NALSAR

STUDENT LAW REVIEW

Vol. 4 2008

student bar council | nalsar university of law

NALSAR
STUDENT LAW REVIEW
vol. 4 2008

This issue shall be cited as 2008 (4) NSLR <page no.>

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Prof. (Dr.) Ranbir Singh
Vice-Chancellor

From the Vice-Chancellor's Desk

It is indeed a matter of pride for me to see the successful launch of the 4th issue of the Nalsar Student Law Review. The release of this issue brings to the fore the continued scholastic evinced by the students of the University. Student law reviews are characteristic to 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 and edited by the students of Nalsar. This edition, like the previous one is a result of the hard work and intellectual inputs of the editorial board which was selected based on a detailed editorial test. I also commend the contributors to the journal whose insightful articles provide a multi-dimensional viewpoint to various aspects of law. I am sure this culture of academic research , inculcated by the Nalsar Student Law Review and taken forward by the mushrooming of journals like the Indian Journal of Constitutional Law and Indian Journal of Intellectual Property Law, would only grow with time.

VICE-CHANCELLOR

10th July, 2008

Foreword

We are living in an age of confusion. Science has exploded old orthodoxies but has not yet found answers to the fundamental questions. Religion has proved itself to be rubbish because instead of encouraging civilized behaviour, it is provoking violence.

Evolution will only lead to the survival of the fittest and not the best. Conscience has proved itself worthless because Gandhi and his assassin stated that they were both according to their consciences. Political economy has shown itself a useless guide since Lincoln's great ideal of 'government of the people, for the people, by the people' has not been achieved, because we do not know how to choose the right people to govern us. Custom would have been a good guide, if we could weed out undesirable customs. This we can do, only by law, whether the law-giver is an autocrat or an elected legislature.

But we must know what are good laws. Everyone who has ideas about it shall express them – be they young or old. The future of the country lies in the hands of its youth and the brilliant students of Nalsar have done good work by providing a journal to enable everyone to articulate his or her views. Such a journal deserves every possible encouragement and I wish it all the success.

- *Vepa P. Sarathi*

Editorial

The law, cast as a profession or as a complex of institutions, has always been notoriously insular. Law academia in all jurisdictions have revelled in intricate formulations of doctrine and nuanced interpretations of precedent that have shown the way forward, inch by inch, for the great stream of law. And yet, in learning the law, we sometimes find ourselves oddly distanced from the society it serves. This year's edition of the *Review* seeks to address this gap with a special section devoted to policy-oriented writing on minority rights and development.

Detecting an ironic insularity in its own functioning, the *Review* has, from this year on, opened submissions to scholars outside Nalsar. We are pleased to find that the number of articles received has doubled from previous years. The Board also organised a popular workshop on legal research and writing. In addition, the journal's archives are now accessible free of charge at the Nalsar web site.

In *Looking Beyond Law: A Review of the Indian Sex Workers' Movement*, Rahul Saha *et al* examine the underpinnings of sex work law in India. While seeking a complete policy overhaul in replacing the old 'rescue and rehabilitation' approach with a new model unobfuscated by moral arguments, they look to collective action as a more potent source of change than reform in the law itself.

In *Fourteen Years and Counting: Redefining Childhood (Perspectives on Child Labour and the Right to Education),* Subhadra Banda *et al* find that, fifty-eight years into the republic, the right to free and compulsory education has yet only obtained the status of a semi-fundamental right. The article argues for vocational training and private sector participation vis-a-vis state-sponsored universal education. Danish Sheikh in *Homosexuality and Homophobia in Indian Popular Culture: Reflections of the Law?,* examines an eclectic set of cultural reference points to find interesting linkages between the Victorian sensibilities of Section 377 and popular perceptions of homosexuality.

Dr. A.P. Singh offers a comprehensive perspective on recent trends towards the privatisation of water supply in *Water Resource Management: The Rights – Regulations Interface*. He argues convincingly that a middle ground must be found between too much and too little state involvement if constitutional imperatives are to be fulfilled.

Aditya Swarup examines emergency powers, martial law and anti-terror legislation in *Sovereignty, Law and the State of Exception: Analysing Giorgio Agamben in the Indian Context*. Swarup employs Agamben's concept of the 'state of exception' to flay the war-like imagery employed by the Indian state to justify arbitrary suspension of human rights.

In *Refugee Rights v. State Security: Social Conditions of Refugees and the Law*, Pavini Emiko Singh argues cogently in favour of sweeping changes in international refugee law; she looks to the according of humanitarian status as a means to bypass the ineffectual sweep of refugee law as it stands today.

Divya Venugopal brings careful empirical research and a broad sweep of theoretical material to bear on the vexed question of why fifth-year students in law school prefer to believe that final year is mostly recreational, in *The Elephant in the Room: Dealing with Final Year Disengagement.*

K. Ashrita Prasad contends that data exclusivity was never intended to be anything more than protection against fraudulent use of data in *Data Exclusivity: Tripping over TRIPS?* As foreign pharma companies lobby for more concessions from the government, she warns against the danger of Indian policy relaxations reaching Trips-Plus levels.

In *Non Applicability of the Doctrine of Res Judicata in Taxation: Scope for Absurdities,* Stella Joseph finds that the time honoured principle of non-applicability of *res judicata* to tax cases has become redundant due to the application of stare decisis. Nirajan Man Singh and P. Sandhya offer insights into the murky depths of hawala transactions in light of applicable law in *Hawala Financing: An Aid to Terrorism.*

In *Narco Analysis and Protecting the Rights of the Accused,* Ananti S Bharadwaj and Sumithra Suresh examine narco analysis from constitutional and statutory perspectives. While they find that it clears both hurdles, they insert a caveat that 'informed consent' is a precondition for ethical deployment of what is evidently a procedure inimical to individual privacy.

Ruchira Goel's analysis of the dilemmas of judicial lawmaking in the area of administrative law conceptualises the enterprise as an impasse between the need to set and follow strong precedents and the paramount objective of ensuring complete and contextualised justice, in *The Terrains of Judicial Arbitrariness: A Comment on Ram Saran v. IG, Police.* Arpan Bannerjee finds reason in the Delhi High Court's view that the media may very well influence gullible jurors, but not dispassionate judges, in *Exploring the Defence's Media Trial Argument in the Parliament Attack Case.* In *CCE v. Acer: Taxation of Software Goes Boink!*, Alok Prasanna comes out fighting against the judgment that exempted the value of software bundled with computers from inclusion in the total value of the computer assessable to excise tax.

Finally, Sandeep Challa surveys Supreme Court dicta to conclude that fundamental rights should be restricted to their classic meaning, that is, rights enforceable against the state, and rights ostensibly enforceable against individuals should be enforced through penal enactments, in *The Enforcement of Fundamental Rights vis-á-vis Private Persons: An Analysis of the Supreme Court's Interpretation.*

Kabir Chandna

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LOOKING BEYOND LAW: A REVIEW OF THE INDIAN SEX WORKERS' MOVEMENT

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INTRODUCTION

"A new spectre seems to be haunting the society. Or maybe those phantom creatures who have been pushed into the shades for ages are taking on human form - and that is why there is so much fear."

-Sex Workers' Manifesto.[1]

In India, sex workers have traditionally been viewed as a menace to society and a class that must be abolished. They are described as a category threatening the social order by endangering public health, sexual morality and civic values.[2] Closely connected with this viewpoint is an understanding that no sex worker chooses her profession voluntarily in order to earn her livelihood, by providing a sexual service; sex workers are victims of coercion and objects of pity.[3]

The discourse outlined above has lead to an understanding that sex workers need to be 'rescued' from their plight and then 'rehabilitated' in order to exist in the mainstream of society. This approach has been incorporated into the Indian law regulating sex work, The Immoral Trafficking (Prevention) Act, 1956 (ITPA). This paper argues that such an approach to improving the conditions of sex workers, dependant on the legal mechanism for its success, is doomed to failure since it fails to engage sex workers themselves as key stakeholders and a morality argument underlies its mandate; what is required instead is an approach that views sex work as a legitimate profession, invites the full participation of sex workers themselves and incorporates within itself their concern to be given the status of full members of society.

In order to meet its aims, this paper is divided into three parts. Part I highlights the failure of the "rescue and rehabilitation" approach by reviewing, in the context of

1. Theme paper of the First National Conference of Sex Workers organized by Durbar Mahila Samanwaya Committee, Calcutta, 14-16th Nov., 1997.
2. Ibid.
3. Ibid.

the ITPA, the Indian experience with this approach. Part II uses the case studies of two sex workers' cooperatives, the Durbar Mahila Samanwaya Committee (DMSC) in Kolkata and Sampada Grameen Mahila Parishad (SANGRAM) in Sangli in order to underline the benefits, advantages and successes of an approach involving the active participation of sex workers in a struggle for their rights. Part III investigates the reasons for the failure of the "rescue and rehabilitation" approach, and the success of the activist approach and concludes that the legal mechanism, being inherently oppressive, is of limited use in a movement until stakeholders in the movement collectively organize themselves in a struggle for their rights.

I. LOOK BACK IN ANGER: THE INDIAN EXPERIENCE WITH "RESCUE AND REHABILITATION"

In this Part we demonstrate that the ITPA outlines a "rescue and rehabilitation" approach and attempt to highlight the failure of this approach by reviewing the functioning of the ITPA.

According to the "rescue and rehabilitation" approach, the social and economic situation of sex workers can be improved by forcibly "rescuing" them from brothels and red light areas, putting them up in "safe homes" and then offering them "respectable" employment.[4] Methods of restricting entry into the profession, such as disallowing the recruitment of consenting individuals for the purpose of prostitution,[5] are obvious corollaries to this approach.[6] The "rescue and rehabilitation" approach makes certain assumptions relating to sex work: One, sex work is "immoral"; two, sex work is inherently "exploitative".[7] Accordingly, the approach entails legal restrictions on sex work, with procedures for rescuing and rehabilitating sex workers.[8] Typically it involves NGOs, "work[ing] with the local police to initiate raids, rescue girls, and arrest brothel keepers in red-light districts",[9] or the State, "forcibly displacing sex workers"[10] and offering them the "opportunity to be housed behind barbed wire in a former children's home to learn handicrafts, including candle-making and embroidery".[11]

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4. Mishra, G. *et al,* "Protecting the Rights of Sex Workers: The Indian Experience", Mishra, G. and Chandramani, R. (eds.), *Sexuality, Gender and Rights* (New Delhi, Sage Publishers, 2005) 89, 95.
5. Section 5 of the ITPA.
6. Mishra, G. *et al,* "Protecting the Rights of Sex Workers: The Indian Experience", Mishra, G. and Chandramani, R. (eds.), *Sexuality, Gender and Rights* (New Delhi, Sage Publishers, 2005), 89, 96.
7. Theme paper of the First National Conference of Sex Workers organized by Durbar Mahila Samanwaya Committee, Calcutta, 14-16th Nov., 1997.
8. Ibid.
9. "Raids, Rescue and Unseen Realities", http\\www.vampnews.org\nov05\raids.html, 3-12- 2007.
10. "India: Eviction of Sex Workers Boosts HIV Risk", http://hrw.org/english/docs/2004/07/06/india9010.htm, 23-11-2007.
11. Ibid.

The ITPA, by defining "prostitution" as "sexual exploitation or abuse of persons for commercial purposes"[12], identifies sex work in terms of the "rescue and rehabilitation" approach. Further, by providing for restrictions on sex work and for rescue and rehabilitation of sex workers, the ITPA clearly integrates this approach into law.[13]

The ITPA restricts sex work in a manner such that sex work *per se* i.e. the act of a sex worker having sexual intercourse with a client, is not illegal, but all other accompanying acts required to carry out sex work are illegal: Keeping of a brothel;[14] procuring, inducing or taking a person for prostitution, with or without that person's consent.[15] The rationale of not prohibiting sex work *per se* but only the accompanying acts, is based on the "rescue and rehabilitation" ideology, wherein the sex worker is identified as the "victim".[16] The ITPA also provides for the rescue and rehabilitation of sex workers by making provisions for forcible "rescue" of sex workers,[17] the setting up of "protective homes" and "corrective institutions" by the State Governments,[18] the keeping of a person in the "care and protection of the Court"[19] and the removal of a prostitute from any place.[20]

The ITPA, which incorporates the "rescue and rehabilitation" approach into law, has been the basis of efforts to improve the conditions of the sex workers in India.[21]. This approach, as the following discussion shall show, has failed to improve the condition of sex workers.

Police Harassment: Sex workers face constant harassment at the hands of Police. The ITPA, by prohibiting all accompanying acts required to carry out sex work, even if not prohibiting sex work *per se*, places sex work *per se* in the grey zone of legality, resulting in the harassment of sex workers by the Police.[22] Typically, this harassment involves the arrest of the sex worker under one charge or another under

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12. Section 2(f) of the ITPA.
13. Kotiswaran, P., "Preparing for Civil Disobedience: The Indian Sex Workers and the Law", http://www.bc.edu/bc_org/avp/law/lwsch/journals/bctwj/21_2/01_FMS.htm, 23-11-2007.
14. Section 3 of the ITPA.
15. Section 5 of the ITPA.
16. Kotiswaran, P., "Preparing for Civil Disobedience: The Indian Sex Workers and the Law", http://www.bc.edu/bc_org/avp/law/lwsch/journals/bctwj/21_2/01_FMS.htm, 23-11-2007.
17. Section 16 of the ITPA.
18. Section 21 of the ITPA.
19. Section 19 of the ITPA.
20. Section 20 of the ITPA.
21. Mishra, G. *et al,* "Protecting the Rights of Sex Workers: The Indian Experience", Mishra, G. and Chandramani, R. (eds.), *Sexuality, Gender and Rights* (New Delhi, Sage Publishers, 2005), 89, 96.
22. Durbar Mahila Samanwaya Committee, *Sex Workers' Right to Self Determination* (1997) in Proceedings of West Bengal State Conference, April 29-30, DMSC, Kolkata.

the ITPA and then being released later in return for money.[23] The Sociologist Jean D'Cunha, in her study on the sex workers in Bombay, found that between 1980 and 1987 as many as 9000 sex workers were arrested, with this number being disproportionately higher than the number of pimps, procurers and brothel keepers arrested.[24] Another study shows this trend to be on the rise: Between 2001 and 2005, 6,043 cases were registered in Karnataka under the ITPA, a vast majority of them were against individual sex workers and not against brothel owners or keepers.[25] Police harassment also routinely extends to physical violence, as a survey conducted among 172 sex workers across 13 districts in Tamil Nadu has shown[26] "nearly 70% of the women had been beaten up with *lathis* and logs of woods and been kicked by booted policemen while some had their hands and legs broken and their sex organs mutilated."[27] Apart from police harassment, sex workers also face harassment at the hands of pimps, brothel owners and local goons.[28]

The ITPA Reinforces Negative Social Attitudes Regarding Sex Work: The ITPA, by branding sex work as "immoral", has further compounded negative social attitudes towards sex workers, as a result of which, sex workers are treated as morally compromised second class citizens, with the basic human rights unavailable to them.[29] Refusal by the Police to register FIR by a sex worker on the ground that they are "*vaishyas* and not 'normal' citizens",[30] refusal by schools to admit children of sex workers,[31] preventing sex workers from residing in any place, [32] are all manifestation of this negative attitude towards sex workers which has resulted in a deprivation of their rights of citizens.

The ITPA Leads to Discrimination Against Sex Workers In Health Care: With the spread of HIV/AIDS, sex workers are commonly viewed as "vectors in the spread of AIDS virus"[33] and as a "risk to public health"[34], with the result that

23. Kotiswaran, P., "Preparing for Civil Disobedience: The Indian Sex Workers and the Law", http://www.bc.edu/bc_org/avp/law/lwsch/journals/bctwj/21_2/01_FMS.htm, 23-11-2007.
24. J.D'Cunha, 'The Legalization of Prostitution: A Sociological Inquiry into the laws relating to prostitution in India and the west' (1991).
25. Kumar, S., "Police Victimize Sex Workers", http://www.deccanherald.com/deccanherald/dec42005/state181342005123.asp, 12 – 11 - 2007.
26. "Fact File", http\\www.vampnews\vol01no3\fact_file.html, 29 – 11 – 2007.
27. Ibid.
28. Kumar, S., "Police Victimize Sex Workers", http://www.deccanherald.com/deccanherald/dec42005/state181342005123.asp, 12 – 11 - 2007.
29. "Turning a Blind Eye", http\\www.vampnews.org/vol01no03/turning.html, 26 – 11 – 2007.
30. "Protect the Rights of Women in Prostitution", http//www.vampnews.org/vol01no01/action.html, 25 – 11-2007.
31. "Turning a Blind Eye", http\\www.vampnews.org/vol01no03/turning.html, 26 – 11 – 2007.
32. Section 20 of the ITPA.
33. "Interview of Meena Shishu", http\\www.youandaids\org\MeenaSeshu\index.asp, 27 – 11 – 2007.
34. http://www.newint.org/issue368/sexworkers.htm, 27 – 11 – 2007.

sex workers face discrimination and exploitation in the area of health care.[35] The National Aids Policy, 1997, which lays down that no individual should be forced to undergo mandatory HIV testing, is clearly ignored in the case of sex workers who are regularly subjected to HIV testing without their consent.[36] Hospitals are also known to refuse to treat and admit sex workers on the ground that they are carriers of AIDS.[37] Sex workers also face the problem of general lack of access to health care.[38]

Financial Insecurity: The earnings of sex workers are commonly appropriated by brothel owners and traffickers, with one survey carried out amongst the sex workers of Calcutta finding that of the average annual turnover of 720 million rupees, as earnings by sex workers, "only a small part goes to sex-workers".[39] Further, with lack of education and information amongst sex workers, access to institutionalized credit is limited,[40] with the result that sex workers are dependent on moneylenders for credit, who charge exorbitant rate of interest that often exceeds 100% per month.[41] Thus, sex workers, having only a part of their earnings at their disposal, are forced to borrow from money lenders at very high rates of interest, with the result that they are caught in indebtedness for most of their working lives.[42]

Rescue of Sex Workers Violates Their Rights: The rescue of sex workers, under the ITPA, are in flagrant violation of the rights of sex workers. Recue attempts by the Police is accompanied with violence and use of physical power, thus depriving the sex workers of their "right to freedom from violence".[43] On rescue, the sex workers are denied information on legal rights they can avail of and are not allowed to meet NGOs or other legal groups, thus violating their "right to seek legal help".[44] These rescue attempts are also carried out in a veil of secrecy, without any information as to the purpose of rescue and the destination of internment, thus violating the "right to information" of sex workers.[45]

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35. Kotiswaran, P., "Preparing for Civil Disobedience: The Indian Sex Workers and the Law", http://www.bc.edu/bc_org/avp/law/lwsch/journals/bctwj/21_2/01_FMS.htm, 23-11-2007.
36. "See Rehabilitation against their will?", http\\www.vampnews.org/vol01no2/against.html, 24 - 11 - 2007.
37. Seshu, M., "Collectivization: Combating Violence against Women in Prostitution", http\\www.vampnews.org/vol 01no02/against.html, 3–12–2007.
38. "Interview of Meena Shishu", http\\www.youandaids\org\MeenaSeshu\index.asp, 27 - 11 - 2007.38 http://www.newint.org/issue368/sexworkers.htm, 27 - 11 - 2007.
39. Gangoli, G., "Prostitution as Livelihood: Work or Crime?",http\\www.anthrobase.com\text\G\Gangoli_G_01.htm, 29 - 11 - 2007.
40. Ibid.
41. Ibid.
42. Mishra, G. *et al,* "Protecting the Rights of Sex Workers: The Indian Experience", Mishra, G. and Chandramani, R. (eds.), *Sexuality, Gender and Rights* (New Delhi, Sage Publishers, 2005), 89, 94.
43. "Reality Bites: Rescue Violates Rights of Women in Prostitution", http\\www.vampnews.org/vol01no02/reality.html, 28 - 11 - 2007.
44. "Reality Bites: Rescue Violates Rights of Women in Prostitution", http\\www.vampnews.org/vol01no02/reality.html, 28 - 11 - 2007.
45. Ibid.

Rehabilitation Attempts Have Failed: Experience clearly shows that the rehabilitation schemes initiated by the Government have backfired. In the rehabilitation homes set up under the ITPA, sex workers undergoing rehabilitation live in "subhuman conditions with severe restrictions on their freedom"[46] and "like convicts with remotest possibility of being rehabilitated"[47]. Besides, while rescue and rehabilitation by the State involves the taking away of the means of employment of sex workers, no attempt is made to provide for alternate means of employment, as there are no efforts to equip sex workers with skills which are marketable.[48] Rather efforts are made to get the inmates "rid of their supposed immorality", for example, by teaching them devotional songs.[49] Sex workers in these homes also encounter physical and sexual abuse,[50] with many of these homes, associated with "rape, corrupt transactions and prostitution"[51] and being perceived as "den of vices" and "second brothels".[52]

The discussion carried out in the part clearly shows that the "rescue and rehabilitation" approach, implemented through the ITPA, has being a failure. It has not bought about any substantive improvement in the lives of sex workers and has, in fact, worsened their condition by placing sex work in the grey area of legality and by reinforcing negative social attitudes about sex work. In the next section we review the Indian experience with one such alternate approach, the activist approach, by carrying out a case study of two sex workers' groups, DMSC and SANGRAM.

II. DMSC and SANGRAM: Looking At The Future With Hope

As against the "rescue and rehabilitation" approach discussed above, there has emerged in recent times an alternate intervention strategy aimed at securing the rights of sex workers. This approach, commonly known as the human rights or activist approach,[53] asserts that if sex workers are to attain the status of full members of society three changes are essential. *Firstly*, it is imperative that sex work be completely decriminalized and sex work be viewed as a legitimate profession.[54]

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46. Kotiswaran, P., "Preparing for Civil Disobedience: The Indian Sex Workers and the Law", http://www.bc.edu/bc_org/avp/law/lwsch/journals/bctwj/21_2/01_FMS.htm, 23-11-2007.
47. Mishra, G. *et al,* "Protecting the Rights of Sex Workers: The Indian Experience", Mishra, G. and Chandramani, R. (eds.), *Sexuality, Gender and Rights* (New Delhi, Sage Publishers, 2005), 89, 102.
48. *Id.*
49. Kotiswaran, P., "Preparing for Civil Disobedience: The Indian Sex Workers and the Law", http://www.bc.edu/bc_org/avp/law/lwsch/journals/bctwj/21_2/01_FMS.htm, 23-11-2007
50. Ibid.
51. "See Rehabilitation against their will?", http\\www.vampnews.org/vol01no2/against.html, 24 - 11 - 2007.
52. Mishra, G. *et al,* "Protecting the Rights of Sex Workers: The Indian Experience", Mishra, G. and Chandramani, R. (eds.), *Sexuality, Gender and Rights* (New Delhi, Sage Publishers, 2005), 89, 102.
53. Ibid. 103.
54. Durbar Mahila Samanwaya Committee, *Sex Workers' Right to Self Determination* (1997) in Proceedings of West Bengal State Conference, April 29-30, DMSC, Kolkata.

Secondly, it is necessary to change social attitudes towards sex work as immoral and inherently exploitative.[55] *Thirdly*, it is necessary that there is solidarity amongst the sex workers, expressed through mutual support, collective bargaining and united action.[56]

This part of the paper reviews the benefits, advantages and successes of the activist approach by reviewing the achievements of two sex workers' groups in India, DMSC and SANGRAM, which have adopted the this approach.

2.1 KOLKATA CALLING: DMSC AND THE ROOTS OF A REVOLUTION

In 1992, the Government of India, through the All India Institute of Hygiene and Public Health, and in collaboration with a number of NGOs undertook an HIV/AIDS intervention program in Sonagachi, the red light district of Kolkata.[57] The program was based on the concept of peer education, which involved the recruitment and involvement of certain sex workers in the project to educate their peers about HIV/AIDS.[58] Although the project has subsequently been an outstanding success,[59] one of the main problems faced by the peer educators in the initial stages of the project was the reluctance of clients to use condoms; if a sex worker insisted on condom usage it was easy for a client to find a sex worker who was willing to service him without one, by paying only a slightly higher price.[60] A search for a solution to this problem led the sex workers to realize that it was necessary to create solidarity and collective strength among sex workers and form an association and insist not only on condom usage but also bring forward a demand for a realization of their basic human rights. Thus, in July 1995, DMSC, which is today a body of sex workers with over 60,000 members, came into being.[61]

The DMSC bases its work on three principles: *Firstly*, DMSC believes that sex work is a legitimate profession and can be a conscious choice of a woman as a means of livelihood.[62] Accordingly, it believes that sex workers should not be denied the

55. Theme paper of the First National Conference of Sex Workers organized by Durbar Mahila Samanwaya Committee, Calcutta, 14-16th Nov., 1997.
56. Mishra, G. *et al,* "Protecting the Rights of Sex Workers: The Indian Experience", Mishra, G. and Chandramani, R. (eds.), *Sexuality, Gender and Rights* (New Delhi, Sage Publishers, 2005), 89, 103.
57. "The Communication Initiative", http://www.comminit.com/experiences/pds12004/experiences-466.html, 26 - 11 - 2007.
58. "Indian Sex Workers Case Study", http://www.eldis.org/gender/dossiers/Indiasexworkers.htm, 25 - 11 - 2007.
59. Nag, M., "Sex Workers in Sonagachi", Economic and Political Weekly, Dec. 3rd, 2005, http://www.epw.org.in/showArticles.php?root=2005&leaf=12&filename=9417&filetype=html, 24 - 11 - 2007.
60. Ibid.
61. Ibid.
62. Durbar Mahila Samanwaya Committee, *Sex Workers' Right to Self Determination* (1997) in Proceedings of West Bengal State Conference, April 29-30, DMSC, Kolkata.

rights and benefits accorded to persons in other professions.[63] *Secondly,* DMSC demands the complete decriminalization of sex work, specifically; it demands the repeal of the ITPA, which it sees as an instrument of torture and exploitation at the hands of the State.[64] *Thirdly*, DMSC believes that in order to bring about a substantive improvement in the lives of a marginalized community, such as sex workers, it is necessary to challenge the dominant ideologies underlying the structures of oppression.[65]

Some of these achievements may be discussed in order to illustrate the extent of success enjoyed by this alternative intervention strategy.

HIV/AIDS Program: The HIV/AIDS awareness and prevention program, which gave rise to DMSC, still forms a core area of the activities carried on by the organization. The fact that the program has been an astounding success is borne out by the following facts and statistics: In 1992, the year in which the program commenced, the rate of condom usage amongst sex workers was as low as 4 per cent,[66] by 2001 the figure had risen to between 65 percent and 80 per cent.[67] HIV prevalence among sex workers in Sonagachi is between 8 to 10 per cent compared to over 60 per cent in Mumbai's Kamathipura red light area.[68] The Sonagachi project was hailed by the National AIDS Control Organization (NACO) as the most successful HIV/AIDS intervention project among sex workers in India.[69] It has also been given the status of a "model project" and "best practice" for HIV/AIDS intervention by the World Health Organization.[70]

Another initiative of the DMSC that has helped in bringing about an increase in the rate of condom usage is the social marketing of condoms. This process involves the selling of condoms by trained sex workers to other sex workers at a lower, subsidized rate.[71]

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63. Ibid.
64. Ibid.
65. Mishra, G. *et al,* "Protecting the Rights of Sex Workers: The Indian Experience", Mishra, G. and Chandramani, R. (eds.), *Sexuality, Gender and Rights* (New Delhi, Sage Publishers, 2005), 89, 104.
66. Mishra, G. *et al,* "Protecting the Rights of Sex Workers: The Indian Experience", Mishra, G. and Chandramani, R. (eds.), *Sexuality, Gender and Rights* (New Delhi, Sage Publishers, 2005), 89, 104.
67. "The Communication Initiative", http://www.comminit.com/experiences/pds12004/experiences-466.html, 26 – 11 – 2007. This estimate puts the 2001 rate of condom usage at 65 percent. However, also *See* Society for Human Development and Social Action, *Report of the Fourth Follow-up Survey 2002* which estimates the 2001 condom usage rate at 80 percent.
68. Jenkins, C., Female Sex Workers: HIV Prevention Projects: UNAIDS Case Study, UNAIDS/00.45E, 70.
69. NACO, "Status and Trend of HIV/AIDS Epidemic in India up to 1999", http://www.naco/trend.htm, 27 – 11 - 2007.
70. "The Communication Initiative", http://www.comminit.com/experiences/pds12004/experiences-466.html, 26 – 11 – 2007.
71. Nag, M., "Preventing AIDS Among Sex Workers", 4th October, 2003, Economic and Political Weekly, 67.

The Usha Multipurpose Cooperative Society: Perhaps the most important step taken by DMSC towards the empowerment and independence of women in sex work is the formation of the Usha Multipurpose Cooperative Society, (UMCSL) a credit cooperative society that has helped sex workers gain financial security and freed them from the high interest rates charged by moneylenders. The UMCSL has a membership of over 6,000 sex workers, making it the largest co-operative society of sex workers in the world.[72] With a minimum deposit of only 5 rupees,[73] by the start of 2004 its working capital had reached 25 million rupees ($550,000) and its annual turnover 52 million rupees ($1.2 million).[74] The total amount of loan issued for the year 2004 was 1.2 crore rupees.[75]

Self-Regulatory Boards: In order to abolish the forced entry of women into prostitution and to stop child prostitution the DMSC has formed a number of self-regulatory boards, whose members include representatives from the National Human Rights Commission, the National Commission for Women and the Indian Bar Association.[76] These boards function as the anti-trafficking wing of the DMSC and try to ensure that all rules and regulations of the sex trade are followed.

The Hosting of National Sex Workers' Conferences: Apart from the initiatives discussed above there have been a number of other achievements of the DMSC. One of the milestones for the DMSC was the organization of three national conferences of sex workers between 1997-2001. These three-day conferences have been seen as major success with over 5000 sex workers attending each conference from all around India and the subcontinent.[77] Representatives from the West Bengal Government, Government of India, WHO, UNAIDS, some trade unions and NGOs as well as some distinguished writers and other intellectuals have participated in various panel sessions of the conferences.[78] These conferences have helped emphasize the demands of the sex workers, had an impact on the public psyche regarding prostitution and helped bring about political support for the movement.

2.2. CHANGING SANGLI: THE EXPERIENCE OF SANGRAM

SANGRAM is another group that has followed the human rights approach to sex work with great success. The group was founded in 1992 and has subsequently

72. http://www.newint.org/issue368/sexworkers.htm, 27 - 11 - 2007.
73. Ibid..
74. Ibid.
75. Nag, M., "Sex Workers in Sonagachi", Economic and Political Weekly, Dec. 3rd, 2005, http://www.epw.org.in/showArticles.php?root=2005&leaf=12&filename=9417&filetype=html, 24 - 11 - 2007.
76. Mishra, G. *et al,* "Protecting the Rights of Sex Workers: The Indian Experience", Mishra, G. and Chandramani, R. (eds.), *Sexuality, Gender and Rights* (New Delhi, Sage Publishers, 2005), 89, 105.
77. "Indian Sex Workers Case Study", http://www.eldis.org/gender/dossiers/Indiasexworkers.htm, 25 - 11 - 2007.
78. Nag, M., "Sex Workers in Sonagachi", Economic and Political Weekly, Dec. 3rd, 2005, http://www.epw.org.in/showArticles.php?root=2005&leaf=12&filename=9417&filetype=html, 24 - 11 - 2007.

formed two large collectives of women each consisting of 2000 to 3000 members.[79] Like DMSC, SANGRAM believes that sex work is a legitimate profession which should be decriminalized and that improving the lives of sex workers requires collective empowerment.[80] The concept of sex promoted by SANGRAM is one of 'responsible sex' rather than 'safe sex'. This concept bases itself on the assertion that one should be responsible for one's actions.[81] 'Responsible sex' is not a concept based on morality, but merely a broader concept than safe sex, encompassing more humane dimensions of sexual intercourse.

Based on the philosophy outlined above, SANGRAM embarked on a peer-based condom intervention with sex workers in Sangli, a sugarcane-rich district with the highest incidence of HIV in Maharashtra.[82]

In 1996, the peer education program resulted in the formation of the first of two sex workers collectives in Maharashtra the Veshya AIDS Muqabla Parishad or VAMP.[83] Some of the significant achievements of VAMP and SANGRAM are discussed below.

The Peer Education Program: The condom distribution and peer education program is built on two underlying philosophies. *Firstly*, VAMP believes that health policies and systems are accountable to people. *Secondly*, all individual sex workers, truckers, widows and those affected by HIV can be empowered to demand accountability from the system.[84] The peer education and condom distribution program is managed by VAMP and the outreach program focuses on convincing truckers, migrant workers and auto-rickshaw drivers to engage in 'responsible sex' and treat HIV.[85] The program also includes a campaign to provide access to treatment, including Anti Retroviral Therapy.[86] Today, more than 10 years later, 120 sex workers distribute 350,000 condoms to 5,000 women in sex work in six districts in two states. It has become one of the largest peer education condom interventions in India.[87]

Providing Education to Sex Workers' Children: In the face of discrimination and harassment from their teachers and peers, many sex workers' children drop out of school. In order to minimize the adverse effects of this

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79. Mishra, G. *et al,* "Protecting the Rights of Sex Workers: The Indian Experience", Mishra, G. and Chandramani, R. (eds.), *Sexuality, Gender and Rights* (New Delhi, Sage Publishers, 2005), 89, 106.
80. Ibid.
81. Ibid.
82. Ibid.
83. Ibid..
84. "Description of SANGRAM", http://www.genderhealth.org/pubs/SANGRAMdesc.pdf., 6 - 12 - 2007.
85. Ibid.
86. Ibid.
87. Kabra, H., "HIV and the Hive of Security", http://www.outlookindia.com/ad.asp?fodna/=12 0040719&fna/ =lMaking&sidequall.htm, 16 - 12 - 2007.

phenomenon, VAMP has started providing supplementary classes to the children of sex workers in the evenings, with older boys of the community taking classes for the younger children.[88]

The District Level Program: In 1997 SANGRAM started an HIV/AIDS intervention program amongst the rural populace at the district level. Today, the project is spread over 713 villages of Sangli district, over eight *tehsils*. There are nine centers in the *tehsils*, run by trained Social Workers. There are 59 primary health centers in the district and ten rural hospitals. 53 women organizers are placed at the Public Health Clinics and 10 workers are placed at the rural hospitals.[89] The district has one civil hospital at Sangli with a counselor placed at the hospital.[90]

The VAMP experience has clearly helped improve the conditions of existence of sex workers in the Sangli District. It has helped build a common identity and this has resulted in VAMP members placing their own demands on a national and local level. There exist also a number of incidental benefits from SANGRAM's efforts: sex workers have developed broader, self-identities as activists and members of VAMP.[91] This in turn has led to a challenging of power structures within the sex workers' community itself in the form of challenges to the abusive authority of the madams and pimps by ordinary sex workers.[92]

III. CONCLUSION

An assessment of the reasons for the failure of the "rescue and rehabilitation" approach and the success of the human rights or activist approach, reveals the following requirements for any successful attempt to improve the condition of sex workers - Firstly, there is a need to understand the ground realities of sex work, without any obfuscation by moral arguments. For example, one of the major reasons for the failure of the "rescue and rehabilitation" approach has been its inability to recognize the fact that sex workers want improvement in their condition, while *remaining as* sex workers.[93] Secondly, for *substantive* realization of rights there is a need for collective organization amongst sex workers. Law is a product of the power structure in the society,[94] and hence, for the substantive realization of rights by the powerless, the power structure itself must be challenged rather than merely the law.

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88. Ibid.
89. "The Communication Initiative- Experiences- SANGRAM", http://www.comminit.com/experiences/pds92004/experiences-2059.html., 12 - 12 - 2007).
90. "Description of SANGRAM", http://www.genderhealth.org/pubs/SANGRAMdesc.pdf., 6 - 12 - 2007.
91. Mishra, G. *et al,* "Protecting the Rights of Sex Workers: The Indian Experience", Mishra, G. and Chandramani, R. (eds.), *Sexuality, Gender and Rights* (New Delhi, Sage Publishers, 2005), 89, 107.
92. Ibid.
93. Theme paper of the First National Conference of Sex Workers organized by Durbar Mahila Samanwaya Committee, Calcutta, 14-16th Nov., 1997.
94. Kapur, R., and Cossman, B., *Subversive Sites:Feminist Engagement with Law in India,*(New Delhi: Sage Publishers, 1996), 27-31. The authors present the view that law is a product of the power structure in the society and hence, in a patriarchal society, law is an instrument of patriarchal oppression.

The "rescue and rehabilitation" approach, failed to look beyond law at the underlying power structures, and hence failed to *substantively* improve the condition of sex workers.

The activist approach on the other hand has focused on the human rights of sex workers and the collective action required to ensure the realization of these rights. This approach has concentrated on bringing about a substantive improvement in the lives of sex workers by giving them better access to health care, financial credit and education. Most importantly, it has helped foster a sense of collective identity that is necessary to provide the sex workers with the courage, and resources, required to challenge the existing moral and legal system.

The successes of the activist approach serves as a model for all marginalized communities struggling for their rights- in order to be given the status of full members of society and bring about an improvement in the groups condition it is unwise to depend solely on the legal mechanism, what is required is collective action on part of the marginalized community, aimed at challenging the social structure that oppresses them. Only through such an approach can empowerment of the community be ensured.

FOURTEEN YEARS AND COUNTING: REDEFINING CHILDHOOD

(PERSPECTIVES ON CHILD LABOUR AND THE RIGHT TO EDUCATION)

Subhadra Banda
Varshini Murali and
Vidya Narayanaswamy[1]

While poverty is the main cause of child labour, the role of the dismal public education system in aggravating the situation cannot be undermined.[1] In fact, deficiencies in the public education system cause children to drop out early and join the labour force.[2] The importance of the public education system needs to be stressed because it represents the only access the poor have to education.[3] It is clear that a cause and effect relationship between poverty and low schooling levels exists if one looks at the school participation of poorer sections of the population.[4] One of the main reasons for the high prevalence of child labour in these areas is the burden of debt, which forces families to send their children to work and low literacy rates among these families further compounds the problem.[5]

This paper discusses the imposition of an age bar which excludes the age groups of 0-6 and 14 -18 years from the guarantee of right to education provided by the Constitution under Article 21-A which was introduced by the Constitution (Eighty-sixth) Amendment Act, 2002. Often, rescued child labourers are of the twilight age of 12- 15, as a result of which they are excluded from the purview of the public education system, leading to the creation of another generation of educationally and economically deprived individuals, which further perpetuates the necessity for the existence of child labour. The authors argue that in order to effectively tackle child labour, the age-restrictive approach towards education must be replaced by one which is more inclusive, thereby enabling effective rehabilitation and empowering the victims of child labour. The article discusses the constitutional as well as judicial articulation of the right to education, the role of economic capacity of the state in determining the school leaving age and explores possible solutions

1. Shanta Sinha. *Emphasising Universal Principles towards Deepening of Democracy Actualising Children's Right to Education.* (June 18 2005- EPW Special Article).
2. *Id.*
3. *Id.*
4. Gerard Oonk, *Elementary education in India*, India Committee in the Netherlands. 10 (1998)..
5. *Too busy working to go to school available at* http://www.unicef.org/india/child_protection_230.htm (last visited 1st Dec. 2006).

that achieve the above-mentioned goal.

The scope of this article shall not, however, extend to issues of quality of education and the implementation of anti child labour legislation.

