature of the Constitution.*"[33] S Radhakrishnan was of the view that "*adult suffrage is the most powerful instrument devised by man for breaking down social and economic injustice and destroying the walls that imprison men's minds.*"[34] It is thus amply clear that the right to vote was an integral component of the vision expounded by the founders of the Republic of India.

It is submitted that Article 325 and Article 326 of the Constitution of India categorically indicate the existence of the right to vote in the hands of the citizens. Article 325 provides for non-discrimination in the realm of inclusion into the electoral rolls. In addition, Article 326 provides not only for election on the basis of adult suffrage, but also limits the grounds[35] on which a citizen may be disqualified from voting.[36] So, any statute that endeavours to regulate the right to vote must fall within the constitutional confines of these two Articles and it is not correct to say that the right to vote is merely a product of the legislature.[37] The legislature's power to interfere with this right

[31] An interesting facet of these decisions is that none of them were primarily concerned with the exact status of right to vote in the Indian constitutional framework. The observations on the nature of the right to vote were made in the course of determining the specific points of controversy in the cases.

[32] Granville Austin, "The Indian Constitution: Cornerstone of a Nation", 46 (2002).

[33] K M Panikkar, "Hindu Society at Crossroads", 63-64 (1955) quoted in Granville Austin, "The Indian Constitution: Cornerstone of a Nation", 46 (2002).

[34] S Radhakrishnan, Foreword in B Shiva Rao, "The Framing of India's Constitution: A Study (1968)" quoted in Granville Austin, "Working of a Democratic Constitution: The Indian Experience", 18 (2002).

[35] The grounds mentioned in the Article are: non-residence, unsoundness of mind, crime or corrupt or illegal practice.

[36] The constitutional scheme on the issue of voting in India has several similarities with the constitutional provisions of Spain, supra n. 16

[37] MP Jain, "Indian Constitutional Law", 943 (2003).

is circumscribed by the Constitution. Thus, it is contended that the opinions expressed in *NP Punnuswami v. Returning Officer,*[38] *Jyoti Basu v. Debi Ghosal*[39] and by MB Shah and Dharmadhikari, JJ in *Peoples Union for Civil Liberty v. Union of India*[40] that the right to vote is the creation of a statute and is subject to statutory limitation is untenable and does not withstand the touchstone of constitutional and jurisprudential logic. This view ignores the directive of our constitutional founders as enshrined in Articles 325 and 326. However, the view of P Venkatarama Reddi, J. that the right to vote is a constitutional right and not a mere 'gift of the legislature' appears to be in consonance with constitutional intent.

## III. The Statutory Right of Voting: The Limitations

The fact that there is no fundamental or constitutional right to election and vote is a contradiction apparent on the face of it and is difficult to reconcile with the principle of popular sovereignty.[41] The Supreme Court in *Jyoti Basu v. Debi Ghosal*[42] admitted this contradiction where it remarked that "*a right to elect, fundamental though it is to a democracy, is, anomalously neither a fundamental right nor a common law right. It is pure and simple a statutory right.*"[43]

If the right to vote is treated as a mere creation of statute and rendered subject to statutory mandate, it will always remain hostage to legislative tyranny. If the electorate is likely to sway to a party other than the one controlling the legislature, the legislature could then change the conditions of eligibility for exercising votes in order to doctor the results.[44]

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[38] supra n.28.

[39] supra n.30.

[40] supra n.3.

[41] Tushar Kanti Saha, "Democracy in Danger: Criminality and Corruption in Lok Sabha Elections", 19-22 (2000).

[42] supra n.30.

[43] ibid. at 986, para 8.

[44] This provides for a distinct possibility of reoccurrence of the Florida deregistration controversy which arose during the U.S. presidential elections in 2000. See Demetrios James Caraley, "Editor's Opinion: Why Americans Need a Constitutional Right to Vote for Presidential Electors", 116 Political Science Quarterly 1 at 3, at <http://www.psqonline.org/99_article.php3?byear=2001&bmonth=spring&a=01free>, last visited 14th July 2004.

Further, the legislature will not be obliged to deal with wrongful purging of qualified voters from electoral rolls.[45] Deregistration of voters mainly affects the marginalised groups like migrant labourers, indigenous groups, etc. Given the non-existent socio-economic power of such peripheral groups, elections remain their sole forum for expressing their voice. Consequently, the socio-political deprivation induced by such irregularities gets magnified. A right to vote will enable disenfranchised citizens to fight victimization and negligence of electoral officials who purge legally registered citizens from the voter rolls.[46]

In this context, a constitutional affirmation of the right to vote would provide individuals with a powerful tool to challenge a State action or state inaction that impedes voters.[47] The additional importance of this right lies in the fact that even in the absence of any express affirmative constitutional sanction, the courts have seen it as imposing a positive obligation on the state to ensure that people can vote.[48] Consequently, it appears to be extremely desirable to unequivocally posit the right to vote in the Constitution.

## IV. A Constitutional Right and its Operationalisation

The declaration of the right to vote as a constitutional right would not be a mere case of juristic symbolism. Articles 325 and 326 of the Constitution of India are not toothless but they accord genuine protection to the right to vote. As discussed earlier, they circumscribe the power of the Legislature to interfere with the right to vote of the citizens. It is postulated that the legislature can confine the right only on grounds of non-residence, unsoundness of mind, crime or corrupt or illegal practice.

A law disqualifying people from voting on any other ground can be challenged under Article 226 of the Constitution. This Article is extremely expansive in its ambit and a High Court may there under enforce not only a fundamental right but any other legal

[45] This acquires significance in the light of the fact that discrepancies in electoral rolls pose a major impediment to smooth conduct of elections. This problem was acknowledged by the National Commission for the Review of Working of the Constitution in its study.

[46] supra n. 22.

[47] Some observers have argued for converting the right to vote into a fundamental right. The debate between constitutional right and a fundamental right would require an elaborate discussion of the issues involved and has not been dealt with in this paper.

[48] supra n.1.

right. It was asserted by the Supreme Court in *Dwarka Nath v. I-T Officer*[49] that "*this Article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised.*"[50] Thus, the significance of a constitutional right lies in the fact that it is independent of statutory norms and the remedy under Article 226 would be available in all cases. The remedy arising thereof shall be immune to legislative dictates.

## V. Conclusion

The assertion of the Supreme Court that there is no fundamental or constitutional right to vote and that this right is a product of the Legislature stands at odd with globally accepted tenets of democracy and our constitutional philosophy. This right has acquired a principal position in all the major countries of the world. Further, the Constitution of India does, by necessary implication, place the right to vote on a pedestal higher than ordinary statutory rights. Articles 325 and 326 circumscribe the power of the Legislature to restrict the scope of the right to vote. Undue legislative interference can be dealt with through resort to the constitutional remedy guaranteed by Article 226.

Nevertheless, by way of abundant caution and for removal of all doubts, a constitutionally guaranteed right to vote should be introduced. An express assertion of this right will dispel the unwarranted and potentially dangerous cloud of confusion that has enveloped the constitutional status of the right to vote in India. An express constitutional protection of the right to vote protects the right from the whims and caprices of an overwhelming legislative majority. In addition, it ensures that there is more accountable implementation of the right. It will result in a remedy for the people who are chronically disenfranchised due to systemic flaws in the electoral processes.

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[49] AIR 1966 SC 81.

[50] ibid at 84-85, para 4.

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# ENFORCEABILITY OF A GUARANTEE ON THE WINDING UP OF A GUARANTOR-COMPANY

*Swethaa Ballakrishnen**

There is no challenge to the clear legal position that the obligations of the guarantor in a contract of guarantee crystallise only when there has been a breach by the principal debtor. However, this clarity faces serious threat when extended to a case where a company is the guarantor and there is no breach by the principal debtor at the time of winding up of the surety.