RIGHT TO EDUCATION – THE LEGAL FRAMEWORK

Despite the existence of the Directive Principle of State Policy that refers to free and compulsory education, its implementation, much like the other policy guidelines in Part IV of the Constitution, has been poor. Article 45 provided for a time frame of 10 years for the effective implementation of these goals. These goals were further reiterated in Article 51 as a fundamental duty. However, fifty eight years later it remains unimplemented. An examination of the Constituent Assembly Debates regarding Article 45 reveals that fourteen was set as the upper age limit for compulsory education in order to bring it in agreement with the minimum age for employment as laid down in Article 24.[6] However, the minimum age of employment met with criticism on the ground that children are weak and unfit for employment at this age, and that this age was higher in other countries.[7]

The Supreme Court first read the right to education into Article 21 of the Constitution in *Mohini Jain v. Union of India*[8]. It was, however, limited to the age of 14 years in *JP Unnikrishnan v. State of Andhra Pradesh*[9] where it was also held that the right to education under Article 21 drew its content from Article 45 of the Constitution.[10]

It was in the light of the Unnikrishnan judgment that the Constitution (Eighty-sixth) Amendment Act, 2002, introduced Article 21-A, which mandated the State to provide free and compulsory education to children between the ages of 6 and 14.[11] The reason for the incorporation of Article 21-A into Part III of the Constitution was to make explicit what is implicit in Article 21.[12]

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6. CONSTITUENT ASSEMBLY DEBATES OFFICIAL REPORT (Ambedkar) 540 (4th rep. 2003).
7. CONSTITUENT ASSEMBLY DEBATES OFFICIAL REPORT (Shibban Lal Saksena) 814 (4th rep. 2003).
8. Mohini Jain v. Union of India, (1992) 3 SCC 666, (¶ 12) - *"The right to education flows directly from right to life. The right to life under Art. 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to provide educational facilities at all levels to its citizens."*
9. Unnikrishnan v. State of Andhra Pradesh, (1993) 1 SCC 645, (¶145) - *"Right to education, understood in the context of Articles 45 and 41, means : (a) every child/ citizen of this country has a right to free education until he completes the age of fourteen years, and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development."*
10. Unnikrishnan v. State of Andhra Pradesh, (1993) 1 SCC 645, ¶150.
11. Constitution Eighty-sixth Amendment Act, 2002, *Statement of Object and Reasons, available at* indiacode.nic.in/coiweb/fullact1.asp?tfnm=86. ,
12. REPORT OF THE 165TH LAW COMMISSION OF INDIA, 81(1997), *"The question is debatable whether it is at all necessary to amend the Constitution when there is an explicit recognition of the implicit right to education till the age fourteen years by the Supreme Court in Unnikrishnan."*

It is often argued that the right enshrined under Article 21-A is subject to availability of economic resources. The enforceability of a socio-economic rights means that the State must recognize and take steps by adopting legislative measures for the full realization of such rights to the maximum of the available resources of the State.[13]

In the celebrated opinion of YACOOB J in *Government of South Africa v. Grootboom*[14] which dealt with the enforceability of socio economic rights, it was emphasized that the duty of the state to act in furtherance of a positive obligation is specifically subject to the availability of resources.[15] However, the House of Lords has, on several occasions, has taken cognizance of the fact that once an authority determines a group of persons towards whom it owes a statutory duty, the excuse of economic incapacity would not be available to it[16]. Thus it is submitted that the right to education under Article 21-A is not subject to economic capacity of the State.[17]

It is also relevant to note that, positive rights, such as the one enshrined in Article 21-A, are enforceable.[18] Legislative guidelines are necessary in order to detail the exact manner of achieving this lofty goal. One such attempt is the Right to Education Bill which makes it the responsibility of the State to ensure that children working in violation of the Child Labour (Prevention and Regulation) Act be withdrawn from labour and be re- instated in schools.[19] It also calls for states to be proactive and ensure the removal of any impediment preventing a student from accessing education.[20] The UPA Government directed that the Bill be used as a model Bill leaving it to the discretion of the states whether they wish to adopt it. Only nineteen states and two union territories have laws that enforce the right to education. However, these laws place the onus of providing education on the parents, which is

13. 1 REPORT OF THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION 69 (2002).
14. 2001 (1) SA 36.
15. *Id*, ¶ 46 - *"The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the state than is achievable within its available resources."* Per Yacoob J.
16. R v. Sefton Metropolitan Borough Council, ex parte Help the Aged, [1997] 4 All E.R. 532, R. v Wigan MBC Ex p. Tammadge, (1997-98) 1 C.C.L. Rep. 581 (QBD), R. (on the application of Hughes) v Liverpool City Council, [2005] EWHC 428.
17. Unnikrishnan v. State of Andhra Pradesh, (1993) 1 SCC 645,¶ 145, *"Right to education, understood in the context of Articles 45 and 41, means : (a) every child/ citizen of this country has a right to free education until he completes the age of fourteen years, and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development."*
18. Jeanne M. Woods. *Justiciable Social Rights as A Critique of the Liberal Paradigm.* 38 TEX. INT'L L.J. 763 (; Helen Hershkoff. *Foreword: Positive Rights and the Evolution of State Constitutions.* 33 Rutgers L.J. 799.
19. Jayati Ghosh. *Stolen Childhood.* Frontline. November 17, 2006 available at http://www.frontlineonnet.com/fl2322/stories/20061117005300400.htm (last visited Mar. 7,2008).
20. National Advisory Council, *The Right to Education and Challenges Beyond available* at ,nac.nic.in./concept%20papers/educationfeb18.pdf, (last visited Mar. 7,2008)

contrary to the spirit of the 86th Amendment, which makes it the responsibility of the state to ensure the same.[21] The lack of a legal framework to ensure these rights is destructive to the very nature of a fundamental right provided under Article 21A of the Constitution.[22]

In order to understand the constitutional framework in its entirety, it is necessary to carry out a comparative analysis of the Directive Principle embodied Article 45 and the 86th amendment. The former merely places an upper limit of 14 years with respect to availing the right to education. This implies that the State should also undertake the responsibility of preschool education for all children.[23] However the amendment is more exclusionary in its approach and introduces an age bracket of 6 -14 years in identifying the beneficiaries of this right. Ironically, the Statement of Objects and Reasons of the 86th Amendment further illustrates this disparity between the Directive Principle and Fundamental Right.[24]

Such numerical demarcations are created to absolve the government of responsibility towards a section of children whose numbers are reckoned in crores; and were earlier a section that was identified by the constitution makers as deserving of the right.[25] The constitutional amendment does not take cognizance of the fact that the period from zero to six years is crucial. One could also argue that it is during this time that the child's mental faculties are at an important stage of development during that time, and thus the inclusion of this age group becomes crucial.[26]

With specific regard to reinstating child labourers into the schooling system, it is relevant to bear in mind that such children may have dropped out of school for a good number of years, enough to make them feel alien in a regular school environment. Hence, it is important that these children, instead of being introduced

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21. *Ibid.*
22. National Advisory Council, *The Right to Education and Challenges Beyond available* at ,nac.nic.in./concept%20papers/educationfeb18.pdf, (last visited Mar. 7,2008).
23. M.V.Foundation, *Implementation of the Right to Education Some Considerations, available at* www.**mv**findia.in/campaigns/Children's%20Right%20to%20Education/Article_on_Right_to_Education (last visited Mar. 7,2008)
24. Constitution Eighty-sixth Amendment Act, 2002, *Statement of Object and Reasons* - The Supreme Court in its judgment in Unni Krishnan J.P. vs. State of Andhra Pradesh, A. I. R, 1993 SC 2178, has held that children of this country have a fundamental right to free education until they complete the age of *fourteen years.* The Common Minimum Programme of the United Front Government resolves to make right to free and compulsory elementary education a fundamental right and to enforce it through suitable statutory measures. The Committee of Education Ministers which was set up to examine the implications of the aforesaid resolution have recommended that the Constitution be amended to make the Right to Free and Compulsory Education from *six to fourteen years* of age as a fundamental right and to make a fundamental duty of parents to provide opportunities for education to their children of this age group.
25. *Id.*
26. Vijayashri Sripati and Arun K. Thiruvengadam, *Constitutional Amendment Making the Right to Education a Fundamental Right,* 2 INT'L J. CONST. L. 148 , 148 (2004)

into regular schools directly, are sensitized to the schooling system through bridge courses provided at National Child Labour Project (NCLP) schools and other such special schools. While children below the age of nine are directly introduced to regular schools, it is mandatory for the older children to undergo the bridge course before they are ready to return to the regular schools. It has been noticed that schools are ill equipped to deal with children who are 9+ and have never been to school.[27] The child is therefore at risk of dropping out and re-joining the labour force. Children who are 12+ and willing to join Residential Bridge Courses are discouraged from doing so on account of the fact that they are "too old to be in school".[28] It has been documented that "above a certain threshold in respect of hours of work, which varies according to age and type of activity, a child's learning capacity can be impaired".[29] American researchers have documented data that establishes that the academic performance of young persons between twelve and seventeen years old is adversely affected if they work even fifteen hours a week.[30]

This delimitation of the upper age limit to avail the right to education has been an issue that has evoked much debate, leading to the constitution of a committee by the National Commission for Child Rights (NCPCR) to re-examine the limit.[31]

The Chairman of the Commission has expressed the view that there is a need for a universal definition of a child, which will apply across the board for purposes such as conferment of right to education, prevention of child labour, etc.

ARTICULATION OF THE RIGHT TO EDUCATION IN INTERNATIONAL LAW

In order to better understand the right to education, it is necessary to situate this discourse within the international framework of child rights. Article 1 of the Child Rights Convention defines a child as "every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier"[32] The ICESCR[33] while failing to prescribe an age limit, states that primary education

27. Shantha Sinha, *Getting Children Into School :Flexibility is the key available at* http; //www.mvfindia.in/documents/articles/GETTING%20CHILDREN%20INTO%20SCHOOL.pdf (last visited Mar. 7,2008).
28. *Id.*
29. Katherine Cox, *The Inevitability of Nimble Fingers? Law, Development, and Child Labor,* 32 VAND. J. TRANSNAT'L L. 115 (1999).
30. International Labour Conference, *Combating the Most Intolerable Forms of Child Labour: A Global Challenge 5, ILO (Amsterdam Child Labour Conference) (1997)* available at http://www.ilo.org/public/english/comp/child/standards/resolution/amsterdam.htm (last visited Mar 7 2007)
31. Sonia Sarkar, *Panel to decide upper age limit of childhood,* THE TIMES OF INDIA, 14 Jan 2008, *available at* http://timesofindia.indiatimes.com/India/Panel_to_decide_upper_age_limit_of_childhood/articleshow/2697661.cms (last visited Mar. 7, 2008)
32. Convention on the Rights of the Child, 20 Nov. 1989, Art. 1 1577 U.N.T.S. 3

should be compulsory for all. It also states that secondary education should be made available and accessible to all in a progressive manner. Looking at regional instruments, the African Charter on the Rights and Welfare defines a child to mean every human being below the age of 18 years.[34] The Charter mandates that the right to education should be made free and compulsory with respect to basic education and provides for the progressive realization of right to free secondary education.[35] However, the ILO permits flexibility in upper age limit with respect to right to education, allowing countries which are not educationally and economically developed to set the minimum age at fourteen.[36] Several of these international instruments demarcate obligations of states by segregating primary from secondary

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33. Convention on the Rights of the Child, 20 Nov. 1989, Art. 13 1577 U.N.T.S. 3,- General comment on its implementation
    1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
    2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
        (a) Primary education shall be compulsory and available free to all;
        (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
        (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
        (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
        (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
34. African [Banjul] Charter on Human and Peoples' Rights, October 21, 1986, Art. 2, 21 I.L.M. 58, Definition of a Child – "*For tile purposes of this Charter. a child means every human being below the age of 18 years.*"
35. African [Banjul] Charter on Human and Peoples' Rights, October 21, 1986, Art. 3, 21 I.L.M. 58, - States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:
    (a) provide free and compulsory basic education:
    (b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;
    (c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means;
    (d) take measures to encourage regular attendance at schools and the reduction of drop-out rates;
    (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.
36. International Labour Organization (ILO), *Minimum Age Convention, C138*, 26 June 1973. C138, Art. 4. – *"Notwithstanding the provisions of paragraph 3 of this Article, a Member whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years."*

education. According to a standard laid down by UNESCO, the former usually begins at ages five, six or seven and lasts for four to six years (the mode of the OECD countries being six years).[37] Thus it is evident that the age bar of 14 is not a demarcation between secondary and primary education. The debates of the Constituent assembly reveal that such demarcation was rejected and thought to be "inappropriate"[38]. The inconsistency manifests itself on two levels – 1) conflicting age limits in international instruments and 2) conflict between age limits in domestic legislations and international instruments. Such inconsistencies act as an impediment in the implementation of anti-child labour legislations and education benefits.

Several countries have set their age limit for access to 'free education' to eighteen. For instance, in Flanders, the constitutional principle of access to free education, applies only till the age of eighteen, which happens to be the age of end of compulsory education. In Ireland, compulsory education applies till the age of sixteen, and 'free further education' is funded until the age of twenty one, if he/she wishes to continue studying during that period. In Netherlands, the end of compulsory full time schooling is set to sixteen, even after which, support is lent in the form of an 'education contribution' for all those who wish to pursue their education.[39] The South African Constitution grants every person the right to basic education. The South African Schools Act, 1996 provides for compulsory education, for all children between the ages seven and fifteen, the school leaving age being fifteen. South Africa maintains its minimum age of employment at fifteen. However, the provisions under the Basic Conditions of Employment Act, 1996 strengthen the prohibition of child labour, and protect children in employment between fifteen and eighteen years of age.[40] Israel recently increased its 'school leaving age' from sixteen to eighteen.[41] An overview of various such nations and states, many of which have lately made changes to their age of compulsory education, increasing it to either seventeen or eighteen, only goes to show the growing importance of a higher secondary education.

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37. International Standard Classification of Education, November 1997, *avaiable at* http://www.unesco.org/education/information/nfsunesco/doc/isced_1997.htm-*"The core at this level consists of education provided for children, the customary or legal age of entrance being not younger than five years or older than seven years. This level covers in principle six years of full-time schooling."*
38. CONSTITUENT ASSEMBLY DEBATES OFFICIAL REPORT (Ambedkar) 540 (4th rep. 2003).
39. IDES NICAISE, THE RIGHT TO LEARN – EDUCATIONAL STRATEGIES FOR THE SOCIALLY EXCLUDED YOUTH IN EUROPE 84 (2000).
40. *At What Age..are school-children employed, married and taken to court?*, *available at* http://www.right-to-education.org/content/age/south_africa.html (last visited March 7, 2008).
41. Or Kashti and Shahar Ilan, *Knesset raises school dropout age to 18*, HAARETZ, July 19, 2007, *available at* http://www.haaretz.com/hasen/spages/883341.html (last visited March 4, 2008).

CONCLUSION

Although India's public expenditure has witnessed a steady rise, and its official literacy rate has increased to 65.38%, till date, only 4.11 % of its GDP is spent on education. Right to education is a means to an end- an end to the cyclic deprivation of generations denying them means to realise their fullest potential. It is necessary to understand that there is no substitute to the implementation of this right.

It is submitted that the 86th amendment is exclusionary in its language as it is indifferent to the constitutional intent and purpose it was conceptualised to achieve. Children, rescued from the rut of child labour, cannot be made victims of such deprivation, and be excluded from 'free education' due to no fault of theirs. To compensate the victims of child labour for their loss, one needs to adopt a holistic, individualistic approach. It is conceded that the economic capacity of the State plays an important role with respect to providing educational benefits for those falling in the age group of 14-18.[42] However, each child labourer needs to be examined individually, in order to adequately compensate the child with enough and more educational opportunities ensuring that he is not forced to return to the work force where he will only face further exploitation. In sum, it is a bill of exclusion rather than inclusion, a complete denial of rights. [43] The Directive Principle embodied in Article 41 of the Constitution makes it the duty of the state, within the limits of its economic capacity and development, to make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. A recent amendment sought to be introduced envisages that the right to education should be available to *all* citizens, although the duty of the state is still subject to its economic capacity and development.[44] Fifty eight years after the Constitution has come into force, a Directive Principle essential for the realization of the constitutional goal of the elimination of child labour has attained semi - fundamental right status. An accelerated process, defying such precedent of legislative lethargy, is necessary to realize this fundamental right in its entirety.

In light of our economic set up, and incapability to grant every child a 'free education' till the age of eighteen, lifting the maximum age limit will pose to be a problem.

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42. Unnikrishnan v. State of Andhra Pradesh, (1993) 1 SCC 645, (¶145) - *"Right to education, understood in the context of Articles 45 and 41, means : (a) every child/ citizen of this country has a right to free education until he completes the age of fourteen years, and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development."*
43. Jayati Ghosh. *Education Bill – A Critique.* THE HINDU, August 17, 2006, *available at* http://www.frontlineonnet.com/fl2322/stories/20061117005300400.htm (last visited February 24,2008).
44. *The Constitution (Amendment) Bill, 2007, available at* http://164.100.24.208/ls/Bills/16_2007.pdf (last visited Mar 7, 2008)

However, education upto Standard Eight or Nine is simply inadequate to fight this vicious circle of poverty and deprivation, and to discourage them from re-entering the workforce. Also, non-access to secondary education prevents these children from realising their full potential. What could be done, perhaps, is to expand the curriculum of these NCLP schools to include vocational and technical training, thereby providing even those children falling outside the upper age limit of fourteen with an opportunity to learn. Private participation in the arena of education and rehabilitation is necessary to tackle the issue of child labour. In a developing nation such as ours, where the resources of the State are limited, private participation will supplement the State's efforts in this direction.

Dependency on child labour recycles poverty and hopelessness by turning today's generation of child labourers into tomorrow's sick, unemployed, uneducated and unproductive adults. Empowerment by education lies at heart of a movement-the eradication of systemic, institutionalised deprivation that manifests itself in child labour.

WATER RESOURCE MANAGEMENT: THE RIGHTS -REGULATION INTERFACE

*Dr. A.P. Singh**

1. Introduction

I would like to highlight three points by way of introduction before moving on to my understanding of Water Resource Management from legal perspective. One, national, regional and seasonal water scarcity in developing countries has been posing and shall continue to pose severe challenges for national governments and the international community. These challenges of growing water scarcity are exacerbated by the increasing costs of water; wasteful use of already developed water supplies; degradation of soil in irrigated areas; depletion of groundwater; water pollution and degradation of water-related ecosystems; subsidies and the distorted incentives that govern water use; inequitable water access by women, the poor, and disadvantaged groups; and threats of transboundary conflicts at national and international levels.

Secondly, is should also be taken note of with a pinch of salt that any kind of a water resource management, regulation or exploitation through legislation and effective administration with focus on water conservation, recycle/reuse, restrictions to ensure equitability in water availability and pragmatic land use; regulation by education, i.e., by creating awareness amongst the people to enable their participation and traditional knowledge in sustainable water resource management; or management of water resources to achieve overall aspirational goal of sustainable development shall require some kind of legal interventions. However noble and ennobling could be the goals of traditional modes of water management, the matters relating to water management are so complex and involve so many components that the role of the state and of legal interventions cannot simply be wished away.

Thirdly, and this follows from the first two propositions, the whole range of issues relating to water resource management, from ensuring supply of safe drinking water to ensuring supply of water for irrigation purposes, from equitable distribution of river waters to various states to the issues of large dams, depletion of ground water resources to recharge of ground water acquifers and so many other issues, may not possibly be covered in one paper alone. And therefore while the intention of the author would be to highlight all important issues relating to water resource management, from regulatory perspective, only some of the issues shall be dealt with comprehensively in all their dimensions.

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2. WATER RESOURCE MANAGEMENT : THE BACKGROUNDER

To begin with, the majority of sources of supply of water both for drinking and sanitation and for irrigation purposes can be classified into two, i.e. surface and underground water. The ownership and regulatory pattern of these sources of water have not been uniform throughout the history. If we look at the pre-colonial period, the ownership and regulation of the water supply was in the hands of the community. Water management in traditional societies has largely been vested in the community domain. Water akin to land, forestry and other common resources has been considered as commons in several parts of India especially in scheduled areas[1]. Age-old practices for water management have been refined over the years and have continued from one generation to another. Utilisation, allocation and distribution of resources in such commons have been governed by social norms, taboos and rules and regulations based on the availability and the demands thereupon. The practice of setting aside river reserves and attaching sacred sanctity to certain water bodies; not defiling the water sources were some of the practices for management of the water. There are plenty of examples of traditional water management practices from around the country. These practices could be in the form of tanks in Tamil Nadu or the *naulas* (water springs) and the *gools* (channels) of Uttaranchal; the *johads* (earthen check dams) of Rajasthan and the *pokhars* (ponds) of West Bengal.

With the onset of colonial period the 'State' asserted its rights under the doctrine of *eminent domain* to own and control the water management practices. A brief analysis of the entire gamut of colonial laws enacted by the colonial government related to irrigation, fisheries, electricity, canal and drainage brings out that the Crown had extended its control over all waters. For instance, the preamble to the Northern India Canal and Drainage Act, 1873 states, 'the provincial government is entitled to use and control, for public purposes, the water of all rivers and streams flowing in natural channels, and of all lakes and other natural collections of still water'. Similarly, the Bombay Irrigation Act, 1879, lays down that 'whenever it appears expedient to the state government that the water of any river or stream flowing in a natural channel .... should be applied or used by the state government.... the state government by notification, may declare that the said water will be so applied'.

3. PLURALITY OF LAWS : THE POST INDEPENDENCE REGULATORY PERSPECTIVE

The pattern of ownership and control of water sources continued in the post-colonial period. However in schedule areas the community management practices not only

1. The Constitution of India accords a special status to areas predominantly inhabited by indigenous communities in India. These areas have been placed under two categories: the V and VI schedules.

continued but were even recognised by the state system under the 5th and 6th schedule of the constitution. Apart from this the Indian Easement Act, 1882, recognised the right of a riparian owner to unpolluted waters. A riparian owner has a right to use the water of the stream which flows past his land equally with other riparian owners, and to have the water come to him undiminished in flow, quantity and quality and to go beyond his land without obstruction. Section 7 of the Easement Act provides that every riparian owner has the right to the continued flow of the waters of a natural stream in its natural condition without destruction or unreasonable pollution.

Some of the earlier cases reinforce the rights of riparian to free flowing water without any obstruction (by a dam)[2], no material decrease in water for lower riparian[3], judicious use by upper riparian so as not to injure the right of the lower riparian[4]. The earlier decisions also make a point that riparian right is a natural right[5] and accrues only in natural streams/ rivers and not in artificial water bodies.

Further 73rd Constitutional amendment which has been enacted to associate the community in general in governance processes, puts special emphasis on decentralised governance in India. Under these provisions *Panchayats* (bodies of local self-governance) have been empowered to manage *inter alia*, water resources within their geographical jurisdiction.

Furthermore, there appears to be some kind of an asymmetry in Indian law between the ownership of surface and ground water. While surface water is considered a state property, ground water belongs to the owner of the land. Unrestricted extraction from the ground by some could lead to inequities and injustice to others as people share the same aquifers. The Central Ground Water Authority has promulgated 'Environment Protection Rules for Development and Protection of Groundwater'. The Working Group on Legal, Institutional and Financial Aspects, constituted under the Ministry of Water Resources, has suggested that the state should play the role of a facilitator; and the role of the user organisations and panchayats should be that of a regulatory agency.

4. WATER RESOURCE : THE RIGHTS PERSPECTIVE

Looking at the water management issues from individual rights perspective, it must be noted that under the Indian Constitution there is nothing like a right to safe drinking water, but by way of the *doctrine of emanation* the apex judiciary in India has constructed a sort of right to receive adequate supply of drinking water under

2. Jagan Nath v Chandrika, AIR 1919 Oudh 74; Vippalapati v Raja of Vizianagram, AIR 1937 Mad 310.
3. Sethramanamalingam v Anada Padyach, AIR 1934 Mad 583.
4. Malipat Madhatil v Neelamance, AIR 1938 Mad 649.
5. Secy. of State v Sannidhiraju, AIR 1932 PC 46, Ram Sewak Kaz v Ramgir Choudhary AIR 1954 Pat 320.

the Constitution. This evidently has been done under Article 21 of Indian Constitution. In fact individuals, communities and an active judiciary is responsible for finding spaces in the Constitution to reinforce the right to water as a basic right not merely for human beings but for all living things. In addition to the Right to Life under Article 21 which encompasses the right to water, there are other provisions in the Constitution such as Article 14[6] and Article 17[7] which could be interpreted to provide an equitable and unbiased access to all irrespective of creed, caste, race etc.

Article 14 has been interpreted by the Judiciary to guarantee inter-generational equity which is a right of each generation to benefit from natural and cultural inheritance from past generations and which would entail conserving the biological diversity and the sustainable use of other renewable and non-renewable natural resources. Article 14 is also interpreted to include a right of intra-generational equity, which emphasises on the right of equitable distribution within this generation. Article 17 is implemented by the Protection of Civil Rights Act, 1955 to ban the practice of untouchability (social disability) imposed on certain classes of persons by reason of their birth in certain castes. Article 39 lays down principles for the establishment of a welfare state that prescribes: that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good.

This big range of rights of individuals and communities relating to water access, may lead to some kind of a confusion. But the intention of the system appears to be clear. There could be different forms of rights of individuals and communities in different situations. And in every situation it may not be possible for the individual or the community to manage the resource in such a manner that everybody's interest is taken care of. In fact quite a few situations may lead to various dispute situations and in many cases the individuals or communities may not be competent at all to manage the vast range of rights relating to the resource or the resource itself. A familiar example could be multipurpose projects, wherein conflicting and colliding interests of many people and communities essentially require an arbiter to mediate in these dispute situations. On the other hand, the needs of large amount of water for irrigation purposes, energy needs for industrial development and such other national requirements underline the importance of these multipurpose projects and small communities can neither afford nor manage such mega-investment project. Therefore the role of the state system has been designed in such a manner that it not only help in management of the resource base, but also help in mediating and administering and adjudicating the whole range of rights of individuals and

6. Right to equality before law is embodied in Article 14 of the Constitution.
7. Abolition of Untouchability.

communities. And it was for this reason that it was stated in the beginning of this article that the role of the state system in water management cannot be wished away. It is an inevitability of the modern national governance systems.

5. STATE OF POLLUTION AND REGULATION

Once the basic frame of the rights and ownership issues and role of the state in the water resource management is understood, the next important question would naturally be as to the state of the resource base itself. It must be noted in this context that though India is blessed with a number of fresh water supply resources, perennial river systems, wells, freshwater lakes and many traditional fresh water supply sources, but the state of pollution of these sources is in such a bad shape that it appears highly unlikely that the state system can meet the growing demand of irrigation, expanding industrial base and the supply of drinking water and sanitation facilities. India's 14 major river systems which cater to the 80 percent needs of Indian people are amongst the 100 most polluted rivers of the world. The water of these rivers cannot be used without proper treatment. Out of 3100 towns around 200 have full or partial treatment facilities, rest of the towns are without any treatment facilities.[8] Over two thirds of illnesses in India are due to contaminated water ;17 per cent of the population does not have access to safe drinking water; About 38 per cent of urban population in India, who are below the poverty line, have no access to water ; 69 per cent of the people do not have access to sanitary services ; 80 per cent children of India suffer from water- borne diseases; of which 7 lakh die each year ; 44 million people suffer from problems related to water quality – due to presence of fluoride, iron, nitrate, arsenic, heavy metal and salinity and towards the end of 20th century, nearly 65000 villages in India had no system of regular supply of safe drinking water.[9]

What has been done to deal with the problems of pollution ? Early statutory attempts in India to control pollution of water can be traced back to legislation of local bodies, their basic duty being to keep their surrounding areas clean. In modern India, the initial days of independence saw the heydays of economic reconstruction by way of industrialization. That time gone, by the early seventies, due to urbanization and industrialization water pollution has become a major problem. Need of treatment of domestic and industrial effluents before being discharged into water – and due to pollution of rivers and streams, availability of water has been

8. National Law School of India University, Bangalore, Report on "State of India's Environment" submitted to Indira Gandhi Institute of Developmental Administration, Bombay 2000.
9. State of India's Environment, Report 2006, National Institute of Rural Development Hyderabad.

reduced to a significant extent. Water Act 1974[10] represent one of India's first attempts to deal with comprehensively with an environmental issue, i.e. water pollution.

Water Act provides for a permit system or consent procedure to prevent and control water pollution. The Act generally prohibits disposal of polluting matter in streams, wells and sewers or on land in excess of the standards established by the state boards. A person must obtain consent from the state board before taking steps to establish any industry, operation or process, any treatment and disposal system or any extension or addition to such a system which might result in the discharge of sewage or trade effluent into a stream, well or sewer or onto land. The state board may condition its consent by orders that specify the location, construction and use of the outlet as well as the nature and composition of new discharges. The state board must maintain and make public a register containing the particulars of the consent orders. The Act empowers a state board, upon thirty days notice to a polluter, to execute any work required under a consent order which has not been executed and expenses on such a work can always be recovered from the polluter.

The Water Act appears to be comprehensive in its coverage, applying to streams, inland waters, subterranean waters and sea or tidal waters. But the very scheme of the Act does not warrant the conclusion and ground water (subterranean waters) appears to be lying outside the scope of the Act. That probably is the reason why the Central Ground Water Authority and such other authorities have been established under the aegis of central government. Another incident which appears to be warranting this conclusion is the fact that as and when the issues of ground water depletion or salination of ground water have come up before the country, Water Act has not been made applicable, rather states have obligingly approved separate body of laws and rules for the same. This was the precise reason why there was a demand for such a long time for passing of a Ground Water Regulation Act. And it is now, after such a long time that a bill for ground water regulation has been circulated by the Ministry of Water Resources,[11] which is slated to be put before the house in the coming winter session of the Parliament.

This clearly implies that despite an Act devoted for the purpose of restoring the wholesomeness of water, and to ensure that domestic and industrial effluents are not discharged into watercourses without adequate treatment, the issues relating to drinking water are not adequately and comprehensively addressed.

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10. Water is a State subject but with the growing incidents of water pollution in the country, a need was felt for a comprehensive central legislation. Consequently, this law was enacted under Article 252 (1) of the Indian Constitution, which empowers the Union Government to legislate in a field reserved for the states, where two or more state legislatures consent to a central law.
11. See the Bill on Ground Water Resource Management circulated by Min of Water Resources, Government of India for eliciting public opinion during Aug 2006.

6. FUTURE AGENDA OF REGULATORY MECHANISM

New problems of regulation have surfaced with the new developments in view of the utility of the resource base. One such problems has been depletion of ground water due to heavy demands of agriculture and the application of outdated agricultural technology. And therefore the new ways of regulation. Presently the control being exercised in the country for regulating groundwater development is in the form of indirect administrative measures being adopted by institutional finance agencies who by and large insist on technical clearance of the schemes from authorized groundwater departments of respective states. These departments in turn look into the various aspects of groundwater availability. Another control imposed by the institutional agencies, availing financing from National bank for Agriculture and Rural Development is by way of prescribing spacing criteria between the groundwater structures. Yet another method of indirect control is by way of denial of power connections for the pump-sets financed through loans from banks. However, in the absence of any law, the administrative measures do not prevent affluent farmers from constructing wells in critical areas, which leads to further compounding of problems of regulation and resource management. An affluent farmer with his large capital investment can construct a high capacity well which affects shallow wells in the neighborhood, leading to the creation of another area of conflicting situations and colliding interests. This diffused way of regulation, lacking the character of an integrated management of water resources, with lot of loopholes and pitfalls specially in the area of ground water resources is not a satisfactory situation and there have been demands for long that some kind of an integrated water resource regulation be designed to replace the chaotic form of regulation at the moment.

Water pricing is another area which calls for a better regulation perspective. This is particularly significant in view of the increasing demand of water for agriculture purposes and the outdated agricultural technology and increasing needs of urban sectors in view of new thrust on marketisation and liberalization and resulting boom in urbanization. And the new sources of water are increasingly expensive to exploit, limiting the potential for expansion of new water supplies. In India, the real costs of new irrigation have more than doubled since the late 1960s and early 1970s, and the recovery of the costs is just fraction of the invested costs in water sector.

In view of this one of the most important challenges today is to generate water savings from existing agricultural, household and industrial uses. Water use efficiency in irrigation in much of the developing world including India is typically in the range of 25 to 40 percent. Therefore a particularly difficult challenge will be to improve the efficiency of agricultural water use to maintain crop productivity growth while at the same time allowing reallocation of water from agriculture to urban and industrial uses. Since irrigated area accounts for nearly two-thirds of world rice and

over one-third of world wheat production, growth in irrigated output per unit of land and water is essential to feed growing populations. At the same time, because of the limited number of cost effective new sources of water, the rapidly growing household and industrial demand for water will need to come increasingly from water savings in irrigated agriculture, which generally accounts for 80 percent of water diverted for use in developing countries. Moreover, water savings in agriculture, to truly contribute to reducing water scarcity, should be accompanied by improved efficiency in urban and industrial use. It must be noted in this context that in urban sector water supply systems, "unaccounted for water" (much of which is direct water losses) is often 50 percent or more in major metropolitan areas. These inefficiencies seem to imply the potential for huge savings from existing uses of water.

This way, while, significant amount of water is going waste due to inefficiencies of the system an important side effects of this misuse of water in agricultural sector is seen in the form of significant degradation of existing irrigated cropland. All this loss of agricultural land is taking place due to waterlogging and salinization and lack of improved agricultural and irrigation practices. In India, though no reliable data as to the total loss of cropland is available, one thing that can be stated safely is that the situation is fairly serious and is likely to further increase significantly.

Another important issue, and the one which has been the bone of contention for so long is the issue of large dams. In the aftermath of independence and the enthuse for rapid growth and industrialization, these dams and big industrial enterprises, at one time, were considered the temples of modern India. Once those heydays of rapid industrial growth were over, the doubts were raised as to the efficacy of the large dams as they involved large scale environmental and social costs including the dislocation of people displaced from dam and reservoir sites. The controversy over the Narmada Valley Development Program in western India is illustrative of the issues that need to be resolved if large-scale irrigation projects are to play a role in future water development. The Narmada project includes 30 large dams, 135 medium-sized ones, and 3,000 small ones, and covers an area from the watersheds of the Narmada river in Madhya Pradesh and Maharashtra in central India through Gujarat on the west coast and on to arid regions in Rajasthan.

The main dam in the project is the Sardar Sarovar, which is designed to provide domestic water to 40 million people, generate 1,200 MW of electric power, and irrigate 1.8 million hectares of land (Seckler 1992).[12] These benefits are large, but the environmental and human costs of the construction of the dam are also large.

12. Seckler, David. *The Sardor Sarovar Project in India.* A Commentary on the Report of the Independent Review. Center for Economic Policy Studies Discussion Paper No. 8. Winrock International Institute for Agricultural Development, July 1992.

The reservoir to be created by the Sardar Sarovar dam would flood 37,000 hectares of forest and farmland and displace nearly 100,000 people, mostly poor tribal villagers. An additional 80,000 hactares of land will be utilized for the construction of the distribution network, affecting, in various degrees, another 140,000 people (Berger 1994).[13] Assessment of large-scale dams should include a comprehensive accounting of costs and benefits, and if projects proceed they must employ equitable, realistic and practical methods for compensating those who are negatively affected. Future construction of large-scale dams will require balanced development approaches acceptable to diverse constituencies. The cost of supplying water for household and industrial uses is also increasing rapidly.

7. IMPERATIVES OF STATE INVERVENTION : THE PUBLIC TRUST

All this requires state and legal interventions and there is no gainsaying of the fact that the state has not only been facilitating the supply and management of this scarce resource but has promoted the availability and long-term sustenance of the resource. That said, the instances of failure on the part of the state system have been numerous. In fact the experiences of the people working at the grassroot level shows that the present legal framework does not support community initiatives ; in fact it is hostile to them. Nevertheless the role of the state system in managing this scarce water resources cannot be overemphasized. The crux of the problem is, as to what should be the norms of state intervention in facilitating the management & augmentation, and creation of conditions, which shall help the exercise of the right to access and reception of clean water which has been raised to the status of a fundamental right by the Indian Judiciary. Californian Supreme Court dealt with the issue in *Monolake* case. "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriate water right system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests"[14] The Court went on explaining the imperatives of Public Trust, "As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in

13. Berger, T. The independent review of the Sardar Sarovar projects 1991-1992. *Water Resources Development* 10(1): 55-66.

14. See Johnson, 14 U.C. Davis L. Rev. 233. 258-257; Robie, Some Reflections on Environmental Considerations in Water Rights Administration, 2 Ecology L.Q. 695, 710-711 (19/2); Comment, 33 Hastings L.J. 653, 654.

mind its duty as trustee to consider the effect of the taking on the public trust[15] and to preserve, so far as consistent with the public interest, the uses protected by the trust.

Justice Kuldeep Singh in *M.C.Mehta v. Kamalnath*[16], explained the imperatives of Public Trust Doctrine in Indian context. "Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust...". In the exercise of its rights as a trustee of the public, therefore, the state system has not only to ensure that the right conditions are created for exercise of the fundamental right to Water but also do this in the capacity of the public trustee, which carries a heavy and sacred duty enshrined in the very basic document of our socio-political existence i.e. the "Constitution of India". And the agenda for that is very heavy, "To prepare medium and long-term national use plans *inter alia* including agricultural practices, human settlement patterns and industrial topology in consultation with Ministries/Departments concerned based on the regional water supportive capacity ; to assess the present irrigation practices and cropping patterns, with respect to high water consuming crops and lay down National Agricultural Water Use Policy to encourage judicious use of water resources; to keep under review groundwater levels and quality, and surface water quantity to devise and implement pragmatic strategies at plan and programme levels; to ensure maintenance of minimum flows in the rivers so as to fulfill the riparian rights to protect the flood plains, so as also protect the vital ecological functions of the rivers; to ensure techno-economic feasibility and to implement programmes on reuse of appropriately treated sewage for agriculture, reuse of industrial waste waters as industrial process water, use of treated sewage in social forestry and public parks in municipal areas and reuse of treated waste water in new housing complexes for non-consumptive usages; to protect, conserve and augment traditional water retaining structures; to protect, conserve and augment natural and manmade wetlands in the country; to promote rain water harvesting in human settlement practices, particularly in cities with more than 10 lakh population in arid/semiarid regions; to promote and implement modern and traditional water harvesting technologies to ensure minimal expenditure in groundwater harnessing; to design and implement programmes to arrest alarming rates of decline in snowline in the country; to ensure catchment area treatment, including construction of checkdams, contour bunding,

15. See United Plainsmen v. N.D. State Water Cons. Comm'n 247 N.W 2d 457,462-463 (N.D. 1976).
16. AIR 1997 SC 3127.

control of river bank erosion and plantation of endemic fast-growing tree species to arrest soil and water loss in all river basins, and to ensure the implementation of afforestation programmes for achieving a minimum of 33 % of forest cover as per National Forest Policy 1988. This would also include a duty to prepare and implement guidelines for various water usages commensurate with production and scarcity value of the resource and to ensure community participation with a view to harnessing traditional knowledge at all stages of water resource management."

8. CONCLUSION

The current legal system and its regulatory pattern, as we have seen above leaves much to be desired. Given the duty of the state system in view of the responsibilities it carries under the Indian Constitution and the role of public trustee with respect to water resources that has been imposed upon it by the people's initiatives and the initiatives taken by the Indian judiciary, the state system has to craft its priorities with utmost care. It must be noted that the inefficiencies of the state system in managing water resources, during post-independence period cannot be the excuse for going towards the softer options of privatizing water supply systems, the efforts for which are being made now in various parts of the country, including the state of Rajasthan and Chhattisgarh. All these imperatives have been worked out well in the National Water Policy and in view of the 73rd amendment of the Constitution, the role of the state in water resource management has got to be that of a facilitator rather than that of a despot and shurker of the responsibility in favour of the private parties.

HOMOSEXUALITY AND HOMOPHOBIA IN INDIAN POPULAR CULTURE : REFLECTIONS OF THE LAW ?

Danish Sheikh

Introduction

> *Some men like Jack and some like Jill; I'm glad I like them both; but still I wonder if this freewheeling really is an enlightened thing – or is its greater scope a sign of deviance from some party line? In the strict ranks of Gay and Straight, What is my status? Stray? or Great?*
>
> *Vikram Seth*

Homosexuality and bisexuality, as we now know from modern research, are ubiquitous throughout the world. Whether tolerated or not, they are practiced in every culture to some degree.[1] The differences among cultures is the degree of openness regarding practice.

In a democratic and pluralistic country like India, it is a shame that we have a law that abuses human rights and limits fundamental freedoms such as is enumerated in Section 377 of the Indian Penal Code, which, by prohibiting "carnal intercourse against the order of nature"[2] in effect punitively criminalizes private, consensual sexual acts between people of the same sex.

India is a country with vibrant popular culture. Nowhere is the collective consciousness of the nation probably better essayed than in the cinema, which is viewed with passionate fervour. Taking cinema as the mainstay of Indian popular culture, along with a few examples from literature and television, this paper seeks to understand the link between the depiction of homosexuality in Indian popular culture and the law, which as it stands now is blatantly homophobic. Different viewpoints are looked from and observed in Indian popular culture, such as the non – acceptance of homosexuality by some quarters, the crude stereotyping that is played to squeeze out a few laughs, and the slowly emerging new wave of thought that treats the subject with a compassionate eye, and gives it a humane treatment.

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1 http://www.bidstrup.com/phobiahistory.htm, 29-1-2008
2 Section 377, Indian Penal Code

In the Closet

To a large extent, the Indian context of homosexuality seems to differ quite greatly from the Western notion, in the way that as opposed to the West where homosexuality continues to find increasing acceptance as a lifestyle choice, the concept is not even properly acknowledged in India. Gay activist Ashok Row Kavi has proclaimed that the Indian gay movement–and Indian gay consciousness on a whole–can be compared to America in the 50s and early 60s. There is no "official" construction of gay identity with a large section of people simply denying that gay men and lesbians exist. He also talks about how, in India, there is a generally blind eye kept towards sexuality of any kind, the reason being that the concept of marriage, child-bearing, and continuing caste and family lines is held onto strictly.[3]

This attitude is portrayed in the movie Bend it like Beckham, directed by Gurinder Chadha, in a scene where the lead protagonist's male best friend comes out to her. Bewildered, she wheels around to look at him, and implores : "But you're Indian !"

The idea of homosexuality is, then, more confined to homosexual acts, which are indulged in by those who otherwise lead lives with a heterosexual preference. In author Vikram Seth's award winning novel, A Suitable Boy, two male characters who are shown to be otherwise having female love interests and leading heterosexual lives, indulge in occasional acts of homosexuality, something which one of them comments in the course of the book, made more sense when they were younger, thus implying the thought that homosexuality is merely a phase which may be grown out of.

We can thus observe how the very idea of a gay lifestyle is not shown much prominence in popular culture, an extension of the Indian atmosphere which continues to sweep homosexuality into the closet, and away from the facet of a lifestyle choice.

Enforcing Stereotypes

The most common depiction of homosexuals in Indian cinema and television tends to centre on an array of crude stereotypes, attempting to squeeze out humour from mocking exaggerated characterizations. The common Bollywood perception about homosexuals is that gay men are more effeminate than girls, and lesbian women more masculine than the men.

On Indian television, perhaps the only depiction of homosexuality was that of a comically effeminate gay fashion designer in the soap *Jassi Jaisi Koi Nahin*, a remake

3 www.globalgayz.com/g-india.html, 30-01-2008

of the Colombian telenovela *Yo Soy Betty La Fea*. The character's exaggerated effeminacy was played for laughs, and the overall portrayal was extremely negative.

A number of Indian movies have attempted depictions of gay and lesbian characters in more fleshed – out roles; however, the attempt to step beyond the trite only backfires as the same stereotype that they seek to banish is instead perpetuated. *Mango Souffle*, released in 2003, was among the first Indian movies to talk openly of gay men and feature an onscreen lip-lock between two men. However, the movie is guilty of mining many of the clichés associated with the gay community. It uses the very comfortable backdrop of the fashion world and the perceived normlessness as a foil. As *The Hindu* journalist Ziya us Salam states, the director tried to raise the issue of whether the individual should always be subservient and the society paramount. But the way he went about his task, rather than 'discovering' something new the viewers were treated to the same old public parks, floundering youngsters and the like.[4]

The year 2004 saw the release of director Karan Razdan's lesbian-themed movie *Girlfriend* to violent protests with its explicit depiction of sexuality onscreen. The film potrays an obsessive, sexually abused and murderous lesbian character who attempts to prevent her female childhood friend from pursuing a relationship with a man. Lesbianism is misrepresented in a big way, with its roots being traced to the lesbian character's sexually abused past. The movie goes on to connect the character's homosexuality to her obsessive, even psychopathic nature. In doing so, as a member of the women's organization Forum Against Oppression of Women states, "it exploits a delicate issue that is hardly given proper coverage in the country, and converts it into a gross caricature, weaving a number of negative myths associated with lesbian women, and only serves to antagonize society even further."[5]

Out of the Closet

Having seen the crude stereotypes, there is a new wave of thought that has been emerging, a more liberal representation of homosexuality in popular culture, devoid of the homophobic overtones that plague the caricatured representations.

The year 1996 saw the release of Rinci Vidi Wadia directed Bomgay, which earned its place in cinematic history by being India's first gay-centric film. The film features six vignettes which address what it means to be gay in contemporary India and the struggle of the gay community to establish an identity.

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4 http://www.hindu.com/fr/2004/06/18/stories/2004061801190100.htm, 26-01-2008

5 http://news.bbc.co.uk/2/hi/entertainment/3805905.stm, 02-02-2008

In 2000, the Deepa Mehta directed film *Fire* was released. With its forthcoming depiction of a lesbian affair, it sparked off heated reactions in India. In the movie, two oppressed housewives almost completely sidelined by their respective husbands find in each other what their husbands refuse to give. Their relationship progresses while their uncomprehending husbands watch, the men in fact unwittingly feeding the affair by keeping the women in the domestic sphere and in each other's company. As a critic from the Bright Lights Film Journal put it, the film "combined a cutting edge critique of a patriarchial society with a refreshing view of lesbianism as a clear road out of it".[6] In a slew of protests, it was forcibly pulled out of movie halls nationwide by right-wing protestors.[7]

Nishit Saran directed the 2001 documentary *Summer in My Veins*, which features the closeted director coming out to his relatives. The documentary addressed a number of issues like coming out, ostracization and the fear of HIV-AIDS.

My Brother Nikhil, directed by debutante Onirban, released in 2005, depicted the story of a gay man's struggle with his family and his country after contracting the HIV virus. As reported by the New York Times, while it wasn't commercially a runaway blockbuster, its impact lay in having served up a story about love and loss, which are sentimental staples of contemporary Indian cinema, with a gay man at its centre, and having done so without kicking up the slightest fuss from India's cultural conservatives.[8] A large amount of support was garnered for the movie with a plethora of actors from the Indian film industry along with athletes promoting the movie in television spots.

In the book *Same-Sex love in India*, the authors show that same-sex relationships have been affirmed and celebrated in poetry and prose, in mythology, literature and medical treatises throughout the lengthy span of Indian history. For instance, the book explores the concept of 'swayamvara sakhi', a word found in the 11th century story cycle the Kathasaritsagara that refers to deep love between women and also refers to a self-chosen relationship.[9]

The year 2003 also saw India's first Gay and Lesbian film festival held in Mumbai. Titled "Tremors of a Revolution", it featured limited turnout with about 200 attending, but is nonetheless an important landmark in coming out process of the homosexual community as a whole.[10] The Nigah Queerfest, held in the summer

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6. http://www.brightlightsfilm.com/30/fire.html, 01-02-2008
7. http://www.iht.com/articles/2003/09/17/edsriva_ed3_.php, 01-02-2008
8 http://www.nytimes.com /2005/04/06/movies/06bomb.html, 30-01-2008
9. Vanita, R. and Kidwai, S.(ed.), *Same-Sex Love in India: Readings from Literature and History*, (Palgrave Macmillan, 2001)
10. http://aolhometown.planetout.com/search/splash.html?keywords=india+popular+culture&skip=1, 4-02-2008

of 2007 in New Delhi, is another step forward in acceptance of the community with respect to popular culture. Through the media of film, art, photography and workshops it proclaimed itself as a pronounced step to take sexuality into mainstream city and arts spaces.[11]

Section 377

In 1860, with the institution of the Indian Penal Code by Lord Macaulay, Sec. 377 criminalised homosexuality, by putting forth that "carnal intercourse against the order of nature"[12] was to be punishable by law. This archaic law stands even today, though homosexuality was decriminalized in the year 1967 by England itself. As stated in an open letter by Vikram Seth and a host of others and endorsed by Amartya Sen, the law has been used to "systematically arrest, prosecute, terrorize and blackmail sexual minorities. It has spawned public intolerance and abuse, forcing tens of millions of gay and bisexual men and women to live in fear and secrecy at tragic cost to themselves and their families."[13] Also, in 1994, the United Nations Human Rights Committee affirmed in its decision *Toonen v Australia* that the criminalization of same-sex sexual relations between consenting adults violates Articles 2 (equal protection) and 17 (right to privacy) of the International Covenant on Civil and Political Rights (ICCPR). India ratified the ICCPR in 1979, and is bound by its provisions.[14] Article 21 of the India Constitution guarantees the Right to life and personal liberty. The right to privacy is implicit in this section and can be extended to that of sexual privacy. As observed by Justice K.K.Mathew in Govind v. State of MP AIR 1975 SC 1378, "Any right to privacy must encompass and protect the personal intimacies of the home." Thus, if two adults engage in consensual intercourse within their private boundaries, Section 377 can be seen as violative of their fundamental rights.[15]

The presence of Sec. 377 establishes, in its way, a frontier. It tells us what to think of homosexual people, and it legitimizes a negative view of their lives. By its very nature it prevents everyone from seeing them as equals, instead pushing them into the category of the inferior "other". By everyone, reference is being made to homosexual as well as heterosexual people, because, the law also, as said by Foucault, "teaches queer people what to think about themselves." The law then, is essentially homophobic in nature, a fact which extends to general perceptions of homosexuality and percolates into our popular culture.

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11. http://www.thequeerfest.com/index.html, 2-02-2008
12. Section 377, Indian Penal Code
13. http://www.openletter377.com/, 20-10-2007
14. http://www.gaylawnet.com/laws/in/sodomy.htm, 28-01-2008
15. Bhatt, P., *Fundamental Rights : A Study of their Inter-relationship*, (Kolkata: Eastern Law House Pvt. Ltd., 2004), 21

Section 377 as it stands requires proof of penetration for conviction.[16] Even though this means that only a specific homosexual act is criminalized, the stigma that it projects extends to the very identity of homosexuality itself. Thus, while supporters of the criminalization of the act of sodomy may assert how the I.P.C only punishes the act, the status that is forced onto the homosexual community is that of presumptive criminals, simply based on their sexual orientation. Even though conviction rates under the section are very low, being an unenforced law it does its share of damage. As Christopher R. Leslie writes, "the primary impact is symbolic : nominally unenforced laws are used to classify groups and stigmatize common behaviour. By labeling gay men and lesbians as criminals, sodomy laws make gay individuals targets for abuse by both private individuals and public officers." [17] There being no space within the family to express a non-heterosexual alternative, and few mechanisms which can help parents to understand and cope with such disclosures, violence and hostility tend to be the majority of the responses to coming out in a society that is witness to homophobia.

Rights violation with regard to the medical establishment are observed in various cases, with a large number of doctors carrying social prejudices against sexuality minorities into treatment.[18] In 2001, the National Human Rights Commision (NHRC) admitted a complaint from a patient at the All Indian Institute of Medical Sciences, alleging psychiatric abuse at the hands of the consulting doctor, having been put on a 4 year course of drugs and told he had to be "cured" of his homosexuality. The NHRC finally chose to reject the complaint, with informal conversations with chairman showing his belief that till Section 377 was read down, nothing could be done. [19]

The position of sexual minorities, particularly men who have sexual intercourse with men, is disproportionately affected by HIV/AIDS, due to heavy stigmatization and existence in an atmosphere of marginalization. Aside from the act of penetrative anal intercourse which results in an increased risk of HIV infection, the social stigma and discrimination that is attached enforces a silence around such sexual behaviour and proves a major hurdle in the provision of information and support.[20] HIV/

16. Biren Lal v. State of Bihar I (1996) CCR 427 Pat.)
17. Leslie, C.," Creating Criminals : The Injuries inflicted by Unenforced Sodomy Laws", as taken from Sociology – II Reading Material, Compiled by Prof. Kalpana Kannabiran, June 2007 edition, NALSAR University of Law, Hyderabad
18. Human Rights Violations against Sexuality Minorities in India : A PUCL – K fact-finding report about Bangalore
19 Narrain, A. and Khaitan, T., "Medicalisation of Homosexuality : A Human Rights Approach", as taken from Fernandez, B. (ed.), *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India* (New Delhi : India Centre for Human Rights and the Law, 2002)
20. Legislating an Epidemic : HIV/AIDS in India, The Lawyers Collective, (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2003)

AIDS outreach workers face a two step problem in reaching out to this group of people : firstly from the side of the police; and from the affected population due to their criminalized status, thus inhibiting them from stepping forward to claim the aid.[21]

The law criminalizing homosexuality was passed in silence, without debate or discussion, and went on to ensure just that – silence. Macaulay, in his introductory report to the draft bill stated "*[...we] are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of the opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.*"[22] Within the silence that has since ensued, there has been limited debate. These recent new developments and depictions of homosexuality in popular culture have stirred a healthy debate on the subject, dragging it out of the barriers of silence that it had been enclosed within. If societal views can be seen to be reflected in popular culture, then we can observe a gradual understanding of homosexuality and the beginning of a spark of acknowledgment as opposed to outright disapproval. Law must be used to bring about the change that is so required and is so essential to allowing the queer community to live with dignity.

The 172nd Law Commission report has recommended deletion of Section 377, to be replaced with a redefined law on sexual assault., which would include oral, vaginal, anal, and other forms of penetrative intercourse without consent between men and women, men and men, and women and women, within the ambit of criminal law, thus effectively decriminalizing consensual same sex relations.[23]

It is currently being challenged in the Delhi High Court. In the first reply to the petition, the then NDA government said : "Indian society, by and large, disapproves of homosexuality and that this disapproval justifies it being treated as a criminal offence".

Conclusion

We have thus seen different perceptions of homosexuality in popular culture, and how the heterosexist law comes out to be an illustration of the deviation from the

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21. Epidemic of Abuse : Police Harassment of HIV/AIDS Outreach Workers in India : A Report by Human Rights Watch

22. Report of the Indian Law Commission on the Penal Code, October 14, 1837, pp. 3990-91, as taken from Gupta, A., "Section 377 and the Dignity of Indian Homosexuals", Economic and Political Weekly, November 18, 2006.

23. http://lawcommissionofindia.nic.in/ , 10-02-2008

norm, which in Indian popular culture is predominantly heterosexual. Any deviant from the norm tends to be criticized or punished, as seen in the crude caricatures represented in popular culture. The recent rise of voices against the essentially homophobic law is also reflected in popular culture with the new wave of thoughtful and sensitive depictions of homosexuality.

The first and most important step that must be taken is to decriminalize consensual sexual relations between members of the same sex. If such laws are widely enforced, then the wider society will be placed on the same level as the original community. Otherwise, the law will simply remain a tool for arbitrariness in the police and judicial systems, a standing threat against, and reproach to gay men and lesbian women.[24] While there may be a backlash, the fact remains that such human rights violations as those imposed by Section 377, which would be a cause for shame anywhere in the world, are especially so in India, which was founded on a vision of fundamental rights applying equally to all, without discrimination on any grounds.

Beyond this basic social recognition would be the need to establish a framework of laws that will provide sexuality minorities with rights on par with those enjoyed by heterosexuals. It may yet be a while before same-sex partnerships will be recognized equally before the law, but at least in the name of humanity and of our Constitution, the striking down of the cruel, discriminatory and homophobic law that is incorporated under Section 377 will herald the movement towards equality, and acceptance of the realm of homosexuality beyond the heterosexual norm.

24. Levy, J., "Sexual orientation : Exit and Refuge" , 184, from *Minorities within Minorities : Equality, Rights and Diversity* edited by Avigail Eisenberg and Jeff Spinner-Halev

SOVEREIGNTY, LAW AND THE 'STATE OF EXCEPTION'

Aditya Swarup

INTRODUCTION

The concept of sovereignty is an aspect that requires a comprehensive understanding in the studying of legal systems today. In the early 19th century when Austin gave the definition of a sovereign, apart from assuming it to be a body of people who are supreme in their authority, he created a distinction between the *sovereign* and the *members of the sovereign.* While the principle is clear the members of the sovereign are subjected to the sovereign by the doctrine of checks and balances, the core argument of this paper is to critique the idea of a 'state of exception' where the 'members of the sovereign' create exceptions to the restraints they are originally subjected to. The 'state of exception' is a recent concept in jurisprudence (2005) propounded by Italian scholar Giorgio Agamben[1] where in certain authorities; members of the sovereign seek to place themselves above the law in certain circumstances. The author would like to look at this concept in the Indian context and has surveyed various case law in this regard. On the same lines, this idea is related to an interplay between the exercise of power by the sovereign and the guarantee of fundamental freedoms, an idea which is intrinsically related to the role of the Judiciary that the author has sought to bring out in the paper.

This paper then is an attempt to present a dynamic view point about sovereignty and its relationship between law and the state of exception with specific analysis in the Indian context. Part I seeks to look at the concept of sovereignty and presents the prevalent idea of it in the Indian Legal system. Part II explains the State of Exception as propounded by Giorgio Agamben and Part III critiques this concept as regards its application in the Indian context with case law and presents certain concluding observations.

PART-I

THE NATURE OF AUSTIN' S SOVEREIGN

After Austin's return from Germany he started a series of lectures on his idea of jurisprudence and a sound theory of law. His theory of sovereignty is found in his 6th lecture where he also promotes the idea of subjection to an authority. It is critiqued by a lot of scholars that Austin, in his theory of sovereignty tried to justify the notions of Hobbs, Bodin and Rousseau. Austin seemed to be heavily impressed by Hobbs'

1. Giorgio Agamben, STATE OF EXCEPTION, 1st ed. 2005, Univ. of Chicago Press.

Leviathan, power and the unqualified obeisance to the king of England[2]. In his lecture, Austin asserts that subjection is the correlative of sovereignty and sovereignty is inseparably connected with the expression 'independent political society'.[3] The sovereign in an 'independent political society' is divided in two parts; *the portion of the sovereign* and the portion *to which its members are subject.* Austin contends that, in order to merge the latter with the former it would be necessary to find a political sovereign in which all the members are adults of sound mind.

The attempt by Austin to base sovereignty on the habitual obedience of the subjects has been severely criticized.[4] It is said that he sought to confuse between the notions of legal[5] and political sovereignty[6]. However, Austin tacitly stated that the ultimate source of law is an abstract concept and what he sought to do was provide an unfailing test of locating legal sovereignty in the state.[7] He said that law cannot itself be based on law but must be based on something outside and above the law and in doing so sought to base it upon fact, i.e. the habitual obedience of the mass of the population.

To proceed from the theoretical perspective presented above, a true understanding of the situation of the sovereign in India relevant for our discussion can be had from the case of *Indira Gandhi v. Raj Narain*,[8] where the Court had the daunting task to address the issue of parliamentary sovereignty and checks and restraints on the powers of the parliament. Emphasizing that absolute sovereignty[9] does not exist in India, the Court looked into the nature of a sovereign[10] and stated that the 'sovereign', if conceived of as an omnipotent being, has no existence in the real world.[11] Several thoughtful writers have deprecated the use of the expression in legal discussion as it has theological and religious overtones. Nevertheless, as the practice has become inveterate it will only create confusion if any departure is made in this case from the practice. If it is made clear that sovereign is not a 'mortal God' and can express himself or itself only in the manner and form prescribed by law and can be sovereign

2. *Leviathan* was written by Thomas Hobbs in 1651. It promoted his idea of social contract by the symbol of a fire breathing dragon that symbolized an authority of power meant to protect the State.
3. WB Bizzell, "A Critique of the Austinian Theory of Sovereignty", 22 Green Bag 514, (1910).
4. MDA Freeman, (ed.), LLOYD'S INTRODUCTION TO JURISPRUDENCE, 7th ed. 2001, p. 213.
5. Legal Sovereignty is the capacity to determine the application of law and that body that is not subject to its principles.
6. Political sovereignty is more regarded the power to make decisions unfettered by an external/ internal force. It is that body in the state that is uninfluenced and supreme amongst the people.
7. WL Morrison, "Some Myths about Positivism", (1958) 68 Yale LJ 212.
8. *Indira Gandhi* v. *Raj Narain*, AIR 1975 SC 2299.
9. According to the Court, "A sovereign in any system of civilized jurisprudence is not like an oriental despot who can do anything he likes, in any manner he likes and at any time he likes." AN Ray, J. at para 321.
10. In *Synthetics* v. *State of UP*, (1990) 1 SCC 109, the Court held that the word 'sovereign' means that the State has power to legislate on any subject that is in conformity with the limitations prescribed by the Constitution. In *Delhi Transport Corp.* v. *Mazdoor Congress*, AIR 1991 SC 101, the Court held that all Governmental exercise of power must be subject to the Constitution as it is supreme in nature.

only when he or it acts in a certain way also prescribed by law, then perhaps the use of the expression will have no harmful consequence.

'Legal Sovereignty', according to the Court, is a capacity to determine the actions of persons in certain intended ways by means of a law....were the actions of those who exercise the authority, in those respects in which they do exercise it, are not subject to any exercise by other persons of the kind of authority which they are exercising[12]. The Parliament in India does not have sovereign power to make any law it wishes, but is sovereign over the law that is just by procedure.[13] Understanding the above by an Austinian notion of sovereignty, the Parliament is just a member of the sovereign and not the sovereign itself. Its powers are subject to some higher authority, which in our opinion is the Constitution and more specifically Article 13(2) of the Constitution.

THE DICHOTOMY IN THE LAW

I have thus explained the nature of the sovereign and the where it is located in the Indian legal system. Such an understanding assumes great relevance after the case of *Keshavananda Bharti v. Union of India*[14] in 1973. While laying down the structure for the basic structure doctrine, Nani Palkiwala argued that all organizations are the very creation of the Constitution and hence none of these bodies can place themselves above it. In a sense, every legal authority is subject to the provisions of the constitution and the Parliament, which is one of its outcomes cannot destroy its basic foundation.[15] It is not surprising then that all the eleven judgments in some way or the other recognized this theory and the majority[16] completely abided by it.

Emphasizing that certain aspects of the constitution are inalienable,[17] the Court also propounded the *Basic Structure Doctrine*[18]. Seven of the thirteen judges in the *Kesavananda Bharti* case, including Chief Justice Sikri who signed the summary statement, declared that Parliament's constituent power was subject to inherent

11. *Indira Gandhi* v. *Raj Narain*, AIR 1975 SC 2299 at para 281.
12. Ibid. at para 282.
13. Ibid. at para 327. See also Owen Dixon, "Law and the Constitution", 50 L.Q.R. 590 at 604, *'the law that a sovereign can act only by law is supreme but as to what may be done by a law so made, the sovereign is supreme over that law'.*
14. *Keshavananda Bharti* v. *State of Kerala*, AIR 1973 SC 1461.
15. MV Kamath, NANI A. PALKHIVALA, p. 246.
16. The Majority judgments were given by Sikri CJ, Shelat, Grover, Hegde, Jagmohan Reddy, Khanna and Mukherjea JJ.
17. This gave rise to the Basic Structure Doctrine meaning that certain features of the Constitution are inalienable and the Parliament is itself subject to it. The consequence is that no Amendment to the Constitution can be made that alters or abrogates any law that is a part of the Basic Structure.
18. The phrase 'basic structure' was introduced for the first time by M.K. Nambiar and other counsels while arguing for the petitioners in the case of *IC Golaknath* v. *Union of India*, AIR 1967 SC 1643 , but it was only in 1973 with *Keshavananda Bharti's* case that the concept surfaced in the text of the Apex Court's verdict.

limitations. Parliament could not use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution.[19]

I would not like to further delve on the various aspects of the *Basic Structure* doctrine but would like to state that the doctrine has established the supremacy of the Constitution[20] and that no *member of the sovereign*, i.e. the legislature, judiciary or the executive shall place himself above it. All organizations are subject to the Constitution and its principles are non- derogable. While this is THE LAW in the Country today, we notice that that Court has itself created some exceptions to this doctrine and its application. The idea of a sovereign has been subjected to certain exceptions. Questions are raised that if rights ascribed in the Constitution are to be given priority over the exercise of government control, why is it that we ourselves create exceptions to this principle in times of emergency and in dealing with acts like terrorism[21] ? Another perturbing issue is the abrogation of the fundamental laws by the armed forces in various areas that seeks to place them above the Constitution in certain circumstances[22].

It is this idea of *members of the sovereign* placing themselves above the sovereign that I'd like to explore in this paper. While I do so, I would also like to present a critique of the 'State of Exception' as propounded by Italian legal scholar Giorgio Agamben, present live examples of its application and look at it in the Indian context.

PART-II

GIORGIO AGAMBEN AND THE 'STATE OF EXCEPTION'

In 1998, Giorgio Agamben wrote *Homo Sacer: Sovereign Power and Bare Life*,[23] where he describes the homo sacer as an individual who exists in the law as an exile[24] and holds that life exists in two capacities. One is natural biological life (Greek: Zoë) and the other is life (Greek: bios). The effect of homo sacer is, he says, is being stripped of one's political and biological lives. As "bare life", the homo sacer finds himself submitted to the sovereign's state of exception, and has no political significance. Agamben says that the states of homo sacer, political refugees, those

19. *Keshavananda Bharti* v. *State of Kerala*, AIR 1973 SC 1461.
20. Lord Bringham of Cornhill, "Law Day Lecture", (2000) 1 SCC (Jour) 29. See also See also *Nair Service Society* v. *State of Kerala*, (2007) 4 SCC 1 : *P. Kannadasan* v. *State of Tamil Nadu*, (1996) 5 SCC 670 : *AK Gopalan* v. *State of Madras*, 1950 SCR 88 : *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha*, 2007 (4) Kar LJ. 249.
21. *ADM Jabalpur* v. *Sivakant Shukla*, AIR 1976 SC 1207 ; *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569.
22. *Inderjit Baruah* v. *State*, AIR 1983 Del 513.
23. Giorgio Agamben , HOMO SACER: SOVEREIGN POWER AND BARE LIFE, 1998, Stanford, CA.
24. According to Agamben, this is a paradox: It is only because of the law that society can recognize the individual as homo sacer, and so the law that mandates the exclusion is also what gives the individual an identity.

persecuted in the Holocaust, and the "enemy combatants" imprisoned in Guantanamo Bay and other sites are similar. As support for this, he mentions that the Jews were stripped of their citizenship before they were placed in concentration camps[25].

Thus, Agamben argues, "the so-called sacred and inalienable rights of man prove to be completely unprotected at the very moment it is no longer possible to characterize them as rights of the citizens of a state"[26]. *Homo Sacer* is the total disregard to the rights of the citizens and comes into play when members of the sovereign exercise their power without any restrictions, checks and balances. Tyranny then gets imbibed in democracy.

This idea of a State of Exception was further elaborated in his book titled *'State of Exception'* in 2005. In the book he borrows Carl Schmidt's definition of sovereignty stating;

Sovereignty is the power to decide the state of exception, to decide to whom the law applies and to whom not. The authority that can declare an emergency is the soverign.[27]

Going further from here, Agamben identifies the State of exception as a modern institution that has its roots in the French revolution[28], first world war and the present day political government.[29] The modern formulation of the state of exception arrives with a 1789 decree of the French constituent assembly, distinguishing a 'state of peace' from a 'state of siege' in which 'all the functions entrusted to the civilian authority for maintaining order and internal policing pass to the military commander, who exercises them under his exclusive responsibility'.[30] From there the state of exception is gradually emancipated from its war context and is introduced during peacetime to cope with social disorder and economic crises. The key observations are, first, that 'the modern state of exception is a creation of the democratic-revolutionary tradition and not the absolutist one',[31] second, that the state of exception immediately assumes a 'fictitious' or political character, where a vocabulary of war is maintained metaphorically to justify recourse to extensive government powers.[32]

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25. Giorgio Agamben , HOMO SACER: SOVEREIGN POWER AND BARE LIFE, 1998, Stanford, CA.
26. Ben Chappell, "Rehearsals of the Sovereign: States of Exception and Threat Governmentality", http://cdy.sagepub.com (Last visited 13th Aug. 2007).
27. Christoph Burchard, "Interlinking the Domestic with the International: Carl Schmitt on Democracy and International Relations", *LJIL* 19 (2006) 1.
28. Giorgio Agamben, STATE OF EXCEPTION, 1st ed. 2005, p. 24, Univ. of Chicago Press.
29. Agamben explicitly links the State of Exception to the treatment of detainees in Guantanamo bay by the US government.
30. Giorgio Agamben, STATE OF EXCEPTION, 1st ed. 2005, p. 5, Univ. of Chicago Press.
31. Ibid. at p. 19.
32. Ibid. at p. 17.

This theory is an integral part of positive law and is linked to the idea of the sovereign.[33] The State of exception is generally a phenomenon where in certain authorities; members of the sovereign seek to place themselves above the law in certain circumstances. That larger thesis emerges only gradually. Agamben seeks to base the state of exception as 'an integral part of positive law because the necessity that grounds it is an autonomous source of law'. This approach is today codified in various constitutions[34] through the notion of derogation and emergency. When faced with a public emergency that 'threatens the life of the nation', human rights statutes[35] – and many constitutions – permit states to suspend the protection of certain basic rights. The existence of derogation like clauses is generally represented as a 'concession' to the 'inevitability' of exceptional state measures in times of emergency, and also as a means to somehow control these.[36] In practice, the derogation model 'creates a space between fundamental rights and the rule of law', wherein states can remain lawful while transgressing individual rights.

Agamben also understands the state of exception to be 'essentially extrajuridical', something prior to or other than law. This can also be seen in a Constitutional endorsement of the state of exception (emergency provisions) in most countries. Echoing Alexander Hamilton, that 'the circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed',[37] proponents argue that it is neither possible nor desirable to control executive action in times of emergency using standard judicial accountability mechanisms.[38]

The idea of a 'state of exception' is intrinsically related to the interplay between sovereignty and the guarantee of fundamental freedoms. In fact, over the past decade, this concept has been diluted to the extent that it is also applicable to non- emergency situations like handling terrorism and is used as an excuse to violate 'due process' clauses. Notable instances in this area are the passing of the Patriot Act[39] in USA

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33. Ibid. at p. 23.
34. Agamben notes that by 1996 atleast 147 countries had some sort of emergency provisions in their Constitutions. In 1978, an estimated 30 Countries were in a state of emergency.
35. This is also noticed in many Human Rights Treaties and Conventions. International Covenant on Civil and Political Rights (ICCPR; entered into force 1976), Art. 4; European Convention on Human Rights (ECHR; entered into force 1950), Art. 15; American Convention on Human Rights (ACHR; entered into force 1978), Art. 27.
36. Hickman, "Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism", 68 Modern Law Review (2005) 655.
37. Quoting Alexander Hamilton from the FEDERALIST PAPERS.
38. Stephen Humphreys , "Legalising Lawlessness: On Giorgio Agamben's State of Exception", *EJIL* (2006), Vol. 17 No. 3, 677–687.
39. Also known as Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.

and the Guantanamo cases. The Patriot Act for instance gives unbridled powers to the Authorities to violate basic constitutional rights in the name of protecting the Country from terrorism. When speaking about the USA Patriot Act, Agamben writes,

"What is new about President Bush's order is that it radically erases any legal status of the individual, thus producing a legally unnamable and unclassifiable being. Not only do the Taliban captured in Afghanistan not enjoy the status of POW's as defined by the Geneva Convention, they do not even have the status of people charged with a crime according to American laws "[40]

The Guantanamo cases are also related to the 'state of exception'. The Military Commissions Act[41] in the USA did not provide for *habeas corpus* provisions or the application of the Geneva Conventions to the prisoners in Abu Gharaib. They were to be treated as 'enemy combatants' without any status and tried before the Military Commission set up by the Bush Administration. In Agamben's philosophy then they were *homo sacers* in a state of exception created by the sovereign.

It is however worthy to note that in *Hamdan v. Rumsfeld*,[42] the Supreme Court held that military commissions set up by the Bush administration to try detainees at Guantanamo Bay lack "the power to proceed because its structures and procedures violate both the UCMJ and the four Geneva Conventions signed in 1949."

Another case in this regard is *Rasul v. Bush*[43], where the United States Supreme Court decision held that the U.S. court system has the authority to decide whether foreign nationals (non-U.S. citizens) held in Guantanamo Bay were rightfully imprisoned or not. The core contention of the litigation was that the United States government cannot order indefinite detention without due process. The detainees have the right to challenge the legality of their detention in court. To make that challenge meaningful, they have the right to be informed of the charges they face, and the right to present evidence on their own behalves and to cross-examine their accusers. The failure of the Bush Administration to provide these protections raises serious questions about their commitment to the U.S. Constitution which is supreme and inviolable in nature.[44]

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40. Giorgio Agamben, THE STATE OF EXCEPTION, 1st ed. 2005, p. 3. In *American Civil Liberties Union v. Ashcroft* (2004), the ACLU challenged the legality of infringing the right to privacy by taping phone conversation and surveillance by the FBI under the Patriot Act which the Court held to be illegal and violative of due process.
41. The Military Commissions Act, 2006.
42. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749.
43. *Rasul v. Bush*, 542 U.S. 466 (2004).
44. William Rehnquist, CJ., gave the opinion that the US Constitution is supreme and no statute has the violate due process clauses.

Both the cases I have quoted above have sought to place the idea that the state of exception can be negated by appropriate action by the judiciary. The Courts then have the daunting task of applying the principles of checks and restraints to regulate the powers of the members of the sovereign. While we have noticed that to some extent, this is being done in the United States, we shall now proceed to analyse the 'state of exception' in the Indian Context.

PART-III

STATE OF EXCEPTION IN THE INDIAN CONTEXT

I would now like to discuss the relevance of the 'state of exception' in the Indian context. While there may be many aspects involved, we would like to focus on three main issues; emergency, terrorism and the armed forces. This would also include a critique of the decision in *Masooda Parveen v. Union of India.*[45]

In *ADM Jabalpur v. Sivakant Shukla*[46], the Supreme Court in a four is to one ratio held that a Presidential order issued during the proclamation of an emergency taking away the fundamental rights guaranteed under Articles 14, 21 and 22 was perfectly constitutional in nature. In what is famously referred to as the *habeas corpus* case, the Supreme Court became the guardian of sovereign action and not the protector of fundamental rights.[47] What happened in that case was that many politicians, journalists, and social activists were arrested by Prime Minister Indira Gandhi under the Maintenance of Internal Security Act (MISA)[48] on non-existent or frivolous grounds after Emergency was declared in 1975. The detentions were challenged, but they were met with the government's plea that Article 21 was the sole repository of liberty, and that as the right to move for enforcement of that right had been suspended by the Presidential order of June 27, 1975, petitions were liable to be dismissed at the threshold. This objection having been overruled by nine high courts, the appeal was heard by a five-judge bench in the Supreme Court. The Court unfortunately upheld the emergency proclamation and defended the member of the sovereign in its unjust action.

Of the five judges, only one of them, Justice Khanna, showed courage in negating this totalitarian claim. To quote Justice Khanna[49],

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45. *Masooda Parveen* v. *Union of India*, WP (Civ) 275 of 1999, decided on 2nd May 2007.
46. *ADM Jabalpur* v. *Sivakant Shukla*, AIR 1976 SC 1207. The case of *Makhan Singh* v. *State of Punjab*, (1964) 1 Cr LJ 269 had also brought up this issue during the emergency proclamation in 1963 and the Court upheld the restrictions on habeas corpus on the wordings of the notification.
47. Peter D'Souza, "When the Supreme Court struck down the Habeas Corpus", PUCL Bulletin, June 2001.
48. Maintenance of Internal Security Act, 1973.
49. *ADM Jabalpur* v. *Sivakant Shukla*, AIR 1976 SC 1207.

"As observed by Chief Justice Huges, Judges are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice. A dissent in a Court of last resort, to use his words, is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possible correct the error into which the dissenting Judge believes the court to have been betrayed."

The Other four judges[50] sought to rely solely on the English case of *Liversidge v. Anderson*[51] where the English judges held that all civil and political rights could be taken away during war time. A State of exception for the guarantee of fundamental freedoms was then created by the members of the sovereign by placing themselves above the Constitution.[52]

Such a case brings ambiguity to the point as to whether the Constitution is an instrument to further sovereign interests or the guardian on fundamental freedoms? Can members of the sovereign who are subjected to the Constitution violate the exceptions that they created to the basic structure and place themselves above the law? Agamben rightly points out in this regard that the state of exception is the creation of the sovereign to exercise greater control and reduce the citizen to bare life or *homo sacer*.[53]

While emergency provisions are the most evident form of the creation of a state of exception, the members of the sovereign are finding other ways to create such states. One example of this is the introduction of drastic measures to tackle the instance of terrorism.. In *Kartar Singh v. State of Punjab*[54], the Supreme Court upheld the validity of the Terrorist and Anti- Disruptive Activities Act, 1985[55] and 1987[56] claiming them to be the need of the hour to *handle the menace of terrorism*. The consequence was legalizing confessions made before a police officer, extending the limit of habeas corpus, limitless search power and discretion by the officer to declare anyone as a terrorist and an area as a terrorist affected area.

One of the points that has been emphasized in this case is that if a law ensures and protects the greater social interest, then such a law will be regarded as a wholesome

50. Chandrachud J., Bhagwati J., AN Ray C.J., and MH Beg J. were a part of the majority.
51. *Liversidge* v. *Anderson*, HL (1942). See Rajinder Sachar, "ADM Jabalpur case: A Supreme Mistake", PUCL Bulletin, August 2006.
52. KG Kannabiran says that the Supreme Court stooped to its lowest in giving this shocking judgment. KG Kannabiran, "The Court has always held against Liberty", PUCL Bulletin, August 2006.
53. Giorgio Agamben, STATE OF EXCEPTION, 1st ed. 2005, Univ. of Chicago Press.
54. *Kartar Singh* v. *State of Punjab*, 1994 SCC (4) 569.
55. Terrorist and Disruptive Activities (Prevention) Act, (13 of 1985).
56. Terrorist and Disruptive Activities (Prevention) Act, (28 of 1987).

and beneficial law although it may infringe the liberty of some individuals.[57] Such a law will ensure the liberty of a greater number of the members of the society at the cost of one or few.[58] In my view, this is a false interpretation of the rights guaranteed in Article 21. Article 21 clearly states "No one shall be deprived.....established by law". Such a right is clearly an individual right the responsibility for the protection of which is in the hands of the State.[59] Having acknowledged this, the State is not allowed to deprive the life and liberty of one individual in light of the interests of a majority group. Our Constitution is the paramount parchment and is the sole protector of the rights of an individual. The word 'right' is a strong one and its correct usage is not in suggesting it, but to assert it and demand it from the State[60]. No member of the sovereign has the power to abrogate the rights of any individual and this holds true specially when it comes to the rights of a given set of individuals with regard to the interests of a majority. While such principles were strongly upheld in the 1970's[61], a line of cases in the 1980's[62] show us that the Courts have not given importance to this concept and applied otherwise.

On the same lines if we look at the 'procedure established by law' which Krishna Iyer J. said is synonymous to 'due process of law' in the United States, we see that individuals rights are not permitted to be compromised in light of a majority or in the name of security of the State[63]. Reference may be drawn to *Hamdi v. Rumsfeld* in the United States, where the Court held that strict procedures and measures like unlawful detention to tackle terrorism violate due process and state security cannot be used as an excuse.[64] Due process includes the very foundation of natural justice principles and any action by the State must not violate them. These principles are sacrosanct in the sense that no law or authority can over look them in any condition. Every member of the sovereign is bound to follow the principles of 'due process' or 'procedure established by law' and cannot create exceptions as per the situation at hand. A few scholars argue that the judiciary in our country has never been rights oriented claiming that it has always sought to protect the interests of the State vis a

57. *Kartar Singh* v. *State of Punjab*, 1994 SCC (4) 569.
58. M.P. Jain, INDIAN CONSTITUTION LAW, 5th ed. 2003, p. 1277.
59. *Francis Coralie* v. *Union Territory of Delhi*, AIR 1981 SC 746.
60. Conor Geaty, "Can Human Rights Survive: the Crisis of Authority", 2005 HAMLYN LECTURES, 10th November 2005.
61. *Keshavananda Bharti* v. *Union of India*, AIR 1973 SC 1461 : *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597 : *AK Roy* v. *Union of India*, AIR 1982 SC 710 : *ADM Jabalpur* v. *Shivakant Shukla*,, AIR 1976 SC 1027.
62. *In re The Special Courts Bill*, AIR 1979 SC 478 : *Inderjit Baruah* v. *State*, AIR 1983 Del 513 : *Kartar Singh* v. *State of Punjab*, 1994 SCC (4) 569.
63. *Rumsfeld* v. *Padilla*, 542 U.S. 426 (2004) : *Rasul* v. *Bush*, 542 U.S. 466 (2004).
64. *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004).

vis the individuals[65]. This can recently also be observed in the case of *PUCL v. Union of India*[66] where the Court upheld the validity of the Prevention of Terrorism Act (POTA).

MASOODA PARVEEN V. UNION OF INDIA

In May 2007, the Supreme Court in its judgment in *Masooda Parveen v. Union of India*[67] made important revelations as to the State of Exception and its application in the Indian context. It is infact shocking to even imagine the Court can create such an exception and give unbridled power to the army to handle the situation in Kashmir.

The deceased and husband of the petitioner, Ghulam Mohi-uddin Regoo was one day taken by 17 Jat Regiment soldiers an brutally tortured. The reason that the wife and most witnesses gave was because he had refuse to pay an extortion fee to the soldiers. The petitioner alleged that her husband was tortured to death by the army and later his body was returned in pieces to her. The explanation given by the Army was that he was leading them to a hideout which was blown up the moment he reached there with the soldiers. Surprisingly no soldier was injured by the blast and the only fatality was Ghulam's death. Ghulam's wife, Masooda filed a petition before the *Court demanding compensation and a job on "compassionate grounds."*

The Army said that Ghulam was a militant so no ordinary law would apply to them in this regard. They went on further to say that since Ghulam was a militant, Masooda would have to suffer for her husband's wrongdoing. The Army's rationale was readily accepted by the Supreme Court which impliedly stated that since there is 'no evidence to say that he was not a militant, so he is presumed one', that is, if the Army identifies a person as a militant he is one until proved otherwise. There was no evidence produced by the Army to support this notion and nothing on record about Ghulam's mode of death. From what I understand, in a petition for habeas corpus, it is upon the state to show that death was incidental and it is all the more onerous on the state to show so. It further stated,

"We are not unmindful of the fact that prompt action by the army in such matters is the key to success and any delay can result in leakage of information which would frustrate the very purpose of the army action."

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65. Jayanth K Krishnan, "Scholarly Discourse, Public Perceptions and the cementing of norms: The Case of the Indian Supreme Court and a Plea for Research", WILLIAM MITCHELL LEGAL STUDIES RESEARCH PAPER SERIES Working Paper No. 77 August 2007.
66. *People's Union for Civil Liberties* v. *Union of India*, (2004) 9 SCC 580.
67. *Masooda Parveen* v. *Union of India*, WP (Civ) 275 of 1999, decided on 2nd May 2007.

So the Court has violated the ruling in *Naga People's Movement v. Union of India*[68], and given an upper hand to the Army to indulge in such nefarious activities. The Court also authoritatively stated that since Masooda's husband was a terrorist, so compensation *on compassionate grounds* is to be given to her. The exception was created by the Court. The Army which is to be subjected to the sovereign; i.e. the Constitution, is then given a free hand by the Court to place itself above it.

Another instance of a 'State of Exception' is the enactment of the Armed Forces (Special Powers) Act, 1958[69] by the Parliament that sought to give special powers to the Army in conducting its activities in certain territories within India. The Act gives the Armed Forces wide powers to shoot, arrest and search, all in the name of "aiding civil power." First applied to the North Eastern states of Assam and Manipur, the Act was then amended in 1972 to extend to all the seven states in the north- eastern region of India. The enforcement of the AFSPA has resulted in innumerable incidents of arbitrary detention, torture, rape, and looting by security personnel[70]. This legislation is sought to be justified by the Government of India, on the plea that it is required to stop the North East states from seceeding from the Indian Union. After persistent human rights violations, the Government appointed the Justice BP Jeevan Reddy Commission[71] to inquire and recommend the changes in the Act. The Commission took note of the abuse of power and recommended certain changes to the Act to make it humane in nature. However, these recommendations have not yet been considered.

It must be noticed that in as much as the members of the sovereign create the 'state of exception', it is the Supreme Court the ultimately gives sanction to its conduct. There used to prevail a notion that the Supreme Court stands as a guardian of fundamental rights and due process.[72] A law, the consequence of which is the violation of any of the fundamental rights in the Constitution must be struck down.[73] In all the cases that are explained above, the Court has maintained that even though fundamental rights have been violated, the situations demand their sanction and thus validated them. This seems to attract Jhering's notion of law serving as a means

68. In *Naga People's Movement* v. *Union of India*, (1998) 2 SCC 109, the Court laid down guidelines for search, seizure and arrests to be made by the Army and categorically stated that no rights must be violated in such circumstances.
69. Armed Forces (Special Powers) Act, 1958.
70. "Armed Forces Special Powers Act : A Study in National Security Tyranny", Report by the *South Asian Human Rights Documentation Centre*. Available at http://www.hrdc.net/sahrdc/resources/armed_forces.htm .
71. The Entire Report is available at http://www.hindu.com/nic/afa/.
72. Bhagwati J. in *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248.
73. The Supreme Court in *RC Cooper* v. *Union of India*, (1970) 1 SCC 250 was of the view that State action must be adjudged in the light of its operation upon the rights of individuals and groups of individuals in all its dimensions. This was further upheld by Raj C.J. in *Bennett Coleman Co.* v. *Union of India*, (1972) 2 SCC 106.

to an end[74]. Accordingly, in such a purposeful evaluation of law, even if it sacrifices individual liberty, it will be valid[75]. To quote from *Kartar Singh's case*[76];

"that it has been felt that in order to combat and cope with such activities effectively, it had become necessary to take appropriate legal steps effectively and expeditiously so that the alarming increase of these activities which are a matter of serious concern, could be prevented and severely dealt with."

So much so, that while recently in a case testing the Constitutional validity of state sponsored armed groups, the Chief Justice stated[77] that there is nothing wrong with arming private groups, discharging a constitutional responsibility to protect in order to tackle the menace of Maoist trouble in a territory. What can be seen time and again is the Court sanction to State action when the purpose is justified, irrespective of the violation of rights. It is this situation that needs to be timely addressed. From a Court that once had the notion of standing up to State injustice[78], we seem to be more and more validating state action for invalid ends. The creation of a 'state of exception' is a method of confirming the validity of this means-end approach taken by the State and the Supreme Court. But the question arises if such a notion is justified? Can there be separate situations, determined by the State themselves as to when fundamental rights can be abrogated?

The answer lies in understanding whether people in a country are to be treated as 'citizens' or 'subjects'. The distinction lies in the fact that 'citizens enjoy rights' while 'subjects obey laws'. The State of exception seeks to treat the people as subjects to meet the ends of the state to be allegedly in 'state and societal interest'. Such an approach is not justified. State action must be tested from the touchstone of violation of rights; individual rights are supreme and inalienable and in modern democracies States must not abrogate them in greater interest. While the United States Supreme Court seeks to invalidate a state of exception in certain circumstances, regrettably the Indian Supreme Court stands by the State in protecting its actions. It is submitted that the 'State of Exception' is a pandora's box to the destruction of democracy and this can only be negated by an active role played by the Courts in respective legal systems.

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74. R. Von Jhering, "Law as a Means to an End", MDA Freeman, (ed.), LLOYD'S INTRODUCTION TO JURISPRUDENCE, 7th Ed. 2001, p. 703.
75. I. Jenkins, "Jhering", (1960-61) 14 Vanderbilt L. Rev. 169.
76. Ratnavel Pandian J., *Kartar Singh* v. *State of Punjab*, 1994 (3) SCC 569.
77. The Hindu, "Constitution of Salwa Judum Challenged", Sunday, May 20th, 2007. Available at http://www.hindu.com/2007/05/20/stories/2007052013221300.htm.
78. Jayanth Krishnan, "Scholarly Discourse, Public Perceptions and the Cementing of Norms: the Case of the Indian Supreme Court and a Plea for Research", Vol. 9, Journal of Appellate Process and Practice, (forthcoming 2008).

REFUGEE RIGHTS v. STATE SECURITY: SOCIAL CONDITIONS OF REFUGEES AND THE LAW

Pavini Emiko Singh

INTRODUCTION

International Refugee Law, although not a recent development, is one of the least evolved areas of International Law, owing in part to the hesitation by States to homogenize norms and restrictions in this respect. One of the most pressing concerns in the International sphere today is the need for protection of individuals fleeing from war, situations of internal conflict, or a regime that infringes their basic rights as citizens of the world. However, shockingly, most members of the International community have under the guise of protection of internal security, closed their doors to these individuals, an action which goes against the very spirit of international cooperation and the protection of human rights the world over. This article attempts to:

(i) Highlight the vulnerability of the present framework of refugee law in the face of restrictions imposed to preserve 'State security', and

(ii) It's inadequacy in providing adequate criterion for determination of refugee status, along with

(iii) The experimentation by various countries in their attempt to solve the latter issue.

This analysis is supplemented by a field study, conducted by the author as part of a research group, of a paradoxical situation dominating the world refugee concerns today- that of the Sudanese refugees in Israel.

REFUGEE LAW IN THE INTERNATIONAL SPHERE

Legislation in international law and the domestic law of states regarding refugees has been formulated recently due to the combined impact of the First and Second World Wars, which left many countries in a state of disarray. As was famously stated by the American diplomat William Smyser, "the second half of the twentieth century has witnessed an unprecedented explosion in the number and impact of refugees".

One of the first and still the most relied on source is the Convention Relating to the Status of Refugees, signed in 1951 in Geneva (also known as the Geneva Convention)[1], signed after the two World Wars and the Cold War. Although many

1. Convention Relating to the Status of Refugees (1951), 189 U.N.T.S. 150.

conventions and declarations signed subsequently have attempted to elaborate further on the topic, including the Universal Declaration of Human Rights[2] and the Cartagena Declaration on Refugees[3], the Geneva Convention continues to be of prime importance.

THE GENEVA CONVENTION AND THE CONCEPT OF ASYLUM

Article 1 of the Geneva Convention defines refugee as a person who,

"*as a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it.*" [4]

The author, after doing a comparative analysis of the law regarding refugees in 7 European countries including Poland, Bulgaria, Romania, Czech Republic, Sweden, Germany, the United Kingdom, along with the United States of America, found that all these countries have almost replicated the Geneva Convention in their domestic laws. While this seems at the first glance desirable, it must be stressed that a law formulated in 1951, which was also affected by the then existing scenario after World War II, and the beginning of the Cold War, may not be applicable in the present scenario, when there have been such drastic changes in the economic and military dynamics of the world.

THE PRINCIPLE OF NON-REFOULEMENT: THE BACKBONE OF REFUGEE LAW

The main guiding principle in refugee law is the *principle of non-refoulement*[5]. Article 33 of the Geneva Convention states that no State shall expel or return (refouler) a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. However, this is not absolute as Art.33(2) allows the *forced return* of refugees concerning whom there is reasonable ground for regarding as a danger to the security of the country which they are in. Restrictions like this, imposing subjective requirements of 'security of the country' can be interpreted differently

2. Universal Declaration of Human Rights, 10 December 1948, GA Res. 217(III) U.N. GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).
3. Cartagena Declaration on Refugees, Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85).
4. Convention Relating to the Status of Refugees (1951), 189 U.N.T.S. 150, Art.1.
5. Goodwin-Gill, G., *The Refugee in International Law* (Oxford: Clarendon Press, 1998), 117.

depending on the attitude the host country wishes to adopt. Therefore, provisos like Art.33(2), purporting to supplement the main principle, can actually be used to override the norm as has been done in the case of the Sudanese refugees in Israel, who are branded 'enemy nationals' and imprisoned on arrival.