In such a situation, is there a subsisting right to proceed against the guarantor? Is the enforcement of a guarantee subject to breach by the principal debtor at the time of the guarantor's winding up? Or can the surety be proceeded against, irrespective of the conduct of the principal debtor?

This paper envisages a situation where the guarantor-company is being wound up, and traces the rights and liabilities of the creditor that can be triggered by virtue of such winding up. It also seeks to look at situations that might arise in case the winding up occurs before and after the breach of the obligation or debt.

## I. Contracts of Guarantee and Guarantors' Liability

A surety or a guarantor is one, who in consideration of some act or promise on the part of the creditor, undertakes to perform the promise or to discharge the liability of a third party in the event of a default. The liability of a guarantor presupposes the existence of a separate liability of the principal debtor, and is thus only secondary to that of the principal debtor.[1]

Liability, for the purposes of a contract of guarantee, may cover debts both present and future.[2] However, it is well-settled law that the guarantor may not be liable under

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[1] *Lima Leitao & Co v. Union of India,* AIR 1968 Goa 29.

[2] *EP George v. Bank of India,* AIR 2001 Ker 107.

the terms of the guarantee, if the creditor has not called upon the principal debtor to pay the amount or perform his promise. Thus, the liability of the guarantor commences only when the principal debtor defaults,[3] and it is only at this stage that the creditor can choose to proceed against the surety.[4]

The liability of the guarantor is discharged in cases where the principal debtor is himself discharged[5] or in cases where there has been a material variance in the terms and conditions of the initial contract of guarantee.[6]

Contract law does not provide for the voluntary revocation of the liabilities of the surety. A logical extension of this principle is that, the guarantor cannot choose to discharge himself of the obligations under the contract, unless such a discharge was triggered by the action of the principal debtor (by way of variance, payment, etc). Such voluntary discharge would amount to fundamental breach of the contract.

The only event, in which the guarantor is discharged from the terms of the contract of guarantee without any action on the part of the principal debtor, is in the case of continuing guarantees when the guarantor gives a notice of revocation or, upon his death.[7] When a continuing relationship is constructed on the faith of a guarantee, the guarantor's heirs may, by notice of his death, revoke the guarantee as regards future transactions.[8] As revocations on the guarantors' own account is restricted to the case

[3] *Moschi v. Lep Air Services,* [1973] AC 331; *General Produce Company v. United Bank Ltd,* [1979] 2 Lloyds Rep 255.

[4] The creditor can choose to proceed against the surety without proceeding against the principal debtor, except in cases where the contract of guarantee provides to the contrary. If such a demand or request is made under the terms of the contract, such demand should be a necessary ingredient of the creditors' cause of action against the guarantor. See *Re J Brown's Estate, Brown v. Brown,* [1893] 2 Ch. 300, *MS Fashions Ltd. v. Bank of Credit ans Commerce Intl. SA (in liquidation),* [1993] 2 All ER 769.

[5] Section 128 of The Indian Contract Act, 1872, entails that the liability of the surety is co-extensive with the liability of the principal debtor. Thus unless it can be shown that the contract is one of indemnity, the validity of the sureties' liabilities rests on the validity of the principal debtors' liability.

[6] *M S Anirudhan v. Thomco's Bank Ltd.,* [1963] I Supp SCR 63, AIR 1963 SC 746.

[7] Section 131 of the Indian Contract Act, 1872.

[8] *Courthart v. Clementson,* (1879) 5 QBD 42. However, in cases where the guarantor could not discharge his liability by giving notice, then his death does not relieve the estate from liability. See also *Lloyds v. Harper,* (1880) 16 Ch. D 290.

of continuing guarantees, this cannot be reasonably extended to apply by analogy to the instant situation.

## II. Enforceability of a Guarantee in the Case of a Guarantor's Winding Up

Before addressing the issue of enforceability of guarantee where the guarantor is being wound up, it is important to recognise that there are two possible situations that may be envisaged whilst determining the validity of such enforcement. The first is a case where there is a breach committed by the principal debtor before the winding up proceedings against the guarantor are initiated. The second is when there is no breach by the principal debtor and the winding up proceedings are initiated against the guarantor.

### Cases where the breach precedes winding up

In cases where there is a breach by the principal debtor and subsequently the guarantor is being wound up, the enforcement is relatively straightforward. It is, by now, an accepted position in contract law that the liability of the guarantor is dependant on the principal debtor. In other words, the enforcement of the guarantee is contingent on the existence of the liability of the principal debtor at the time of enforcement of the guarantee.

Thus, if there is a breach by the principal debtor at any point in time before the guarantor is wound up, the guarantor is instantly liable and the creditor will be recognised as the guarantor's creditor in the winding up proceedings. However, in cases where the guarantor is a Sick Industrial Unit that is being wound up, the creditor cannot proceed against the Company without the consent of the National Company Law Tribunal (NCLT).[9]

[9] Section 424G of The Companies Act, 1956. See also *Patheja Brothers Forgings and Stamping v. ICICI Ltd.*, 2000 CLC 1492 (SC).

**Cases where the winding up precedes the breach**

The law is virtually silent in cases where the principal debtor has not committed any breach at the point in time when the guarantor is being wound up. It is envisaged that the contract of guarantee has no specifications regarding the possible breach winding up of the guarantor[10] and whether in such an instance the creditor will have a remedy against the guarantor.

In winding up proceedings, there is no liability that gives the lender the right to implead himself into the proceedings. If there is nothing that triggers the liability against the principal debtor, following the already established reasoning that the liability of the guarantor is co-extensive and contingent with the liability of the principal debtor; it follows that the creditor has no right to proceed against the guarantor.

The concerns of the Court in *Bank of Bihar v. Damodar Prasad*,[11] regarding the object of the guarantee seem to be relevant in this case. If such winding up proceedings allowed the guarantor an embargo against the enforcement of a contract of guarantee, the point of the guarantee, which is to allow for a safety net for the creditor in the case of breach by the principal debtor, will be lost.

Further, there is a duty upon the surety to pay the decretal amount and on such payment, he is immediately subrogated to the rights of the creditor.[12] Thus, there is really no loss to the guarantor while making a provision for the creditors, as his right to be indemnified protects him. However, in a situation where the creditor is not allowed to proceed against the guarantor, the purpose of a contract of guarantee is lost.

Having laid down the legal propositions that might govern a fact situation similar to the instant case, there arises the question as to the enforcement of such guarantee and

[10] It is important to note that most contracts of guarantee or loan agreements usually provide for this eventuality by way of 'events of default' and the 'potential events of default' clauses. These clauses almost always target the eventuality of the guarantor's winding up. There is little jurisprudence regarding the enforceability of a guarantee when the guarantor is being wound up, because in most cases the contract provides for proposed breaches and the guarantor is bound by the limitations of the contract.

[11] AIR 1969 SC 297.

[12] Section 145 of The Indian Contract Act, 1872 lays down an implied promise to indemnify the guarantor. Thus, proceeding against the guarantor entails that there will be a corresponding right of the guarantor to proceed against the principal debtor.

the remedies that the creditor might be allowed in such cases. The question that has to be addressed in such a case, is whether a creditor can ask the receiver dealing with the guarantors' winding up to make a provision for him to provide for the eventuality of a breach at a future date.

## III. Claim for a Future Eventuality in a Petition for Winding Up

It is the object of winding up to realize the assets and to distribute the surplus among the shareholders and the creditors.[13] The Companies Act, 1956 provides that any person having a claim against a Company - present or future, certain or contingent - must be able to prove such a claim.[14] Thus, all claims against the Company, both present and future shall be admissible in proof against the Company. Although a mere possibility of a future earning will not, in itself, be a contingent debt that can be proved,[15] it is enough if it can be proved that there was an agreement transacted between the parties.[16]

The only requirement whilst making a future claim is that the winding up proceedings must be carried out with reasonable expediency. Claims must be made before all the accounts are written, and once the accounts have been written up, the Official liquidator shall have the right to reject such a claim on the ground of laches.[17]

In the case of a guarantor being wound up, there is a contract of guarantee in existence and any future claim that is made is contingent on this contract. Thus, the creditor's claim will be one that is within the ambit of this provision.