This principle is also embodied in the Convention Against Torture, 1984, which states in Art.3 that no State party shall return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture[6]. In the context of 'protection of asylum-seekers in situations of large-scale influx' the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) adopted Conclusion No.22 in 1981 which states that in all instances of asylum-seekers,, the "fundamental principle of non-refoulement – including non-rejection at the frontier-must be scrupulously observed." Customary international law also extends the principle of non-refoulement to include displaced persons who do not enjoy the protection of the government of the country of origin.[7]

ASYLUM AND STATE SECURITY

The concept of asylum has been in existence in the form of religious beliefs of many countries since the ancient times.[8] However, the present concept of asylum has limited itself to the definitions laid out in the 1951 Convention, which clearly is unable to ensure a common standard of protection. One of the most significant horrors stories occupying the attention of the world today is that of the genocide in Darfur in Sudan. This genocide is carried on by the Arab militia (one of them being the Janjaweed) against the Sudanese of Negroid descent with the silent aid of the Sudanese government.[9]

In this instance, the Arab has become the "white man" and the story of racist colonization repeats itself as entire villages of Sudanese, both Muslim and Christian, are burnt down and thousands of families are wiped out. One of the most common escape routes for the survivors of such tragedies is Darfur-Khartoum-Egypt-Israel. Here however, lies the real irony. The Sudanese refugees come to Israel with the hope of asylum, and within half an hour of crossing the border, they are arrested by the border police, transferred to army bases and then the prisons and kept in the cells especially reserved for *enemy nationals*. A group of people, escaping from a

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6. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.
7. Goodwin-Gill, G., "Non-refoulement and the New Asylum Seekers", in Martin, D. (ed.), *The New Asylum Seekers: Refugee Law in the 1980s* (Dordrecht: Martinses Nijhoff Publishers, 1988), 103.
8. Chimni, B., (ed.), *International Refugee Law* (New Delhi: Sage Publications, 2000), 82.
9. The information regarding this example has been gathered from an interview conducted of Sudanese refugees in an Israeli prison by the author as part of a research group.

ruthless government targeting them for the colour of their skin, are then punished by other countries for being representatives of the same government.

Egypt did not prove an adequate shelter due to ineffectiveness of the status granted to the asylum seekers which is dealt with in the next part of the article, and eventually, unable to remain in a place where they spent most of their time in jail and the rest living on the streets, they paid the Bedouin to help them cross the Israel-Egypt border. After crossing, most of them turned themselves in to get assistance from the authorities, only to get the brand "enemy national prisoner". The disappointment was evident in every answer. None had spoken to family in Sudan, most doubted if they had any family left in Sudan. They had been in Israeli jails for time spans of between four months to 1 year, with nothing other than the routine tribunal hearing. In such a situation, following from the principles of State Liability[10] and from the very wording of the Geneva Convention, these are bona fide refugees eligible for asylum. While they did not complain of any ill treatment in prison, in such a situation to punish them for the acts committed by the perpetrators of the violence against them, is in clear contravention of any humanitarian or human rights norm.

Article 31 of the Geneva Convention expressly states that a State shall not impose penalties on account of their illegal entry or presence, on refugees coming directly from territory where their life or freedom was threatened according to Article 1, if they can show good cause for such illegal entry or presence.[11]

Therefore, the imprisonment of these refugees as a result of a perceived threat to security is in gross violation of their human rights and every international norm relating to refugees. Examples like this serve to highlight how perceptions of State security have overshadowed the ideals of the Geneva Convention, an obstacle that the existing framework of the Convention seems to provide no resistance to. The concept of 'enemy national' has not been specifically dealt with in the definition of 'refugee'- whether it was because such instances were not contemplated, or whether protection was meant to be granted irrespective of origin of the refugee. Whichever the reason, the indisputable reality is that lacunae such as this one are being used by States to interpret the law in ways that defeat its very purpose.

The treatment of the Sudanese refugees is a clear violation of the theory propounded recently by scholars concerning the 'right to be granted asylum'.[12] Interestingly, this right is almost opposite to the right attributed to sovereign states- the 'right to grant

10. The emerging concept of State Liability in Refugee Law has been dealt with in the last section- A Move for Change.
11. Convention Relating to the Status of Refugees (1951), 189 U.N.T.S. 150, Art.31.
12. Kennedy, D., "International Refugee Protection" (1986) 8 Hum. Rts. Q. 1, 57.

asylum'.[13] In a case before the Supreme Court of the United States- *Chris Sale, Acting Commissioner, Immigration and Naturalisation Service, et al. v. Haitian Centers Council Inc., et al.*[14], it was held that the President had the power to establish a naval blockade that would prevent illegal Haitian migrants from reaching American soil, even though it posed a greater risk of harm to the Haitians who would face a long and dangerous return voyage. The Court felt that since neither the Convention nor any statute prevented such action, this was within the limits of the authority of the President. This is another example of how Art.33(2) can be misused and the exception is allowed to defeat the norm

INADEQUACY OF TEMPORARY PROTECTION AS A SOLUTION

There was an attempt to create a solution to the problem of refugee rights versus state security through an emergence of the term of *'Temporary Protection'*. This was initially conceived in the context of refugees fleeing the conflict in Yugoslavia, so the host country did not have to grant permanent asylum to them and burden their resources.[15] There are three main characteristics of temporary protection: *firstly*, even those refugees who fall within the definition of the 1951 Convention may be given only temporary protection; *secondly*, the arms-length measures deliberately make the industrialized countries less accessible as even asylum-seekers facing imminent danger on return can be given only temporary protection; and *thirdly*, the granting of temporary protection is based on a premise of return, regardless of what the wishes of the refugee are to that effect.[16] If the host State considers it safe for the asylum-seeker to return after a certain amount of time, the person concerned has no say in the matter. While this does have certain merits regarding the providing of immediate security (as states are less hesitant to grant temporary status), recognizing protection needs and ultimately facilitating repatriation, the question remains- *how temporary is temporary?*, and what is the way to guarantee a safe return to the country of origin-and most importantly, how can the root cause in such country be dealt with.[17] Therefore, the concept of temporary protection, while an easy way out for countries determined to close their borders to any kind of a perceived racial or economic threat, is risking lives of asylum-seekers who are eventually forced to return to the places they have escaped from. To add to this, temporary protection is hardly given much importance by local authorities of different countries, and essentially the asylum-seeker is powerless against any kind of aggression shown by

13. *Ibid.*
14. 113 S. Ct. 2549, 113 S. Ct. 2549, 125 L. (92-344), 509 U.S. 155 (1993).
15. Chimni, B., (ed.), *International Refugee Law* (New Delhi: Sage Publications, 2000), 89.
16. *Ibid.*
17. United Nations High Commissioner for Refugees, *The State of the World's Refugees- In Search of Solutions* (Oxford: Oxford University Press, 1995), 85.

them. The Sudanese refugees are a clear example of this. These were young men, from the age of 17-31, who had managed to flee while their families were burnt down, had been arrested and tortured by the police in Khartoum, escaped, and finally managed to get entry into Egypt. After reaching Egypt, they all applied to the UNHCR. Out of all of them, one was given asylum, one temporary protection, the other was rejected, one had his interview rescheduled three times, and the rest never even heard from the office again. Irrespective of qualification (one of them was a qualified engineer who had done his education in Khartoum) they were all street vendors while in Egypt. The Egyptian police would repeatedly arrest them *in spite of their having being granted temporary protection by the UNHCR* and then release them in return for payment of some money, and if there was no money, they could be kept in jail for over 1 month. They also faced severe discrimination from the Egyptian people who felt they were "bad people because they had black skin"[18].

As a result of instances like this, many believe that refugees should not be made guinea pigs in the experiment to address the root cause of States' unwillingness to open their borders. Unless there is a dependable response to the risk of human rights abuse, the autonomous right to seek protection outside the frontiers of one's own state should not be compromised through measures such as temporary protection.[19]

A MOVE FOR CHANGE

The criteria laid down in the Geneva Convention are not only open to various interpretations, they have also clearly been proved to be insufficient. The latter problem, however, is now slowly being addressed by countries individually. Most legislations, drawing from the Convention, adhered to the requirement of a "well founded fear of persecution" for the granting of refugee status, requiring at least some threat of death, either in the form of a death penalty or as part of indiscriminate killing in the country of nationality. It has been recognized that asylum-seekers escaping from conditions due to natural disaster, civil war, etc., are not covered by the existing definition.

To combat this issue, the concept of granting '***Humanitarian Status***' was created. The dislocation of large number of people could not be handled by the traditional solutions of resettlement or temporary asylum, and called for something more effective-the acknowledgment of the root causes of their problems, and subsequent action by the International community. While the earlier concept of strictly defining refugees allowed greater scope for discretion by the State in which asylum was

18. As mentioned during the interview by one of the refugees.
19. Hathway, J., ed., *Reconceiving International Refugee Law* (London: Martinses Nijhoff Publishers 1997) xxiii.

sought, there has been a growing awareness that a 50 year old definition is no longer adequate. The United Nations High Commissioner for Refugees, while addressing the Economic and Social Council, referred to situations of international conflict, civil war, general political and social instability, etc., and stated that if persons were obliged to leave their country of nationality as a result of such events, they would not be refugees according to the statutory definition, but would be in a situation *analogous* to refugees.[20] The General Assembly, in its Resolution A/RES/49/169 of 20 December 1994, called upon States to take all measures necessary to ensure respect for the principles of refugee protection and the humane treatment of asylum-seekers in accordance with internationally recognized human rights norms. Many countries, including the seven mentioned earlier, have started developing separate criteria for granting of humanitarian status. These include civil war, natural disasters, etc. Sweden also provides for the granting of humanitarian status to homosexuals fleeing from countries like India where homosexuality is a crime.

However, despite UNHCR's repeated recommendations that such asylum-seekers should be protected against refoulement and be permitted to remain in the territory of refuge until a permanent solution can be found for them, there is no customary international law protecting humanitarian refugees.[21] It remains dependant on the individual initiative of each State.

Recently, there have been efforts to evolve a theory of State Liability which centers on the principle that every State must be held responsible for the performance of its international obligations under the rules of international law, whether derived from custom, treaty, or any other source of international law.[22] Therefore, failure to perform such obligations would amount to an international wrong.

There has also been discussion concerning the existence of the "Right to Remain" which can draw inference from the principle of non-refoulement, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the 1973 Convention on Suppression of Crime of Apartheid.[23]

In such a scenario, keeping in mind the provisions of the Universal Declaration of Human Rights and the Convention Against Torture, to turn away asylum-seekers

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20. Jackson, I., *The Refugee Concept in Group Situations* (London: Martinses Nijhoff Publishers, 1999), 421.
21. Hailbronner, K., "Non-refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking?", in Martin, D. (ed.), *The New Asylum Seekers: Refugee Law in the 1980s* (Dordrecht: Martinses Nijhoff Publishers, 1988), 128.
22. Beyani, C., "State Responsibility for the Prevention and Resolution of Forced Population Displacements in International Law", (1995) Int'l J. Refugee L. *(Special Issue)*131.
23. Gowland-Debas, V., (ed.), *The Problem of Refugees in the Light of Contemporary International Law issues*, (The Hague: Martinses Nijhoff Publishers, 1994), 102-105.

from the border or to return them when it is felt that their persecution is not severe enough, is a gross violation of International Law- a violation that nearly every State is guilty of.

All these principles have been evolved with the aim of being able to provide better protection to asylum-seekers, where the host country is obliged to look beyond its security concerns and address the humanitarian issues involved. Initially, laws relating to refugees were made keeping in mind the country's foreign policy, relations with neighbours, level of technological development, etc. Now, however, there is a slow change towards the other direction, where the human rights of the refugees are considered paramount irrespective of where they are from, or what the economic policies of the host country are. Unfortunately, this has not been implemented in many countries yet, but with the initiative of the UNHCR and human rights organizations like hotlines for migrant workers, there is a gradual shift towards this thought process.

CONCLUSION

The concept of granting refugee status emerged from the whole idea of burden-sharing amongst the international community regarding problems faced by large numbers of people, as is evidenced from the emphasis on principles such as non-refoulement. However, unfortunately, this has now turned into the phenomenon of burden-shifting[24] as states anxious to close their borders to what they assume are security threats, now begin to find reasons to avoid granting refugee status. This attitude has resulted in situations like that of the Sudanese refugees where ironically, a problem which is known by all to stem from mass violations of human rights, culminates in a repeat performance of this violation by other countries who are turned to for assistance.

There is also not enough acknowledgment of the fact that the existing definition framed in 1951 does not cover a whole range of people in need of asylum, and it cannot be left to individual States to be pro-active. There is necessity for improvement to be made on an international scale, wherein either the definition itself is amended or international regulations governing the granting of humanitarian status as a parallel to refugee status are created. In the present scenario where individualistic concerns of States dominate even the human rights sphere, it is only the force of collective recognition that will succeed in ensuring refugees their rights.

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24. Chimni, B., (ed.), *International Refugee Law* (New Delhi: Sage Publications, 2000), 90.

THE ELEPHANT IN THE ROOM: DEALING WITH FINAL YEAR DISENGAGEMENT

*Divya Venugopal**

The adoption of the five-year structure in national law schools has been hailed as a triumph of professionalism that revamped a flailing system of legal education. Despite this, in the final few semesters, especially the ninth and the tenth, complaints of ennui towards learning the law are common in the class in Nalsar–feelings of weariness and discontent towards education, with all anxiety directed towards obtaining employment. Faculty openly declare their difficulty in dealing with a class that is in-attentive and openly uninterested, resorting to minor transgressions of codes of conduct in the classroom as the attendance rule forces all students to attend class.

When attempting to come to terms with crisis in Nalsar, given that its structural set up is extremely different from a law school functioning as part of a large university abroad, situational empathy when found in academic writing about law schools in America is all the more valuable.

James Boyd White describes in his essay a "caricature" of law students in their final year of law school, their attention focussed on getting a job and learning doctrinal material that they think will prepare them in a practical way for the job they are about to enter, resulting in,

> *" at its worse,a kind of contempt: for the courses, for the theoretical conception of law that their teachers seem to have, and for the intellectual process in which they are themselves engaged".* [1]

White then proceeds to describe a reduction of law school education as studying "doctrine in a vacuum" in the final years of law school. He then puts forward varied reasons as to why classes in the final year are marked by passivity or resistance, unconcern or inattention, and a kind of disguised hostility on both sides of the podium.[2]

This paper considers the idea of the disengaged student in the final year of law school. In order to do so it first explores the concept of educational engagement and the factors that are said to impact it. The paper then probes the veracity of the existence of the disengaged student in law school. In the next section it looks at

1. White is at pains to note that this caricature need not be representative of all or any law school in particular, but "is widely believed and has enough truth in it, to make it worth our attention, even if only as a cultural artifact; James Boyd White, "Doctrine in a Vacuum: Reflections on What a Law School Ought (And Ought Not) to Be," 35 *Journal of Legal Education* 155
2. *ibid.*

whether there are pervasive barriers to engagement that are created and maintained by structural factors in the university and evaluates options that may enthuse engagement among final year law students.

PART 1

A. WHAT IS ENGAGEMENT

Crucial to proceeding further is a definition of what constitutes "engagement". Surveys that measure engagement, especially in an educational institution, seek to define it not only in terms of the grades that are obtained but also in terms of academic investment, motivation and commitment.[3] In this view, engagement encompasses both institutional and personal factors that impact the individual. There are therefore a variety of factors that work individually and in conjunction with each other that affect engagement.

1. FACTORS THAT AFFECT ACADEMIC ENGAGEMENT

Bonita London et. al looking at psychological theories of educational engagement envisage the process of engagement in three levels or layers.[4] Each of the factors is interlinked and impacts the working of the law school creating as it were, "*a network of potential sources of disengagement, and consequently, windows of opportunities for interventions.*"

The first level at which engagement is explored is the *institutional level* which encompasses the policies, regulations, and formal or informal structures that students have to deal with in the institution. Some of the factors that were identified in this category were grading and evaluation practices, diversity of the academic environment and the availability of limited scholarships and fellowships.

(a) INSTITUTIONAL FACTORS

I. GRADING AND EVALUATION PRACTICES

Grading and evaluation practices are a powerful institutional variable that impacts the level of law students' engagement. For many students, the institutionally sanctioned grading and ranking procedures create a distinct hierarchy among the students that translates later into potential for success.[5] As coveted internships, job prospects and even possibilities of higher education are linked to grades, 'a culture of competition for limited resources can make the goal of collaboration or of engaging

3. Bonita London, Vanessa Anderson, Geraldine Downey, Studying Institutional Engagement: Utilizing Social Psychology Research Methodologies To Study Law Student Engagement, 30 Harv. J. Law & Gender, 389, 392. Available at www.law.harvard.edu/students/orgs/jlg/vol302/389-408_London.pdf
4. Bonita London et al., *Psychological Theories of Educational Engagement: A Multi-method Approach to Studying Individual Engagement and Institutional Change,* 60 Vand. L. Rev. 455
5. Duncan Kennedy, How the Law School Fails: A Polemic, 1 Yale Rev. L. & Soc. Action 71, 72-73 (1970)

the course material in a deep and reflective process less likely.'[6] This competitive environment may result in students disengaging from a learning-focused approach in favour of an approach that maximizes performance.

II. DIVERSITY

People's perceptions of the world around them are informed by their different backgrounds. Voices from diverse cultures bring to the classroom important and different perspectives.[7] Studies confirm that "student body diversity promotes learning outcomes, better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."[8] The Gurin Report[9] found that undergraduate "[s]tudents who experienced the most racial and ethnic diversity in classroom settings and informal interactions with peers, showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills." The presence or absence of diversity therefore plays a role in the learning process in the classroom and impacts student engagement.

(b) SITUATIONAL FACTORS

According to London, there are two situational factors that may impact engagement including (1) the pedagogical practices of the professor, and (2) the social culture of the institution[10]

I. PEDAGOGICAL PRACTICES

The pedagogical philosophy of professors has long been identified as a key influence on emotions, attitudes, and behaviour– an important socialization agent[11] – for law students .[12]

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6. Bonita London et al., *Psychological Theories of Educational Engagement: A Multi-method Approach to Studying Individual Engagement and Institutional Change,* 60 Vand. L. Rev. 455, 457
7. Association of American Law Schools, *Statement on Diversity, Equal Opportunity and Affirmative Action*, AALS Handbook: Statements Of Good Practices, available at: http://aals.org/about_handbook_sgp_div.php
8. Gary Orfield & Dean Whitla, Diversity and Legal Education: Student Experiences in Leading Law Schools in Diversity Challenged: Evidence On The Impact Of Affirmative Action 143 (Gary Orfield with Michal Kurlaender eds. 2001)
9. Amici Brief submitted in Grutter v. Bollinger, 123 S.Ct. 2325 (2003) In this report, Professor Gurin analyzed three sources of data: 1) national data collected from over 9,300 students at nearly 200 colleges and universities; 2) survey data collected from over 1300 undergraduate students who entered the University of Michigan in 1990; and 3) data collected from undergraduate students who were enrolled in the Intergoup Relations, Community, and Conflict Program at the University of Michigan; Available at www.wcl.american.edu/journal/genderlaw/11/fata.pdf, last visited 7/16/2008
10. London describes this as the culture of competition versus collaboration in the institution. Describing it as the social culture has more resonance in the context of Nalsar as it allows a number of different factors to be taken into account.
11. See generally James M. Henslin, Sociology: A Down-To-Earth Approach, (4th Ed) Boston: Allyn and Bacon, 1999
12. Susan P. Sturm, From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession, 4 Duke J. Gender L. & Pol'y 119, 129 (1997)

Susan Sturm notes that pedagogic philosophy is often the main driving force behind classroom dynamics, the relationships between professors and students, and between students in the course. An important point she makes is that pedagogical practices are not necessarily institutionalized, but are reflective of the individual teaching philosophies of faculty members.[13] Different teaching styles impact student engagement and investment in each of their classes differently.

A number of writers have drawn attention to the hierarchical nature of law classes in which the professor is the source of all knowledge and the students' role is devoid of power, authority, and feelings of control toward their outcomes. These feelings of powerlessness also contribute towards differing levels of engagement by students in a course.

II. SOCIAL CULTURE OF THE INSTITUTION

Institutional rules and regulations pertaining to grading and seemingly limited 'prizes' at the end such as internships and jobs may result in students feeling like they are in constant competition with peers for the top spots available. While competition may drive some students to increase their efforts and production, it also produces some negative consequences that interfere with certain key goals of education. The competitive environment of legal education may have the unintended effect of creating ruptures in academic efficacy which in turn, compromise the confidence, engagement, and motivation of students.[14]

Through a study of intergroup relations and group dynamics, social psychologists Elliot Aronson and Shelley Patnoe proposed that the formation of collaborative work groups in which each member feels valued and respected and contributes to the overall group's success is important in fostering the engagement and investment of all students. Their findings indicate that institutional methods to have more avenues for collaboration would produce greater engagement among students.[15]

III. INDIVIDUAL FACTORS

At the personal or individual level there are a variety of issues that impact the engagement of law students. Differences in competence beliefs[16] or their perceptions of their own intelligence and capabilities lead individuals to either withdraw and

13. Susan Sturm, *The Architecture of Inclusion*, 29 Harv. J.L. & Gender 247 (2006).
14. Carol S. Dweck, Self-theories: Their Role in Motivation, Personality, and Development 26 (1999).
15. Elliot Aronson & Shelley Patnoe, The Jigsaw Classroom: Building Cooperation in the Classroom 9-15 (2d ed. 1997). Study cited in Bonita London et al., *Psychological Theories of Educational Engagement: A Multi-method Approach to Studying Individual Engagement and Institutional Change,* 60 Vand. L. Rev. 455
16. Bonita London et al., *Psychological Theories of Educational Engagement: A Multi-method Approach to Studying Individual Engagement and Institutional Change,* 60 Vand. L. Rev. 455,460

disengage when faced with obstacles or re-invest and increase their efforts to cope with difficulties. Research on 'academic goal endorsement' and 'achievement motivation' provide other models of competence beliefs that similarly impact engagement in law school.[17]

One's social identity and the expectations that one is boxed into by virtue of that identity affect engagement in subtle and not-so subtle ways. Patronizing remarks and attitudes towards female students or members of ethnic groups affect students' sense of belonging and their involvement in classroom and other activities. As London et al note, for students who are not in the inner circle of inclusion, and who do not feel comfortable within the system, psychological engagement becomes difficult to maintain. The possible fallout of this may be disengagement from the institution, or, in some cases, "dis-identification" with one's negatively stigmatized group entailing a loss of one's identity in favour of assimilating into the institutional culture.[18]

The above examples are illustrative of a host of factors that work on their own or in consonance with other factors to weave a complex web of variables that maintain levels of engagement and disengagement.

Now that a degree of theoretical comfort has been reached on understanding engagement and the factors that impact it, we seek to verify and understand the phenomenon of disengagement in the context of Nalsar.

UNDERSTANDING DISENGAGEMENT IN NALSAR

At the very outset, there is a need to establish the veracity of the claim that law students in the final year are a disengaged breed. Personal experience in Nalsar certainly confirms the presence of this breed. Of course being a subject of casual banter in the hallways, and a recurring rant over *chai* hardly makes for authoritative view, even if it does, as White describes, represent a set of expectations "against which both faculty and students report that they must struggle." [19]

In order to test the hypothesis a sample survey was carried out among the fifth years. Preliminarily, a focus group consisting of students selected from across the spectrum of the grade point averages in the class, and two faculty members was

17. See example Andrew J. Elliot & Marcy A. Church, A Hierarchical Model of Approach and Avoidance Achievement Motivation, 72 J. Personality & Soc. Psychol. 218, 220-27 (1997); Bonita London et al., *Psychological Theories of Educational Engagement: A Multi-method Approach to Studying Individual Engagement and Institutional Change,* 60 Vand. L. Rev. 455
18. Bonita London et al., *Psychological Theories of Educational Engagement: A Multi-method Approach to Studying Individual Engagement and Institutional Change,* 60 Vand. L. Rev. 455, 464
19. James Boyd White, "Doctrine in a Vacuum: Reflections on What a Law School Ought (And Ought Not) to Be," 35 *Journal of Legal Education* 155, 156(1986)

questioned as to what indices would constitute academic engagement. The following criteria were generated after discussion:

1. Attentiveness in class
2. Volunteering in class/Raising questions
3. Preparation for class
4. Originality and depth of research attempted in a research paper
5. Following up on class discussions
6. Performance on assessment tasks[20]

Once a definition of academic engagement as constituting these factors was settled upon given their frequent recurrence with interactions in the focus group, fifth year students were asked as to whether they were academically engaged/involved in learning the law in the classroom. Over 90% of students surveyed replied in the negative.

In the next question, a set of adjectives to describe student attitude towards class was listed. Students were asked to pick what seemed most relevant for them. A blank was left for students to fill in an adjective of choice if either a. Enthusiasm, b. Ennui, c. Apathy or d. Interest did not adequately describe their attitude in class. A third of those surveyed approached the classroom with a sense of ennui and another third with a feeling of apathy. Ten percent said the only reason they were in class was attendance while another ten percent said that the only thing that they got out of the class room was the air conditioning and catching up on gossip with their peers.

On the other hand, the control group composed of second years and a few third years *all* reported to be engaged in the classroom and at least half of those surveyed said they approached the class with interest. Feelings of apathy were prevalent in

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20. A similar set of factors were used to gauge academic engagement in survey across American and Canadian law schools. The Law School Survey of Student Engagement 2006 used among others (that are not relevant in the institutional set up of Nalsar) the following factors:
    1. Asked questions in class or contributed to class discussions
    2. Prepared drafts of an assignment before turning it in
    3. Included diverse perspectives in class discussions and papers
    4. Coming to class without completing assigned readings or cases
    5. Discussed assignments with a faculty member
    6. Discussed career choices and options with a faculty member
    7. Worked harder than you thought you could to meet faculty standards and expectations
    8. Discussed ideas or readings from class with others outside of the classroom

    Engaging Legal Education: Moving Beyond The Status Quo, Law School Survey on Student Engagement, Available at http://lssse.iub.edu/2007_Annual_Report/pdf/EMBARGOED__LSSSE_2007_AnnualReport.pdf, last visited 7/16/2008

only about a quarter of those surveyed. Among the remaining persons surveyed a few expressed enthusiasm, while ambivalence accounted for the other respondents.

What was surprising was that when both the groups were given factors that were said to impact educational engagement and were asked to rank them in the order of importance, the results between the control group and the fifth year group were surprisingly similar. Both the groups ranked faculty as the number one factor that affected engagement . (42% of fifth years, and 52% of the control group). About a fifth of both the groups attributed a strong influence on personal beliefs and motivations, while a tenth believed that grading and evaluation practices were most important. Social culture or an atmosphere of learning in the place received little importance with only about 5 percent of those surveyed in both the groups believing it was the most important. The only difference in attitudes came about in the context of the value of diversity , both of people and perspectives in the classroom contributing towards engagement. Double the number of fifth years as compared to the control group believed that diversity was the most important factor that affected involvement/engagement in learning. (about twenty percent and ten percent respectively.)

Limitations of the Survey

An important caveat to be kept in mind is that cross-sectional survey methodologies, that gather information from a population at a given point of time rely on retrospective reporting–students reporting about experiences of engagement over the course of a semester– which can be biased by memory artefacts and psychological reappraisal or reconstruction, all of which interfere with the accurate reporting of one's experiences.[21]

There may also be systematic differences (confounding factors)[22] apart from the two groups being in different years that could contribute to the staggering difference in the key question of engagement. These confounding factors could range from the fact that as Nalsar is akin to a total institution there may be a variety of socialisation factors at play that induce a greater degree of disengagement after five years of living in the institution. Or it could merely be attributable to the fact that the survey for the fifth years was handed out during a break between classes and may have been filled in when classes were in progress adding to a sense of detachment from

21. Bonita London, Vanessa Anderson, Geraldine Downey, Studying Institutional Engagement: Utilizing Social Psychology Research Methodologies To Study Law Student Engagement, 30 Harv. J. Law & Gender, 389, 392. Available at www.law.harvard.edu/students/orgs/jlg/vol302/389-408_London.pdf
22. See generally http://www.camcode.com/help/basics/confounding.htm <last visited 7/16/2008> for a basic discussion on confounding factors.

the class while the control group was surveyed in their free time in the library and in the mess.

Notwithstanding these limitations, the survey produced extremely stark results: Over 90 percent of final year students were not engaged in the classroom, while out of the same number of students surveyed in the second and third year, all of them reported to be involved in the classroom. Despite these contrasting results, students believed that the same factors affected their engagement at the beginning and end of law school.

Given the situation of near-complete disengagement in the final year, the next section broadly divides possible responses into four categories.[23]

PART II

REACTING TO DISENGAGEMENT IN LAW SCHOOLS

OPTION 1: LET THE ELEPHANT BE

> *"The system is working fine. Leaving a semester free for recruitment means that students can focus their energies on getting a job even though it obviously disrupts the educational process."*

Sander and Gulati point to this 'happy charade' of the final year as a handy institutional arrangement. They link the prevalence of this notion to the theory of legal education that states that law school educations serves merely a signaling and symbolic function[24] making it convenient and workable for a number of interests: employers, university administrators, and many students and teachers. Through student surveys, they found that a large percentage of students find law school to be excessively theoretical and feel that they could be better prepared to practice law. However, this factor in itself does not cause them to be dissatisfied with their schools. Once the grades have been obtained, and the resumes have been filled – students disengage. Law school they feel has served its primary purpose, and the task now is to find a job and wait out the remainder of school.[25]

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23. The division into categories broadly draws from Sanders and Gulati who suggest dividing up reform measures into 7 broad categories. Sanders, Mitu Gulati , Bob Sockloskie "The Happy Charade: An Empirical Examination of the Third Year of Law School,") 51 *Journal of Legal Education* 235-66 (2001); republished (with extended footnotes) as Chapter 4 of Sherwyn &Yelnosky, editors, *NYU Selected Essays on Labor and Employment Law*, volume 2 (2003).
24. According to this view, law schools are most important as signals of prestige that affect future employment prospects, and the different stake holders–the students, administrators and faculty all benefit from this arrangement.
25. Sanders, Mitu Gulati and Bob Sockloskie "The Happy Charade: An Empirical Examination of the Third Year of Law School," , Chapter 4 of Sherwyn &Yelnosky, editors, *NYU Selected Essays on Labor and Employment Law*, volume 2 (2003), 186

When the above authors presented a paper at New York University's law school that advocated final year curriculum reform to make it more substantively ambitious and more closely linked to real-world problem-solving, there was adamant opposition from the students.

> *"We will be working hard enough next year," they argued. "Let us get our credentials in peace!"*[26]

Big firms invest little in training so junior associates are forced to either sink or swim and must bill mind-numbing hours on mostly tedious tasks.[27] The final year of law school is therefore considered a brief reprieve before the sentence begins.

While engagement at this stage, when there is a basic level of comfort with handling legal materials, is tremendously useful as students will be able to build on and use higher level thinking skills: to apply rules, analyze issues, synthesize doctrines with ease, [28] just this factor by itself is unlikely to bring about any change.

OPTION 2: ABOLISH THE FINAL YEAR

The next option is to completely abolish the fifth year and modify the curriculum so there are a greater number of courses that one has to do over the four years. Since the five year model is relatively new in the country and has been seen as a great leap from the three year model in terms of bringing in professionalism and improving the standard of student admissions with competitive entrance exams, a proposal to abolish the fifth year will not be easy. When the five year law schools were contemplated, the curriculum was sought to be structured in a manner that in the first two years of this five-year program, students would take a combination of doctrinal law courses and social science and humanities subjects. During the third and fourth years, the courses would be primarily law subjects, but students would also be asked to enrol in skills-based classes or their choice of different public interest clinics. In the fifth year, students could take electives, but regardless of their selection, there would remain a strong clinic and writing component to these final year courses.[29] As the Bar Council of India has the power to regulate the standards of admission and has overall responsibility for the formulation of legal education in India, the proposal would have to be made very seriously there.

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26. Mitu Gulati and Bob Sockloskie ,The Happy Charade: An Empirical Examination of the Third Year of Law School,", Chapter 4 of Sherwyn &Yelnosky, editors, *NYU Selected Essays on Labor and Employment Law*, volume 2 (2003).189
27. Michael Asimow, Embodiment of Evil: Law Firms in the Movies, 48 UCLA L. Rev. 1339 (2001).
28. Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401, 407 (1999).
29. N.R. Madhava Menon, *Changes in the Law Curriculum – A Proposal*, in ALL INDIATEACHERS' ASSOCIATION: REPORT OF THE COMMITTEE ON REFORMS IN LEGAL EDUCATION IN THE 1980s, 51 (1979) Jayanth Krishnan, "Professor Kingsfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India" http://ssrn.com/abstract=682341, 38

Since the system is still very new, and the average age of the National Law Schools that have a joint entrance programme through the Common Law Admission Test is less than ten years[30] abolishing the fifth year may not also serve any purpose, but merely push greater disengagement in the fourth year after law school has finished its 'signalling function.'

However, talking about abolition is one way to ensure that reform proposals are discussed, and defending the structure of law schools as they exist now would certainly raise debates over the value and effectiveness and the implementation of the final year curriculum.[31]

OPTION 3 : NEW METHODOLOGIES IN THE CLASSROOM

Given the importance assigned to faculty and teaching practices by students in the survey, it would be worthwhile to evaluate the caricature of the disengaged law student described by James White in the earlier section that heavily alludes to teaching practices as a main cause of the malaise. Despite declarations by faculty about how it is important to merely understand the functioning of rules, what tends to be tested is ones ability to reproduce as many rules and cases as possible in the examination. An anxiety on the part of the professor to finish "portions" and "cover the course" leaves the student with the feeling that all study is merely to crack the final examination making academic engagement of any other kind redundant.

This focus on discrete texts which is challenging and novel in the first few years of law school becomes what White describes as "doctrine in a vacuum" in the final year. Speaking from his experience as a teacher, he describes students cheerfully and passively accepting the teacher as responsible for running the class and '*agree[ing] to praise one teacher and blame another for the performance, as if it were a TV show.*'. This process reduces "good teaching" to getting the material across in an entertaining way and students reduce courses to course outlines to be crammed the day before the exam. Law school, on these terms, trivialises both law and education.

Carol Parker reiterates that this vision of lawyers, trained to think only for a final exam, trivialises legal thought[32] so as to suggest that the law is simply the mechanical

30. NLSIU-Bangalore, NALSAR-Hyderabad, NLIU-Bhopal, NUJS-Kolkata, NLU-Jodhpur, HNLU-Raipur and GNLU-Ahmedabad are the Universities that have an agreement to administer the CLAT or the Common Law Admission Test. The average age of these universities is 8.
31. Gulati puts forward the same argument when discussing the abolition of the third year in the American Law School; Sanders, Mitu Gulati and Bob Sockloskie "The Happy Charade: An Empirical Examination of the Third Year of Law School," , Chapter 4 of Sherwyn &Yelnosky, editors, *NYU Selected Essays on Labor and Employment Law*, volume 2 (2003),
32. Carol M. Parker, A Liberal Education in Law: Engaging the Legal Imagination Through Research and Writing Beyond the Curriculum . Journal of the Association of Legal Writing Directors, Vol. 1, 2002 Available at SSRN: http://ssrn.com/abstract=1095529.

application of rules. Apart from constraining the legal imagination, such learning does little to sustain interest in a topic and reduces learning to a passive exercise.

Legal education then becomes not about thinking like a lawyer, but learning to pass the final exam. The student is placed in a situation where roles and relations are determined where the teacher is seen as the powerful knowledge manipulator and the student is infantilised into a role with no responsibility beyond preparing for a routine examination using the course outline.

Detailed empirical surveys by Gulati, Sander and Sockloskie seemed to suggest that final year law students have a hunger for applying what they have learned in law school to client problem-solving. After analysing data from over eleven law schools across the United States, they concluded that:

> *"it does not seem to us that students are simply being negative about their schooling, or that they are simply impatient to graduate so they can start maximizing financial gain. They seem to have a definite agenda that links career goals to serving clients and working on real-world problems, and they dismiss the third year of law school because it does not seem very relevant to that agenda."*[33]

The key question that then needs to be asked is how can law school curricula, especially in the final year, be designed to expose students to questions that exemplify the legal mind at work, so as to promote individual engagement in learning and development of expertise in legal thought? Given the existing situation, what minor tweaking and adjusting can be done in the curriculum to awaken fifth year engagement?

Active learning techniques such as applying concepts to real- world problems are effective methods of teaching critical thinking and higher level cognitive skills.[34] Through active learning techniques, students learn to construct and not simply receive knowledge.[35]

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33. Sanders, Mitu Gulati and Bob Sockloskie "The Happy Charade: An Empirical Examination of the Third Year of Law School," , Chapter 4 of Sherwyn &Yelnosky, editors, *NYU Selected Essays on Labor and Employment Law*, volume 2 (2003), 185
34. Ernest T. Pascarella & Patrick T. Terenzini, How College Affects Students: A Third Decade Of Research, Volume 2 (2005); Engaging Legal Education: Moving Beyond The Status Quo, Law School Survey on Student Engagement, Available at http://lssse.iub.edu/2007_Annual_Report/pdf/EMBARGOED__LSSSE_2007_Annual_Report.pdf, last visited 7/16/2008
35. Marcia Baxter Magolda, Creating Contexts For Learning And Self-Authorship (1999). Engaging Legal Education: Moving Beyond The Status Quo, Law School Survey on Student Engagement, Available at http://lssse.iub.edu/2007_Annual_Report/pdf/EMBARGOED__LSSSE_2007_Annual_Report.pdf, last visited 7/16/2008

Simple changes in evaluation techniques may allow for more active leaning. For instance, final year students could be given sets of take-home problem based questions on a regular basis instead of examinations.

Studies also show that the vast majority of students learn more when performance standards require a level of effort greater than what students would ordinarily put forth if left to their own devices.[36] This could be achieved by introducing a greater degree of rigour in the syllabus with emphasis on critical reading skills which ought to have been developed earlier, but have still largely been neglected.

Giving a complete choice of subjects in the final year is one move that could motivate greater engagement. Opinions voiced while taking the survey among students in the fifth year were of the view that after one has chosen a career path or at least direction by means of the first job, there is little inclination to study subjects in areas one feels one will never use. Introducing the element of choice automatically could raise the level of engagement one notch due to a higher degree of perceived relevance and responsibility for the choice.

Introducing electives that make the transition from sheltered student life into the world of work easier such as training in etiquette and grooming and other courses with a clear real-world practical focus would also help in removing the general atmosphere of discontent and apathy that prevails in the final year.

However, even if better practices can motivate a large percentage of students to change, the problem seems to be of such a magnitude that minor tweaking may not be enough to help improve levels of engagement.

OPTION 4: THE MEDICAL SCHOOL MODEL

When setting up the National Law School, Madhav Menon's idea was that the five-year law program would be as rigorous as any engineering or medical school curriculum, both of which had the reputation in India for being highly demanding. [37]

To incorporate vigour into the final year, one possible way is to take the route taken by medical schools and have rigorous clinical legal programmes. In this model, a set number of hours per day are set aside as clinic hours. Observation is interspersed with seminars and readings that prod reflection upon, and deepen understanding of

36. George D. Kuh, Jillian Kinzie, John H. Schuh, Elizabeth J. Whitt, and Associates, Student Success In College: Creating Conditions That Matter (2005).
37. He despised the fact that "law . . . [had become] reserved for the rejects from other disciplines and for those who wanted it cheapand with least effort." Excellence In Higher Education, Education: Some Insights From The National Law School Experience, by Dr. N.R. Madhava Menon, August 1998, cited in Jayanth Krishnan, "Professor Kingsfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India" http://ssrn.com/abstract=682341, 38

each day's experience. Using the analogy of medical school, law schools could develop community law practices that allowed final year law students to gain some real-world exposure, while at the same time have intensive seminars and tutorials on the practice and application of law.

Students in the final year could choose from a variety of practice settings, and each practice setting could be complemented by instructional strategies aimed at teaching relevant skills, covering related doctrinal areas, and practicing legal ethics.[38] This way, the full range of interests of students could be catered to. Clinics need not be limited to pro bono charitable work, but possibilities of structured externships or secondments with corporate law firms, industries or large trading houses wherein they would study the legal process involved in the establishment of such an organization and their day to day working in terms.[39]

There are also some fundamental problems with this model: The Advocates Act[40] strictly forbids students from representing clients and Bar Council of India Rules prohibit full-time faculty from practice and even pro bono litigation. However, as full time lawyers can teach, even without a change in the law, this system could be workable.

This plan is also extremely radical in calling for a complete shift in the working of a final year of law school. It could also work out to be initially expensive to set up training programmes for persons staffing the clinics and to set up the system in general. Still, this option clearly has an advantage over the other options in that it allows a vision of the final year of law school as a climax to a legal education rather than "a lethargic denouement."[41]

CONCLUSION

The idea of a five year law school is still very young in India. One main advantage of the system being in its formative years is that it is more open to flexibility and change. The way that the national law schools have been structured, by which they

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38. Sanders, Mitu Gulati and Bob Sockloskie "The Happy Charade: An Empirical Examination of the Third Year of Law School," , Chapter 4 of Sherwyn &Yelnosky, editors, *NYU Selected Essays on Labor and Employment Law*, volume 2 (2003), 192
39. This idea is actually prescribed by the Bar Council of India in its compulsory clinic paper on Professional Ethics, Accountancy for Lawyers and Bar Bench Relations. See Frank S. Bloch , M. R. K. Prasad, *Institutionalizing A Social Justice Mission For Clinical Legal Education: Cross-National Currents From India And The United States*, 13 CLINICLR 165, Appendix 1
40. The Advocates Act, 1961- see sections 29 and 33 which provide that only enrolled advocates are entitled to practice law
41. Sanders, Mitu Gulati and Bob Sockloskie "The Happy Charade: An Empirical Examination of the Third Year of Law School," , Chapter 4 of Sherwyn &Yelnosky, editors, *NYU Selected Essays on Labor and Employment Law*, volume 2 (2003), 192

are unencumbered by the administrative red-tapism that comes from being just another department at a large university, allows for them to experiment better with changes in the curriculum.

With the issue of fifth year disengagement, the main hurdle is in trying to perceive it as a 'problem'. The signaling theory of law school detailed above provides the perfect excuse behind which students can merrily bide one year of their time at the top of the law school hierarchy before joining the ranks of the law firm as foot soldiers. It is for this reason that fifth year disengagement becomes the proverbial elephant in the room. Everyone knows it exists, but no one wants to do anything about it, or even acknowledge that it is a problem.

This paper details various options that are available to infuse the final year of legal education with more interest and importantly relevance. Moving towards the medical school model may be the best remedy for the malaise of the final year disengagement.

DATA EXCLUSIVITY – A RECONCILIATION OF THE DEBATE FROM THE INDIAN PERSPECTIVE

*K. Ashrita Prasad**

INTRODUCTION

It is but an inescapable part of human nature to expect returns for one's efforts. In fact, it is this expectation that forms the drive for further human achievement. However, the question is - Can one claim exclusive rights over the product of one's creation when the interest of the society at large is at stake? The answer to this question is rather complex because it involves a juxtaposition of the interests of the inventor and the society which then need to be carefully reconciled.

A need for similar deliberation arises in the context of test data submitted to Drug Regulatory Authorities for obtaining marketing approval of pharmaceutical drugs. The interest of the inventor is pitted against the interest of the society because while the former claims exclusive rights over the test data generated by him there is a fear that the grant of such 'data exclusivity' would affect public interest. The present paper attempts to examine this juxtaposition and provide reconciliation in the Indian context.

The block comprising certain developed nations and multinational pharmaceuticals are stressing on the need for exclusive rights over such data. The mantle is now upon the developing nations such as India to decide their stance on the issue.