In the event the guarantor is an insolvent company, the aforesaid Act provides that the insolvency rules in place will govern such winding up.[18] The Presidency Towns Insolvency Act, 1909 provides for liquidated damages that arise from a breach of

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[13] AM Chakraborty, "Taxmanns Company Law", Vol.2, 1332 (1994).

[14] Section 528 of The Companies Act, 1956.

[15] *Newman (RS) Ltd., In re Raphel's Claim*, [1916] 2 Ch. 309.

[16] *Pure Milk Supply Co. v. Hari Singh*, [1963] 33 Com Cases 459 (Punj).

[17] *Bherumal Lal Chand v. Official Liquidator*, [1947] 17 Com Cases 166 (Sind).

[18] Section 529 of The Companies Act, 1956 deals with the application of insolvency rules in the winding up of insolvent companies.

trust.[19] These damages - both present and future[20] - will be deemed to be debts provable in insolvency proceedings.[21] Thus, a debt arising out of indemnity will be a provable debt and such claim will be allowed.[22]

In the instant case, there is an apprehension of breach in trust by the principal debtor. As the liability of the guarantor is co-extensive with that of the principal debtor, there is an apprehended breach of trust by the guarantor. Such breach of trust giving rise to damages is one that may well be argued to fall within the definition of a provable debt; and thus, a provision for the creditor may be made while finalising the accounts of the guarantor.

Thus, as per a strict interpretation of the provision and the derived case law, it is reasonable to conclude that a claim for a future amount can be made in a case where there is a contract to substantiate it and the claim is made before the final accounts are written up.[23]

It is important to note, at this stage, that the above enunciation covers a situation wherein the creditor is seeking to make a claim for a future eventuality *during* the course of the winding up proceedings. Thus, it is a case where although the breach has not yet happened, the creditor is seeking to make a provision for the eventuality. However, if the creditor wishes to enforce a guarantee *after* the guarantor is wound up, the above-mentioned remedies will not be available to him, and he would have to use the contractual remedies of breach and repudiation.

## IV. Conclusions

Noting the scarcity of jurisprudence on the subject, it is apparent that there is no absolute authority on the law of enforcement of guarantees when a guarantor is being wound up. From the reading of the general law of guarantee and winding up, it is

[19] Section 46(1) of The Presidency Towns Insolvency Act, 1909.

[20] Section 529(1)(b) of The Companies Act, 1956 read with Section 46(3) of The Presidency Towns Insolvency Act, 1909 provides for the valuation of future and contingent liabilities to be observed in accordance with the laws of insolvency prevalent and in force at the time being.

[21] Section 46(3) of The Presidency Towns Insolvency Act, 1909.

[22] AIR 1936 Mad 793.

[23] supra n. 20.

deduced with a fair degree of clarity that the enforcement of such a guarantee is contingent.

The enforcement of a guarantee by a creditor is determined by two exclusive conditions- first, the principal debtors' breach and second, the ability to prove the future debt arising out of the contract of guarantee, before the guarantor is wound up.

In conclusion, and summarizing the above elaborated propositions, the following fictitious case situations could well cover the law of enforcement of a guarantee when the guarantor is being wound up:

- In a case where the principal debtor commits a *breach before the initiation of winding up proceedings*, the breach is co-extensive with the liability of the guarantor, and the creditor can choose to proceed against the guarantor. The same will also be a provable debt to be recovered during the winding up procedure;
- If the *guarantor is a sick unit*, the approval of the NCLT is required before proceeding against the guarantor;
- In a case where the *principal debtor has not committed a breach before the initiation of winding up proceedings*, the creditor can choose to file a claim for a future eventuality under Section 528 of The Companies Act, 1956 before the guarantors' accounts are finalized. If the Official Liquidator is satisfied with the probability of this eventuality, the guarantee may be enforced;
- In a case where the *guarantor company is insolvent*, the rules of the insolvency legislation operate and eventuality of a claim for the eventuality of a future debt must be made in accordance with the rules therein;
- In a case where the *creditor does not claim for the eventuality of future damages, and the guarantor company is wound up, and subsequently, a breach is committed by the principal debtor*, the only possible remedy that might be left with the creditor is the contractual remedy of breach and repudiation.

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# PRICE FOR A 'PANCH' – NO THIRD CHILD

*Sumiti Yadava**

On July 30, 2003, a three-judge bench of the Supreme Court of India comprising of Justice R C Lahoti, Justice Arun Kumar and Justice Ashok Bhan, dismissed a batch of 200 writ petitions[1] challenging the constitutional validity of the provisions of The Haryana Panchayati Raj Act, 1994 ("the Act") that enforce a two-child norm on Panchayat members. The writ petitioners/appellants were largely people who had been disqualified under the Act.

The impugned provisions were Sections 175(1)(q) and 177 of the Act. Section 175(1)(q) provides that no person who has more than two living children can be a sarpanch or a panch of a gram panchayat; or member of a Panchayat Samiti or a Zila Parishad. This is subject to the provisio that a person having more than two living children up to the expiry of one year from the commencement of this Act shall not be disqualified. Section 177 provides that any member who was disqualified on the grounds mentioned in Section 175 at the time of election, or incurs such disqualification during term in office, shall cease to hold office.

The provisions were challenged on five grounds: (i) that the provisions are arbitrary and hence violative of Article 14 of the Constitution of India; (ii) that the disqualification does not serve the purpose sought to be achieved by the legislation; (iii) that the provisions are discriminatory; (iv) that the provisions adversely affect the personal liberty of individuals, in that they restrict the number of children a person can have and hence violates Article 21 of the Constitution; (v) that the provisions interfere with the freedom of religion and hence violate Article 25 of the Constitution.

While dismissing the petitions, the Bench observed,

> *"disqualification on the right to contest an election by having more than two living children does not contravene any fundamental right, nor does it cross limits of reasonability."* [2]

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[1] *Javed and Others v. State of Haryana and Others*, JT 2003 (6) 283.

[2] supra n. 1 at 298, para 25.

The Bench lauded the provisions and saw them as a viable solution to the problem of 'population explosion'.

## I. Article 14 rights 'not violated'

The first ground of challenge was that the provision is arbitrary in nature and violates Article 14[3] of the Constitution of India. It was further contended that the disqualification does not serve the purpose that the legislation seeks to achieve. Additionally, the provision was alleged to be discriminatory. These three grounds of challenge were dealt with collectively.

The Court observed that Article 14 forbids class legislation, but does not forbid making a 'reasonable classification' for legislative purposes. The classification will be deemed to be reasonable if two conditions are fulfilled, namely: the classification must be based on intelligible differentiation that clearly distinguishes persons inside the group, from those outside it; and secondly, such differentiation must have a rational relation to the object sought to be achieved by the legislation.

According to this test, the Court held the classification to be 'well-defined' since persons having more than two children are clearly distinguishable from those who do not. It was further held that one of the objects of the impugned legislation is to popularise family planning/family welfare programmes and the disqualification seeks to achieve the same by creating a disincentive.

The Bench, while rejecting the contention made with regard to arbitrariness, took the view that the number of children fixed at two was based on legislative wisdom. It could have been more or less, but the Court refused to delve into the issue as it was a policy decision outside the purview of judicial review.

Passing this judicial test, however, is not sufficient to answer questions of violation of the equality provision. The Supreme Court, spearheaded by Justice Bhagwati, has evolved an alternate mechanism of testing the validity of a provision on the touchstone of

[3] The provision reads as follows: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Article 14. The new approach to Article 14 goes beyond the classificatory principle and is not confined by its limits.[4] As Bhagwati, J. opined, *'Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits.'*[5] Under the new approach, Article 14 seeks to ensure fairness and equality of treatment. An arbitrary action strikes at the roots of equality, and Article 14 strikes at arbitrariness of State action.[6] Thus, essentially, 'reasonableness' of State action is the demand of Article 14.

Examining the impugned provisions of the Act in this light would perhaps give a different result. As elucidated below, the imposition of a two-child norm for panchayats goes against the aims of the National Population Policy (NPP), has serious societal fallouts and challenges the basic concepts of democracy. It is difficult to share the Court's confidence in the 'reasonableness' of the provisions in view of these.

## II. Serving a "purpose"

The second contention raised was that the number of children a person has, does not affect his/her competence to be a member of the *panchayat* and thus, there was no nexus with the purpose sought to be achieved by the Act. The Court dismissed this contention while reiterating the view that one of the objectives of the legislation was family welfare/ family planning, which is consistent with the NPP.[7]

It was observed that Article 243G of the Constitution vested the State legislatures with the power to make such laws as would allow gram panchayats to function as units of self-governance, and Clause (b) of Article 243G allowed the gram panchayats to implement schemes of economic development and social justice. The Act noted "Public and family welfare- implementation of family welfare programmes" as one of the duties of gram panchayat under Section 21(XIX) of the Act and thus, the Court took the view that the provisions conformed with the objective of the Act.[8] However, the

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[4] MP Jain, "Indian Constitutional Law", 1029 (2003).

[5] *EP Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3; VN Shukla, "Constitution of India", at 64 (MP Singh ed. 2001), (1950).

[6] *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

[7] supra n. 1 at 293 para 9.

[8] ibid. at 293 para 10.

linkage made by the Court between family welfare and family planning, seems doubtful because a healthy, prosperous family does not necessarily require fewer members, though this may be a contributory factor.

## III. 'No discrimination'

The Court saw no discrimination in the fact that the provisions applied only to panchayats in Haryana and not to other States, State Legislatures or the Parliament. Accepting such a submission was, according to the Court, violative of the autonomy given to State Legislatures and the Parliament (under Article 246 read with the Seventh Schedule to the Constitution) to make laws with respect to subjects within their legislative competence. It was held that legislation cannot be deemed to be discriminatory merely because only one State enacts it and other States lack similar law. The provision was seen as the first step in implementing a policy decision.

The Court held that a law enacted by a State Legislature while exercising its legislative powers cannot be compared to a law made by the Parliament or another State legislature under its legislative power, since the sources of power and those exercising the power are different. The Court opined that when the source of authority for two statutes thus differs, Article 14 has no application.

## IV. Violation of Article 21?

The challenge to the constitutional validity of the Act with respect to Articles 21[9] and 25[10] was struck down while stating that the disqualification was "*conceptually devised in national interest*".[11] The Court observed that requirement of 'reasonableness' applies to all fundamental rights. It also believed that ideals of socio-economic justice and the nation's advancement cannot be ignored by citing 'undue stress' on fundamental rights.[12]

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[9] The provision reads as follows: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

[10] The provision reads as follows: "(1) Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to...right freely to profess, practice and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice. (b) providing for social welfare and reform..."

[11] supra n. 1 at 298, para 25.

[12] ibid. at 298, para 28.

The Court quoted national and global responses to the population problem to justify its stance, for instance, the 'carrot and stick' rule followed by China in controlling its population,[13] as well as the prominence given to population control in every five-year plan of our country and its failure in meeting set targets. The case of *Nergesh Meerza*[14] was also cited by the Bench to support their reasoning.

## V. Challenge to Article 25

Another contention was that four marriages were permitted for men for procreation under Muslim law, and such a provision would violate the right to freedom of religion under Article 25. The Court held that it may be permissible for Muslims and other communities to have as many children as they want, but no religion or law in India puts an obligation on anyone to contract bigamous or polygamous marriages, or to have more children than one. The Court defined the ambit of protection under Article 25 by stating that the protection provided is only with respect to religious practices that form an essential and integral part of the religion.[15] It observed that polygamy, like practices of *sati* and human sacrifice, could be prohibited by the State in the interests of public order. The Court observed that a person is free to have more than two living children, but will have to "pay a little price" for doing so, by being ineligible to hold a post in a panchayat in Haryana.[16]

## VI. Taking the old line

The Court's decision in these writ petitions may be seen in continuum with the decisions of the Rajasthan High Court in upholding similar provisions of The Rajasthan

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[13] Under this rule in China, couples following the one-child norm were provided incentives in the field of education and employment. Those breaching the one-child norm suffered under disincentives, which included penal action. The Supreme Court commented that India being a democracy, procreation beyond a limit has not yet been penalised, but "*complacence in controlling population in the name of democracy is too heavy a price to pay, allowing the nation to drift towards disaster* "; ibid. at 300, para 34.

[14] *Air India v. Nergesh Meerza*, (1981) 4 SCC 335; In this case the Court has upheld the validity of a rule which would terminate the services of airhostesses with two existing children on their third pregnancy. Reasons given were two-fold: firstly, the provision was seen as being protective of the larger health interests of the airhostesses and upbringing of their children; and secondly, it would 'whip up' the family planning programme.

[15] *Dr. M Ismail Faruqui and Others. v. Union of India and Others*, (1994) 6 SCC 360 was relied on.

[16] supra n. 1 at 307, para 61.

Municipalities Act 1959[17] and The Rajasthan Panchayati Raj Act, 1994[18]. The said Acts also disqualify a person with more than two children from holding office under the Acts. The High Court's reasoning while dismissing both cases was similar to that given by the Supreme Court in the present case. The right to be elected was said to be a statutory right subject to the limitations provided under the statute. While quoting Bertrand Russell to observe that "*Population explosion is more dangerous than a hydrogen bomb*", the Supreme Court expressed concern over how the growing population was hampering national progress, and justified the restrictions as having a social purpose.[19]

## VII. The Right approach?

The Court's decision is in tune with a target-oriented approach of population stabilisation, but interestingly, the Government itself renounced this target- based approach[20] of the 1970's and 1980's, to adopt a 'development is the best pill' approach[21] to the population problem. The latest NPP claims to be one of advocacy, quality care and individual choice. It affirms the "*commitment of the government towards voluntary and informed choice and consent of citizens while availing of reproductive health services, and continuation of the target free approach in administering family planning services*".[22] This clearly contradicts the Court's assumptions of the provision being in conformity with the NPP.

The Supreme Court order is also not in consonance with the spirit of the International Conference on Population and Development, (ICPD), Cairo, 1994[23]. As a signatory to

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[17] *Saroj Chotiya v. State of Rajasthan*, AIR 1998 Raj 28

[18] *Mukesh Kumar Ajmera v. State of Rajasthan*, AIR 1997 Raj 250

[19] supra n. 1 at 299, para 32.

[20] Laxmi Murthy, "No Kidding: Apex Court Enforces Two-Child Norm", Infochange News and Features, August 2003 at <http://infochangeindia.org/features123.jsp>, last visited 25th February 2004.

[21] TK Rajalakshmi, "Children as Disqualification", Frontline, Vol.20, Issue-17, August 16-29, 2003 at < http://www.frontlineonnet.com/fl2017/stories/20030829002204600.htm>, last visited 25th February 2004.

[22] "Population and Family Planning-Laws, Policies and Regulations" at < http://www.unescap.org/pop/database/ law_india/india1.htm>, last visited 27th February 2004.