The present paper only examines Article 39.3 and the concept of Data Exclusivity in the pharmaceutical sector. In Part One of the Research Paper an insight into the concept of data exclusivity is provided. As the controversy surrounding data exclusivity flows from Article 39.3 of the TRIPS Agreement, Part Two deconstructs and looks into the negotiating history of Article 39.3. From the on-going debate on the issue it is discernible that three major interpretations of Article 39.3 have emerged. In Part Three the researcher shall elaborate on each of these approaches. In Part Four the stance of India, as reflected in the Inter-Ministerial Report submitted in May 2007, will be discussed. In Conclusion, Part Five of the paper shall critically analyze the varied interpretations attributed to Article 39.3 and the Inter-Ministerial Report from the Indian standpoint to make a case for the model of data protection.

* *The researcher is grateful to Adarsh G and Manasvini Raj for their valuable inputs.*

UNDERSTANDING DATA EXCLUSIVITY

For a comprehensive understanding of the concept it is necessary to be aware of the associated terminology. The individual who invents the drug for the first time is the innovator and the person who subsequently manufactures an identical drug is termed the generic producer.

The generic drugs are identical to the brand name drug (innovator's drug) in terms of active ingredients, safety and efficacy and are comparable in dosage form, strength, route of administration, quality and performance characteristics, and intended use.[1]

Every drug that is manufactured cannot be marketed unless it is granted approval by the concerned Authority, the Drug Regulatory Authority in India. Under the current system in India an innovator can obtain marketing approval only after he establishes the safety and efficacy of his drug. In order to establish the same he needs to submit extensive pre-clinical and clinical test data pertaining to trials conducted on humans and animals.[2] However, a generic manufacturer has to only prove bio-equivalency, that is, chemical and biological equivalency, of his drug to that of the innovators'.[3] The Drug Regulatory Authority satisfies itself about the safety and efficacy of the generic drug by relying upon the test data submitted by the innovator.

This is in contrast to the system that will be followed under a Data Exclusivity Regime where the Drug Regulatory Authority is disallowed from relying on the innovators' test data to grant approval to generic manufacturers because the innovator has an exclusive right over the data generated by him.[4] Therefore, if the generic manufacturers wish to market the drug during the exclusivity period they will have to submit independent test data or they may simply wait for the expiry of the exclusivity period. The implementation of data exclusivity quite clearly then, impacts the entry of generic manufacturers.

The protection afforded under Data Exclusivity is distinct and independent to that obtained under a system of patents and hence, they must not be confused. This is

1. Molzon Justina A, "The Generic Drug Approval Process", (1996) 5 J. Pharmacy & L. 275, 275.
2. Under Rule 122-B(2) of The Drugs and Cosmetics Rules, 1945 for the marketing approval of a new drug results of pre-clinical and clinical trials as prescribed in Appendix I to Schedule Y must be submitted. Under Form 44 to the Drugs and Cosmetics Rules, 1945 the marketing approval for an already approved drug only requires a bio-equivalence test.
3. Dhar Biswajit and Gopakumar KM, "Data Exclusivity in Pharmaceuticals: Little Basis, False Claims", Economic and Political Weekly, (2006) 5073, 5073.
4. Report of the Commission on Intellectual Property Rights, Innovation and Public Health, (2006) http://www.who.int/intellectualproperty/documents/thereport/ENPublicHealthReport.pdf, last accessed on 6 March 2008.

reflected in the structure of the TRIPS Agreement, under which they have been discussed under separate Sections in Part II of the Agreement.[5]

LOCATING DATA EXCLUSIVITY UNDER THE LEGAL FRAMEWORK

The proponents of data exclusivity trace the concept to Article 39.3[6] of the Trade Related Intellectual Property Rights (TRIPS) Agreement. Article 39.3 comes under Part II, Section 7 of the TRIPS Agreement that discusses "*protection of undisclosed information*", a distinct category of intellectual property under Article 1.2.

There is no unanimity in the interpretation of Article 39.3. Presently, there are three emerging approaches to the interpretation of the provision- the first that advocates data exclusivity, the second that argues for data protection and the third that mandates a compensatory liability model.

In order to understand these diverse perspectives and decide their propriety, the researcher would first deconstruct and look into the negotiating history of Article 39.3. From the text it is apparent that the provision comes into play only when:

i. The specific member Nation requires the submission of undisclosed test or other data as a pre-condition for granting marketing approval of the pharmaceutical product,

ii. Such pharmaceutical product utilizes new chemical entities and

iii. The test or other data is the product of considerable effort.

On the fulfillment of the above criteria, it is incumbent upon the Member State to protect the data against *unfair commercial use* and disclosure. There is an exemption from the obligation to protect against disclosure only when it is necessary to protect the public or when steps have been taken to protect the data against unfair commercial use.

Article 39.3 can be invoked in India because the submission of test data is a pre-requisite for obtaining marketing approval under the law as has already been pointed out.

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5. Patents provide exclusive rights over an invention whereas Data Exclusivity purports to protect an innovator's test data. Also, the application for a patent is made at the stage of basic research itself unlike data exclusivity that comes into the picture only at the time of marketing approval. While a patent provides protection for 20 years, the period of protection in case of Data Exclusivity has been relatively more short-term and non-uniform. For example, Data Exclusivity conferred is 5 years in the United States and Australia, 10 years in the European Union, 8 years in Canada, 6 years in China and Japan. MSF Technical Brief, "Data exclusivity in International Trade Agreements: What consequences for access to medicines?", (2004) 3, http://www.citizen.org/documents/DataExclusivityMay04.pdf, last accessed on 7 March 2008.

6. "Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public or unless steps are taken to ensure that the data are protected against unfair commercial use."

Unfair commercial use is the most clinching phrase because it determines the extent of obligation of Member States such as India. As the Agreement does not elaborate on the meaning and scope of the phrase it forms the primary bone of contention giving rise to the three distinct interpretations. The phrase can be traced back to the concept of unfair competition envisaged under Article10*bis* of the Paris Convention, 1967 which was defined as any act contrary to honest practices of competition.

At this juncture, it would be of some help to look at the negotiating history of Article 39.3.

Originally, it was the United States of America that articulated its demand for test data protection in 1987. However, with the passage of time by 1990 she was joined by the European Community and Japan. The demand of the United States[7] in 1990 stated that Member States shall not use test data for the commercial benefit of any person except with the right holder's consent and on payment of reasonable value or on the conferment of exclusive rights for a reasonable period. The European Community's demand[8] was couched in terms that required protection against unfair exploitation by competitors for a reasonable period of time.[9]

Basing on these demands, a consolidated text[10] was framed for the forthcoming Brussels Ministerial Conference which used the term unfair commercial use and stated in clear terms that the data may not be relied upon for a reasonable time for the approval of competing products. No consensus having emerged at Brussels, Arthur Dunkel drafted the proposal for Article 39.3 which retained unfair commercial use but dropped the specific prohibition on reliance.[11] The same has been adopted

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7. "Contracting parties which require that trade secrets be submitted to carry out governmental functions, shall not use the trade secrets for the commercial or competitive benefit of the government or of any person other than the right holder except with the right holder's consent, on payment of the reasonable value of the use, or if a reasonable period of exclusive use is given to the right holder."
8. "Contracting parties, when requiring the publication or submission of test or other data, the origination of which involves a considerable effort, shall protect such efforts against unfair exploitation by competitors. The protection shall last for a reasonable time commensurate with such efforts, the nature of the data required, the expenditure involved in their preparation, and shall take account of the availability of other forms of protection"
9. Watal Jayashree, *Intellectual Property Rights in the WTO and Developing Countries*, (New Delhi: Oxford University Press, 2001), 198.
10. Parties, when requiring, as a condition of approving the marketing of new pharmaceutical products or of a new agricultural chemical product, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall [protect such data against unfair commercial use. **Unless the person submitting the information agrees**, the data may not be relied upon for the approval of competing products for a reasonable time, generally no less than five years, commensurate with the efforts involved in the origination of the data, their nature, and the expenditure involved in their preparation. In addition, Parties shall] protect such data against disclosure, except where necessary to protect the public.
11. Skillington Lee G. and Solovy Eric M., "The Protection of Test and Other Data Required by Article 39.3 of the Trips Agreement", (2003) 24 Nw. J. Int'l L. & Bus. 1, 9-11.

as Article 39.3 in the TRIPS Agreement. Hence, Article 39.3 does not contain an explicit prohibition on reliance of test data by subsequent generic manufacturers.

INTERPRETING ARTICLE 39.3 – A LOOK AT THE THREE DIVERSE APPROACHES

The debate surrounding data exclusivity hinges on Article 39.3 and more particularly, on the phrase 'unfair commercial use' which has not been defined in the TRIPS Agreement. The researcher will now elaborate on the three emerging perspectives on interpreting Article 39.3.

THE FIRST APPROACH - DATA EXCLUSIVITY

One of the approaches to the interpretation of Article 39.3 is the concept of Data Exclusivity. This has been floated by some developed nations such as the United States of America, the European Union, Canada, Japan and China and pharmaceutical multinationals such as the International Federation of Pharmaceutical Manufacturers Associations[12]. The United States of America was the first to provide for data exclusivity under The Hatch Waxman Act, 1984[13].

At the instance of the United States, nations such as Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua and Singapore have executed bilateral and multilateral trade agreements that incorporate data exclusivity.[14] For example, Article 1711(6) of the North American Free Trade Agreement required the signatories to provide a minimum five years exclusivity period.

United States of America has been mounting pressure on other nations including India to adopt data exclusivity by including them in the Priority Watch List in the Special 301 Report prepared by the United States Trade Representative (USTR). India has been enlisted in the 2007 Special 301 Report.[15] In 1996 USTR initiated action against Australia for not implementing data exclusivity. Succumbing to pressure from the United States, in 1998 Australia adopted a five-year period of

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12. Bale Harvey E., "Encouragement of New Clinical Drug Development: The Role of Data Exclusivity", International Federation of Pharmaceutical Manufacturers Associations. http://www.ifpma.org/documents/NR83/DataExclusivity.pdf, last accessed on 6 March 2008.
13. Under the U.S. Hatch-Waxman Act, 21 U.S.C. § 355(c)(3)(E)(ii) and (iii) a five year period of exclusivity has been conferred on an abbreviated new drug application whereas a three year period has been conferred on drugs having an active ingredient that has already been approved.
14. MSF Technical Brief, "Data exclusivity in International Trade Agreements: What consequences for access to medicines?", (2004) 4, http://www.citizen.org/documents/DataExclusivityMay04.pdf, last accessed on 7 March 2008.
15. 2007 Special 301 Report, http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Review/asset_upload_file230_11122.pdf, last accessed on 7 March 2008.

exclusivity.[16] Interestingly, the United States also initiated action against Argentina. However, Argentina did not budge and continues to maintain its law without granting data exclusivity.[17]

It is the contention of those supporting exclusivity that the omission of the specific prohibition on reliance during the negotiations was only to avoid redundancy as the term unfair commercial use had already come to include a prohibition on reliance by regulatory authorities.[18] They affirm that the very fact that a competitor, the generic manufacturer, obtains a commercial benefit constitutes an unfair commercial use.[19]

It is their belief that the innovator must be provided an incentive for the considerable effort in terms of the time and resources invested in the course of generating test data. Estimates reveal that the development of a new drug costs $500 million and requires 15 years, on an average. In the absence of exclusive rights, generic companies would be able to free ride on the innovator's data reducing the cost incurred by them to around $1 million.[20] Also, where patents fail to provide protection (as in case of natural substances) data exclusivity would afford the necessary incentive.[21]

THE SECOND APPROACH - DATA PROTECTION

The second interpretation attributed to Article 39.3 is one that supports protection and not exclusivity.

This approach has been floated by the generic manufacturers and several developing nations. The Commission on Intellectual Property Rights, Innovation and Public Health[22] appointed by the World Health Organisation also subscribes to this view. Several arguments have been advanced to buttress this conclusion.

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16. Fellmeth, Aaron Xavier, "Secrecy, Monopoly, and Access to Pharmaceuticals in International Trade Law: Protection of Marketing Approval Data under the Trips Agreement", (2004), 45 Harv. Int'l L.J. 443, 450.
17. Correa Carlos M., "Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines", (2004) 36 Case W.Res.J.Int'l.79, 82.
18. Dhar Biswajit and Gopakumar KM, "Data Exclusivity in Pharmaceuticals: Little Basis, False Claims", Economic and Political Weekly, (2006) 5073, 5075.
19. Correa Carlos M., "Unfair Competition under the Trips Agreement: Protection of Data Submitted for the Registration of Pharmaceuticals", (2002) 3 Chi. J. Int'l L. 69, 78.
20. Bale Harvey E., "Encouragement of New Clinical Drug Development: The Role of Data Exclusivity", International Federation of Pharmaceutical Manufacturers Associations. http://www.ifpma.org/documents/NR83/DataExclusivity.pdf, last accessed on 6 March 2008.
21. Correa Carlos M., *Protection of Data Submitted for the Registration of Pharmaceuticals: Implementing the Standards of the TRIPS Agreement* (Geneva: South Centre/WHO, 2002), 43, http://www.southcentre.org/publications/protection/protection.pdf , last accessed on 6 March 2008.
22. Report of the Commission on Intellectual Property Rights, Innovation and Public Health, (2006) http://www.who.int/intellectualproperty/documents/thereport/ENPublicHealthReport.pdf, last accessed on 6 March 2008.

During the negotiations of Article 39.3, the specific prohibition on reliance that had earlier been included was dropped which indicates that reliance by the regulatory authority upon the innovator's test data to approve subsequent applications of generic producers does not amount to unfair commercial use. This view is also supported by scholars such as Carlos Correa.[23]

The ordinary meaning conveyed by the phrase unfair commercial use is unjust application or conversion of data for the purpose of making a profit or other business benefit.[24] Reliance by the Government, that is, the Drug Regulatory Authority, does not amount to unfair commercial use because drug approval is a legitimate function of the State, a non-commercial entity.[25] This was re-affirmed in the Canadian case of *Bayer Inc. v. Attorney General*[26] wherein the Court held that when bioequivalence of the generic and innovator drug is proved, the Regulatory Authority does not rely upon any confidential information in granting approval. Hence, only when the competitor obtains the test data using fraudulent or dishonest means and uses it for his benefit it would comprise unfair commercial use.

Another argument forwarded is that the generation of test data does not involve any element of creativity or exercise of the intellect and thus, exclusive rights as are guaranteed to other intellectual property cannot be claimed in the instant case.[27]

The proponents argue that there is a significant public health angle to the debate as the conferment of exclusive rights would adversely affect access to drugs.[28] With the advent of data exclusivity, the entry of generic manufacturers is impeded[29] and the innovator is placed in a situation of monopoly which may result in a spiraling of prices and in turn affect access to drugs. The Supreme Court of India has read the fundamental right to health into Article 21[30] of the Constitution of India in *Consumer*

23. Correa Carlos M., "Unfair Competition under the Trips Agreement: Protection of Data Submitted for the Registration of Pharmaceuticals", (2002) 3 Chi. J. Int'l L. 69,75.
24. Skillington Lee G. and Solovy Eric M., "The Protection of Test and Other Data Required by Article 39.3 of the Trips Agreement", (2003) 24 Nw. J. Int'l L. & Bus. 1, 16.
25. Correa Carlos M., "Unfair Competition under the Trips Agreement: Protection of Data Submitted for the Registration of Pharmaceuticals", (2002) 3 Chi. J. Int'l L. 69, 76.
26. 87 C.P.R. (3d) 293, (Fed. Ct. of Appeal 1999).
27. Correa Carlos M., "Unfair Competition under the Trips Agreement: Protection of Data Submitted for the Registration of Pharmaceuticals", (2002) 3 Chi. J. Int'l L. 69,71.
28. "Confronting the HIV/AIDS Crisis", Global Economic Justice (2004), 16 http://www.kairoscanada.org/e/economic/GEJRSummer2004.pdf, last accessed on 7 March 2008 where Medicines Sans Frontiers expresses its concern for the lives of persons living with HIV/AIDS in Central America due to the provision for data exclusivity in the Central American Free Trade Agreement.
29. Satyanarayana, K. et al., "Data Protection Issues in India", (2006) Indian J Med Res 723, 724.
30. "No person shall be deprived of his life or personal liberty except according to the procedure established by law".

Education and Research Centre v. *Union of India*[31]. This right cannot be effectively realized unless there is access to drugs.[32] The right has also been recognized at the international level.[33]

Paragraph 4 of the Doha Declaration adopted on 14 November, 2001 held that the TRIPS Agreement should be interpreted in a manner supportive of the Members' right to protect public health and promote access to medicines for all. Hence, the interpretation of data protection that promotes access to medicines should be adopted.

As a repercussion of data exclusivity, if the generic manufacturers wish to circumvent the exclusivity period they will have to replicate the trials to reaffirm the safety and efficacy of the drug. Such trials would be unethical in nature because the requirements of safety and efficacy have already been proved by the innovator.[34]

The other issue with the grating of data exclusivity is that in countries that have not provided for pharmaceutical patents, such a grant would guarantee a minimum monopoly to the innovator even in the absence of a patent protection.[35]

One of the means by which the exclusivity of a patent can be overcome is the issuance of compulsory licenses. Now, if in the case of a patented drug for which compulsory license has been issued, data exclusivity is also introduced, would data exclusivity pose a barrier to the use of compulsory license? If it does, then until the period of exclusivity expires, the license cannot be made use of. Therefore, countries will have to ensure that the use of compulsory licenses is not restricted by data exclusivity.[36]

THIRD APPROACH - COMPENSATORY LIABILITY

An alternative construction has been suggested in a 'compensatory liability' model, where the data is permitted to be relied upon in return of a 'fair' compensation being paid to the originator.[37] This approach takes a via media between the above two approaches.

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31. AIR 1995 SC 922, para 26.
32. Yamin Alicia Ely, "Not Just a Tragedy: Access to Medications as a Right under International Law", (2003) 21 B.U. Int'l L.J. 325, 330-331: Crook Jamie, "Balancing Intellectual Property Protection with the Human Right to Health", (2005) 23 Berkeley J. Int'l L. 524, 529.
33. Art.25(1) and Art.15 of The Universal Declaration of Human Rights, 1948; Art.12(1) and Art.12(2) of International Covenant on Economic Social and Cultural Rights, 1976; The Alma Ata Declaration, 1978; Art.7 of the TRIPS Agreement and Doha Declaration, 2001.
34. Junod Valerie, "Drug Marketing Exclusivity under United States and European Union Law", (2004) 59 Food & Drug L.J. 479, 482.
35. Satyanarayana, K. et al., "Data Protection issues In India", (2006) Indian J Med Res 723, 726.
36. MSF Technical Brief, "Data exclusivity in International Trade Agreements: What consequences for access to medicines?", (2004) 2, http://www.citizen.org/documents/DataExclusivityMay04.pdf, last accessed on 7 March 2008.
37. Basheer Shamnad, "Protection of Regulatory Data under Article 39.3 of Trips: A Compensatory Liability Model ?", http://papers.ssrn.com/sol3/papers.cfm?abstract_id=934269, last accessed on March 6, 2008.

The same model has been followed in the United States Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 1980. Under the Act any person seeking to use data must first attempt to obtain a voluntary license in exchange of some compensation. If the innovator and the subsequent applicant fail to reach a consensus within 90 days either of them resort to arbitration to adjudge upon the quantum of fee payable.[38]

INDIA'S STAND ON ARTICLE 39.3 – REPORT OF INTER-MINISTERIAL COMMITTEE

India amended its Patent Act, 1970 in January 2005 to make it compliant with TRIPS. However, it has not yet included any provision concerning data exclusivity. Due to the ongoing debate surrounding Article 39.3, an Inter-Ministerial Committee was constituted on February 10th, 2004 to assist the Department of Chemicals and Petro-Chemicals regarding the steps to be taken in the context of Article 39.3 of the TRIPS. Three years subsequently, on 31st May, 2007 the very date on which the Secretary Mrs. Satwant Reddy was stepping down from office, the much awaited Report was submitted. The Committee drew a distinction between the recommendations for the sectors of pharmaceuticals, agricultural chemicals and traditional medicines.

The Committee considered the varied interpretations and concluded that the models of exclusivity and compensatory liability ought to be rejected. The minimum requirements mandated by Article 39.3 are non-disclosure of test data and non-acceptance of fraudulently obtained data. For this, there is a need to strengthen the present legal and regulatory framework. The safeguard in the extant Drugs and Cosmetics Act, 1955 provides that an Inspector shall not, without the sanction in writing of his official superiors, disclose to any person any information acquired by him in the course of his official duties[39] was found to be inadequate. To ensure that undisclosed test data is not put to unfair commercial use thus, explicit provisions have to be included. The need to upgrade the physical infrastructure and technical skills was also recognized.

Though this would suffice for the present, it was opined that after the expiry of a transition period, higher standards of data protection *may* be adopted after a cautious study of its potential impact on the sector and the public. The duration of the transition period was to be deliberated upon. A model providing for a 5-year exclusivity period was formulated the implications of which was still to be analyzed. Hence, they thought that a calibrated approach with a transition period is best suited for India.

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38. Fellmeth, Aaron Xavier, "Secrecy, Monopoly, and Access to Pharmaceuticals in International Trade Law: Protection of Marketing Approval Data under the Trips Agreement", (2004), 45 Harv. Int'l L.J. 443, 462.
39. Rule 53, Drugs and Cosmetics Rules, 1945.

ANALYZING THE THREE INTERPRETATIONS FROM THE INDIAN STANDPOINT

The interpretation of Article 39.3 has been mired in controversy and now it is time for developing nations like India to determine their standpoint on the issue. It is the submission of the researcher that the second approach is the most appropriate for India.

India is only obliged to fulfill the minimum requirements mandated by the TRIPS Agreement. The text of Article 39.3 does not mandate exclusivity and the negotiating history clearly rules out the adoption of a construction favouring either data exclusivity or compensatory liability. The adoption of either of these approaches would be indulging in the implementation of a TRIPS-Plus provision, that is, a provision going beyond the requirements of TRIPS to protect intellectual property[40]. Hence, the correct approach is to provide for data protection, that is, to punish a competitor for the fraudulent use of the test data submitted to the Regulatory Authority. To ensure observance of the same the legal and regulatory framework must be fortified as recommended by the Inter-Ministerial Committee.

The basic flaw in constructing Article 39.3 to mandate exclusive rights is that it is based on the underlying assumption that in the absence of exclusivity there is no incentive to undertake innovation. The very fact that innovation has occurred through these decades without exclusive rights bears out that such an incentive was never deemed necessary! Hence, it is simply greed that is prompting the developing nations to champion the cause of exclusive rights.

Aaron Fellmeth has discussed the viability of the compensatory liability model and he points to the weaknesses that it suffers from. Firstly, he says that there is no yardstick for arriving at the fair compensation. If the matter comes up before the arbitrator failing an agreement, he would be placed in a difficult situation because he would not be aware of the market value of the data. Further, what if the decided amount does not reflect the true balance between the interest of the innovator and the generic producer? If the provision of appeal is exercised by the aggrieved party, it would ultimately be a long drawn out process. In the light of these flaws he concludes that the approach would not be feasible.[41]

The researcher is in concurrence with the conclusion of Fellmeth and would like to highlight certain other additional arguments. If one were to look at the negotiating history of Article 39.3 such proposal had been floated by the United States of America in 1990 itself. However, it failed to garner the support of other Member nations and thus, such a construction ought to be avoided. The principle of *in dubio mitius* states

40. Carlos M Correa, "Bilateralism in Intellectual Property", 36 Case W. Res. J. Int'l L. 79, 79.
41. Fellmeth, Aaron Xavier, "Secrecy, Monopoly, and Access to Pharmaceuticals in International Trade Law: Protection of Marketing Approval Data under the Trips Agreement", (2004), 45 Harv. Int'l L.J. 443, 463.

that merely because the language and intent of a treaty provision is ambiguous, it cannot be interpreted to impose onerous obligations. As the obligation of compensation has not been mentioned anywhere in Article.39.3, it is clearly an onerous construction and must be avoided.

Furthermore, the model envisaged by United States FIFRA would pit the generic manufacturer and the innovator against one another. There is bound to be a greater bargaining power in the hands of the innovator and thus the negotiation may not be fair and voluntary at all!

As has been highlighted by the second model of interpretation favouring data protection, the advent of exclusive rights forestalls a potential threat to the access of medicines.

The existing Indian system that does not provide exclusive rights to the innovator has contributed to the timely introduction of generic producers and access to drugs for many a poor patient.[42] When India had been considering amendments to the Patent Act, the United Nations Special Envoy for HIV/AIDS wrote a letter to the Prime Minister emphasizing that any decision concerning the Indian generic industry must be made bearing in mind the fact that the lives of nearly half the 7,00,000 persons infected with HIV/AIDS living in several developing nations depend upon it.[43] Hence, the life of many individuals would be affected by India's stance.

Moreover, for every generic equivalent that is manufactured during the period of exclusivity, separate clinical trials need to be conducted, which would lead to a spate of unwarranted and unethical trials.

Though the recommendation of the Inter-Ministerial Committee was published in May 2007, the government has not yet spelt out its policy decision. The researcher concurs with the Report to the extent that it recommends a data protection regime. However, the Committee went a step further to suggest that higher standards of data protection *may* be adopted after the expiry of an unstipulated transition period in the long-term interest. More than anything else, such an open-ended suggestion seems to have been included only to appease the block of developed nations!

The debate surrounding data exclusivity clearly juxtaposes the greed of a few individuals against the health and well-being of large sections of the population. As a closing observation, the researcher would like to submit that it is only wise to choose the interest of the latter over the former and can only hope that the Indian government also reconciles the above conflicting interests by adopting the approach of data protection.

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42. Satyanarayana, K. et al., "Data Protection Issues in India", (2006) Indian J Med Res 723, 725.
43. Stephen Lewis, "Letter from the UN Special Envoy to the Prime Minister", (2005), http://www.cptech.org/ip/health/c/india/unaids03112005.html, last accessed on 7 March 2008.

NON APPLICABILITY OF DOCTRINE OF RES JUDICATA IN TAXATION: SCOPE FOR ABSURDITIES

Stella Joseph

INTRODUCTION

The *doctrine of res judicata* has played a pivotal role in guiding judicial systems across the world. However in the matters of taxation, the doctrine is held to not apply for reasons idiosyncratic to taxation. Yet it may be observed that the absence of res judicata in taxation when coupled with the presence of doctrine of precedents could lead to certain absurdities. This paper seeks to explicate on the non-applicability of res judicata in matters of taxation and draw out the absurdities that might arise because of the non-applicability and examine the lack of solutions for the same.

MEANING OF DOCTRINE OF RES JUDICATA

The Doctrine of res judicata implies that no court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

The doctrine of res-judicata as embodied in Section 11 of the Civil Procedure Code, 1908 (CPC) corresponds to what is known as "estoppel by judgment" in English law. It is a principle of convenience and rest and not of absolute justice[1].

However, it is well settled that Section 11 of the CPC is not the foundation of the principle of res judicata, but merely a statutory recognition thereof and hence, the provision is not to be considered exhaustive of the general principle of law[2].

NON- APPLICABILITY OF THE DOCTRINE IN TAX CASES

The applicability of Doctrine of res judicata is severely curtailed in the matters of taxation.

To illustrate, the fact situation of *CIT* v. *Brij Lal Lohia and Mahabir Prasad Khemka*[3] can be analyzed. In that case the question in issue was with regard to the genuineness of two gifts made by the assessee. In respect of the assessment years 1945-46 and

1. Delhi Golf Club Limited v. New Delhi Municipal Corporation, AIR 1997 Delhi 347.
2. Kalipada De v. Dwijapada Das AIR 1930 PC 22 at p. 23.
3. [1972] 84 ITR 273 (SC).

1946-47, the Tribunal had found that the said gifts were not genuine gifts and the High Court did not interfere with the said finding of the Tribunal on the view that it was a finding of fact and the Supreme Court affirmed the said view. In respect of subsequent assessment years 1947-48, 1948-49, 1949-50, 1950-51 and 1951-52, the assessee produced additional evidence and the Tribunal, after taking into consideration the said additional evidence, came to the conclusion that the gifts in question were genuine gifts.

The Supreme Court held that the fact that in the earlier proceedings, the Tribunal took a different view of the two gifts was not a conclusive circumstance and the decision of the Tribunal reached in those proceedings did not operate as res judicata. The Doctrine of Res judicata would not apply to tax assessments and hence the courts have a right to re-examine the case between the same parties on the identical questions of fact in a different assessment year. A decision taken by the authorities in the previous year would not estop or operate as res judicata for subsequent years[4].

To understand the true scope of non-applicability of res judicata in taxation, it would be ideal to first chart out the developments in England, the parallel changes in the Indian scenario and then analyze the reasons for the non-applicability of res judicata in the field of taxation.

EVOLUTION OF THE PRINCIPLE OF NON-APPLICABILITY

ENGLISH LAW

Position in England is unambiguous now with respect to non-applicability of res judicata in tax matters. But earlier the courts had come to opposing viewpoints on this matter.

The first case to uphold this rule was *Broken Hill Properietary Co. Ltd.* v. *Broken Hill Municipal Council*[5]. In that case, the Court held that the assessment in the previous year would not estop the parties from re-litigating the same question on a subsequent year's assessment[6].

However, in the same year, *Hoystead* v. *Taxation Commissioner*[7] was decided in which their Lordships held to the contrary[8], which made the picture hazy.

The situation cleared a bit with the case of *IRC* v. *Sneath*[9] where the courts explicitly stated that although a decision reached in one year would be a cogent factor in the

4. Municipal Corporation of City of Thane v. Vidyut Metallics Ltd. and Anr. (2007)8SCC688.
5. 1926 AC 94.
6. ibid.
7. 1926 AC 155.
8. 1926 AC 155.
9. [1932] 2 KB 362; 101 LJKB 330 (CA).

determination of a similar point in a following year "but it [could not]" be treated as an estoppel binding upon the same parties, for all years[10].

The position was strengthened with the case of *Society of Medical Officers of Health* v *Hope*[11] which clearly upheld the *Broken Hill* case.

Finally the current position of law was laid down conclusively in the case of *Gaffoor* v. *Colombo Income-tax Commissioner*[12]. Herein the Privy Council was compelled to choose between its two former decisions in *Broken Hill* case and *Hoystead* case. Their Lordships expressly adopted the principle laid down in *Broker Hill* case and expressly disapproved *Hoystead* case. They held that although "[i]t may be that the principles applied in these cases form a somewhat anomalous branch of the general law of *estoppel per rem judicatam*,", they are well established in their own field[13].

INDIAN LAW

The Indian position can be understood to be a gradual transformation from applicability being the rule and non-applicability being the exception to the reverse scenario. In one of the earliest cases, i.e. in *M. M. Sankaralinga Nadar and Bros.* v. *CIT*[14], the Court had attempted to reconcile *Broken Hill* case and *Hoystead* case and held that that unless fresh facts come to light, the Income Tax Officer is bound by the earlier assessment proceedings[15].

The situation relaxed a bit with time and in the decision of *Kamlapal Molilal*[16] the court held that the doctrine of res judicata should not apply to taxation in general. However, interestingly the rationale behind the non-availability was this: because the Income-tax authorities are not Courts, there are no two parties before them and there are no pleadings. So consequently the doctrine of res judicata was still understood to apply to decisions of courts and not apply to only Income Tax authorities.

A yet more liberal approach followed in the case of *Amalgamated Coalfields Ltd. and Anr.* v. *The Janapada Sabha, Chhindwara*[17] wherein the non-applicability of res judicata was extended to even constructive res-judicata in writ petition. This position was squarely upheld in *Devilal Modi, Proprietor, M/s. Daluram Pannalal Modi* v. *Sales Tax Officer, Ratlam and Ors*[18].

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10. Ibid.
11. (I960) 1 All ER 317.
12. 1961 AC 584.
13. Ibid.
14. 1930 Mad 209 [FB].
15. Ibid.
16. 1950-18 ITR 812.
17. [1963] Supp. 1 S.C.R. 172.
18. AIR 1965 SC 1150.

The actual scope of the non-availability of res judicata is expounded succinctly in the case of *M.M. Ipoh and Ors.* v. *Commissioner of Income-tax, Madras* [19] which may be stated as follows:

1) The Doctrine of res judicata does not apply so as to make a decision on a question of fact or law in a proceeding for assessment in one year binding in another year
2) Not only decisions at an administrative level, 'but also those by courts' of competent general jurisdiction fall within the exception to the general rule, and no estoppel can be founded upon them when the same point is raised again in another year of assessment or is in respect of a list other than that fixed in the original decision.
3) This will be so even in cases, where there is a formal admission that no material circumstance has in the meantime changed.

RATIONALE OF NON-APPLICABILITY OF DOCTRINE OF RES JUDICATA IN TAXATION

There have been several reasons for exclusion of the doctrine of res judicata in tax matters, offered by Courts during the course of time. The reason which is attached to the exclusion, in effect is indicative of the true scope of the exclusion itself. For example initially Courts[20] supported the exclusion because they felt that IT authorities were not courts and hence the doctrine should not apply to their decisions. In effect, the exclusion was limited only to IT authorities and not to courts.

A catena of cases has held that the rationale for exclusion is that the cause of action itself has changed from the previous assessment year to the present assessment year and hence the doctrine has no application[21]. Others have stated that the doctrine is inapplicable because there cannot be any estoppel against a statute and tax laws are subject to changes annually[22].

In *Delhi Golf Club Limited* v. *New Delhi Municipal Corporation*[23] it was felt that public interest would be better served by by-passing the rule of res-judicata and taxing the property in a year of assessment if the incidence of tax be rightly attracted under the law and ignoring the factum of its having escaped in an earlier year though by a

19. [1968] 67 ITR 106 (SC).
20. Kamlapal Molila AIR 1950 All 249; also Lord Rudeliffe in Gaffoor v. Colombo Income-tax Commissioner, 1961 AC 584.
21. Bharat Sanchar Nigam Ltd. and Anr. v. Union of India (UOI) and Ors AIR 2006 SC1383, Commissioner v. Sunnen 333 U.S. 591 (1948).
22. Delhi Golf Club Limited Vs. Respondent: New Delhi Municipal Corporation AIR 1997 Delhi 347, Jain Exports v. Union of India and Ors 1987 (29) ELT 753.
23. AIR 1997 Delhi 347.

conscious and deliberate decision. Scholars[24] believe that this public purpose is so vast that it offsets any disadvantages from instances of re-litigation which might spill over because of non-availability of the doctrine.

Turner in his book[25] has stated that not only decisions at an administrative level, but also those given by courts of competent general jurisdiction fall within the exception to the general rule, because the question of the liability of the taxpayer-for the subsequent year's tax or rates is not to be regarded as the same question as that of his liability for the first. What might in other types of case be regarded as *eadem quaestio* is not so to be regarded in taxation and rating cases, which are *sui generis* in this regard.

LIMITATIONS TO THE NON-APPLICABILITY OF RES-JUDICATA

While examining the scope of exclusion of res judicata in tax cases, a rider becomes essential. It is not that in all cases the courts would simply overlook the decisions previously delivered. Here two schools of thoughts exist. The first school maintains that the exclusion of the doctrine is absolute and in all cases, the authorities/ courts would have the power to re-open the case and overlook the previous decisions[26]. However the other school of thought emphasizes that the exclusion may be applicable only after certain conditions are fulfilled. In other circumstances, the courts would still be bound by previous decisions.

The position is summarized tersely in the case of *Tejmal Bhojraj* v. *Commissioner of Income-tax*[27] as follows:

(i) The doctrine of res judicata or estoppel by record does not apply to the decisions of income-tax authorities.

(ii) A previous finding or decision of such an authority may, however, be reopened and departed from in subsequent years in the following circumstances, namely:

  (a) the previous decision is not arrived at after due enquiry

  (b) the previous decision is arbitrary or perverse[28]

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24. Willis S J., "Some limits of equitable recoupment, tax mitigation, and res judicata: reflections prompted by Chertkof v. United States", (1985) 38 *Tax Law.* 625.
25. Spencer-Bower and Turner on Res Judicata, 2nd Edn., pp. 260-61 cited in Agricultural Income-tax Officer and Ors v. Puthumoole Krishna Bhat [1982] 133 ITR 532 (Ker).
26. Amalgamated Coalfields Ltd. and Anr. v. The Janapada Sabha, Chhindwara [1963] Supp. 1 S.C.R. 172 as interpreted in Agricultural Income-tax Officer and Ors. Vs. Respondent: Puthumoole Krishna Bhat [1982]133ITR532(Ker).
27. [1952] 22 ITR 208 (Nag).
28. Upheld in CIT v. Dalmia Dadri Cement Ltd. [1970] 77 ITR 410 and H. A. Shah and Co. V. CIT [1956] 30 ITR 618.

(c) if fresh facts come to light which, on investigation would entitle the officer to come to a conclusion different from the one previously reached[29];

(iii) In the absence of such circumstances, the Income-tax Officer cannot arbitrarily depart from the finding reached after due inquiry by his predecessor in office simply on the ground that the succeeding officer does not agree with the preceding officer's findings.

The effect of revising a decision should not lead to injustice and the court must always be anxious to avoid injustice being done to the assessee[30]. If the validity of a taxing statute is impeached by an assessee who is called upon to pay a tax for a particular year and the matter is taken to a High Court and it is held that the taxing statute is valid, it may not be easy to hold that the decision on this basic and material issue would not operate as *res judicata* against the assessee in a subsequent year[31].

These conditions are important because "even though the principle of res judicata may not apply [.....] it is very desirable that there should be finality and certainty in all litigations including litigations arising out of the Income-tax Act."[32]

DOCTRINE OF PRECEDENTS

Consistency is the cornerstone of the administration of justice. It is with a view to achieve consistency in judicial pronouncements that the courts have evolved the rule of precedents, principle of stare decisis[33]. Black's law dictionary defines *Stare decisis* as "the doctrine of precedent under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation"[34]. The doctrine of precedents or the principle of Stare Decesis would mean that the Single Judge of the High Court is bound to accept as correct, the judgments of the Courts of co-ordinate jurisdiction of Division Benches and of Full benches of the High Court and of the Supreme Court[35]. A corollary of the rule is that the Courts are bound only by decisions of higher courts and not by those of lower or equal rank[36].

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29. Upheld in Sankaralinga Nader v. Commissioner of Income Tax ILR 53Madras 420(44).
30. N.A. Shah and Co. v. Commissioner or Income-tax 1956-30 ITR 618 (45).
31. Amalgamated Coalfields Ltd. v. Janapada Sabha 1963 Supp (1) SCR 172] and Municipal Corporation of City of Thane v. Vidyut Metallics Ltd. and Anr JT2007(11)SC131.
32. N.A. Shah and Co. v. Commissioner or Income-tax 1956-30 ITR 618 (45).
33. Government of Andhra Pradesh & Ors. v. A.P. Jaiswal & Ors. 2000(8)SCALE181.
34. Bryan A Garner (ed), "Black's Law Dictionary", 8th ed, 2004 Thomson Press MN, US, p 519 p 1442.
35. National Insurance Co. Ltd., rep. by its Manager v. Smt. Huligemma and Anr II(2005)ACC576.
36. State of Gujarat v. Gordhandas Keshavji Gandhi and Ors. AIR 1962 Guj128.

SOURCE OF DOCTRINE OF PRECEDENTS

The underlying principle of the doctrine of precedents is that normally the Courts should maintain the finality of judicial decisions and finality of binding precedents. It has been accepted in India and the USA as well as in the legal system based upon that of England [37]. The doctrine is embodied under Article 141 in the Constitution which states that "the law declared by the Supreme Court shall be binding on all courts within the territory of India"[38]. With respect to taxation, Chapter XX of the Income Tax Act, 1961 deals with Appeals and Revision. The doctrine of precedents may be derived specifically from sections 256, 257, 260 and 261 which deal with the appellaté and revisionary power of the High Court and the Supreme Court.

SCOPE OF DOCTRINE OF PRECEDENTS

It can be stated that there are three basic elements in a judgment, which would constitute as precedents:

(i) Findings of material facts, direct and inferential. An inferential finding of facts is the inference, which the judge draws from the direct or perceptible facts.

(ii) Statements of principles of law applicable to the legal problems disclosed by the fact

(iii) Judgment based on the combined effect of the same[39].

A precedent essentially builds itself up on the facts particular to a case. A decision is an authority for only what it decides which may be figured out by bearing in mind that a decision of the court takes its colour from the questions involved in the case in which it was rendered[40]. In fact the facts are so important, that "even a sight distinction in fact or an additional fact may make a lot of difference in decision making process"[41].

It is trite law that under the Doctrine of Precedents, High Courts are not bound by the decision of each other. Specific to taxation, it has been held that the structure of S. 257 and 260 itself depends on the fact itself encourages High Courts to have their own separate viewpoints[42].

There is unanimity of opinion amongst different High Courts that decisions of the High Court are binding on the subordinate courts and authorities or Tribunal under

37. Ahamed Hossain Sk. v. State of West Bengal and Ors (2001) 3 CAL. LT 335(HC).
38. Article 141, The Constitution of India.
39. supra n. 3 p 8074.
40. State of Punjab v. Baldev Singh (1999) 6 SCC 172.
41. Jaya Sen v. Sujit Kr. Sarkar AIR 1998 Cal 288.
42. Suresh Desai v. CIT (Del HC) 1998 II AD (Delhi) 578.

its superintendence throughout the territory in relation to which it exercises jurisdiction. The binding authority does not extend beyond its territorial jurisdiction. The decision of one High Court is not a binding precedent for another High Court or for courts or Tribunals outside its territorial jurisdiction[43].

ABSURDITIES WHEN BOTH THE DOCTRINES DO NOT CO-EXIST

It is re-emphasized in several cases that even a slight variation in facts would make the precedents invalid[44]. So theoretically the perfect precedent would be a case having the identical facts, which is most probable if the case deals with the same assessee. However the same conditions are required for the non-applicability of doctrine of res judicata. So the applicability of doctrine of precedents and non-applicability of the doctrine of res judicata would be most visible in case of same assessee and the same question of law in a different year. The interception of the two doctrines in the matters of taxation is highlighted in a number of cases.

In the case of *Agricultural Income-tax Officer and Ors.* v. *Puthumoole Krishna Bhat*[45] the courts observed an 'exception' to the proposition that the courts can reopen the case in a different assessment year would be a valid precedent, the effect of which is derived from the fact that a precedent is enforceable not only on the same parties but on all people alike. Hence while applying the doctrine of precedents, the court would be liable to hold the same thing and although they are allowing the case again, because of non application of res judicata, they are in the end holding same decision.

While the assessment of the previous year would not be taken into account for the assessment of this year due to non applicability of res judicata, the same would nevertheless be taken into consideration due to the applicability of doctrine of precedents. In the case of *New Jehangir Vakil Mills Co. Ltd.* v. *CIT*[46], the issue before the court was whether the assessment of the year 1943 can be applied to 1944. After stating the law that doctrine of res judicata was not applicable, the Court nevertheless observed that

"it was open to the taxing authorities to consider the position of the assessee in 1943 for the purpose of determining how the gains made in 1944 should be computed" even though the subject of the assessment proceedings was the computation of the profits made in 1944[47].

43. CIT v. Thana Electricity Supply Ltd, 206 ITR 727 Bombay; CIT v. Ved Parkash, 178 ITR 332 Pb & Har; State of A.P. v. CTO, 169 ITR 564 A.P.
44. Jaya Sen v. Sujit Kr. Sarkar AIR 1998 Cal 288.
45. [1982]133ITR532(Ker).
46. [1963] 49 ITR (SC) 137.