[23] Principle 8, ICPD, 1994, declares: States should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to health care services, including those related to reproductive health care, which includes family planning and sexual health...and provide the widest range of reproductive health care services without any form of coercion. All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so." < http://www.un.org/popin/icpd/ conference/offeng/poa.html>, last visited 25th February 2004.

the action plan, India is committed to making linkages between population, development and gender.[24]

## VIII. Societal Concerns: Desired Impact?

The fallout of making eligibility of contesting panchayat elections contingent on family size is evident through the study conducted by 'Mahila Chetna Manch' (MCM), a Bhopal based NGO. Implications of the two-child norm on the Panchayati Raj Institutions in Madhya Pradesh, Orissa, Rajasthan, Andhra Pradesh and Haryana were recorded and MCM found that 40% of all candidates for Panchayat posts were disqualified or caught in legal proceedings relating to their disqualification on the basis of number of children. Of these 50% of Scheduled Castes and 38% of the Backward Castes were women. In Orissa, women constituted about 55% of all such cases, while in Andhra Pradesh they formed 48%.[25] Many cases have been reported of women being deserted, of forcible sex-selective abortions and instances of children being given in adoption or abandoned. An example is the case of a woman sarpanch from Madhya Pradesh who gave up one of her children in adoption in order to escape the disqualification.[26]

Health groups and women's groups had previously approached the National Human Rights Commission (NHRC) with a memorandum that the two-child norm was discriminatory, anti-democratic and violative of commitments made by the Indian Government in International Covenants. As a result, in a National Colloquium held in January 2003,[27] a Declaration was issued saying that "*propagation of a two-child norm and coercion or manipulation of individual fertility decisions through the use of incentives and disincentives violate the principle of voluntary informed choice and human rights of the people, particularly the rights of the child.*" The Declaration clearly stated that such measures are inconsistent with the NPP. Thus, we have a situation where the decision of the Supreme Court is

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[24] supra n.21.

[25] Akshaya Mukul, "Two child norm cripples women" at <http://timesofindia.indiatimes.com / articleshow/msid-39505740,prtpage-1.cms>, last visited 19th March, 2004.

[26] Angana Parekh, "Weighted against Women" at <http://timesofindia.indiatimes.com /articleshow/ 18491241.cms>, last visited 22nd March 2004.

[27] Dr. Justice AS Anand, Keynote Welcome Address on the theme "Women Empowerment –the key to achieve Millenium Development Goals", at a function organized by the U.N. Information Center on Mar. 7, 2003 at <http://nhrc.nic.in/womensday03.htm>, last visited 29th March 2004.

not in consonance with the Declaration issued by the NHRC. Though the NHRC declaration is not binding on the Supreme Court, it certainly has persuasive value.

On the submission that such a disqualification would be most harmful to women, as in India, women usually have to submit to the demands of their husbands and bear a third child if he so desires, the Bench opined *"...We do not think that with the awareness that is arising in Indian womenfolk, they are so helpless as to be compelled to bear a third child even if they do not wish to do so."*[28] However, this observation is not well founded in the Indian context. In a social scenario where preference is for the male child and there exists gender inequity, coercive methods will only serve to further undermine the status of women. In addition, there is high probability of a spurt in incidents of female foeticide and infanticide. The reproductive rights of the women are not respected and the skewed sex-ratios are ample evidence of the discrimination against the girl child. According to a study, large number of women members were disqualified under these provisions in Ambala, Mewat and Gurgaon districts of Haryana.[29] Prioritizing health, education and livelihood of women was hailed by the NPP as a better way of meeting required ends. As Rajeev Dhavan observes, *"...local democracy is fundamental to the Constitution. Women must share this power. But, they cannot, if, for some reason they decide to have a third baby."*[30]

## IX. Lesson from the Past

Such coercive measures could possibly backfire on the Government. One must not forget the 'forced sterilisation' during the Emergency period in 1976. Thousands of people were sterilized within six months, while hundreds died of infections associated with the operations and in protests against the pogroms. This was an important factor in the Indira Gandhi government being voted out of power in the subsequent elections. There also followed a backlash against family planning as the number of sterilisations dropped to 900,000 that year. [31]

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[28] supra n. 1, at 307, para 63.

[29] Exploratory study commissioned by the Ministry of Health and Family Welfare and supported by United nations Population Fund (UNFPA) conducted in Andhra Pradesh, Madhya Pradesh, Rajasthan, Haryana and Orissa, supra n. 21.

[30] Rajeev Dhavan, "Democracy vs. Demography", The Hindu, August 8, 2003 at <http://www.hinduonnet.com/ thehindu/2003/08/08/stories/2003080801641000.htm>, last visited 6th March 2004.

[31] Betsy Hartmann, "Sterilization and Abortion" at <http://www.hsph.harvard.edu/rt21/race/HARTMANNCh13. html>, last visited 29th March 2004.

## X. In Conclusion

With the restrictions imposed by the Act in force, people with more than two children might begin to be treated as lesser citizens, and if such a process starts, there's no knowing its end. As Rajeev Dhavan explains, in constitutional terms, this is called 'suspect classification' and once legitimised, it can be expanded in many directions. Licenses, education and other benefits may be denied to families with more than two children.[32] This does not augur well for our democracy.

We must learn from past mistakes and not attempt the use of coercive measures once again as a means to solve our population problem. The best way would be to make concerted efforts to ensure reproductive rights are respected and people are educated enough to make voluntary, informed choices to have smaller families rather than using undemocratic, coercive methods to do the same.

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[32] supra n. 30.

# REDEFINING FREEDOM OF EXPRESSION VIS-À-VIS THE NATIONAL FLAG

*Dhruv Arora**

Freedom of expression is one of the cornerstones of democracy. Its understanding is dependant on society and prevalent values. Different decisions by the Indian Supreme Court, exemplify the varying types of freedoms that come under the freedom of expression.[1] While some rights may not find an explicit mention in Article 19(1) of the Constitution of India, yet they may be read into one of the clauses therein. But where do we draw the boundaries for this freedom? In an increasingly diverse and heterogeneous society, viewpoints that dissent or deviate from pre-existing norms may be viewed as heresy or transgressions. In matters concerning the entire nation one must proceed with caution.

One such sensitive issue relates to the use of the Indian National Flag, which for any country is a symbol of its pride, independence and is in fact analogous to its identity in the world. Prior to the decision in *Union of India v. Naveen Jindal*,[2] citizens could not display the flag in their private capacity, and this prohibition was absolute- even putting up the flag as an exhibition of one's patriotism was no excuse. The only exception made was for designated national holidays or special occasions, such as Independence Day or Republic Day. The decision of the Supreme Court, however, has significantly altered this position.

Ensuring dignity and respect for the Flag, does not necessitate restricted access. The rights of citizens need to be kept in mind during prioritisation. What is indisputable is that this freedom cannot be absolute and unhindered, for that would be impractical as

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[1] For instance, some of these rights are: the right to sing [*Usha Uthup v. West Bengal*, AIR 1984 Cal 268], the right to demonstrations [*Kameshwar Singh v. State of Bihar*, AIR 1962 SC 1116], the right to liberty of the press [*Sakal Papers P(Ltd.) v. Union of India*, AIR 1962 SC 305], the right to stage dramatic performances [*Charan Singh v. Union of India*, AIR 1961 Punj 272], the right to remain silent or not speak [*Bijoe Emanuel v. State of Kerala*, (1983) 3 SCC 615].

[2] 2004 (1) SCALE 677.

well as unreasonable. The boundaries to be set and the lines to be drawn must be done keeping in mind the nature of the activity, its constitutional implications and restrictions, prescriptive as well as proscriptive legislation.

## I. The Case: Specifics

Naveen Jindal was a Joint Managing Director of a public limited company at Raigarh, Madhya Pradesh. He had displayed the national flag at the office premises of his factory, but was stopped from doing so by Government officials. The reason given was that this was not permitted under the Flag Code of India. In a writ petition before the Delhi High Court, he contended that he could not be prevented from doing so as the Flag Code merely contained executive instructions not amounting to law. He further contended that the right to display the national flag is a fundamental right, covered under Article 19(1)(a) of the Constitution of India, namely, the right to freedom of speech and expression. Therefore, the core question in the *Naveen Jindal* case, was whether or not the right to display the national flag by private citizens is a fundamental right, coming within the purview of Article 19(1)(a) of the Constitution of India.

The High Court held that as long as he did so respectfully, he could not be restricted and, therefore, Article 19(1)(a) did come to his aid in this case. On appeal the Supreme Court took into consideration the history and contemporary relevance of the flag, rules relating to its display in other countries (whether inclusionary or otherwise), constitutional and statutory provisions and Constituent Assembly debates. It ultimately concurred with the High Court and held that the right of a private citizen to display the national flag was a fundamental right within the purview of Article 19(1)(a). At the same time, this right was not absolute and was subject to the reasonable restrictions contained in Article 19(2).

Amidst several adjournments, the Union of India appointed the Shenoy Committee, to look into various issues relating to the liberalisation of the use of the national flag. The Committee ultimately supported fewer restrictions on the use of the flag.

The Court also held that a fundamental right comes coupled with a fundamental duty and if the former is granted, the latter cannot be discarded. The Court, relying on a plethora of decisions, held that the Flag Code was a mere body of executive instructions

without any statutory basis, and, therefore, did not amount to 'law' under Article 13 of the Constitution, or a law which the State was entitled to make under the provisions of clauses (2) to (6) of Article 19 in order to curtail guaranteed fundamental rights.[3]

## II. The Flag Code, Regulatory Legislation and its Implications

The hoisting and use of the national flag is regulated by The Emblems and Names (Prevention of Improper Use) Act, 1950 and The Prevention of Insults to National Honour Act, 1971 and The Flag Code of India. As a result of the petition filed by Naveen Jindal, the original Flag Code has now been replaced with The Flag Code, 2002, which allows unrestricted display of the national flag, while ensuring that it is consistent with the dignity of the flag.

The new Flag Code of India, 2002, superseded the old one on 26th January 2002. Section 2 of the new Code recognises the right of citizens to display the national flag, and for the sake for convenience, has been divided into three parts.[4] The old Code was more conservative in approach and disallowed the use of the national flag by private citizens.

The Flag Code is a set of executive instructions and not statutory rules or legislation. However, the Court held that The Flag Code, to the extent it provides for preserving respect and dignity of the national flag, deserves to be followed.

The new Flag Code reflects the changed attitude of the Court towards the national flag. By allowing its free use by citizens, it has recognized the importance of the freedom of expression and the extent to which it may be allowed. It would be ironic if Indians were denied access to the very symbol that denotes their freedom from slavery and independence. It is a safe assumption that citizens are mature and aware of their duties and obligations, to give the flag the reverence it deserves. In addition, the Court ought

[3] *Kharak Singh v. State of UP*, AIR 1963 SC 1295; *State of Madhya Pradesh and Another v. Thakur Bharat Singh*, AIR 1967 SC 1170; *Bijoe Emmanuel and Others v. The State of Kerala and Others*, (1986) 3 SCC 619.

[4] Part I of the Code contains a general description of the National Flag. Part II of the Code is devoted to the display of the National Flag by members of public, private organizations, educational institutions, etc. Part III of the Code relates to display of the National Flag by Central and State governments and their organisations and agencies.

to be given credit for acknowledging that there can be no restrictions on displaying the national flag as a means of displaying one's patriotism for the nation.

The new Flag Code, while adopting a more liberal stance, does provide sufficient safeguards for the appropriate usage of the flag. The freedom that it confers on citizens is not absolute, but subject to certain restrictions, as mentioned under Article 19(2) of the Indian Constitution. Incidentally, with the introduction of the new Flag Code, there has been a massive increase in the sales of the national flag.[5]

The Prevention of Insults to National Honour Act, 1971 (as amended by The Prevention of Insults to National Honour (Amendment) Act, 2003), not only describes what constitutes 'disrespect' for the national flag, but takes an additional step to ensure its respectful use as well. It prescribes a three year imprisonment or fine, or both, for anyone found treating the flag with disrespect.[6]

Thus the restrictions imposed on the display of national flag, as contained in the aforesaid Act and The Emblems and Names (Prevention of Improper Use) Act, 1950, and according to The Flag Code, 2002, will be applicable. Some of them are: the flag shall not be dipped in salute to any person or thing, it cannot be inscribed or written on, cannot be intentionally displayed with the saffron down, shall not be used as a covering for a building, shall not be intentionally allowed to touch the ground or the floor or trail in water etc.

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[5] Gaurav Vivek Bhatnagar , "Good Old Flag is Hot New Bestseller", The Hindu, 25th January 2002 <http://www.hinduonnet.com/thehindu/2002/01/25/stories/2002012503070300.htm>, last visited 21st March 2005. The sales of the national flag nearly trebled since the amendment of the Flag Code. The Khadi and Village Industries Commission has been bracing itself for the soaring demand, as stocks have dried up and college students, businessmen, government officials etc scramble with zeal and fervour to buy the national flag that they are now free to display.

[6] Section 2 of The Prevention of Insults to National Honour Act, 1971 states: "Whoever in any public place or in any other place within public view burns, mutilates, defaces, defiles, disfigures, destroys, tramples upon or otherwise shows disrespect to or brings into contempt (whether by words, either spoken or written, or by acts) the Indian National Flag... or any part thereof, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both".

## III. The National Flag, Freedom of Expression and some National Experiences

In order to examine the extent of freedom granted to the display of the flag in India, it would be helpful to investigate the position in other nations across the world. Countries like Canada, Brazil and Malaysia permit free use of the Flag by private citizens while this is not allowed in Egypt, Japan and Sweden.

In the United States, there now exists, what could be described as the most unhindered use. This has not always been the case, for flag desecration statutes were adopted by almost all states by 1932 and these outlawed writing on the flag, publicly mutilating or defacing it either by words or actions and using it for advertising.[7] These state statutes could be considered to be the culmination of the organized flag protection movement that had begun to take birth in the late 1800s. Later cases have been more liberal. For instance, in 1969 in *Street v. New York*,[8] the Supreme Court held that the State of New York could not convict a person based on his verbal remarks. Similar decisions were delivered in *Smith v. Goguen*[9] and *Spence v. Washington*.[10] Following these cases, there were revisions in many of the State Flag Desecration statutes. Ultimately, in 1989, came *Texas v Johnson*,[11] a landmark case, where the burning of the national flag was protected under the right to freedom of expression.[12] A similar stance was adopted by the Courts

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[7] *Halter v. Nebraska*, 205 U.S. 34 involved a conviction of two businessmen selling "Stars and Stripes" brand beer with representations of the U.S. flag affixed to the labels.

[8] 394 U.S. 576.

[9] In *Smith v. Goguen*, 415 U.S. 94 , the Supreme Court held that Massachusetts could not prosecute a person for wearing a small cloth replica of the flag on the seat of his pants based on a state law making it a crime to publicly treat the flag of the United States with "contempt."

[10] In *Spence v. Washington*, 418 U.S. 405, the Supreme Court held that the State of Washington could not convict a person for attaching removable tape in the form of a peace sign to a flag. The defendant had attached the tape to his flag and draped it outside of his window in protest of the U.S. invasion of Cambodia and the Kent State killings. Although not a flag burning case, this was the first time where the Court clearly stated that protest involving the physical use of the flag should be seen as a form of protected expression under the First Amendment.

[11] 105 L Ed 2d 345.