In any case there are a series of cases which uphold that the previous decision may nevertheless be taken as cogent evidence for the subsequent year. As was reiterated in *IRC* v. *Sneath*[48], "rules of fair-play will require him to consider all materials including an earlier decision on a similar point placed before him". Again, in the case of *E. V. Koradu* v. *Commr. of Agrl. I.T.*[49], it was pointed out that it is open to the Tribunal to rely upon the previous order of the. Tribunal "as a piece of evidence on which it may rest its present conclusion"[50] and that "the rule of exclusion of the doctrine of res judicata in tax cases does not go to the extent of requiring the taxing officers to ignore the earlier proceedings."[51]

Despite the non-applicability of the doctrine, the lower courts cannot escape the decisions of the higher courts made previously on the same issue. This point comes out in the observations made in the case *British Indian Corporation Ltd.* v. *Commissioner of Income Tax*[52]. While commenting on the fact that the principle res judicata is not applicable even on decisions of higher courts, the court clarified that

"Of course when the Tribunal receives the High Court's advice on reference in one year it would be bound when the same question arises in a subsequent year." However such requirement is imposed "on the ground of stare decision and not of res judicata"[53].

Similarly in *Bharat Sanchar Nigam Ltd. and Anr.* v. *Union of India (UOI) and Ors*[54], the Court observed that although res judicata does not apply in matters pertaining to tax for different assessment years, the Courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why Courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is "not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement"[55]. The court clarified that "where facts and law in a subsequent assessment year are the same, no authority whether quasi judicial or judicial can generally be permitted to take a different view."[56]

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47. Ibid.
48. 1932] 2 KB 362; 101 LJKB 330 (CA).
49. [1980] 122 ITR 615 (Ker).
50. Ibid.
51. Ibid.
52. AIR1967All362.
53. Ibid.
54. AIR2006SC1383.
55. Ibid.
56. Ibid.

The most appropriate case to highlight the absurdity is the case of *Amalgamated Coalfields Ltd.* v. *Janapada Sabha*[57], where the court held that even if a direct decision of this Court on a point of law does not operate as res judicata in a dispute for a subsequent year, such a decision would, "under Article 141, have a binding effect not only on the parties to it, but also on all courts in India as a precedent in which the law is declared by this Court." The Court discarded the question about the applicability of res judicata to such a decision as "a matter of merely academic significance."[58]

There are repercussions of the applicability of one doctrine and the non-applicability on the same set of facts. While other areas of law function harmoniously due to the presence of both the doctrines, in taxation, the non-co-existence of the two doctrines leads to the following absurdities:

As has been stated above, in taxation, the doctrine of precedent applies to higher courts while the lower courts are not bound by the doctrine. If res judicata is not applicable to taxation, but doctrine of precedent is, the lower courts would allow a case year after year, but in case the matter is appealed, strictly applying the doctrine of precedents, the courts would have to hold the same decision year after year. This is truly an absurdity since while the assessee is allowed to try his case again in a different assessment year he/she might still be reverted back with the samedecision applying the doctrine of precedent. Under the doctrine of precedents, the lower authorities are bound by the decision of the higher courts. So although the lower authority is allowed to try the case again the following year, it is still bound by the decision of the higher court in the previous year(s). Ultimately, the applicability of doctrine of precedent would make the non-application of res judicata redundant.

SECTION 158A: A POSSIBLE SOLUTION?

Section 158A under Chapter XIVA, weas introduced in the Income Tax Act, 1961 in the year 1984. As per the CBDT Circular[59], while explaining the insertion of a new chapter XIVA: "when there is a difference between the Income tax Officer and a taxpayer on any question of law arising in the case of the taxpayer for several years, the taxpayer has to contest the question of law for each of these years. This leads to unnecessary proliferation of appeals before the appellate authorities and reference application before the HC on identical questions of law in the case of the same taxpayer. To rectify the same Section 158A gives the assessee an option to furnish to the ITO or the appellate authority as the case may be, a declaration in the

57. (1963) Supp.1 SCR 172.
58. Ibid.
59. No 398, dated 14th Sept 1984.

prescribed form and verified in the prescribed manner, that if the authority agrees to apply to the relevant case (which is currently pending before that authority), the final decision on the question of law in his case for another assessment year which is pending before the HC or the SC under Sections 256, 257 or 261, he shall not raise such question of law in the relevant case in appeal before any appellate authority or for reference before the HC or the SC or in appeal before the SC under the aforesaid sections of the Income Tax Act. The only factor necessary for invoking this section is that the question of law involved in both these decisions should be the same."

As is evident, Section 158A gives the opportunity to the assessee to overcome the absurdities posed by the applicability of doctrine of precedents and the non applicability of doctrine of res-judicata.

However the section itself is fraught with certain loopholes which as per Chaturvedi[60], prevents it from fulfilling its main objective. Firstly, the option is only available to the assessee and not to the department. Secondly, the assessee in turn is discouraged to invoke the section for two primary reasons:

1) He/ She would not wish to debar himself/herself from the option of a further appeal, in case the decision in the other case is unfavorable

2) In case more than one questions of law is in dispute, some not squarely covered by the previous decision, the assessee would have to anyway file for an appeal/ review for the same

CONCLUSION

The non-applicability of doctrine of res judicata to tax cases is arrived at after careful judicial calculations and reckoning. Under general rule, the doctrine of res judicata is rested on, (i) public policy that finds expression in the maxim, *interest repuhlicae ut sit finis litium*- it is in the interest of the State that litigations come to an end, and (ii) private justice, namely, that one may not be vexed or harassed by litigation after litigation on the same cause of action.

This exclusion also rests on public policy, public policy outweighing repetitive litigation as was stated by Lord Radcliffe in *Mohamed Falil Abdul Caffoor* v. *CIT*[61]. He held that private justice is achieved to the extent of giving finality and attributing conclusiveness to what is decided in one assessment, so far as that assessment is concerned, and only to that extent. Such confinement of the operation of the principle of res judicata to the particular assessment in which the decision is given

60. Chaturvedi, Pithisaria, *Income Tax Law*, (Agra: Wadhwa and Company Law Publishers 1999), 5450.
61. [1961] AC 584 (PC).

"is a necessary consequence of accepting the fact that it is in public interest"[62] that there be no bar or prohibition in examining a question afresh each time that question recurs, recurrence of the same question for a decision in assessment after assessment being an inevitable feature of taxation.

Be that as it may, with the existence of doctrine of precedents, absurdities crop up as stated above. The non-applicability of res judicata to taxation has become redundant due to applicability of doctrine of precedents. In any case even the non-applicability of the doctrine of res judicata itself is diluted as is stated above. In this regard although S 158A comes to aid, it is at best a half-baked solution. The dearth of any sort of judicial discussion on this issue is also worrying. This topic of study surely deserves a lot more judicial exposition.

62. Ibid at pp. 599-600

THE PLIGHT OF A SECOND WIFE: A CASE STUDY

Divya Sharma *

INTRODUCTION

Bigamous and polygamous marriages have not been given statutory recognition under the personal laws of different communities[1] with exception of Muslims. Section 5 lays down the conditions for a valid marriage; Section 5(i) is relevant for the present study which states that 'neither party has a spouse living at the time of marriage.' The expression, 'spouse living' here needs to be understood as the legally wedded spouse in the eyes of the law. Section 11 of the Hindu Marriage Act clearly says that a marriage solemnized in contravention of Clause (i) of Section 5 would be void *ab initio.* Thus, the issue pertinent for the present study is, whether a married woman whose marriage is void or defective is entitled to maintenance or not? We shall look into the present legal regime as well as study various judicial decisions in order to find out the status of the second wife, both under the civil and criminal law.

MAINTENANCE UNDER THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

As per Sastric Hindu Law, it was the duty of the husband to provide food, clothes and shelter to his wife and fulfill her necessities during their marriage[2]. However, after the codification of Hindu law relating to maintenance and marriage, a Hindu male is under the legal obligation to maintain his spouse and this obligation is personal arising out of the very nature of the relationship that exists between them. An inclusive definition of 'maintenance' is found under Section 3 (b) (i) of the Hindu Adoptions and Maintenance Act, 1956, according to which maintenance includes, in all cases, provision for food, clothing, residence, education and medical attendance and treatment. Section 18(2)(d) sets out the grounds upon which a married woman shall be entitled to live separately from her husband without forfeiting her claim to maintenance if he has another wife living.

MAINTENANCE UNDER THE HINDU MARRIAGE ACT, 1955

The Hindu Marriages Act, 1955 deals with the procedural aspects of the claim of

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* The author of this article is greatly indebted to Dr. Vijender Kumar Associate Professor, NALSAR University of Law for his guidance and supervision while working on this article

1. Kusum, *Family Law Lectures, Family Law I,* (New Delhi: Lexis Nexis Butterworths, 2003), pp. 3-7.
   Also see 'Section 18 & 19 of the Parsi Marriage and Divorced Act, 1936; Section 4 (a)read with S.24 of the Special Marriage Act, 1954 and Indian Christian Marriage Act, 1872 Section 60, Indian Divorce Act, 1869 Sections 18 & 19

maintenance by a married woman who is a respondent in matrimonial proceedings during pendency of such litigation under Section 24 and permanent alimony and maintenance under Section 25[3]. An order for permanent alimony and maintenance under section 25 may be made when any decree granting substantive relief is passed.

MAINTENANCE UNDER THE CRIMINAL PROCEDURE CODE, 1973

Apart from personal laws, the Code of Criminal Procedure also provides for maintenance of wives, irrespective of religion. This relief is available whether or not any matrimonial proceedings are pending. Section 125 of the Code mentions that maintenance shall be granted to a 'legally wedded wife' only. In another capacity, namely as a divorced wife, she is entitled to claim maintenance from the person to whom she was married.[4]

According to the Explanation to Section 125 of the Criminal Procedure Code, 'wife' includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. However, the second wife is disentitled from receiving maintenance from her husband as the laws declare second marriage to be null and void. Marriage between the parties thus plays an integral part in deciding the question of maintenance. The right of maintenance is based upon the existence of marital relations and her right terminates on remarriage.

MAINTENANCE TO THE SECOND WIFE: JUDICIAL DICTA

The issue of maintenance of a second wife has in fact come up before different High Courts on several occasions. And courts have taken conflicting views depending on the facts and situation of each case and interpreting the expression "wife" under Section 125 either liberally or narrowly.

HIGH COURT CASES

The question first came up before the Madras High Court in *Narayanaswami* v. *Padmanabhan*[5], where the Court was of the view that Section 25 of the Hindu Marriage Act, 1955, cannot be construed in such a manner as to hold that notwithstanding the nullity of the marriage, wife retains her status for purposes of applying for alimony

2. Vyas. N, "Right of maintenance and second wife's despodancy under Hindu Law", 2007 (2) Gujarat Law Herald 29.
3. Corresponding provisions under the personal Laws are Special Marriage Act, 1954, s.37, The Divorce Act 1869 Ss. 36, 37 & 38 as amended in 2001 Dissolution of Muslim Marriage Act, 1939, S.2((a) The Muslim Women (Protection of Rights on Divorce) Act, 1986, Section.4
4. *Rohtash Singh* v. *Ramendri*, 2000 Cr. L. J. 1498 (SC) as cited in Anil Zachariah, A SECOND WIFE IS ENTITLED TO MAINTENANCE OR NOT?, 2004 (2) KLT, p. 16.
5 *Narayanaswami* v. *Padmanabhan* AIR 1966 Mad. 394.

and maintenance. According to the Court the proper construction of Section 25 would be that where a marriage is admittedly a nullity, that section will have no application. Thus, the Madras High Court took a conservative view on maintenance to a wife whose second marriage is in contravention with the provisions of Section 5(i) read with clause (2) of Section 5 and Section 11 of the Hindu Marriage Act, 1955.

However, the Madhya Pradesh High Court and Bombay High Court made a bold attempt and took a broad and different view. In *Laxmi Bai* v. *Ayodhya Prasad*[6], the Madhya Pradesh High Court held that the expression 'wife' or the 'husband' used in Section 24 of the Hindu Marriage Act does not have to be literally construed so as to convey only legally wedded wife and husband but construed liberally to mean petitioner or respondent claiming to be wife or husband in a pending matrimonial case. The expression "wife and husband" in the context of the section and scheme of the Act should mean a "person claiming to be a wife and husband." It was held that the Act confers wide powers on the matrimonial Courts so as to regulate the matrimonial relationship between the parties and such powers are to be exercised by the Court even in a case of alleged or proved invalid bigamous marriage.

A similar view was taken by the Bombay, Punjab, Patna, and Madras High Courts.[7] However, in the year 2004 the Full Bench of the Bombay High Court overruled its earlier decision in *Bhausaheb* v. *Leelabai* [8] and held that the expression "any decree" in Section 25 of the Hindu Marriage Act, 1955 cannot be construed to read in so liberal and expanded a form that it would interpret "every decree". Section 25 though a welfare legislation does not have a distinct tilt in favour of the woman so as to enable even an "illegitimate wife" to claim maintenance. The Court further observed that if the construction of word "wife" is not accepted uniformly, for the purpose of same remedy provided in a special legislation i.e., Section 125 of Criminal Procedure Code, an anomalous position may occur. A woman who has been denied maintenance in a petition under Section 125 of Criminal Procedure Code for the reason that she is not a "legally wedded wife" would successfully pray and obtain permanent alimony in total disregard of earlier judicial pronouncements.

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6 *Laxmi Bai* v. *Ayodhya Prasad* AIR 1991 MP 47.

7 *Govindrao Ranoji* v. *Ayodhya Prasav*. *Ayodhya Prasad* AIR 1976 Bom. 433; *Singh* v. *Bhajan Kaur* AIR 1973 punj.44; *Rajeshbhai* v. *Shantabai* AIR 1982 Bom; *Rajeshbhai* v. *Shantabai* AIR 1982 Bom; *Shantaram* v. *Dagybau* AIR 1987 Bom.182; *Mangla* v. *Prahlad* 1994 Cr.LJ 2643, 2644 Bom; *Krishankant Vyas* v. *Reena* AIR 1999 Bom. 127; *Veena Devi* v. *Ashok Kumar Mandal* 2000 Cr LJ 2332(Pat.); *Mallika* v. *P. Kundanlal* Cri. LJ 2000 142 (Mad).

8 *Bhausaheb* v. *Leelabai* AIR 2004 Bom. 283.

However, in January 2008, the Delhi High Court in *Narinder Pal Kaur Chawla* v. *Manjeet Singh Chawla*[9] again took a different view that a second wife has the right to claim maintenance under Section 18 of the Hindu Adoptions and Maintenance Act, 1956. The legislature has carved out a distinction between a 'second wife' and a 'concubine'. In this case, the husband had not discussed the facts of his first marriage, and then married the appellant and maintained a relationship for a period of 14 years as husband and wife. The second wife was known as a lawfully wedded wife, took responsibility for the house and bore two children.

The Court also took support from the provisions of the Protection of Women from Domestic Violence Act, 2005 and held that if to not give maintenance to the second wife would amount to giving a premium to the respondent for defrauding the appellant.

The Court referred to *Reema Aggarwal* v. *Anunpan*[10], a case of dowry death. The Apex Court pressed into service the mischief rule and purposive interpretation to hold that for the purpose for which section 498-A and 304-B were introduced by the legislature in the Indian Penal Code, the Court can read a male entering into second matrimonial alliance, as 'husband' why, for the purpose of granting maintenance to a woman under Section 18 of the Act, can the second wife be not treated as a 'Hindu wife' in the absence of the definition of 'Hindu wife' specifically excluding second wife. Even if it is presumed that appellant could not be treated as 'Hindu wife' since she is not the legally wedded wife of the respondent, such a wife is entitled to a lump sum amount in the form of damages or otherwise.

On 3.3.2008, a Division Bench of the Bombay High Court[11] held that the second wife has no claim over the family pension of a government employee as per Rule 21 of Central Civil Services (Conduct) Rules which bars a government employee from entering into a second marriage when his or her spouse is still alive. The petition was filed by Leelabai Bagade, who claimed to be the second wife of Vithal Bagade. The husband had died in 2000, followed by the first wife Lakshmi in 2002. Leelabai then applied for a family pension and the government rejected her plea. The Central Administrative Tribunal too, dismissed her application and she approached the High Court. The Judges referred to the Supreme Court decision of Rameshwari Devi v. State of Bihar (2000) where it was held that while minor children from a second marriage could claim a share of family pension till they turned adult, the second wife was not entitled to it.

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9. *Narinder Pal Kaur Chawla* v. *Manjeet Singh Chawla* AIR 2008 Del. 7
10. *Reema Aggarwal* v. *Anunpan* AIR 2004 SC 1418
11. Shibu Thomas, 2nd Wife has no claim on family pension-HC : TOI, 3.3 2008, p. 1.

But on 9.4.2008, a Division Bench of the Delhi High Court[12] held that the law protects not only a man's wife but also a "mistress" or live-in partner, thus, expanding the ambit of the new law on Protection of Women from Domestic Violence Act, 2005. The Division Bench passed the judgment on a petition filed by a man for quashing criminal proceeding against him on a complaint filed by his live-in partner.. Rejecting this, the Court held that:

"Like treatment to both (wives and mistress) does not, in any manner derogate from the sanctity of marriage since an assumption can fairly be drawn that in a live-in relationship with a man it could be fairly assumed that the relationship was initiated and perpetuated by a male."

The Bench said that in dealing with such cases: "the Court should also not be impervious to the social stigma which always sticks to women and not to the men."

The Court also said that "it is not unconstitutional for the parliament to provide for protection to a woman in a relationship akin to marriage along with and juxataposed to the protection given to wives and legitimate children."

SUPREME COURT CASES

There have been unfortunate situations where a woman has been defrauded by a man into a bigamous relationship and has had to suffer. Her status being that of an illegitimate wife, she is not entitled to claim maintenance. In view of the Supreme Court rulings in *Yamunabai* v. *Anantrao*[13] and *Bakulbai* v. *Gangaram*[14] this is the settled law. The Supreme Court in these cases held that a wife whose marriage is void because of the subsistence of the husband's marriage could not claim maintenance. In *Bakulbai's* case the Court went further still and held that such a wife has no claim even if she is kept in dark by the husband about his first marriage. According to the Court while the legislature has considered it advisable to uphold legitimacy and paternity of the child born out of the void marriage it has not extended a similar protection in respect of the mother of the child.

In order to lend efficacy to the provisions of Section 125 of the Criminal Procedure Code, a presumption has been engrafted through judicial construction. If the claimant proceeding under this section shows that she and the respondent have lived together as husband and wife, the Court may presume that they are a legally wedded couple for the purpose of granting maintenance. This presumption of valid marriage, however, is rebuttable, if respondent is able to prove by adducing cogent evidence

12. Mistress or Wife , Law protects every one –Metro Now, 9. 4. 2008, p.10
13. *Yamunabai* v. *Anantrao* AIR 1988 SC 644
14. *Bakulbai* v. *Gangaram* 1988(1) SCALE 188

that the so-called valid marriage is in fact a void marriage and thus no relief can be given under Section 125.

So is the case of *Rameshwari Devi* v. *State of Bihar*[15], where the dispute was over the payment of family pension and death-cum-retirement gratuity to two wives of Narain Lal, who died in 1987 while posted as Managing Director, Rural Development Authority of the State of Bihar. Appellant was the first wife. Narain Lal was stated to have married second time with Yogmaya Devi on April 10, 1963 while the appellant was still alive. From the first marriage he had one son and from the second marriage four sons born in 1964, 1971, 1972 and 1976. The learned single judge in his judgment held that children born to Narain Lal from the wedlock with Yogmaya Devi were entitled to share the family pension and death-cum-retirement gratuity and further that family pension would be admissible to the minor children only till they attained majority. He also held that the second wife Yogmaya Devi was not entitled to anything. Appeal by the first wife Rameshwari Devi against the judgment was dismissed by the Division Bench. According to her there was no marriage between Narain Lal and Yogmaya Devi and the children were, therefore, not legitimate. Aggrieved Rameshwari Devi came to the Supreme Court.

The stand of the State Government was that Rameshwari Devi was the "legally wedded" wife of Narain Lal. He married Yogmaya Devi in April, 1963 and that the marriage with Yogmaya Devi was against the provisions of law as contained in Sections 5(i) and 11 of the Hindu Marriage Act, 1955. It was, therefore, a void marriage. Second wife had thus no status and could not claim any share from the estate of Narain Lal as per the provisions of Hindu Succession Act, 1956. Accordingly State Government sanctioned family pension and gratuity to Rameshwari Devi only.

In appeal before the Supreme Court, the crucial question for consideration was whether the term 'wife' in Section 125, Cr PC includes also the appellant – a woman whose marriage was solemnized with the respondent without her knowing that he was already married. Arijit Pasayat J of the Supreme Court, by expressly relying upon the earlier decision of the Apex Court in *Smt. Yamunabai Anant Rao Adhav* v. *Anant Rao Shivram* ,[16] reiterated the principle that in order to invoke the benefit of Section 125 Criminal Procedure Code, a 'wife' has to be a "legally wedded wife." Accordingly, if a woman marries with full Hindu rites a man who already has a living spouse, her marriage with that man is "a complete nullity in the eye of law and she is, therefore, not entitled to the benefit of Section 125 of the Code, or the Hindu Marriage Act, 1955".

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15. *Rameshwari Devi* v. *State of Bihar* AIR 2000 735. See also in Supreme Court cases *Mohd. Ikram Hussain* v. *UP*, *Raj Kumar Kanwal* v. *UOI* and *K. Vimla* v. *K. Veerswamy.*
16. *Smt. Yamunabai Anant Rao Adhav* v. *Anant Rao Shivram* AIR 1988 SC 644.

In *Savitaben Somabhai Bhatya* v. *State of Gujarat*[17], the appellant claimed to have married respondent no. 2 according to the customary rites and ceremonies of their caste. Subsequently, a child was born out of this union. As the respondent neglected the appellant and the child, an application in terms of Section 125, Criminal Procedure Code was filed before the judicial magistrate claiming maintenance. The respondent opposed the application by stating that the appellant was not his 'legally wedded' wife, nor was the child his. Notwithstanding this plea, the judicial magistrate awarded maintenance. However, the respondent husband in special criminal appeal before Gujarat High Court succeeded in setting aside the maintenance order on the plea that before the alleged date of marriage between the appellant and respondent no. 2, the latter was already married. Thus, maintenance was granted only to the child.

Pursuing the principle laid down in *Smt. Yamunabai Anantrao Adhav* Case, the Supreme Court in *Savitaben's* case went further to the extent of observing that the fact that the respondent was treating the appellant as his wife "is really inconsequential," because "it is the intention of the legislature which is relevant and not the attitude of the party." Further, even the plea that the appellant was not informed about the respondent's earlier marriage when she married him is of "no avail", because "the principle of estoppel cannot be pressed into service to defeat the provision of Section 125 of the Code." Hence she is not entitled to the benefit of Section 125. In this respect, however, the Supreme Court seems to sympathize with the appellant by agreeing with her that the law operates harshly against the woman who unwittingly gets into a relationship with a married man. Thus, in the opinion of the court, as per the present provisions of Section 125, there is no escape from the conclusion that the expression 'wife' refers to 'legally wedded wife'.[18]

In view of the above Supreme Court decisions, in *Yamunabai, Rameshwari Devi* and *Savitaben's* cases, this is now the settled law that the second wife is not entitled to claim maintenance. However, there have been cases where the Supreme Court has taken a liberal view on the question of the standard of proof required in proceedings for claim of maintenance, for example in *Dwarika Prasad Satpathy* v. *Bidut Prava Dixit*[19].

In *Ramesh Chandra* v. *V. R. Daga*[20] the Supreme Court held that strict proof of performance of essential rites is not required. It further tried to distinguish between the legality and the morality of relationships. It observed that keeping in consideration the present state of statutory Hindu law, a bigamous marriage may be declared

17. *Savitaben Somabhai Bhatya* v. *State of Gujarat* AIR 2005 SC 1809.
18 Ibid p. 1811.
19. *Dwarika Prasad Satpathy* v. *Bidut Prava Dixit* 2000 Cr. LJ 1 SC.
20. *Ramesh Chandra* v. *V. R. Daga* AIR 2005 p.441

illegal for contravention of the provisions of the Act but cannot be said to be immoral so as to deny even the right of alimony or maintenance to a spouse financially weak and economically dependent.

The Supreme Court in its recent judgment of 22nd January, 2008 in the case of *Vidyadhari* v. *Sukharana Bai*[21] has given partial relief to a second wife who had been duped into bigamous relationship, without deciding as to her status. In this case, Sukharana Bai was the wife of Sheetaldeen. During the subsistence of the first marriage Sheetaldeen got married to Vidyadhari, who had four children out of wedlock and lived with him for about twenty-five years. The deceased Shetaldeen had nominated Vidyadhari for receiving amounts under provident funds and the family pension plan. The major issue raised in this case was, to whom was the succession certificate to be granted. The Court though acknowledging Sukharana Bai as the only legitimate wife of the deceased, yet granted the certificate in favour of Vidyadhari on the ground of being the nominee of his property and the mother of four children. To balance equities the Court also recognized Sukharana Bai as one of the legal heirs of the deceased and ordered Vidyadhari to protect her one - fifth share and to pay the same to her.

CONCLUSION AND SUGGESTIONS

Until now the maintenance of a woman marrying a male Hindu during the subsistence of his first marriage is the moot question that has been debated and confronted by various jurists, lawyers, judges of both the High Courts and the Supreme Court, social workers and other fora. The legislature considered it necessary to include within the scope of Section 16 of Hindu Marriage Act and Section 125 of Cr. P.C. an illegitimate child for maintenance but it has not done so with respect to a woman not legally married. As such it is desirable to take note of the plight of the unfortunate woman who unwittingly enters into wedlock with a married man and gets no monetary benefit. The legislative intent being clearly reflected in Section 125 of the Code, there is no scope for enlarging it by introducing any artificial definition to include a woman not lawfully married in the expression 'wife'. This inadequacy in law can be corrected only by the legislature.

In this regard, it is pertinent to note the recommendations of the 178th Report[22] of the Law Commission of India, suggesting amendments in Section 125 of Cr. P.C and Section 18 of the Hindu Adoptions and Maintenance Act, 1956, towards maintenance to the second wife.

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21 Civil appeal no. 575 of 2008.

22. 178th Report on Recommendations for amending various Enactments, both Civil and Criminal, December, 2001(Web site www.lawcommissionofIndia.nic.in)

We learnt from the above discussions that the High Courts gave conflicting decisions over the issue of maintenance to a second wife. In particular, the recent judgment of a Division Bench of the Delhi High Court, in *Narinder Pal Kaur Chawla's* case (2008) gave a purposive interpretation to "wife", thus granting maintenance to a second wife. But the law as of date clearly states that marriage with a second `wife' during the lifetime of the first is a void marriage and the wife of a void marriage is not entitled to maintenance.

The question that arises for consideration is whether the husband can take advantage of his own wrong by not disclosing to the second wife the factum of his first marriage, and hence can it be said that the legislature which was conscious of the social stigma attached to children of void/voidable marriages closed its eyes to the plight of a woman who, unknowing of the legal consequences, entered into a matrimonial relationship. If such a restricted meaning is given, it would not further the legislative intent. When legal terms are inadequate and lead to loose ends and unfair treatment, the court can rely on its inherent power to do justice by giving remedial and salutary reliefs like payment damages in the form of maintenance to the second wife.

HAWALA FINANCING: AN AID TO TERRORISM

Nirajan Man Singh
P. Sandhya

INTRODUCTION

Most of the terrorist activities prevailing all over the world are predominantly backed by multifarious sentiments, but a closer analysis would reveal that the lifeblood of most of the terrorist activities is finance. Therefore, it can be assumed that curtailing the inflow of such funds to back up terrorist activities would relatively reduce the extent of terrorism. Time and again, it has been reiterated that terrorist activities are largely inexpensive. However, to the contrary, Ehrenfeld[1] says, even a very sophisticated and deadly attack such as that of September 11, 2001, has been estimated to have cost only US$500,000, though the maintenance and expansion of terrorist bases require constant infusions of large amounts of money. There may be multiple theories, discrepancies while evaluating the chief causes of terrorism and the related backward integration, but the hypothesis of pecuniary backup for the continuation of such terror based activities cannot in any way be nullified. To stop the inflow of finances to terrorists is in itself a real big fight, but once curbed, it would make the world a place with peace and harmony to live in.

The September 11 attack (often described as a horrendous, dastardly and despicable attack) on the World Trade Center, had an enormous financial, as well as psychological impact on New York City. This attack was meticulously planned, having the capacity to terrify what is known as the 'mightiest nation'. The aftermath of the global war on terror after this attack unleashed a series of legislations and conventions, both national and international, to check the financing of terrorist and criminal activities.

For an easy understanding, the paper has been divided into three parts. Part 1 will generally summarize the meaning and the logic behind a typical Hawala transaction. This Section chronicles several characteristics of Hawala transactions that help explain the reasons behind its development and why it continues to be an appealing transfer system till date. Part 2 will attempt to scrutinize the Hawala system by piercing its veil. After the explanation of the Hawala system, Part 3 studies the merits of domestic regulatory efforts against Hawala businesses in India and assesses the relative success and failure of these legislative efforts. Part 4 concludes the paper with remarks on the challenges posed to the enforcement authorities by terrorist financing.

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1. Sean S. Costigan, "Funding evil: How terrorism is financed and the nexus of terrorist and criminal organizations", 1st ed. 2007, Ashgate Publishing.

PART-1

CONCEPT OF HAWALA

"According to the World Bank, the total value of money remitted to developing countries in 2002 through Hawala system reached at least U.S. $80 billion, a figure that is double the aid provided by the combined total of government aid, private bank lending and International Monetary Fund ("IMF") or World Bank aid and assistance."[2]

Known as *Hawala* in India, *Hundi* in Pakistan or *Fei-qian* in China, this underground banking system is colossal and widespread. Today, Hawala system is used primarily by diaspora communities, although there is concern that some sectors of the population use Hawala networks to launder money, evade taxes, traffic contraband, and fund terrorist activities.[3] However, to check such unregulated informal funds transfer, the Indian government has made rigorous efforts to follow international standards of Anti-Money Laundering (AML) regulations. To this effect, the guidelines on know your-customer (KYC) and AML standards issued by the Reserve Bank of India and the provisions of the Prevention of Money Laundering Act (PMLA), 2002, are consistent with the international best practices and are applicable uniformly. Further, SEBI has asked non-banking agencies to put in place their AML policies and KYC norms and procedures.

The Hawala practice is cost-effective, efficient and far-reaching. In a simple Hawala transaction, a Hawala broker in one country takes money from a customer and, for a fee, dispenses an equal amount to the recipient through an associate in another country. For instance, 'A', an Indian salesman, entered the United States on a tourist visa five years ago, which has now expired. He has saved US$15,000 which he wants to send to his family in India. He has several options; he could go to a bank, use money transfer mediums such as Western Union, or use Hawala.

If 'A' chooses to use a bank, he would probably have to first open an account with proper identification, which might be difficult on account of his expired visa. In addition, the bank could charge him the official exchange rate, an additional charge to issue a bank draft in order to send the money abroad, all of which could take a week to reach the desired destination. If 'A' uses a money transfer service, it would also require proper identification and will be expensive.

Another option for 'A' is to send money through a Hawala broker. He will be charged comparatively less. The Hawala broker will provide 'A' with a code, which

2. Dilip Ratha, Workers' Remittances: An Important and Stable Source of External Development Finance, World Bank Global Dev. Fin., at 159 (2003).
3. El Qorchi, supra note 4 (pointing out illegal uses of Hawala networks); Carroll, supra note 5 (positing that Hawala networks are tied to criminal activity).

he will disclose to the recipient. This Hawala broker will contact his associate in India via telephone, facsimile, or e-mail and instruct him to give an equal amount to A's family on provision of the correct code. Using the Hawala route would allow 'A' to get a better exchange rate as compared to banks and Western Union, and thus, send more money home.

Hawala remittance can be completed in a matter of days or even hours in large cities. In contrast, banks or money service businesses usually take several business days, and could involve additional delays due to holidays, weekends and time differences. Also, because there are many places without banks, Hawala networks fill the void.

Furthermore, some recipients are illiterate, and do not know how to encash a cheque, operate a bank account, or sign for legitimately wired money.

It can easily be seen, therefore, that the biggest factor which contributes to the popularity of Hawala as a transaction mechanism is its simplicity and the lack of procedural formalities. It is essentially an informal system, that is not intrinsically evil, but the fact that it enables the parties to transact without leaving a 'paper trail' makes it immensely suited for financing criminal activities, such as terrorism.

PART-2

PIERCING THE VEIL OF HAWALA

Very few events leave such palpable changes perceived in every human transaction in such short periods of time. It would not be inappropriate to accord 9/11 the status of such an event which has had a direct impact on all kinds of institutions, irrespective of the fact whether they were military, economic or social.

Financial and Banking Institutions were no exception to these changes. As a matter of fact, they were subjected to intense pressure to bring about a direct change in the existing policies and increase the levels of scrutiny and security. Hawala and its alleged connection to money laundering and terrorist activities started getting mainstream media attention.

There are varying opinions regarding Hawala; in October 2001, nearly a month after the September 11, 2001 terrorist attacks, Time Magazine published an article entitled "A Banking System Built for Terrorism" which portrays it to be a peculiar financial system which is both dangerous and beyond ordinary analysis.[4]

The Hawala system is often linked with money laundering and terrorist activities, or described as a mysterious system for "moving money without money moving at all,

4. Meenakshi Ganguly, "A Banking System Built for Terrorism", Time Magazine, Oct. 5, 2001, http://www.time.com/time/world/printout/0,8816,178227,00.htm.

and without leaving traces or records."[5] Contrary to these interpretations, John F. Wilson, a senior economist with the International Monetary Fund (IMF), argues that Hawala should be understood as an "economic phenomenon," comparable in mechanics and economic structure to most remittance alternatives, which can only be regulated by reducing the economic incentives to engage in Hawala.[6]

While piercing the veil it is essential to draw a distinction between "White Hawala" and "Black Hawala". Following the Indian and Pakistani usage, the term "White Hawala" refers to legitimate transactions while the term "Black Hawala" refers to illegitimate transactions.

This distinction is valuable for money laundering enforcement. While the legitimacy of informal Hawala transactions are subject to national legal frameworks, "white Hawala" transactions consist mainly of migrant worker remittances, humanitarian relief aid, personal investments and expenditures.[7] "Black Hawala" transactions, in contrast, are "almost always associated with serious offences that are illegal in most jurisdictions" such as smuggling, money laundering and terrorist financing. This paper focuses mainly on Black Hawala Transactions, which necessitated legal action by various financial authorities.

BLACK HAWALA

1. Smuggling: It is a known fact that the growth of the present Hawala network has its roots in trading and smuggling operations in South Asia in the 1960's and 1970's.[8] In an effort to avoid gold import restrictions, traders and smugglers used boats to ship gold from places like the Gulf Cooperation Council (GCC) countries to South Asia."[9] To remit funds back to their countries of origin or purchase more gold, traders and smugglers used the growing population of South Asian nationals working in the GCC countries.

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5. John F. Wilson, "Hawala and Other Informal Payment Systems: An Economic Perspective", Remarks at Seminar on Current Developments in Monetary Financial Law (May 16, 2002), http:// www.imf.org /external /np/leg/sem/2002/cdmfl/eng/wilson.pdf.
6. Supra n.4; see also International Monetary Fund, About the IMF, at http://www.imf.org/external /about.htm (last visited Dec. 25, 2007). "The IMF is an international organization of 184 member countries. Since the IMF was established its purposes have remained unchanged but its operations-which involve surveillance, financial assistance, and technical assistance-have developed to meet the changing needs of its member countries in an evolving world economy."
7. Patrick M. Jost & Harjit Singh Sandhu, The Hawala Alternative Remittance System and Its Role in Money Laundering, Interpol General Secretariat, at http://www.interpol.int /Public/FinancialCrime /Money Laundering /hawala/default.asp (last visited Dec. 24, 2007).
8. Patrick M. Jost & Harjit Singh Sandhu, The Hawala Alternative Remittance System and Its Role in Money Laundering, Interpol General Secretariat, at http:// www.interpol.int/Public/FinancialCrime /MoneyLaundering /hawala/default.asp (last visited Nov. 24, 2007).
9. Ibid.

2. Terrorist Financing: Major concerns have been raised about using Hawala as an instrument to fund terrorists. The lack of requirements for identification or inquiries into the source is an important facet of Hawala transactions. It allows dealers to facilitate multiple transfers, which conceal the ultimate origin of the funds through their effective network in different jurisdictions. For example, international attention was directed towards the Hawala system when investigators traced an anonymous fund transfer by Al-Qaeda operatives involved in the September 11 terrorist attacks.[10]

3. Money Laundering: Interpol has defined money laundering to embody three phases: (1) placement; (2) layering; and (3) integration. Hawala is vulnerable to abuse at each phase of the money laundering process.[11]

Despite the classification between Black and White Hawala Transactions, it can be concluded that Hawala *per se* (whether White or Black) is illegal in India and most part of the Asian economy, because the very nature of the process permits evasion of financial and other regulations.

PART -3

IS HAWALA LEGAL?

"International guidelines designed to bring Hawala under a regulatory umbrella fail to explain why Hawala has survived for so many years and why it is likely to continue its survival despite increased regulation"

Many South Asian nations (such as India) have laws that prohibit speculation in the local currency, prohibit foreign exchange transactions at anything other than the official rate of exchange, and impose strict licensing requirements on money remitters and foreign exchange dealers. In addition, there are regulations governing inbound and outbound remittances. One of the attractions of Hawala networks is the evasion of these regulations.

As mentioned in chapter 2, it is possible to state that Hawala is illegal in India because it offers privacy and lacks paper trail, and is largely used for illegitimate purposes.

In India, there already exists a very centralized and over-regulated pattern of banking in which the Reserve Bank of India (RBI) determines almost all the general policies of banking and, indirectly, large number of internal policies as well.[12] The shield of professional ethics can easily be pierced if there exists large-scale corruption and

10. K. Raveenran, "U.A.E. Takes Unprecedented Action on Hawala", The Daily Star, Oct. 25, 2003, available at http:// goldismoney.info/forums/archive/index.php/t-4556.html.
11. http://en.wikipedia.org/wiki/Money_laundering for more information; last visited Jan 12th, 2008.

unprofessionalism in the banking sector. A banker cannot be penalized under criminal law for divulging sensitive financial information. Instead of curbing the malpractices, which already exist, the growing threat to terror and 'national security' should not prove to be an excuse for curbing financial freedom and privacy.

The draconian POTA (though now repealed) and the amendment to the Unlawful Activities (Prevention) Act, 1967 gave wide powers to the authorities in these countries to investigate financial matters of its citizens on grounds which are far less convincing.[13]

As on date, the estimated Hawala money in India is around 40% of its Gross Domestic Product.[14] Consequently, the Indian government has adopted firm measures with respect to the regulation of its informal market, particularly the Hawala system, with the passage of two legislations, i.e. The Foreign Exchange Regulation Act (FERA)[15] and its later consolidated and amended version, The Foreign Exchange Management Act (FEMA).[16] These acts have explicitly prohibited "Hawala-type" transactions.

LEGISLATIONS IN INDIA

There are three key enactments, which have a bearing on the financing of terrorism and other criminal activities i.e. COFEPOSA, FEMA and Money Laundering Act. The main issue that appears to emerge is the incongruity between these three enactments. For instance, if we look at the interplay among the Money Laundering Act, 2002, the COFEPOSA and the FEMA, we find that the legal position is somewhat unclear.

FOREIGN EXCHANGE MANAGEMENT ACT, 2000[17]

The FERA, enacted in 1973, was drafted with the objective of introducing regulations for the entry of foreign capital into India's economy.[18] It represented the Indian legislature's efforts to combat the extensive Hawala system that continues to flourish in India. Under FERA, Sections 8 and 9 provided "detailed legal prohibitions on the Hawala market." In particular, Section 8 imposed strict licensing requirements on money changers and prohibited the acquiring, borrowing, selling, or transferring

12. http://www.rbi.org as visited on Jan. 15th, 2008.
13. http://www.satp.org/satporgtp/countries/india/document/actandordinances/POTA.htm as visited on Jan. 2nd, 2008.
14. http://www.merinews.com/catFull.jsp?articleID=132023.
15. Foreign Exchange Regulation Act, No. 46 (1973) (India) [hereinafter FERA].
16. Foreign Exchange Management Act, (1999) (India) [hereinafter FEMA].
17. FERA was repealed in June 2000 and replaced by FEMA, which is largely considered a law much more in keeping with the spirit of liberalization and globalizing the Indian economy. While the offences under FERA are those of criminal in nature, the offences under FEMA are civil in nature.
18. Rohit Sachdev, "Comparing The Legal Foundations Of Foreign Direct Investment In India And China: Law And The Rule Of Law In The Indian Foreign Direct Investment Context", Columbia Business Law Review, 2006 CLMBLR 167.

of foreign exchange from persons other than "authorized dealers" in India. Moreover, Section 8 regulated persons other than authorized dealers or money changers and imposed on them requirements to sell any foreign exchange acquired to an authorized dealer in an effort to legislatively force funds from the informal market into the formal market.[19] Additionally, Section 9 of FERA specifically restricted Hawala transactions by prohibiting the making of any payment or credit to any person outside India without conditional approval from the Reserve Bank of India.

Taking into consideration the substantial financial developments in India, FEMA was introduced which further expands upon FERA's concept of licenses for moneychangers.[20] In particular, FEMA provides for a heightened role of the Reserve Bank of India in regulating the transactions by specifying that the Reserve Bank, in consultation with the Central Government, may specify: "(a) any class or classes of capital account transactions which are permissible; and (b) limit which foreign exchange shall be admissible for such transactions."[21]

Beyond these measures, the government in India has established a special federal police unit with the sole function to fight economic crime. The unit's mission is to tackle economic crimes like bank fraud and the movement of money from foreign countries through informal fund transfer systems.

THE CONSERVATION OF FOREIGN EXCHANGE AND PREVENTION OF SMUGGLING ACTIVITIES ACT, 1974

Several preventive detention laws have been enacted by the Central Government, most of which have been particularly frowned upon. 'The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974' (COFEPOSA) enacted in 1974, provides for preventive detention in certain cases for the purposes of conservation and augmentation of foreign exchange and prevention of smuggling activities and for matters connected therewith, is one such legislation, which is a powerful instrument in the hands of the Central Government. It is a preventive detention law relating to economic offences. The Act was enacted to provide for preventive detention in certain cases for the purposes of conservation and augmentation of foreign exchange and prevention of smuggling activities and for matters connected therewith.[22]

Time and again, we come across news items wherein huge sums are transferred either from India or to India. Funds from clandestine channels are received, credited

19. Section 8(3), FERA.
20. see also India Info Law, Foreign Exchange Management Act (FEMA) 1999 to replace Foreign Exchange Regulation Act (FERA), at http://law.indiainfo.com/foreign-exchange/fema.html (last visited Dec. 26, 2007).
21. FEMA ch. 2(a)-(b).
22. Derek P. Jinks, "the anatomy of an institutionalized emergency: preventive detention and personal liberty in India", Michigan Journal of International Law, 22 MIJIL 311.

into bank accounts and maintained under fictitious names and addresses. Such transactions, more often than not, are results of criminal conspiracies leading to Hawala transactions.

Section 3 of the Act points out several grounds under which persons can be detained.[23] A reading of this section reflects that the COFEPOSA has not evolved from the stage of its enactment in the 1970s when the chief concern of the Indian state was not terrorism, but of smuggling. The crimes that come within the mischief of the COFEPOSA, as per Section 3 of the Act relate mainly to smuggling, and to activities prejudicial to the conservation and augmentation of foreign exchange. While these activities may constitute a part of terrorist activities, they certainly do not cover the entire spectrum. An expansion of the offences that the COFEPOSA covers must be re-examined. At the same time it must be noted that Preventive Detention enactments in India have been apt to misuse by the enforcing authorities. For instance, the POTA gathered so much bad press due to misuse that it ultimately had to be repealed. The COFEPOSA therefore must at best be used as an enforcing legislation rather than one which criminalizes Hawala and similar activities *per se*. It should accordingly only be used sparingly and in the most evident of cases.

On the one hand, FEMA treats foreign exchange violations merely as civil violations, while on the other, these are liable for preventive detention under COFEPOSA.