[12] Gregory Johnson, a member of the Revolutionary Communist Party, was arrested during a demonstration outside of the 1984 Republican National Convention in Dallas after he set fire to a flag while protestors chanted "America, the red, white, and blue, we spit on you." In a 5-4 decision authored by Justice Brennan, the Court found for the first time, that burning the flag was a form of symbolic speech subject to protection under the First Amendment.

in *Harold Omand Spence*[13] and *Sidney Street v State of New York.*[14]

Courts in the United States, therefore, have displayed a considerable support for the First Amendment rights of citizens to be able to use their flag as a form of protest.[15] Whether or not this is a positive trend is a debatable issue. Banning flag desecration or making it punishable has been argued to be unjust because it would amount to taking penal action against people for merely expressing their thoughts or ideas. Further, the fact that people resort to desecration of the national flag implies that, at some level, there is dissatisfaction with the government, and non-allowance of such expression is undemocratic. On the other hand, there are the more conservative groups, which argue that there are alternative channels of expression and the burning or mutilation of a symbol of national pride, is non justifiable, no matter what the circumstances. Instances parallel to the *Johnson* case have been found in the United Kingdom[16] and Hong Kong.[17]

Thus, there are no universal standards that regulate the degree of freedom that may be allowed to private citizens with regard to their national flags. While some countries subject display to severe restrictions, others give priority to civil liberties, such as the

[13] 41 L Ed 2d 842. The display of the national flag was considered to be within the contours of the First Amendment.

[14] 22 L Ed 2d 572. Even a distasteful form of expression could be used if protected by the Constitution.

[15] The First Amendment to the US Constitution provides: "*Congress shall make no law in abridging the freedom of speech or of the press.*" The US Courts have read the First Amendment to require a considerable amount of Laissez Faire in the marketplace of ideas. In his dissent in *Abrams v. United States*, 250 U.S. 616, 40 S.Ct 17, Holmes J. argued that the regulation of dissident speech is impermissible because the free speech clause recognizes that the "*ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market.*"

[16] In *Percy v. Director of Public Prosecutions* [1995] 2 All ER, the claimant, Lindis Percy, while protesting against American military activity, stood on an American Flag and scribbled on it. The High Court accepted her submission that flag denigration was a form of protest activity renowned the world over, and quashed her conviction by a Norfolk district judge.

[17] "Triumph of Freedom of Expression", Hong Kong Voice of Democracy, March 24, 1999, <http://www.democracy.org.hk/EN/mar1999/hr_04.htm> , last visited 21st March, 2005. Activists Ng Kung Siu Chris, of the Constitutionalists Society, and Li Kin Yun, of the Chinese Liberal Democratic Party were arrested by the police for desecrating the People's Republic of China's national flag as a form of protest. The Court of Appeal overturned their convictions, which it held were a breach of the right of free expression as guaranteed under Article 39 of the Basic Law and Article 19 of the International Covenant on Civil and Political Rights.

freedom of expression and, therefore, are less restrictive with regard to usage of the flag. The foreseeable problem with liberalising the rules is that there would be a need for greater civic awareness, enforcement of correct usage and regulation of commercial exploitation. On the other hand, with countries like Australia and Canada permitting comparatively liberal use, there is an increased pressure to relax norms. One of the possible, and practical solutions for ensuring respect for the flag is the incorporation of its relevance and meaning within the educational curriculum. It would not only serve its purpose, but also be a much better and cleaner option than saffronised or hinduised textbooks.

## IV. Conclusion: Drawing the Line

In any national context, while dealing with a symbol of national dignity such as the national flag, it is imperative to consider the historicity, cultural connotations and existing policies that stem from them.

The Constituent Assembly, adopted the tricolour as Independent India's National Flag. Jawaharlal Nehru had hoped that the flag would carry a message of freedom wherever it flew. It would then, be ironical, to make such a discriminative demarcation between ordinary citizens of a country and political dignitaries, whereby the freedom to display the very symbol of freedom itself was curtailed. One must also consider the irony involved in the peculiar fact that Indian citizens are free to display their national flags in other countries, such as Japan, while for decades after Independence they were deprived of this right in their home country. Over the past few decades, several people including members of armed forces have ungrudgingly laid down their lives to keep the tricolour flying in its full glory. The flag characterises India's existence as a nation and is symbolic of the Indian identity.

A country that has for years restricted the use of the flag out of fear of *potential* disrespect, would certainly not tolerate desecration. There is more to this than just speculation about national behaviour. Moreover, as the Court observed, allowing the use of the flag as an expression of anger would amount to disrespect. In the *Johnson* case, one of the main reasons why the respondent was let off was the failure to apply

the test evolved in *United States v. O'Brien*,[18] whereby an important governmental interest in regulating non-speech can justify incidental limitations on the freedom of speech and expression. Reverting to the Indian scenario, millions of people consider the flag sacred and as such it is the duty of the government to protect it. The Constituent Assembly debates have reflected the same. Philosophical justifications regarding free speech in the United States have been based on serving the value of truth, as an essential for self government and in terms of individual liberty and self fulfillment. There are also negative theories, which focus on special reasons to distrust government in the realm of speech regulation.[19]

India, while granting the right to free speech under Article 19(1)(a) of the Constitution of India, has never lost sight of considerations of public interest and social control, as is illustrated through numerous judicial pronouncements.[20] Liberty of speech and expression guaranteed by Article 19 (1)(a) brings within its ambit the corresponding duty and responsibility and puts limitations on the exercise of that liberty. The State has legitimate interest, therefore, to regulate the freedom of speech and expression.

However, the freedom of speech offered in the United States of America is a concept that would be unacceptable in the Indian context. Free speech, in the United States, is entitled to a preferred position, with the First Amendment making this an absolute right while in India it is by no means total. There must, therefore, be a sort of middle path or compromise that should be reached. This is exactly what the Court rose to do in this case. It appreciated the momentous history of this venerated object and also the need to be fair to patriotic citizens and not prevent them from displaying their patriotism. The Court in the *Johnson* case observed: "*If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.*"[21] However, as mentioned above, the right to free expression in India is qualified, and reasonable restrictions are constitutionally recognised.

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[18] 391 U.S. 367.

[19] See generally Kathleen M Sullivan and Gerald Gunther, "First Amendment Law", (2003).

[20] *C Ravichandran Iyer v. Justice AM Bhattacharjee*, 1995 (5) SCC 457; *Kedar Nath Singh v. State of Bihar*, AIR 1962 SC 129.

[21] 105 L Ed 2d 345 at para 9.

The line has now clearly been drawn: citizens are not denied access to the national flag, but are simultaneously subject to certain restrictions that would ensure that the flag gets the respect it deserves.

Making disrespect punishable shall also lead to more responsible behaviour on the part of probable defaulters. There is a great probability that increased access to the national flag shall lead to a collective increase in national pride and sentiment. The national flag, as a symbol of nationhood, would help build a pan Indian identity.

The decision has also expanded the scope of interpretation of Article 19(1)(a). Even before the *Jindal* case, there has been a constant expansion of the scope of the right to free expression. Constitutional provisions are never static, and need to be reinterpreted and reconsidered in light of changing times. Any citizen who wishes to express his love for his nation should not be disallowed from doing so.

Finally, the most interesting revelation, as is evidenced by the positive response to the judgement and burgeoning sales, is that the Indian nationalist spirit still lives on. In an age where sectarian strife raises its ugly head constantly, and communalism is the order of the day, this is undeniably what India, as a nation, needs.