THE MONEY LAUNDERING ACT, 2002

Money laundering is yet another system, which aids launderers to disguise their criminal acts, i.e., wiping off the nexus between the crime and its source.[24] Money laundering as a concept refers to the conversion or "Laundering" of money which is illegally obtained, so as to make it appear to originate from a legitimate source.[25] As per an estimate of the International Monetary Fund, the aggregate size of money laundering in the world could be somewhere between two and five percent of the worlds gross domestic product.[26]

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23. Section 3 of the COFEPOSA provides five grounds for the detention of persons under the Act. These are:
    (a) smuggling goods, or
    (b) abetting the smuggling of goods, or
    (c) engaging in transporting or concealing or keeping smuggled goods, or
    (d) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or
    (e) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods.
24. Kenneth Kaoma Mwenda, "can insider trading predicate the offence of money laundering", Journal of Business & Securities Law, 6 JBSECL 127
25. See http://www.rbi.org.in/scripts/BTCDisplay.aspx?pg=BTCMoneyLaunder.htm for more information. Last visited on Dec. 26th, 2007.
26. Ibid.

The money laundering process has three stages:[27]

a) Placement: This is the first step whereby the money derived from illegal activities is introduced into the existing financial cycle so as to blend such money into the system. This is the most important stage as this relieves the criminal from the major responsibility of guarding such bulk cash, which could otherwise raise suspicion against him.

b) Layering: It consists of a series of transactions and conversions whereby the original source of the funds is concealed i.e. separating the money derived from illegal activities from its source.

c) Integration: This is the final stage whereby the money reverts to the criminal, and the criminal re-introduces such money into the economy, that too in a manner which is legitimate, or atleast appears to be legitimate.

The technique for money laundering is essentially the same as that used to conceal the sources of, and uses for, terrorist financing (both of them i.e. money laundering and terrorist financing, being geared towards secrecy).[28] However, a peculiar feature of terrorism is that funds involved may arise from legitimate as well as criminal or illegal activities. So far as the funds for financing terrorism are derived from illegal sources, it would fall under the ambit of the Money Laundering Act in India. The funds utilised for financing terrorism derived from legitimate sources would require treatment under special laws.

The Money Laundering Act, 2002 and the rules notified thereunder came into force with effect from July 1, 2005. The Act attempts to give a broad definition of the offence of money laundering, by defining it as "any activity connected with the proceeds of a crime." The crimes which are covered under the Act are listed in the schedule to the Act, and range from waging war against the Indian State (thus squarely covering terrorism), to violations of the Narcotic Drugs and Psychotropic Substances Prevention Act, to the Wildlife Protection Act. The Act therefore hits at monetary operations related to criminal activities by making these operations criminal in themselves. Apart from this, the Securities and Exchange Board of India (SEBI) has also been active in issuing guidelines to Banks and Financial institutions to monitor and track money laundering activities. The Ministry of Finance under the Government of India has also set up a Financial Intelligence Unit to ensure that underground transactions such as the Hawala System can be tracked and curbed by

27. It would be advisable to read this segment in consonance with money laundering in Chapter 2.
28. See Money Laundering and Terrorist Financing: Definitions and Explanations- http://www1.worldbank .org/finance/html/amlcft/docs/Ref_Guide_EN/v2/01-Ch01_EN_v2.pdf for more information; last visited on Jan 5th, 2008.

the authorities. It is the central reception point for receiving Cash Transaction Reports (CTRs) and Suspicious Transaction Reports (STRs) from various reporting entities, analysing information gathered to discover transaction patterns and sharing this information with investigation agencies.[29] This is an effective step towards enforcement, but the issue is, that in the absence of a strong primary legislation curbing Hawala transactions, and grassroots level training of enforcement officials (the Police for instance,) is this enough?

There is a strict need to enforce the existing laws, rather than framing new laws which fail effective implementation. The question that remains unanswered is whether this new legislation has enough teeth to bite? While it is too early to decide or comment on the effectiveness of the legislation, what remains to be seen is whether the Act will be able to contribute efficiently and effectively to combat terrorist funding.

Apart from the aforesaid legislations, the Government of India set up the Financial Intelligence Unit- India (FIU-IND)[30]. The main function of FIU-IND is to receive financial information pursuant to India's AML laws, analyze and process such information and disseminate such information relating to suspect financial transactions to appropriate authorities. It is also responsible for co-ordinating and strengthening efforts of national and international intelligence, investigation and enforcement agencies in pursuing the global efforts against money laundering and related crimes.[31]

LESSONS FROM THE PAST

UNION OF INDIA V. VENKATESHAN AND ANOTHER[32]

Facts: Defendant was doing business of collecting Saudi Riyals from Indians in Saudi Arab and in equivalent thereof he was making arrangements for delivery of Indian rupees to various persons in India. It is further alleged that in a very short span the detenu had collected Rs. 16.79 million and had distributed Rs. 1.25 million and was involved in Hawala transactions. Hence, detention order under Section 3(1)[33] of the COFEPOSA Act was passed, directing the defendant to be detained and kept in custody with a view to prevent him from acting in any manner prejudicial to the augmentation of foreign exchange.

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29. http://www.rbi.org.in/scripts/BTCDisplay.aspx?pg=BTCMoneyLaunder.htm for more information; last visited on Jan 15th, 2008.
30. Set up vide O.M dated 18th November 2004. It is an independent body reporting directly to the Economic Intelligence Council headed by the Finance Minister.
31. http://fiuindia.gov.in/about-overview.htm.
32. AIR 2002 SC 1890.

Issue: The High Court quashed and set aside the detention order on the ground that what was considered to be criminal violation of the Foreign Exchange Regulation Act, 1973 has ceased to be so, on the repeal of FERA which is replaced by the Foreign Exchange Management Act, 1999. Hence, the limited question would be whether a person who violates the provisions of the FEMA to a large extent could be detained under the preventive detention Act, namely, COFEPOSA?

Judgment: COFEPOSA and the FEMA occupy different fields. COFEPOSA deals with preventive detention for violation of foreign exchange regulations and FEMA is for regulation and management of foreign exchange through authorized persons and provides for penalty for contravention of the said provisions. But both the legislations aim to promote orderly development and maintenance of foreign exchange market in India.

For exercising the power under COFEPOSA and detaining a person, his involvement in a criminal offence is not a must, as borne out by the provisions of Section 2(e) of the COFEPOSA. Power of detention is clearly a preventive measure. It does not partake in any manner the nature of punishment. Hence, the order of the High court is not justified. Further, if the view of the High court is accepted it would result in implied repeal of the substantial part of Section 3 under COFEPOSA.

Comment: It is to be noted that Article 14[34] of the Indian Constitution is inapplicable because preventive detention and prosecution are not synonymous. The authorities are different. The nature of proceedings is different. In a prosecution, an accused is sought to be punished for a past act. In preventive detention, the past act is merely material for inference about the future course of probable conduct on the part of the detenu.

JAIN HAWALA SCANDAL[35]

The Indian Central Bureau of Investigation, while investigating a case pertaining to "funding of Jammu and Kashmir militants", raided a house in Delhi seizing account

33. Power to make orders detaining certain persons: (1) The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from:(i) smuggling goods, or(ii) abetting the smuggling of goods, or (iii) engaging in transporting or concealing or keeping smuggled goods, or (iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or (v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods, it is necessary so to do, make an order directing that such person be detained.
34. Right to Equality: equality before law.
35. Please visit the website www.thehindu.com/fline/fl1417/1417s001.htm for more information, last visited on Jan 12th 2008.

books implicating India's richest and powerful people, including the then Prime Minister, P.V. Narasimha Rao, in receiving funds through India's illegal Hawala market.[36] Twenty-four politicians were ultimately charged with being beneficiaries of 64 million rupees in bribes and gifts from businessmen.[37]

This case illustrates that a nation's stage of economic, financial, and political development must be taken into account when formulating regulatory strategies, particularly with respect to systems like the Hawala that are so firmly rooted in that country's financial and political being. In a developing country like India, criminal elements already exploiting Hawala transactions have a strong incentive to infiltrate the political structure to ensure their survival and are able to find willing partners among Indian politicians who have not seen big money. Moreover, Financial Action Task Force (FATF)[38] recommendations, which rely heavily on strong criminal justice infrastructure to enforce licensing requirements, are disadvantaged in India where high-ranking Indians are able to escape prosecution unscathed. As a matter of fact, Narasimha Rao survived "numerous corruption scandals in government," the worst of them being a payment to escape prosecution.

CONCLUSION

"Where strong commercial interests tempt; no amount of legal restrictions will be successful."

India is facing multifarious challenges in the management of its internal security. There is an upsurge in the number of insurgent groups and terrorist activities, and an intensification of cross-border terrorism in different parts of the country. The menace of money laundering like Hawala, having a close nexus with organized crime, hits not only at the root of a country's financial structure but also kills its social structure by financing anti-social activities. The western world has woken up to the fact that terrorism can best be attacked by hitting at its roots i.e. by cutting off its means of finance. The United States has reacted through the Patriot Act, amendments to the Banking Security Act and the Money Laundering Act. At the global level, the United Nations has taken steps through the Convention for the suppression of financing of Terrorism.

Despite having numerous legislations in India, there is still a dire need to be vigilant. The COFEPOSA prevents violation of foreign exchange regulations and smuggling

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36. Sanjay Kapoor, Bad Money, Bad Politics: The Untold Hawala Story 88 (1996).
37. The Jain Hawala case implicated high-ranking officials in India including "seven serving Cabinet ministers, all of whom have resigned; the president of the leading opposition Bharatiya Janata Party, who gave up his parliamentary seat; and the chief minister of the local government in New Delhi, who also quit.
38. Financial Action Task Force, an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing.

activities. The appropriate authority is empowered under the said Act to make a detention order against any person whose act is prejudicial to the conservation or augmentation of foreign exchange. Correspondingly, one of the many objectives of FEMA is also to promote the orderly development and maintenance of foreign exchange market in India. The recent introduction of the Prevention of Money Laundering Act, 2002 in the Indian Statute books has given another instrument to counter the economic roots of terrorism. Further, the RBI has issued guidelines on KYC and AML standards.

However, despite the Indian Government's most restrictive legal provisions, Hawala remains a "routine transaction," as people continue to transfer funds out of India at their "sweet will." Indeed, the Indian regulation of Hawala is a typical example where even the most severe licensing provisions cannot ensure compliance. One can say that decades of corruption have bred more corruption, destabilizing efforts to reign in Hawala transactions.

In spite of several laws and legislations in place, it appears to the authors of this paper that the system is not as yet set/ ready to be able to handle this task. It is hoped that more targeted groups such as the 'Financial Intelligence Unit' will be set up by the Government of India in order to track and curb financial transactions to fund terrorism and other criminal activities. At the end of the day, a law is only as strong as its enforcers.

NARCO ANALYSIS AND PROTECTING THE RIGHTS OF THE ACCUSED

Ananthi S Bharadwaj
Sumithra Suresh

1. INTRODUCTION

High profile criminal investigations in recent times have witnessed the emergence of a new investigative tool in India - Narco analysis. Being touted as an alternative to the 'third degree' interrogation methods, narco analysis has opened a Pandora's Box of legal and ethical questions exacerbated by the Supreme Court's refusal to comment on the legality of such investigative techniques.[1]

Though relatively new in the field of criminal investigation in India, narco analysis has been used in the field of psychiatry since long. Barbiturates, which have been in use since the beginning of the last century, came to be used in psychotherapy for narco analysis by 1930, along with other methods of therapy. Narco Analysis was hailed in the field of psychiatry as compared to other psychotherapeutic procedures as it saved time by helping the patient overcome reluctance in talking freely about their inner most feelings and experiences. By means of narco analysis it was possible to achieve a state of 'transference' in many patients whose previous state was either apathy, inaccessibility, or even negative transference.[2]

Narco Analysis has been used as a tool of criminal investigation long before its entry in India. Narco Analysis involving the use of the drug scopolamine on criminals in the United States was first reported in 1922. During and after the war years, United States armed forces and intelligence agencies continued to experiment with the truth drugs and this has been continued by the Central Intelligence Agency (CIA).[3]

The legal standpoint on narco analysis in India has not been clearly pronounced by the Courts. This paper addresses narco analysis in the Indian legal system. The major issues dealt with being, its constitutionality in relation to Article 20 (3) and 21 as well as its statutory sanction under the Code of Criminal Procedure. Also, the paper advocates the use of narco analysis as a feasible alternative to the use third degree methods in investigation. For the same, the researchers have proposed a model comprising guidelines that can facilitate its effective and legitimate use.

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1. *Supreme Court reserves verdict on Narco Analysis*, http://www.indiaenews.com/india/20080124/93625.htm Thursday jan 24 2008, last accessed 06-03-2008.
2. Horsley, J.S. , "Narco Analysis", (1942) *British Medical Journal* 230.
3. Lakshmanan, Sriram, "Narco Analysis and some hard facts", http://flonnet.com/fl2409/stories/20070518002109700.htm, last accessed 18-02-2008.

2. THE PROCEDURE

The test of narco analysis involves the administration of small amounts of Sodium Penthatol and Sodium Amytal dissolved in distilled water and mixed with dextrose, intravenously over a period of three hours. The psychological effect is that the subject loses all inhibition and does not have the ability to manipulate answers easily. This is why it is believed that the information revealed during such a test is mostly the truth.

The subject is then interrogated by investigating officers in the presence of doctors and the same is recorded in audio and videocassettes. Also, experts prepare a report, which is used for the purpose of collecting evidence.

2.1 NARCO ANALYSIS VIS-À-VIS OTHER SCIENTIFIC TESTS

As compared to other scientific lie detection tests such as the Polygraphy and the Brain Mapping, Narco Analysis is based on entirely different principles.

Where the lie detection tests are based on the monitoring of physiological/ autonomic responses while answering questions framed by the clinical psychologist, narco analysis is based on how sodium pentathol handles GAABA (gamma amino butyric acid), a neuro transmitter inhibitor and thereby reduces the inhibitory character of the individual.[4]

2.2 NARCO ANALYSIS: NOT A HEALTH HAZARD

It can be seen from the procedure that narco analysis goes a step further than lie detection tests by the injection of a foreign substance. However this in no way makes narco analysis a health hazard, the following being reasons for the same:

The dosage of the serum is carefully regulated depending upon the age, sex, health and physical condition of the accused. The test is conducted by a team consisting of an anaesthetist who administers the drug and regulates its dosage, a physician who certifies the fitness of the subject before the administration of the test, and a clinical/ forensic psychologist who interrogates and interacts with the accused. Further more, the drug used in low concentration during narco analysis, does not have any adverse effect on the body.[5]

Sodium Amytal and Sodium Pentothal, commonly used for narco analysis, is also used by psychiatrists in treatment of patients to help them recall traumatic experiences

4. Mohan, B.M., "Misconceptions about Narco Analysis", *Indian Journal of Medical Ethics,* Vol. IV No.1 January- March 2007, http://www.ijme.in/151co07.html, last accessed 16-02-2008.
5. *Santokben Jadeja v. State of Gujarat*, 2007 CriLJ 4566, para 30.

they are otherwise unable to remember. Anaesthesiologists have opined that these drugs have no side effects since the drug dissipates in the body within five minutes.[6]

2.3 VERACITY OF THE RESULTS

However, doubts have been raised regarding the truthfulness of the information elicited during the test. Critics of the procedure allege, that since these drugs induce the subject into a delusive state, the subject is prone to divulge information as a result of hallucinations, which in turn don't necessarily point to the truth.[7]

It is submitted that such an allegation is the result of a misunderstanding of the process involved in narco analysis. The procedure is based on the simple truth that the ability to lie depends upon the imaginative power and it is this ability of the individual, which is neutralized by the drugs. At this point there arises a need to clarify that narco analysis does not lead to the individual synthesising new information, but merely aids the subject in overcoming a mental barrier. Dr. J.S Horsley most effectively concludes that by means of narco analysis it is possible to effect a transference in many patients whose previous state was apathy, inaccessibility, or even negative transference.[8] One of the first papers to be published on the use of narco analysis to obtain truthful information from criminals was by a Texas physician, Dr. Robert Ernest House, called the "father of truth serum" and was published in 1922 in the Texas State Journal of Medicine.[9] Dr. House declared before an assembly of law enforcement officers in Houston, Texas, in September, 1924 that –

"In the state induced by the drug, the individual will reply to questions with childlike simplicity and with childlike honesty, without evasiveness, guile, deceit or fraud, as the answer to a query that is stored in his mind as memory."[10]

Hence, a person will find it difficult to lie during such a procedure and his answers will be limited to facts he is already aware of.[11] Furthermore, the interrogators adopt a method of asking questions in a certain pattern, repeating them at regular intervals to see if similar answers are elicited. Hence, repeated questioning further reduces the ambiguities.[12]

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6. O'Connor, James V, *Truth Serum as Behavior Modification*, The New York Times, Sunday, July 22, 2001, http://query.nytimes.com/gst fullpage.html?res=9403E1DF143AF931A15754C0A9679C8B63&sec=&spon=&page wanted=all, last accessed 09-03-2008.
7. http://www.lawyerscollective.org/content/human-rights-0, last accessed 16-02-2008.
8. Horsley, J.S. , "Narco Analysis", (1942) *British Medical Journal* 230.
9. House, Robert E., "The Use of Scopolamine in Criminology", (1931) 2 *American Journal Of Political Science* 328-38; Moenssens, Andre A., "NarcoAnalysis in Law Enforcement", (1961)52 *The Journal of Criminal Law, Criminology and Police Science* 453-458.
10. Address by Dr. R.E.House delivered at The 10th Annual Convention of the International Association for Identification, Houston, Texas, (1925) 6 *Finger Print And Identification Magazine* 3-7.
11. *Narco Analysis Test Constitutional Imperatives*, http://www.symlaw.ac.in/phpmyfaq/index.php?sid=30548&lang=en&action=artikel&cat=3&id=4&artlang=en, last accessed 16-02-2008.
12. Lakshmanan, Sriram, "Narco Analysis and some hard facts", http://flonnet.com/fl2409/stories/20070518002109700.htm, last accessed 18-02-2008.

Dr. B.M. Mohan[13], asserts that the feedback from investigating agencies indicate towards a success rate of 96-97% in these tests.[14] These statistics, in favour of narco analysis are an important consideration while determining its feasibility.

The question of the veracity of the answers elicited during narco analysis is a subject matter of scientific research and enquiry. Though sections of the scientific community have affirmed the increasing veracity and reliability of the results of this process, this is beyond the scope of this academic writing, which seeks to address and establish the legality of the process as an investigative tool in criminal justice dispensation.

3. CONSTITUTIONALITY OF THE PROCEDURE: VIOLATION OF ARTICLE 20 (3)?

One of the biggest legal controversies, which surround narco analysis, is its alleged violation of the Right Against Self incrimination[15] guaranteed under Article 20 (3) of the Indian Constitution.

3.1 TESTIMONIAL COMPULSION UNDER ARTICLE 20(3)

Article 20 (3) of the Indian Constitution gives the accused the immunity from "being compelled to be a witness against himself". It is now settled[16] that the words "to be a witness" includes oral as well as written testimony. The statements made by the accused during narco analysis must amount to a testimony in order to attract Article 20 (3).

The ambit of protection of the Right Against Self incrimination enshrined under Article 20 (3) has been clearly laid down by the Supreme Court in the case of *Nandini Satpathy v. P L Dani*[17]. Here, disagreeing with the narrow construction of the expression 'accused of an offence' by Courts in other cases[18], the Supreme Court clearly laid down that the protection under Article 20 (3) begins to operate at the pre-trial stage.

"Any giving of evidence, any furnishing of information, if likely to have an incriminating impact, answers the description of being witness against oneself. Not being limited to the forensic stage by express words in Article 20(3), we have to

13. Mohan, B.M., "Misconceptions about Narco Analysis", *Indian Journal of Medical Ethics,* Vol. IV No.1 January- March 2007.
14. *Ibid.*
15. No person accused of an offence shall be compelled to be a witness against himself.
16. *State of Bombay v. Kathi Kalu Oghad,* [1962] 3 SCR 10; *Dalmia, R.K. v. Delhi Administration,* AIR 1962 SC 1821(1870).
17. (1978)2 SCC 424.
18. *R.N.Bansilal v. M.P. Mistry,* AIR 1961 SC 29; *State of Bombay v. Kathi Kalu Oghad,* AIR 1962 SC 1808; *R.C.Mehta v. State of West Bengal,* AIR 1970 SC 940; *Bhagwandas Goenka v. Union of India,* Cr.Appeals 131 & 132 of 1961, dated September 20,1963.

construe the expression to apply to every stage where furnishing of information and collection of materials takes place. That is to say, even the investigation at the police level is embraced by Article 20(3)."

Hence, Article 20 (3) may be attracted even at the interrogation stage. In this context, the Supreme Court held that the protection under Article 20 (3) extends to any 'compulsory process' for gathering evidence against the accused. Further, 'compelled testimony' resulting in violation of Article 20 (3), was defined by the Apex Court as'...any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt'

Hence through this landmark case, the Supreme Court widened the scope of 'compelled testimony' under Article 20(3) to not just evidence admitted in Court but also state Compulsion in this context could mean both physical and mental. The critics of the procedure argue that narco analysis amounts to Mental Compulsion.

Mental compulsion results when "the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and therefore extorted".[19]

At the same time, the Court also acknowledges the fact that a voluntary statement by the accused can be invaluable in solving a crime and emphasizes the need for safeguards to 'erase involuntariness' and ensure free will of the accused to make statements during investigation. It has also been held in the case of *Kalawati v. H.P. State*[20] by the Supreme Court that Article 20(3) does not apply at all to a case where the confession is made by an accused without any inducement, threat or promise.

3.2 'INFORMED CONSENT'- a prerequisite

It is at this point that the concept of 'informed consent' of the accused should come into play, by becoming a prerequisite for carrying out the procedure on the accused. 'Informed Consent' means that the accused should be made well aware of the technicalities of the procedure, the effect of the narcotics under whose influence he/she shall be interrogated as well as the physical, psychological and legal ramifications of undergoing the procedure, this knowledge becoming the basis on which he renders his voluntary consent. This is to say that the consent of the accused to undergo narco analysis will extend to answering the questions in the uninhibited state of mind induced by the narcotics used in the procedure thereby rendering the making of any statement during the process completely voluntary and hence in no way extorted.

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19. *State of Bombay v. Kathi Kalu Oghad*, [1962] 3 SCR 10, Para 17.
20. AIR 1953 SC 131.

Public Prosecutors and Forensic experts assert that the procedure is never carried out without the consent of the accused, a form to that effect being required to be signed by him.[21]

However, a contrary approach to the necessity of consent of the accused was adopted by the Indian Judiciary in other cases.[22] The reasoning behind this approach of the Courts is that narco analysis is a part of routine investigation procedures.

'Investigation' as defined under Section 2 (h) of the Code of Criminal Procedure includes all the proceedings under the code for the collection of evidence conducted by police officers or any person (other than a Magistrate) who is authorised by a Magistrate in that behalf. Hence, it was laid down that a statutory right is derived in virtue of these provisions to carry out narco analysis as part of the investigation irrespective of the consent of the accused.

It is submitted that, this ambiguity must be cleared by making 'informed consent' of the accused a prerequisite for the procedure to be administered.

It may well be argued that when no other scientific test viz. blood, semen etc. require consent, of what special significance is consent in context of a narco analysis test? Narco analysis takes scientific investigation a step further by eliciting information by injection of a narcotic substance. Even other similar tests viz. Polygraph and Brain Mapping tests merely monitor the responses during interrogation. This is to say that narco analysis is a big leap as far as investigative techniques are concerned and consent plays a vital role in ensuring that the procedure does not violate the constitutional right against self incrimination of the accused.

3.3 A COMPARISON WITH THE STANCE ON SELF INCRIMINATION IN THE UNITED STATES

Since Narco Analysis as an investigative procedure has been in the United States well before its introduction in India, a worthwhile reference can be made to the Courts' stance on Self Incrimination in the United States.

The landmark Indian Case of *Nandini Satpathy v. P.L. Dani*[23] draws from the case of *Miranda v. Arizona*[24], the US standpoint on the Right against Self Incrimination.

The question regarding the point at which the protection against Self Incrimination begins to operate has arisen in the United States also, i.e whether the protection

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21. Lakshmanan, Sriram, "Narco Analysis and some hard facts", http://flonnet.com/fl2409/stories/20070518002109700.htm, last accessed 18-02-2008.
22. *Dinesh Dalmia v. State*, 2006CriLJ2401, Para 14; *Santokben Jadeja v. State of Gujarat*, 2007 CriLJ 4566, Para 9.
23. (1978)2 SCC 424.
24. 384 US 7 436 (1966).

only begins to apply if the statements are admitted as incriminatory evidence or whether it is operative at the pre trial interrogation stage itself.

Advocates for a broad view of the right against self-incrimination argue that the Fifth Amendment should apply outside the trial setting and the United Supreme Court has also held the same. [25] In *United States v. Hubbell*[26], the Supreme Court affirmed that the Fifth Amendment was violated outside of a trial setting also. The Court held that the 'compelled testimony' envisaged under the Fifth Amendment encompassed compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence.

However, the case of *Miranda v. Arizona*[27] also clearly lays down that volunteered statements are not barred by the Fifth Amendment, which enshrines the Right Against Self incrimination.

Hence it can be seen clearly that the position on Self incrimination as laid down in the *Nandini Satpathy* case[28] is identical to the stance of the United States Supreme Court- i.e. the protection is operative at the interrogation stage itself even without the submission of the statements as evidence in Court.

3.4 RIGHT TO PRIVACY UNDER ARTICLE 21

Human rights activists argue that narco analysis is an infringement upon an individual's basic right to privacy. In the case of *Kharak Singh v. State of UP*[29], Subba Rao J. was of the opinion that privacy was an essential ingredient of personal liberty under Article 21. Further, in the case of *Gobind v. State of Madhya Pradesh*[30], the Supreme Court held the right to privacy to be included in the right to personal liberty guaranteed under Article 21. However, the Court also held that the right to privacy is not an absolute one and that it can be restricted on the basis of a compelling State interest. This is to say that just as the Right under Article 21 is subject to restrictions, so is the Right to Privacy. However, such restriction must be under a procedure established by law.

In this context, State's responsibility towards public safety, justice dispensation and prevention of crimes does qualify as compelling State interest. Narco analysis plays a vital role in the realization of this State interest. It may be argued that the procedure

25. Strauss, Marcy, "Torture", (2003-04) 48 *N.Y.L.Sch.L.Rev.*201.
26. 520 U.S. 27 (2000).
27. 384 US 7 436 (1966).
28. (1978)2 SCC 424.
29. AIR 1963 SC 1295.
30. 1975 (2) SCC 148.

of narco analysis amounts to an invasion of privacy since it involves eliciting personal information from the accused known only to him. However, it must be noted that the procedure is one with the requisite sanction under the existing laws of the land (as will be proved subsequently) and assumes the character of a restriction imposed by law on the said Right.

4. STATUTORY SANCTION ESTABLISHED

Having established the constitutionality of narco analysis, we shall now proceed to examine whether the procedure derives sanction from the existing laws of the land.

Recently, the Solicitor General of India Ghoolam E Vahanvati, arguing before a bench presided by the Chief Justice of India K.G.Balakrishnan, hearing petitions against the procedure of narco analysis, justified its use as a tool of investigation.[31] He asserted that the procedure of narco analysis finds legal sanction under the newly amended Section 53 of the Criminal Procedure Code. In 2005, an Explanation clause was added to Section 53 of the Criminal Procedure Code, the relevant part of which reads as follows:

Explanation– In this section and in Sections 53-A and 54,–

(a) examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;.....(emphasis supplied)

It is submitted that the expression 'such other tests' signifies a provision for recognising newly developed techniques in forensic science and permitting the same in investigative procedures. M R Shah J. in the case of *Santokben Jadeja v. State of Gujarat*[32] observed that:

"Section 53 of the Criminal Procedure Code has been brought on the statute book to have efficient and scientific investigation. It is intended to help in the investigation of the crime on scientific lines so as to enable collection of evidence to prove the guilt or innocence of the persons accused of committing the crime as the modern community requires modern scientific methods of crime detection, lest the public go unprotected."

Hence it can be concluded that purpose behind specifically including the phrase 'such other tests' in addition to those already specified (DNA profiling, testing of

31. http://www.hindu.com/2008/01/23/stories/2008012356001300.htm, last accessed 06-03-2008.
32. 2007 CriLJ 4566.

blood samples, etc.), was to accommodate future advancements in the field of forensics like Narco Analysis. Therefore Narco Analysis as an investigative tool finds legal sanction in the existing provisions of the Criminal Procedure Code.

5. HUMAN RIGHTS-some ethical questions answered

Human rights activists world over have been avidly protesting against the use of third degree methods to extract information. The researchers submit that narco analysis is the most feasible alternative to these 'third degree' methods employed by the police officials during interrogation. However, the human rights activists have labelled even narco analysis as a 'psychological third degree' method of interrogation or in other words as a form of 'torture'.[33] It is important to mention at this juncture that though the term 'torture' is a widely used one in today's context of Human rights violations, there is yet to arise a comprehensive definition of the term.[34]

Third degree methods undoubtedly involve an element of coercion.[35] It is submitted that for narco analysis to constitute a third degree method of interrogation, it must be fundamentally coercive in nature. However, the obtaining of 'informed consent' from the accused negates the element of any possible coercion in the process of administering Narco analysis.

Hence it can be safely concluded that narco analysis as an investigative process finds legal sanction in the Indian laws and does not violate the basic rights of the accused.

6. CONCLUSION

In order to ensure the effective and legitimate use of narco analysis, there arises a need for certain rigid guidelines according to which the process may be put to use.

6.1 A MODEL- guidelines for effective and legitimate use

To this end, the following model is proposed:

I. Firstly, narco analysis is to be treated as a 'last resort' investigative technique. This technique is not to be viewed as a replacement of the existing methods of investigation recognised by the criminal procedural laws. The purpose is instead to renew and channelise investigations which have reached an impasse in spite

33. Strauss, Marcy, "Torture", (2003-04) 48 *N.Y.L.Sch.L.Rev* 213; Mukal, Akshaye, "The Legal Questions Raised over Truth Serum Use", *The EconomicTimes*, 25 July 2002 (human rights community have decried narco analysis as tantamount to torture); "A Shot at Justice:Truth Drug for Godra Accused", *The Indian Express*, 23 June 2002.
34. Strauss, Marcy, "Torture", (2003-04) 48 *N.Y.L.Sch.L.Rev.* 213.
35. Vadackumchery, James, *Crime Law and Police Science*, (1st edn, Concept Publishing Company, New Delhi 2003), 274-275.

of all efforts and exhaustion of all possible alternatives. The decision as to whether Narco Analysis is warranted or not, should be made by the Trial Court by examining the progress of the investigation and whether there has been an exhaustion of traditional means of investigation. The decision of the Court will again be subject to the accused rendering his/her informed consent. Such a measure in place will prevent the police and investigative agencies from shirking their responsibilities of following traditional means of investigation. The absence of such a measure exposes Narco Analysis to the dangers of abuse and exploitation. It is suggested that taking into regard such factors, Narco Analysis should be permitted only once in an investigation. This will ensure that the investigative agencies are more prudent while applying for this procedure, a limited and single opportunity. However, the accused should be given the right to apply to the Trial Court for Narco Analysis to be carried out on him. Such an application should be counter signed by his lawyer to ensure that there is no possibility for the State's investigative agencies to indirectly coerce the accused into applying against his will. This right would further the purpose of Narco Analysis serving as an aid to the accused and helping in the vindication of the innocent. It is submitted that the Trial Court should decide upon such an application on the same grounds used in case of an application for the procedure by the prosecution.

II. The existence of Narco analysis as a procedure that does not violate rights of the accused, hinges on the 'Informed consent' of the accused. The National Human Rights Commission has suggested guidelines for lie detector tests[36] which we recommend be extended to the process of narco analysis also.[37] The guidelines are as follows-

1. The accused should be informed of the physical, emotional and legal implications of such a test.
2. Most importantly, the accused should be made aware that the statements made by him during the course of the test will hold no evidentiary value whatsoever in a Court of Law. To this extent he should be made aware of the relevant provisions of law under the Code of Criminal Procedure and the Constitution safeguarding him against the same.
3. The final option of undergoing the test should be given to the accused and such consent should be recorded before a judicial magistrate in writing upon a consent form signed by the accused and counter-signed by his lawyer.

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36. http://nhrc.nic.in/Documents/sec-3.pdf , last accessed 10-05-2008.
37. Narco analysis takes scientific investigation a step further by eliciting information by injection of a narcotic substance. Polygraph on the other hand just monitors the responses during interrogation. Hence, if the polygraph test itself warrants informed consent, it becomes necessary for the same logic to be extended to narco analysis.

4. As proposed earlier, it is premature to conclude that the test should necessarily result in the accused incriminating himself. On the contrary, the process has an equal probability of vindicating the falsely accused by channelising the investigation in the right direction. According to Dr. B.M. Mohan, the Director of Forensic Science Laboratories (Bangalore), about 25 per cent of the total number of individuals subjected to narco analysis turned out to be "innocent".[38]

III. The pattern of questioning the accused during the process must involve open questions which allows the subject to reveal all that he remembers thereby leaving no room for the investigating officers to lead the subject with specific and suggestive questions[39] thereby taking advantage of the mental state of the accused who is under the influence of narcotics. This questionnaire is prepared by the officials at the Forensic science laboratory, a State run organization. In order that the mental state of the accused is not taken advantage of, the lawyer of the accused must be required to inspect the questionnaire for the nature and pattern of questions. Also, the lawyer of the accused must be present during the procedure to oversee the interrogation and ensure that the authorities are not taking undue advantage of the mental state of the accused. Hence, the lawyer of the accused plays an important role in ensuring that the guidelines for the effective and legitimate use of narco analysis are complied with, since, non-compliance of the same can damage the case for the accused.

IV. Most important of all, at no point during the trial should the prosecution or defence be allowed to mention that the evidence being presented has been gathered from the leads given by the accused during narco analysis i.e no reference should be made to the results of narco analysis though the Court maybe aware that the procedure has been carried out. If such a reference is made, the Court should declare the evidence inadmissible. This measure will ensure no room for bias in the judges' minds by guaranteeing that the Judge is at no point made aware of the results of the procedure. If at any stage of the trial, the prosecution makes any reference to the results of the procedure (whether directly or indirectly), it would tantamount to indirect violation of the accused's right against self incrimination. Where such a situation arises, the accused can claim protection under Article 20(3) of the Constitution.

V. In context of the increasing incidence of organized crimes and terror attacks, many analysts of interrogation techniques have hypothesized the 'ticking bomb scenario'. For example, Alan Dershowtiz describes the scenario thus, "a

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38. Mohan, B.M., "Misconceptions about Narco Analysis", *Indian Journal of Medical Ethics,* Vol. IV No.1 January- March 2007, http://www.ijme.in/151co07.html, last accessed 16-02-2008.
39. Kebbell, Mark R, Gilchrist, Elizabeth, "Eliciting Evidence From Eyewitnesses In Court", Adler, Joanna R., (ed.), *Forensic Psychology Concepts Debates and Practices,* (1st edn, Willian Publishing, UK 2004), 82-83.

captured terrorist knows the location of a ticking bomb that threatens hundreds of innocent lives; there is no time for reflection; a decision must be made".[40] In such an adverse scenario should an exception be provided to the above-prescribed process of narco analysis by doing away with consent of the terrorist if he refuses to render it? In other words, should the State be given the power to impose narco analysis on the accused in such cases for the sake of public safety?

As discussed earlier in the paper, according to the guidelines laid down by the Supreme Court in Nandini Satpathy v. P.L. Dani[41], Narco Analysis without informed consent of the accused would tantamount to 'compelled self incrimination', even if the result is not admitted as evidence in a Court of law. The Court in the above case made the observation that – "relevant replies which furnish a real and clear link in the chain of evidence indeed to bind down the accused with the crime become incriminatory and offend Article 20(3) if elicited by pressure from the mouth of the accused" .

Hence, once again it is reiterated that imposing Narco Analysis on the accused without his consent would be a blatant violation of Article 20(3). The issue in consideration here is whether in cases like the 'ticking bomb scenario', the fundamental rights can be dispensed with in interest of national security.

Numerous questions arise that make it impossible to even determine the exact scenario that Dershowitz imagines[42]. First, how are we to be certain that the terrorist knows the location of the bomb? How are we to be certain that there is a bomb? Moreover, how many lives need to be placed in jeopardy before the "ticking bomb" scenario comes into play? Also should "ticking bomb" be viewed literally? For, example, what if a suspect knew about the planned release of smallpox as a weapon?[43] Even if we could determine the number of lives at risk and the level of certainty that a crime has occurred or is about to occur, and that the suspect in custody has critical information, how do we assess the level of exigency and the inability to obtain the information through traditional means? Must the bomb literally be ticking- what if the information pertains to a plot to plant a bomb within a week or a month?[44] Of course, the longer the time period, the greater the chance that

40. Dershowitz, Alan M, "Is it Necessary to Apply "Physical Pressure" to Terrorists – and to Lie About It?", (1989)23 *Isr.L.Rev.*192.
41. (1978) 2 SCC 424.
42. Strauss, Marcy, "Torture", (2003-04) 48 *N.Y.L.Sch.L.Rev* 201.
43. *Ibid.*
44. Kremnitzer, Mordecai, "The Landau Commission Report : Was the Security Service Subordinated to the Law, or the Law to the needs of the Security Service?", (1989) 23 *Isr. L. Rev.* 216,264, (Landau Commission states that it maybe justifiable to employ special investigative tools like torture, etc to discover a bomb about to go off in a crowded building, and that there is no significant difference between a bomb set to explode in five minutes and one set to detonate in five days).

traditional methods of law enforcement will detect the plot. But the question is where should we draw the line?[45]

Hence it is submitted that no matter how much one tries to confine exceptional circumstances in which Narco Analysis should be imposed upon the accused, the temptation to broaden these circumstances is inevitable. If exceptions are provided, thereby allowing the imposition of Narco Analysis without the consent of the accused, it would in all probability lead to the exploitation of such an exception. Professor Kadish most eloquently summarizes such a danger in the words - "The legitimisation of repugnant practices in special cases inevitably loosens antipathy to them in all cases".[46]

Through this article, the researchers have attempted to establish the legal and constitutional validity of narco analysis as an investigative tool. Also, the suggested model seeks to lay out a path ahead for ensuring the legitimate and effective use of the procedure.

6.2 NEED FOR AN AMENDMENT IN THE CODE OF CRIMINAL PROCEDURE

The Indian Legislature has given recognition to scientific tools of investigation like narco analysis in the form of the recent amendment to Section 53 of the Code of Criminal Procedure, in 2005. However, as has been highlighted in the model, there are many prerequisites for narco analysis to become an effective tool of investigation. The Code of Criminal Procedure in its present form does not provide for these prerequisites especially that of informed consent. In fact no provision in the Code of Criminal Procedure necessitates the consent of the accused before an investigation.

Hence, the researchers strongly advocate an amendment to the Code of Criminal Procedure on the lines of the proposed model. Mere recognition under the phrase 'such other tests' will not suffice considering the increasing use and relevance of the procedure in the present scene of criminal investigation.

Law is a living process and hence, the laws of a country should evolve according to changing needs and demands of the society it seeks to protect, foster and nurture. The criminal justice system in India just like other legal systems should embrace and imbibe developments and advances that take place in science as long as they do not violate fundamental legal principles and serve the good of the society.

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45. Strauss, Marcy, "Torture", (2003-04) 48 *N.Y.L.Sch.L.Rev* 201.
46. Kadish, Sanford, "Torture, State and the Individual", (1989)23 *Isr.L.Rev.*345,352.

CCE V. ACER: TAXATION OF SOFTWARE GOES BOINK![1]

Alok

I. INTRODUCTION

Taxation of software generally is a tricky area, especially in India given legislative lethargy and the cutting edge nature of the technology. The present paradigm of Indian indirect taxation is still reflective of a 19th century model which sees an economy in terms only the manufacture of goods[2], or the rendering of service. It does not take into account the importance of knowledge management (better known as IPR) as an aspect of wealth creation in a modern economy which India strives to be, and which we are constantly assured, is right around the corner.[3] Although "canned software" is technically taxable under the Central Excise Act, 1994 read with the Central Excise Tariff Act, 1985,[4] nevertheless important concepts that are inherently linked to Excise duty, such as "manufacture"[5], "goods"[6] and valuation[7] have not been suitably modified by the legislature.[8] In this context, judicial pronouncement would be an important part of the "filling in" the gaps in the legislative framework.

Unfortunately, some judicial pronouncements in this area, as exemplified by the instance of Supreme Court in Central *Commissioner of Excise v. Acer Computers*[9], have only contributed to the confusion surrounding the matter. In this case comment, I shall show how the Honourable Judges of the Supreme Court not only erred in the law applicable, but also erred in the manner in which the law was to be applied, apart from completely ignoring their own dicta in previous cases. Yet, the Court somehow manages to arrive at the right conclusion despite these mistakes, though that is small consolation for a tax practitioner (or worse, law student) who wishes to make sense of this judgment.

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1. With due apologies to Bill Waterson, creator of *Calvin and Hobbes*, author of *Scientific Progress Goes Boink*!
2. See generally Central Excise Act, 1994 [hereinafter CEA].
3. For the definition and importance of a "knowledge economy", see Peter Drucker, *The Age of Discontinuity: Guidelines to Our changing Society* (1969).
4. See Chapter 85, heading 24 of the Central Excise Tariff Act [hereinafter CETA]. Although exigible to excise duty, rate applicable to software is 0%.
5. Section 2(d) of the CEA.
6. Section 2(f) of the CEA.
7. Section 4 of the CEA.
8. For the exigibility of canned software to sales tax, see *TCS v. State of Andhra Pradesh,* AIR 2005 SC 371 (separate concurring opinion of Sinha J)
9. 2004(8) SCALE 169 (hereinafter "ACER")

Despite the flaws in the reasoning of this judgment, it has nonetheless been cited as authority in the case *Tata Consultancy Service v. State of Andhra Pradesh*[10], for the proposition that software is exigible to taxation.[11] The aim of this case comment is to outline the deficiencies in judgment, and point out the flaws in the manner in which the conclusion has been arrived at.

II. FACTS AND JUDGEMENT IN CCE V. ACER

A. FACTS OF THE CASE

The question in *ACER* is essentially one of valuation. Here the respondent, a manufacturer of "computers, peripherals, servers, note books[sic] and accessories"[12] was asked by the Revenue to pay excise duty on the assembled computers sold by them, with the value of the operating system loaded on to such systems being included in the value of the computers.[13] The respondent contended that the value of the operating system need not be added to that of the computer since the operating system did not in anyway add to the value of the computer sold or make the computer "saleable".[14]

Before the High Court, the Revenue's contention was rejected on the basis of the decision of the Supreme Court in *PSI Data Systems Ltd. v. Collector of Central Excise*[15]. In appeal before the Supreme Court, the matter was brought before a Division Bench where the correctness of *PSI Data Systems* was challenged on the ground that a computer cannot run without an OS, and therefore the Court erred in ignoring the value of the OS for the purposes of Excise Duty. The matter was therefore placed before a Larger Bench comprising of N. Santosh Hegde, S.B. Sinha and Tarun Chatterjee JJ.

B. JUDGMENT AND RATIO OF THE SUPREME COURT

Apart from upholding the decision in *PSI Data Systems*[16], the Court found in favour of the respondent, with reasoning that I have broken down into the following salient points.

1. Computers and Computer software are different classes of goods for the purposes of Central Excise.

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10. AIR 2005 SC 371.
11. See Ibid., ¶. 49.
12. *ACER ¶.* 2
13. Ibid ¶ 2-4
14. Ibid ¶ 8
15. MANU/SC/0181/1997 hereinafter *PSI Data Systems.*
16. ACER ¶ 84.