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# PAYMENT FOR IMPORTING SOFTWARE- NOT ROYALTY

*Jitesh Shahani* *

The ruling by the Income Tax Appellate Tribunal (the ITAT) in the case of *Lucent Technologies Hindustan Ltd. v. ITO*[1] pertaining to taxation of software imports has clarified the position on the subject to a large extent and will be of immense benefit especially to Indian companies who import application software. This has, of late, been the centre of controversy due to the stance adopted by the Indian tax authorities in treating payment for such imports as 'royalty', rendering it liable to tax.[2]

Lucent Technologies Hindustan Ltd. (Lucent-India) manufactures and supplies electronic switching systems to the telecommunication industry. Each switch is configured according to customer specifications, and the software is then integrated with the switch. For this purpose, Lucent-India imports software as well as hardware i.e., the parts and components of the switching system. Lucent-India integrates the software into the hardware and sells the switch.[3]

During the financial years 1998-1999 and 1999-2000, a purchase order valued at USD 1,29,804.56 was placed by Lucent-India with Lucent Technologies Inc., US (Lucent-US) for importing software and hardware, under which certain software was imported from Lucent US and the hardware was imported from Lucent-Taiwan. Lucent-India did not withhold tax at source when it paid Lucent-US for the purchase of software. The Income Tax Officer (the 'ITO') took the view that the payments to Lucent-US constituted payments towards a 'royalty',[4] and that Lucent-India ought to have withheld tax at source.[5] The ITO thus initiated tax recovery proceedings against Lucent-India.[6]

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[1] ITA No. 114 & 115 (Bang)/2002, dated 31st October 2003 (Bangalore Bench).

[2] M Padmakshan, "No Withholding Tax on Software Imports", The Economic Times (Hyderabad), 10th November 2003 at 8.

[3] The customer in most cases is the Department of Telecommunications (DoT).

[4] The tax payable for royalty fee is 20% as per Section 115A of The Income Tax (IT) Act, 1961.

[5] Section 195 of the IT Act, 1961 (on the remittance made outside India).

[6] Lucent-India was treated as an assessee in default under Section 201(1) of the IT Act, 1961.

Lucent-India contended before the ITO that the acquisition of software was inextricably linked to the acquisition of the hardware and neither can function without the other. The entire software is custom-made and use in any other equipment or duplication is not possible. It was asserted that no tax was required to be withheld as the proviso to Section 9(1)(vi)[7] of the IT Act excluded payment for software supplied with a computer or computer based equipment imported under any scheme approved by the Government of India, from the definition of 'royalty'.[8]

It was argued that no profit accrued could be deemed to accrue or arise in India as the transfer of the software took place outside India[9] and that the supplier had no Permanent Establishment in India.[10] Thus, the gains arising from the transfer of software, if any, were not taxable by virtue of the Double Taxation Avoidance Agreement between India and the USA[11] (Indo–US DTAA) and no tax could be deducted from the amounts paid.

The ITO held that the hardware and software were imported separately. The highly sophisticated and complex telecom software that was imported could be regarded as a patent, invention, scientific work, secret formula, or process and accordingly, the payments made for its acquisition were for the use of industrial, commercial or scientific equipment and thus, the same would be 'royalty' as defined in Explanation 2 to Section 9(1)(vi) of the IT Act and also under Article 12(3)(a) of the Indo-US DTAA. In addition, the imports were not made under any of the approved schemes for exemption from the Section. The Assessing Officer relied upon the decision of the Authority for Advance Ruling (AAR) which had held that the payment made by an Indian company for the

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[7] The Proviso to Section 9(1)(vi) reads as follows:-
"Provided further that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum payment made by a person, who is a resident, for the transfer of all or any rights (including the granting of a license) in respect of computer software supplied by a non-resident manufacturer along with a computer or comput
-er-based equipment under any scheme approved under the Policy on Computer Software Export, Software Development and Training, 1986 of the Government of India."

[8] supra n.1, paras 10-11.

[9] Under Article 12(2) of the Indo-US DTAA, 'royalty' is taxable in the State in which it arises and according to the laws of that State.

[10] Article 5 of the Indo-US DTAA.

[11] Under Article 7 of the Indo-US DTAA, it would arise in the US.

import of software is on a totally different footing when compared to the payments made for the purchase of the hardware.[12]

The Commissioner of Income Tax (Appeals) upheld the view taken by the ITO. Lucent-India then filed an appeal before the ITAT.

After considering the rival contentions, the ITAT emphasised the fact that Lucent-India had acquired no rights in the copyright program of the telecom software imported by it. Lucent-India had paid for purchase of the 'copyrighted article' as opposed to 'rights in copyright' contained in the software. Since the assessee had no right to commercially exploit the software, it was only a purchase of product and not a purchase of the copyright. A distinction was drawn between 'payment made for license to use' the software and 'payment made to purchase' the software which gives a license to duplicate.[13] If no rights in copyright transfer with the software, then payments for importing the software do not constitute 'royalty'. Royalty was held to mean "*the payment for the use of or the right to use of the copyright or patent (and other IPR)*", but not "*the payment for patented/ copyrighted articles or for products which cannot be reproduced*".[14]

The ITAT held that since the acquisition of software was inextricably linked to the acquisition of hardware, and one cannot function without the other, the transactions of purchase of hardware and software cannot be bifurcated so as to make the payments towards software subject to Indian taxes. Importing software is customer specific, and it is a clear case of purchase of equipment along with software to make the hardware functional.[15] Further, the ITAT was of the view that the decision of the AAR, raised by the tax authorities, was not applicable to the facts of this case.[16]

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[12] supra n. 1, para 5; See also *In re ABC*, (1999) 238 ITR 296 (AAR), popularly known as the Amex ruling. The rulings of the Gujarat High Court in *CIT v. Ahmedabad Manufacturing and Calico Printing Co.*, ITR 806 and the Calcutta High Court in *N.V. Philips v. CIT*, 172 ITR 521 were also similarly relied upon. The Assessing Officer based his interpretation upon the following premise:
"*Software is an Intellectual property right (IPR) which can be licensed to a user. The same software can be given to any number of users. On an outright sale of an article like hardware, property in its entirety is transferred to the purchaser to the exclusion of others, whereas, in software there is no such outright sale, what is transferred is only the right to use, which may be available to many such users but the IPR still remains intact with Lucent (USA)....*"

[13] *CIT v. Davy Ashmore (I) Ltd.*, 190 ITR 626 (Cal). The distinction was drawn from the ruling in this case.

[14] supra n. 1, para 10.

[15] supra n. 1, paras 10 - 11.

[16] In that case, the payment was made for access to a Central Processing Unit (CPU) that carried on certain processes to the data fed in by the taxpayer. See 238 ITR 296 (AAR).

It was strongly argued before the ITAT that these payments constitute business income of the foreign entity,[17] and would be liable to tax in India only if the foreign entity has a permanent establishment (PE) or business connection in India.[18] Lucent-India, thus, should not be obliged to withhold tax at source at the time of making payments to Lucent-US.

The ITAT considered the US Internal Revenue Service treasury regulations on "Classification of Certain Transactions involving Computer Programs", wherein a transaction involving transfer of a computer program is to be treated as a transfer of a copyrighted article if the buyer does not acquire any right to make copies, distribute or make a derivative program therefrom.[19] Furthermore, as per Article 12 of the Indo-US DTAA, such payments would not constitute a 'royalty' since the payment is not for use of a copyright, patent, etc.[20]

This decision resolved the dispute between tax authorities and the information technology industry in this regard. This is the first judicial decision on this issue and has contributed to the interpretation of law on the subject. It serves as an instrument in the hands of the information technology industry to refute any future claims of a similar nature and will have a positive impact on its development. However, it has to be kept in mind that a clarification by the Central Board of Direct Taxes (CBDT) on the taxability of such imports would serve well to resolve the issue. The Government has set up an Emerging Issues Task Force, which has as one of its focus areas, the taxability of such imported software. Its report, once released, would aid in finally settling the law.[21]

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[17] The decisions of the AP High Court in *CIT v. Klayman Porcelains Ltd.*, 229 ITR 735 and the Madras High Court in *CIT v. Neyvali Lignite Corporation Ltd.*, 243 ITR 459 were also relied upon to stress the fact that if the payment is made for acquiring drawings, designs etc, then the same would not be treated as royalty but taxed as business profits.

[18] The tax payable in such a case would be 10-15% as under Article 12(3)(a)&(b) of the Indo-US DTAA.

[19] supra n. 1, para 7(i).

[20] ibid., para 7(ii).

[21] supra n. 2.

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