2. Since they are classified differently, the value of one cannot be added to the value of the other for the purposes of Excise Duty even if bundled together.
3. The definition of "transaction value", under section 4(3)(d) must be subject to the charging section, i.e. section 3.
4. As software is not exigible to tax itself, it cannot be made part of the transaction value of the computer on which it is loaded.
5. The Revenue cannot levy tax on software where it has been exempted under the statute.[17]

It is my submission that proposition 1 is completely irrelevant, propositions 2 and 3 are plainly wrong in law, and propositions 4 and 5, being conclusions based on propositions 2 and 3 are also incorrect. Broadly, I would like to address my criticism of this case on two fronts:

a. The dispute relates to valuation and not classification as the Court has made it out to be.
b. Section 3 and Section 4 are completely independent provisions, and the latter is not subject to the former as the Court seems to suggest.

III. TWO WRONGS THAT (ACCIDENTALLY) MAKE A RIGHT: CRITICISM OF THE REASONING IN ACER

A. CONFUSING VALUATION AND CLASSIFICATION

For the taxation of any goods exigible to excise duty under the CEA, it is first seen whether such goods are exigible to tax, then the goods to be taxed are valued in accordance with the CEA or the Valuation Rules under the CEA, and the rate as found in the CETA is then imposed on the value, to finally compute the tax payable.[18] The principles of classification and valuation are two separate parts of the matter, and must not be confused.[19] This simple, elementary principle of taxation has been turned on its head by the Court, which begins by trying to determine the rate at which computers and computer software are being taxed, and then proceeds to determine value.

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17. See ACER ¶.84.
18. See section 3 of the CEA.
19. *See Andhra Pradesh Paper Mills Ltd. v. CCE*, 1993 (65) E.L.T. 447; *Col-Tubes (P.) Ltd. V. CCE*, 1994 (72) ELT 342; *Steel Tractors v. CCE*, 1995 (75) ELT 897 (Tri-Del); *CCE v. Eicher Tractors*, 2001 (127) ELT 846 (CEGAT). On the specific aspect of taxation of software *Tata Unisys Ltd. V. CCE*, 1994 (73) ELT 96 (Tri-Del). The last case has not been considered by the Court at all though the reasoning of the Tribunal would apply en force to this particular case. Also see, *Union of India and Ors. etc. v. Bombay India International Ltd.*, AIR 1984 SC 420 where the Supreme Court has held that the measure of levy did not conclusively determine the nature of levy.

To some extent, the fault could be laid at the doorstep of the respondent's counsel as well. Whereas the Revenue argued that the software should be included in the *value* of the PC to be taxed, it was contended by the respondent, that the software could not be included in the value because it was classified separately from the hardware in the CETA and therefore, could not be taxed along with the hardware itself.[20]

The Revenue's argument, in my opinion could have been adequately met by pointing out that hardware was capable of being sold without the software itself, and no real "value" was being added by the software apart from the value of the software itself. In other words, the hardware did not become marketable simply by the installation of the related software, and the software added on was only a marketing practice to attract more consumers.[21]

The Court also goes into a long and tortuous discussion on the aspect of classification that only complicates the matter and raises more questions that are unanswered.[22] The Court keeps questioning exigibility of software to excise duty, raising questions such as whether computer programmes are "goods" and whether the process by which they are produced is "manufacture" for the purposes of the Act, when clearly these aspects are irrelevant to the matter at hand.[23] According to the Court, since software has been exempt[sic] from excise duty, the Revenue would not be justified in imposing the same on software that has been installed on a computer's hard drive.[24] Intuitively this seems correct, but this was an unwarranted and pointless deviation that raises more questions, which even more curiously, the Court completely dodges. The Court brushes aside this problem simply by stating:

"We, however, place on record that we have not applied our mind as regard the larger question as to whether the informations [sic] contained in a software would be tangible personal property or not or whether preparation of such software would amount to manufacture under different statutes".[25]

Moreover, in its "Conclusion", the Court does not, at any point, refer even once to the contention on valuation that was raised by the Revenue and totally fails to rebut the argument made by the Revenue in this regard.[26]

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20. ACER ¶¶ 9-16.
21. For the test of marketing see *Union of India v. Delhi Cloth Mills,* AIR 1963 SC and subsequent case law that have followed the same.
22. See ACER ¶¶ 54-68.
23. For a discussion on the definition of "goods" and "manufacture" see *DCM* supra, n.20. Excise will be imposed on an 'excisable good' only if it has been manufactured. See *CCE v. Indian Aluminium Co Ltd.,* 2006 (203) ELT 3 (SC).
24. ACER ¶¶ 84.
25. ACER ¶85.
26. ACER ¶. 83-86

The Court's ratio seems to be that since software is taxed at 0% rate, it is exempt and consequently, should not be indirectly taxed[27] by including its value in the taxable value of the computer. However, if computer software was taxed at say, 8%, then the question arises as to what rate should the software loaded on computer hardware (taxed at 12%) be taxed? This is another one of those tricky questions that ought to have been answered, but conveniently ignored by the Court. In fact, as the Supreme Court itself has held, the mere exemption of a particular good from duty will not mean that the levy of excise duty on the good itself has been removed.[28]

It must be restated here that the matter in question did not revolve around whether software itself was exigible to excise duty, but whether the value of software installed on computer hardware could be added to the value of the computer hardware for the purposes of imposing duty on the computer hardware. Whereas these questions need to be answered when a case concerns the imposition of excise duty on software alone, they are irrelevant to a discussion on valuation that involves computer software. By going off on this tangent, the Court has unnecessarily complicated a fairly straightforward case, which could have been decided by applying the correct principles.

B. INCORRECT INTERPRETATION OF SECTIONS 3 AND 4.

Section 3 of the CEA is the charging section prescribing the levy of duty on excisable goods, whereas section 4 deals with how such the value of the goods on which the duty is payable has to be determined, whether through transaction value or other means prescribed in the Rules[29].

The Court states that Section 4 is subject to Section 3.The basis for doing so is entirely flimsy. The Court argues, with little authority to fall back on, that Section 4 is in fact subject to Section 3, which is the charging section of the Central Excise Act.[30] The Court would be justified in drawing such a conclusion if Section 4 opened with the words, "Subject to.." or if section 3 contained a non-obstante clause.[31] However, these being two separate and distinct provisions of law, each operating in its own field[32] the Court's assumption that Section 4 is subject to Section 3 is somewhat dubious.

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27. Pun intended!
28. *Hico Products Ltd. v. Collector of Central Excise*, 1994 (71) E.L.T. 339 (SC).
29. See Central Excise Valuation (Determination of Price of Goods Rules), 2000.
30. ACER ¶¶ 54-56, 84.
31. See Vepa P Sarathi, *Interpretation of Statutes*, 578-582 (2005, Fourth Edition) and cases cited therein for a discussion on the scope and interpretation of the non-obstante clause.
32. See *Proctor and Gamble Hygiene & Health Care ltd. V. CCE*, 2005 (190) ELT 289 (SC), where the Supreme Court pointed out the difference between "valuation", found in section 4 as it stood then, and "excisability" as found in section 3 as the provisions stood stood then.

This conclusion is further rocked when one examines that the definition of "transaction value", as contained in section 4(3)(d):

3) for the purposes of this section, -

(d) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, *advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter*; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods." [emphasis mine]

Clearly, it contains elements that cannot be said to be "excisable goods" for the purposes of section 3. The Court's interpretation of Sections 3 and 4 is thus fatally flawed as it does not give a harmonious interpretation[33] of the provisions contained in the legislation.

By holding that the hardware and the software loaded onto such hardware are classified differently for the purposes of the CETA, the Court held that the value of the latter cannot be added to the former. The Court also misinterpreted the scope of sections 3 and 4 subjecting the latter to the former without any textual basis for such an interpretation. Using this line of reasoning, the Court holds that the value of the software may not be added to the value of the computer while determining the exigibilty to tax.

However, it is evident that section 4 stands independent of section 3, and valuation of excisable goods is made on the basis of section 4 alone. The correct test to determine whether value of software has to be included in value of the computer would be the test of marketability. In the present context, the software loaded on to the computer did not by itself make the computer marketable.

IV. CONCLUSION

While one does not doubt the ultimate conclusion drawn by the Court in this context[34], nonetheless, the manner in which the Court has proceeded to decide the matter is highly inadequate, and raises more questions than it answers. What is

33. See *Sanjeevayya v. Election Tribunal,* AIR 1967 SC 1211.

34. In the limited fact situation that the Court has restricted itself to, i.e., where the customers are given the option of choosing the operating systems on their desktop PCs, the value of the Operating Systems so chosen will not be added to the value of the PCs in calculating the assessable value of the goods.

even more disturbing is that the Court actually recognizes the questions its line of reasoning has raised, i.e., the definition of "goods" encompassing software for the purposes of Central Excise and the process of producing software amounting to "manufacture". These questions should not have arisen in this case, and even if the Court did raise them, it should have at least sought to answer them coherently and completely on the basis of the existing law.

As mentioned above, the Court should have applied the test of marketability, i.e., determine whether the software itself made the hardware marketable, and then gone on to decide how the software should have been valued if it was. Though the same conclusion would have been arrived at, it would have made for a clearer understanding of the law in this aspect.

It is therefore submitted that the conclusions in this case need re-examining in light of the errors pointed out earlier. It must be also pointed out that Tribunals, with a couple of exceptions[35], have been wary of applying the "ratio" of this case, taking care to examine the basis on which the decision was arrived at.[36] The hesitation in applying the principles laid down in this case is perhaps an indication of the doubts the Tribunals have with regard to the findings of this case. While the Supreme Court itself has been somewhat reluctant to adhere strictly to the finding in this case[37], no doubt in light of the inadequacies earlier-mentioned, it is necessary for the Court to come out and closely re-examine this decision at the earliest, clearing up the law on this vital matter for the benefit of the industry and the Revenue itself.

35. See *Bhayanagar Metals Limited v. CCE*, 2007 (116) ECC 170 where the CESTAT, in ¶.7 cites *ACER* and the CESTAT decision of *Commissioner of Customs, Mumbai v. Hewlett Packard* MANU/CM/0049/2006 (overturned in the above Supreme Court case) approvingly without a full examination of what each case held. *See also, Aluplex India Pvt. Ltd. V. CCE*, MANU/CM/0665/2006. As mentioned earlier, *ACER* also finds mention in *TCS v. State of AP,* supra note 10.
36. *See e.g., D.J. Malpani v. CCE*, 2005 (191) ELT 516 (Tri-Mumbai); *Adani Exports v. CCE,* MANU/CB/7169/2006;
37. *See CC, Chennai v. Hewlett Packard India Sales (p) Ltd.*, 2007 (215) ELT 484 (SC) where the Court rejected the application of the *ACER* case to a similar fact situation involving laptops on the ground that Laptops are different from Desktop PCs in that the former came loaded with the operating system and was integral to the functioning of the laptop. It must be noted that this was a customs case as against the *ACER* which is an excise case. *See also, Anjaleem Enterprises Pvt. Ltd. V. CCE, Ahmedabad,* 2006 (194) ELT 129 (SC) where the Supreme Court rejected the application of the principle of *ACER* once again on the ground of difference in facts.

THE ENFORCEABILITY OF FUNDAMENTAL RIGHTS VIS-À-VIS PRIVATE PERSONS: AN ANALYSIS OF THE INTERPRETATION OF THE SUPREME COURT*

Sandeep Challa[*]

I. INTRODUCTION

Fundamental rights enshrined under Part III of the Constitution are generally enforceable only against the state.[1] This viewpoint was followed diligently by the Supreme Court initially.[2] However, the Supreme Court has stated that fundamental rights like Articles 17, 23 and 24 were exceptions to this general rule.[3] The principal aim of this case-comment is to establish that firstly, the ratio laid down in the case of *P.D. Shamdasani v. Central Bank of India*[4] is good law, and secondly, the enforcement of fundamental rights requires that the entity has a nexus[5] with the state, and private actions which violate rights will be regulated by ordinary law.

The first case[6] which *substantially* dealt with the question of enforceability of fundamental rights vis-à-vis private persons was the case of *P.D. Shamdasani v. Central Bank of India*[7]. The brief facts of the case are as follows - the petitioner held five shares in the respondent-bank and, the bank sold the shares to a third party by

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* The instant case-comment primarily analyses the seminal case of P.D. Shamdasani v. Central Bank of India, A.I.R. 1952 S.C. 59, and more importantly, traces its application/non-application in the later decisions of the Apex Court.

1. 1 NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION, REPORT 60 (2002); 2 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA – A CRITICAL COMMENTARY 1160 (2006); DURGA DAS BASU, SHORTER CONSTITUTION OF INDIA 39 (2006); M.P. JAIN, INDIAN CONSTITUTIONAL LAW 836 (2005); V.N. SHUKLA, CONSTITUTION OF INDIA 20 (2001).
2. *See P.D. Shamdasani*, A.I.R. 1952 S.C. 59; *Vidya Verma* v. *Shiv Narain Verma*, A.I.R. 1956 S.C. 108.
3. *Sukhdev Singh* v. *Bhagatram*, A.I.R. 1975 S.C. 1331, at ¶ 95; *P.U.D.R.* v. *Union of India*, A.I.R. 1982 S.C. 1485-6, at ¶ 12; *Sanjit Roy* v. *State of Rajasthan*, A.I.R. 1983 S.C. 331-2, at ¶ 3. In addition, the Supreme Court in certain other decisions included even Article 21 as an exception, *see Bodhisattwa Gautam* v. *Subhra Chakraborty*, A.I.R. 1996 S.C. 926, at ¶ 6; *Zee Telefilms Ltd.* v. *Union of India*, (2005) 4 S.C.C. 680, at ¶ 28. The inclusion of Article 21 as an exception to the general rule is contested in the instant case comment.
4. A.I.R. 1952 S.C. 59.
5. The term *nexus* herein is regarded to include instrumentalities of the state, non-statutory bodies performing public functions and, state-aided/controlled entities.
6. It is conceded by the author that there is room for debate whether this case was indeed the *first* case as Patanjali Sastri, J. (as he was then) in the case of *A.K. Gopalan* v. *State of Madras*, A.I.R. 1950 S.C. 74, at ¶ 115, had opined as follows: "*As for protection against individuals, it is a misconception to think that constitutional safeguards are directed against individuals. They are as a rule directed against the State and its organs. Protection against violation of the rights by individuals must be sought in the ordinary law*" (italics supplied). However it is submitted that in the *A.K. Gopalan case* this issue was not directly in question. *See Bijayalaxmi Tripathy* v. *Managing Committee of Working Women's Hostel*, A.I.R. 1992 Ori. 242, at ¶ 20.
7. A.I.R. 1952 S.C. 59.

exercising its right to lien as it sought to recover the debt owed by the petitioner. The petitioner unsuccessfully challenged the actions of the bank before the Bombay High Court.[8] Thereafter, the petitioner approached the Supreme Court by way of a writ petition under Article 32 of the Constitution seeking to enforce fundamental rights guaranteed under Articles 19(1)(f) and 31 against the respondent-bank[9].

II. RATIO OF *P.D. SHAMDASANI v. CENTRAL BANK OF INDIA*

A constitution bench[10] of the Supreme Court had dismissed the petition on the preliminary ground that Articles 19(1)(f) and 31[11] of the Constitution were *not* enforceable against private persons.[12] The reasoning of Patanjali Sastri, C.J. was based upon the interpretation of the language and structure of the fundamental rights in question.

Firstly, with respect to the freedoms contained in Article 19 it was deduced that since restrictions could be placed upon these freedoms *exclusively by the state* in the succeeding clauses of the same Article; this provision envisaged only infringement through state action.[13]

Secondly, regarding Article 31(1) it was conclusively held that the *omission* of the word 'state' does not imply enforceability against private actions. This proposition was substantiated by juxtaposing Article 31(1) with Article 21[14] of the Constitution. Even Article 21 does not have any express reference to 'state', and both provisions are akin to each other because the rights enshrined under both provisions can be deprived by 'procedure established by law' or with the 'express authority of law'.[15] Therefore, as these rights can be curbed *only* by way of an authorised governmental action, it is conclusive that these rights are enforceable only with respect to state action.

In addition, with respect to Article 31(1) it was contended on behalf of the petitioner that as there was no express legislative power pertaining to the 'deprivation of

8. *Id.*, at ¶ 2.
9. It is pertinent to note that the Central Bank of India in 1951 (prior to its eventual nationalization in 1969) was regarded as a private person.
10. The bench consisted of Patanjali Sastri, C.J., Chandrasekhara Aiyar, Mehr Chand Mahajan, Mukherjea and Das, JJ.
11. Arts. 19(1)(f) and 31 of the Const. of India have been repealed by virtue of the Constitution (Forty-fourth Amendment) Act, 1978, § 6 (w.e.f. 20-6-1979). The right to property is now a constitutional right under Art. 300-A of the Const. of India.
12. A.I.R. 1952 S.C. 60 at ¶ 7.
13. *Id.*, 59 at ¶ 3.
14. Art. 21 of the Const. of India states as follows: "No person shall be deprived of his life or personal liberty except according to procedure established by law."
15. A.I.R. 1952 S.C. 59 at ¶ 3.

property' under Schedule VII of the Constitution, it must be regarded that the provision conferred a right against private action. However, this contention was dismissed as it was held that the State had the legislative power either under Entry No. 1 of List II or Entry No. 1 of List III of Schedule VII.[16]

The reasoning in the instant case is flawless but it is interesting to observe that Sastri, C.J. does not refer to his own opinion in *A.K. Gopalan v. State of Madras*[17] wherein he categorically dismissed the notion of enforcement of fundamental rights vis-à-vis private persons. However, his Lordship's observations in the *A.K. Gopalan case*[18] and the *P.D. Shamdasani case*[19] were relied upon and affirmed by another Constitution Bench of the Supreme Court in the case of *Vidya Verma v. Shiv Narain Verma*[20] and several High Court decisions[21]. In the *Vidya Verma case*[22] the Supreme Court merely used the analogies in the previous cases and held that Article 21 of the Constitution of India was unenforceable against private persons.

III. IS ARTICLE 21 ENFORCEABLE VIS-À-VIS PRIVATE PERSONS - A *STARE DECISIS* CRITIQUE

A two-judge bench decision of the Supreme Court in the case of *Bodhisattwa Gautam v. Subhra Chakraborty*[23] had baldly stated that, *"fundamental rights can been enforced even against private bodies and individuals"*. In addition, the Court had applied this reasoning to Article 21 of the Constitution.[24] It is submitted that this decision is completely devoid of reasoning and conveniently does not consider the ratio laid down in the *Vidya Verma case*[25]. Article 141[26] of the Constitution of India embodies the maxim - *stare decisis et non quieta movere*.[27] Furthermore, the Apex Court has held that:

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16. *Id.*, 60 at ¶ 6. It is also relevant to note that this contention is highly untenable as the Parliament is anyway given residuary legislative powers under Art. 248 and Entry 97 of List I of the VII Schedule of the Constitution. *See generally Union of India* v. *Harbhajan Singh Dhillon*, A.I.R. 1972 S.C. 1061.
17. A.I.R. 1950 S.C. 74 at ¶ 146.
18. *Id.*
19. *P.D. Shamdasani*, A.I.R. 1952 S.C. 59.
20. A.I.R. 1956 S.C. 108 at ¶ 7 *aff'd P.D. Shamdasani*, A.I.R. 1952 S.C. 59.
21. *See Sihnu* v. *Lachman Dass*, A.I.R. 1952 H.P. 41, at ¶ 5; *Firm AL. AR. Arunachalam Chettiar* v. *Kaleeswarar Mills Ltd.*, A.I.R. 1957 Mad. 309, at ¶ 24; *Tejraj Chhogalal Gandhi* v. *State of Madhya Bharat*, A.I.R. 1958 M.P. 115, at ¶ 11; *Paika Padhano* v. *Pindiko Patro*, A.I.R. 1958 Ori. 15, at ¶ 11; *Puthota Chinnamma* v. *Regional Deputy Director of Public Instruction, Guntur*, A.I.R. 1964 A.P. 277, at ¶¶ 13-15; *Sri Lakshmi Agencies* v. *Govt. of A.P.*, 1994 (1) A.L.T. 341, at ¶¶ 9-10.
22. A.I.R. 1956 S.C. 108.
23. A.I.R. 1996 S.C. 926, at ¶ 6 (italics supplied).
24. JAIN, *supra* note 1, at 1132. *See also Zee Telefilms Ltd.*, (2005) 4 S.C.C. 680, at ¶ 28.
25. A.I.R. 1956 S.C. 108.
26. Art. 141 of the Const. of India states as follows: "The law declared by the Supreme Court shall be binding on all courts within the territory of India."
27. 4 P. RAMANATHA AIYAR, ADVANCED LAW LEXICON 4456 (2005).

It is commonly known that most decisions of the courts are of significance not merely because they constitute an adjudication on the rights of the parties and resolve the dispute between them, *but also because in doing so they embody a declaration of law operating as a binding principle in future cases.*[28]

In addition, in cases of conflict of opinions pronounced by the Supreme Court, the opinion expressed by the larger bench strength prevails.[29] By virtue of the doctrine of precedent this decision is *per incurium* as it does not consider the ratio of the *Vidya Verma case*[30].

Moreover, it is pertinent to note that S. Saghir Ahmad, J.[31] in the case of *Chairman, Railway Board v. Chandrima Das*[32] had relied upon his previous judgment on a different point of law, i.e. whether the offence of rape constituted a violation of Article 21.[33] But in this case he stated that, "where *public functionaries* are involved and the matter relates to the violation of Fundamental Rights or the enforcement of public duties, the remedy would still be available under the Public Law notwithstanding that a suit could be filed for damages under Private Law."[34] If Article 21 of the Constitution was truly enforceable against private persons then there would be no need to distinguish between private and public law remedies. Hence, it is respectfully submitted that the decision of the Court in the *Bodhisattwa Gautam case* [35] is bad in law.

However, common law remedies will be available to persons aggrieved by private actions, because Article 21 is the sole repository of the right to life and personal liberty *only against the State.*[36] Therefore, common law remedies will be available against infringement of rights by private persons.[37]

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28. Union of India v. Raghubir Singh, A.I.R. 1989 S.C. 1933, at ¶ 8 (italics supplied).
29. *See Commissioner of Sales Tax, J & K* v. *Pine Chemicals Ltd.*, (1995) 1 S.C.C. 58, at ¶¶ 15-17; *N.S. Giri* v. *Corpn. City of Mangalore*, A.I.R. 1999 S.C. 1958, at ¶ 12; *Lily Thomas* v. *Union of India*, A.I.R. 2000 S.C. 1650, at ¶ 56; *Bharat Petroleum Corpn. Ltd.* v. *Mumbai Shramik Sangha*, (2001) 4 S.C.C. 448, at ¶ 2; *S.H. Rangappa* v. *State of Karnataka*, (2002) 1 S.C.C. 538, at ¶ 11; *P. Ramachandra Rao* v. *State of Karnataka*, (2002) 4 S.C.C. 578, at ¶ 28. *See also* N.K. Jayakumar, *Courts*, *in* 10 HALSBURY'S LAWS OF INDIA 339 (2001).
30. A.I.R. 1956 S.C. 108.
31. His Lordship gave the judgment in the case of *Bodhisattwa Gautam* v. *Subhra Chakraborty*, A.I.R. 1996 S.C. 922.
32. A.I.R. 2000 S.C. 988.
33. *Id.*, at ¶ 12.
34. *Id.*, at ¶ 11.
35. A.I.R. 1996 S.C. 922. Moreover, High Courts have continued to follow the *ratio* of the earlier decisions in recent cases neglecting the ratio laid down in the *Bodhisattwa Gautam case*, e.g. *Arun Gulab Gavli* v. *State of Maharashtra*, (2000) 102 Bom. L.R. 390, at ¶¶ 19-20.
36. *Additional District Magistrate, Jabalpur* v. *Shivakant Shukla*, A.I.R. 1976 S.C. 1207, ¶ 135 *contra Additional District Magistrate, Jabalpur*, A.I.R. 1976 S.C. 1207, ¶ 163 (H.R. Khanna, J. , dissenting).
37. *See* BASU, *supra* note 1, at 899.

IV. ENFORCEABILITY OF FUNDAMENTAL RIGHTS VIS-À-VIS PRIVATE PERSONS - CURRENT LEGAL POSITION:

Articles 17[38], 23[39] and 24 of the Constitution of India are considered to be enforceable against private persons.[40] However, these provisions pertaining to untouchability and trafficking clearly provide that ordinary laws will be enacted, and private acts in derogation to these provisions will be punished under offences created under ordinary laws. The Supreme Court in relation to these fundamental rights has stated that, "it is the *constitutional obligation of the State* to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same."[41] Therefore, although these fundamental rights are supposed to be enforceable against private persons, they in turn cast an obligation upon the state to enact *ordinary* penal laws to be enforced against private persons. Thus, it is submitted that state intervention is necessary to enforce these rights and are not directly enforceable against private persons.

It is conceded by the author that the definition of 'state' under Article 12[42] has undergone a metamorphosis, and the ambit of 'other authorities' has been considerably widened.[43] However, the widening of the ambit of the definition of state merely reaffirms the principle that in order for an entity to be subject to Part III of the Constitution of India, such an entity must be defined as 'state'.

V. CONCLUSION

It is submitted that the ratio of the Supreme Court in the *P.D. Shamdasani case*[44] has stood the test of time. Articles 17 and 23 of the Constitution as stated above, are *not* directly enforceable against private persons, and require the state to pass ordinary laws to create offences which in turn are enforceable against private persons. The

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38. Art. 17 of the Const. of India states as follows: "'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be *an offence punishable in accordance with law.*"
39. Art. 23(1) of the Const. of India states as follows: "Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be *an offence punishable in accordance with law.*"
40. *P.U.D.R.*, A.I.R. 1982 S.C. 1485-6, at ¶ 12; *Sukhdev Singh*, A.I.R. 1975 S.C. 1331, at ¶ 95; *Sanjit Roy*, A.I.R. 1983 S.C. 331-2, at ¶ 3.
41. *Id.*, 1490, at ¶ 16; *State of Karnataka* v. *Appa Balu Ingale*, A.I.R. 1993 S.C. 1136, at ¶ 30.
42. Art. 12 of the Const. of India states as follows: "In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or *other authorities* within the territory of India or under the control of the Government of India."
43. *See generally Ajay Hasia* v. *Khalid Mujib*, A.I.R. 1981 S.C. 487; *M.C. Mehta* v. *Union of India*, A.I.R. 1987 S.C. 1086, at ¶¶ 11-18. *See* JAIN, *supra* note 1, at 837.
44. A.I.R. 1952 S.C. 59.

unenforceability of fundamental rights vis-à-vis private persons does not in any way depreciate the applicability of rights, but merely provides for a different mechanism to enforce rights, i.e. through ordinary laws.[45] Moreover, the compulsion of courts to bring an entity within the definition of 'state' under Article 12 of the Constitution, reiterates that fundamental rights are *only* enforceable against the state.

THE TERRAINS OF JUDICIAL ARBITRARINESS: A COMMENT ON RAM SARAN v. IG POLICE

Ruchira Goel

INTRODUCTION: IMPORTANCE OF RAM SARAN v. IG POLICE

Administrative law in India is recognized as largely judge-made law, where it is the judiciary that exercises control over administrative action. Judicial review, therefore, becomes a very important tool of curbing arbitrary administrative action[1]. Yet at the same time, it is important from the point of view of the separation of powers doctrine that judicial review remains just that–the review of the procedure of the way the administrative decision was taken; the courts cannot, by substituting their own judgment for that of the administrator, become a sort of appellate authority.[2] Therefore, the doctrine of judicial review, as recognized in India[3] is restricted to only four grounds, *viz.* illegality, irrationality, procedural impropriety, and, to a certain extent, proportionality.[4] Another important consideration, which the courts have been sadly lacking in taking into account, as will be seen through this case comment, is the contextualizing of these principles to the fact situation at hand.[5]

This paper is a comment on *Ram Saran v. I.G. of Police, CRPF and Ors*[6], and it is in the light of the scope of judicial review with respect to the proportionality of the punishment meted out by the administrative authority, to the appellant, that the case becomes very important. The appellant in this case, while applying for recruitment to the Central Reserve Police Force (hereinafter "CRPF"), had tampered with his date of birth as stated in his school certificate, thereby making him eligible for the post, for which otherwise he would have been two months short in age. After he had served for 27 years, with "good grading" for 10 years,[7] (when he was seeking voluntary retirement) proceedings were instituted against him for lying about his date of birth. The original authority took the appellant's good record into account, and therefore, as punishment, deputed him in rank for a year. However, the appellate

1. MP Jain and SN Jain, Principles of Administrative Law, 13 (Wadhwa and Co, Nagpur, 2003).
2. This fine balance between review and appeal, is a well established principle in administrative law; it finds mention in a corpus of case law; in particular, see Chief Constable of the North Wales Police v. Evans, [1983 1 WLR 1155] and Ridge v. Baldwin, [1964] AC 40, at 96.
3. India follows English case law on this point
4. Council of Civil Servants Union v. Minister for Civil Service, [1985] AC 374. (hereinafter "CCSU case")
5. This lacuna has been critcised by many administrative law scholars, particularly Professor Unpendra Baxi. See Upendra Baxi, *The Myth and Reality of the Indian Administrative Law,* in IP Massey, Administrative Law (Eastern Book Company, Lucknow, 2005).
6. [2006] 2 SCC 541.
7. Id., para 3.

authority, the respondent, enhanced the punishment and terminated his services, as a result of which, he wasn't entitled to any pension.[8] The decision was challenged before the Bombay High Court under Article 266, on the ground that the punishment was disproportionate to the offence committed. On appeal to the Supreme Court, the case was dismissed by Arun and Pasayat JJ.

Since the ramifications of such a decision are that an old man[9] from a rural background[10], who has conscientiously served the CRPF for 30 odd years, will, because of what seems *prima facie* to be a disproportionate punishment, not get any pension benefits, it is important to understand exactly where this case fits in the jurisprudence of proportionality as a ground for judicial review in India.

Therefore, this case comment attempts to analyse this case in the backdrop of the recent cases dealing with the issue of the termination of civil services, and examine the trends that emerge from the same. Further, since Hon'ble Pasayat J. sits on the Supreme Court's Civil Services Bench, the cases examined are the ones before him.

PROPORTIONALITY AS A GROUND FOR JUDICIAL REVIEW: RAM SARAN'S CASE CIRCUMVENTING PRECEDENT?

The status of proportionality as a ground for judicial review in England is not yet settled.[11] In India however, the doctrine of proportionality was recognized in *Ranjit Thakur v. Union of India.*[12] The Indian position on the scope of judicial review of the proportionality of the punishment awarded, is, after the cases of Union of India v. G. Ganayutham,[13] Om Kumar v. Union of India[14] and BC Chaurvedi v. Union of

8. Rule 24 of the Central Civil Services (Pension) Rules, states that dismissal from services entails forfeiture of pension.
9. Since the appellant had applied for the CRPF in 1969, at the time the appeal came before the Supreme Court, he would be 50 odd years old.
10. Supra n. 6, para 5.
11. Lord Diplock in the CCSU case, merely acknowledged proportionality as a "future possibility." See CCSU, supra n. 4.
12. AIR 1987 SC 2387.
13. [1997] 7 SCC 463; The Court in this case expounded the English position, on where judicial review of administrative action would lie, proportionality only coming in if the convention allowing the same were to be incorporated into the law. With regard to the Indian position, the Court, in paragraph 31, the Court categorically stated that since "no fundamental freedoms...are involved" the Court will only play a "secondary role" and apply the Wednesbury test of reasonableness to see if the administrative action suffered from arbitrariness.
14. [2001] 2 SCC 386; In this case, the Court, after reviewing the authorities on the point, came to the conclusion that the "disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

India[15] well settled. The position is that Indian Courts, while reviewing administrative action on the grounds of proportionality, cannot, as a general rule, act as primary courts and exercise judgment on the quantum of punishment, unless the question of the infringement of fundamental rights is involved. Therefore, the courts can only play a secondary role and apply the test of reasonableness as laid down in the English case of Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation[16] (hereinafter "Wednesbury case") where Lord Green enunciated that the court could only strike down that administrative decision which it felt that no reasonable man could have come to. What comprises this criterion of reasonableness has been enunciated by Hon'ble Pasayat J. himself in *Rameshwar Prasad v. Union of India*[17]. An important point made by the learned Judge in the said case was that a decision could be said to be unreasonable in the Wednesbury sense if, *inter alia,* the administrative authority had ignored a relevant material which it should have taken into account.

It is submitted that *Ram Saran's* case falls squarely within the four corners of this proposition, since the Disciplinary Authority had failed to take into account the fact that the appellant had diligently served the CRPF for 30 odd years, and meted out a grossly disproportionate punishment[18]. Yet Hon'ble Pasayat J., while reviewing the decision, has chosen to ignore his own formulation of the Wednesbury test, after stating that in such a case, where no fundamental freedoms are involved, the court could only review the decision on the basis of the said test.[19] In fact, it is pertinent to note that after stating that the Wednesbury test entails that the court cannot pass primary judgment on the offence and the quantum of punishment, the Hon'ble Justice has fallen to prey to his own warning, since he has based his decision on the fact that an "admitted forgery" like the appellant's "does not deserve any leniency".[20] Thus, the Hon'ble Judge has himself imposed his own view on gravity of the appellant's offence and appropriateness of the punishment awarded.

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15. AIR 1996 SC 484; In this case the Court actually explained what is meant by proportionality, stating, "By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality."
16. [1948] 1 KB 223.
17. (2006) 2 SCC 1.
18. Infact, the question of whether the Appellate Disciplinary Authority had even taken relevant factors into account is not evident from the case since learned Pasayat J. has not even looked into the question.
19. Ram Saran v. IG Police, supra n.6, para 8.
20. Id., para 11.

PASAYAT J. ON PROPORTIONALITY: A NON-REASONED "HANDS OFF" APPROACH

To understand where exactly the case of *Ram Saran* fits in jurisprudence of proportionality as culled from civil service cases decided by Hon'ble Pasayat J., it is imperative to analyse the judgments he has delivered on the question. Since the concept of judicial review on the ground of proportionality is itself new, most of cases have come before the Supreme Court after the year 2000. There are around 9 cases relevant to the subject, which have been decided by Pasayat J.

From the cases, two trends are apparent–firstly, that Pasayat J. is by and large a "hands off" judge, who chooses not to interfere with the decision of the administrative authority, no matter how absurd or unjust the decision may be.[21] The second trend, which flows from the first, is that the learned Judge's "hands off" approach has led to rather mechanical unreasoned decision-making, since the context in every case is different, and consequently, the ramifications of not interfering with the administrative decisions are varied, from being unfair to the alleged wrong-doers, to being downright shocking.

To elucidate, of the 9 cases examined,[22] Pasayat J. has remanded only one case back to the High Court, *viz. Kailash Nath Gupta v. Enquiry Officer Allahabad Bank*[23] on the ground that while reviewing the decision of the administrative authority dismissing the appellant from service as he had allowed advances to be made to certain people, without following the bank's procedural safeguards, resulting in a loss of Rs. 46000 to the Bank, the High Court had not taken into account the "relevant factor" that the appellant had served the Bank for 30 years, and that but for the unfortunate dismissal, he could have been superannuated in a couple of years. This case must be contrasted with the present case under study, *Ram Saran v. IG Police*,[24] where the context was the same, that is, the appellant Ram Saran had served as a conscientious officer in the Reserve Police Force for 27 years, and had been about to seek voluntary retirement when he was dismissed for a minor offence he committed as a poor youth from a rural background desperate to gain employment. Yet, Hon'ble

21. And this is despite the fact that the Wednesbury test, with the learned Judge apparently swears by, allows judicial review if there the decision of the administrative body is absurd or suffers from irrationality.
22. The cases are Union of India v. KG Soni [a 2006 Judgment–citation not available], V. Ramana v. Andhra Pradesh State Road Transport, AIR 2005 SC 3417, Canara Bank v. VK Awasthi, AIR 2000 SC 2090, Damoh Panna Sagar Rural Regional Bank v. Munna Lal Jain, AIR 2005 SC 584, Secretary, School Committee, Thiruvalluvar Higher Secondary School v. Government of Tamil Nadu, AIR 2003 SC 4097, Kailash Nath Gupta v. Enquiry Officer Allahabad Bank, AIR 2003 1377, Mithilesh Singh v. Union of India, AIR 2003 SC 1724, Regioanl Managaer UPSRTC, Etawah v. Moti Lal, AIR 2003 SC1462 and Chairman and Managing Director, United Commercial Bank v. PC Kakkar, AIR 2003 SC 1571.
23. AIR 2003 SC 1377.
24. Supra n.6.

Pasayat J. did not deem it fit that the Disciplinary Authority, in awarding the punishment had not taken the relevant factual context into account.

Kailash Nath Gupta's case must also be contrasted with *Damoh Panna Sagar Rural Regional Bank v. Munna Lal Jain*[25], where the facts were very similar, apart from the fact that in the latter, the respondent, who had unauthorisedly withdrawn Rs.25000 from the appellant bank, where he worked, because his wife was critically ill, had repaid the money with 24% interest.[26] When the respondent informed the bank of the withdrawal and repayment, he was subject to a disciplinary enquiry, pursuant to which he was dismissed from service. The High Court, following Pasayat J.'s precedent in *Kailash Nath Gupta's case*, had remanded the case back to the authority in question, directing it to taken relevant factors into account while deciding upon the quantum of punishment to be awarded. On appeal however, Hon'ble Pasayat J. after giving a discourse on the importance of maintaining discipline in bank officers, [and thereby, exercising primary judgment upon the kind of offence, which according to the learned Judge himself, a reviewing court should never do[27]] came to the conclusion that there was nothing so shocking and absurd as per the Wednesbury test, in the disciplinary authority's decision, to warrant the Court's interference. Two relevant points that become apparent from this case are firstly, that even though Pasayat J. himself clearly demarcated the scope of judicial review in *Rameshwar Prasad v. Union of India*,[28] he has clearly crossed his own line, and secondly, that his decisions seem to have no connection to the facts at hand.

Another decision of Pasayat J., in the same field, which raises a disturbing question about the usefulness of judicial review as a tool to control arbitrary administrative action, is the case of *Secretary, School Committee, Thiruvalluvar Higher Secondary School v. Government of Tamil Nadu.*[29] The facts in this case are important and therefore require a more detailed examination. The alleged offender in this case was an English teacher employed by the appellant school. The teacher did not take regular classes, attended school only sporadically, and after the year 1984, stopped coming to school altogether, without taking any leave of absence. As a result of his negligence in teaching, he had not managed to finish large portions of the 12th standard syllabus before the Board Examinations, which was causing great consternation to the students and their parents. The School Board therefore, appointed another teacher to do the same and decided to terminate the services of the first teacher. The management

25. AIR 2005 SC 584.
26. This rate of interest incidentally, is higher than even the interest on a loan availed without security, i.e, an overdraft; id., para 3.
27. See chapter 2, supra.
28. (2006) 2 SCC 1; See also Chapter 2, supra, on the scope of judicial review, generally.
29. AIR 2003 SC 4079.

sought the permission of the Chief Educational Officer [hereinafter "CEO"] of the State[30], who, after conducting an enquiry concluded that the teacher's misconduct was not so grave as to warrant dismissal from service. The Government also directed the management to pay the said teacher his back wages. The order being upheld by the High Court, the appellant appealed to the Supreme Court. Yet again, Hon'ble Pasayat J., who delivered the opinion, refused to intervene since there was nothing so shocking in the administrative decision, to bring in review under the Wednesbury test. No question of relevant considerations, which played such a pivotal role in *Kailash Nath Gupta,* a case concerning actual dereliction of duty by the Bank officer, was even raised by the learned Judge. This decision, more than any other delivered on similar questions by the learned Judge, is very disturbing since the ramification is that a clearly incompetent and disinterested teacher would remain to teach 12th standard English, at the expense of the students.[31] This must be yet again, compared with *Ram Saran's* case, where the consequence of the judgment was that a 60 year old man, who had done nothing wrong during his service, would be deprived of even his pension.

The other cases also have varied factual contexts, ranging from bus conductors who did not issue tickets to passengers and misappropriated money,[32] a bank employee who indulged in various acts of misconduct,[33] to a Constable with the Railway Protection Special Force who was forced to take unauthorised leave while on duty.[34] Across the board, Hon'ble Pasayat J. did not deem it fit to interfere with the orders of dismissal passed by the disciplinary authorities, since the cases were within the four corners of the Wednesbury reasonableness test.

It is especially pertinent to note that in *Mithilesh Singh v. Union of India,*[35] the Constable case, Justice Pasayat yet again, passed judgment on the nature of the offence of "abandoning" one's post,[36] and concluded that since there were no "mitigating circumstances" to show that the punishment was disproportionate, there was no reason for the Court to interfere[37]. Therefore, it appears that in the Hon'ble

30. As per the relevant Act, the School management could not terminate a teacher's employment without the sanction of the CEO.
31. It is also interesting to note that the Hon'ble Judge in this case as well, gave a discourse on the sacrosanct nature of the teaching profession, yet felt compelled to give the decision he did [after ofcourse, discussing how there was nothing shocking about the CEO's decision] since good teachers were anyway "sadly lacking" in the country. See Id., para 10.
32. See V. Ramana v. Andhra Pradesh State Road Transport Authority, AIR 2005 SC 3417 and Regional Manager UPSRTC, Etawah v. Moti Lal, AIR 2003 SC 1462.
33. Canara Bank v. VK Awasthi, AIR 2000 SC 2090.
34. Mithilesh Singh v. Union of India, AIR 2003 SC 1724; in this case the Constable, the appellant, who had been assured that he would get leave to attend a family wedding, by the Adjutant was refused the same by the Guard Commander. Therefore, he was forced to take unauthorised leave. However, before leaving, he informed his immediate superior and safely entrusted his arms and ammunitions with the said superior.
35. Id.

Judge's view, the fact that the Constable had a valid reason to take leave, and had been assured of getting such leave, and had ensured the safety of his arms and ammunition, did not come within the purview of "mitigating circumstances".

An interesting point that comes across in the analysis is that in atleast six of them, the learned Judge has followed the same procedure in delivering the judgment. He has, in all the cases, started with the facts, then proceeded to the same quote paragraphs from the same cases, *viz. Om Kumar, BC Chaturvedi and G. Ganayutham,* followed by his analysis of the said cases, which always begins with "the common thread running through all these judgments is...", and finally his decision in the last paragraph of the judgment, which again, always states the same conclusion–that the authority's decision was not so shocking so as to allow the court to interfere. This clearly shows the mechanical approach Hon'ble Pasayat J. has to reviewing cases on the proportionality of administrative decisions.

CONCLUSION: ARE WE EXCHANGING ADMINISTRATIVE ARBITRARINESS FOR JUDICIAL ARBITRARINESS?

An analysis of *Ram Saran's* case in the backdrop of Pasayat J's decisions in the Civil Services area raises certain disturbing questions. It is accepted that judicial review on the ground of proportionality is extremely limited unless a question of fundamental rights violation is involved. It is also accepted that a court of review cannot act as a court of appeal. However, it is submitted that if, even on the application of the Wednesbury test, the reviewing court can look into whether the administrator took relevant considerations into account, the question must be asked: why is it that the Court, particularly Pasayat J. has consistently refused to do so?

This case, along with the others in the same field also highlights the problem with administrative law as judge-made law: the judge is so concerned with setting a precedent that he fails to contextualize the case, which is very important to do, since administrative law, has no fixed terrain, and questions of administrative law will arise whenever there is an abuse of power. Administrative law is afterall, nothing but judicial power controlling arbitrary judicial action.[38] Yet, when [as is evident from *Ram Saran's* case] the individual's last resort of protest, the highest Court of the land, itself, gives arbitrary unreasoned, non-indivuated decisions, where is the

36. Id., para 8.
37. Id., para 12.
38. Upendra Baxi, *The Myth and Reality of the Indian Administrative Law,* in IP Massey, Administrative Law, p. xx (Eastern Book Company, Lucknow, 2005).

common man to turn? When the courts, in their hurry to be efficient[39] forget about fairness and the maxim that justice must not only be done, but must also manifestly *seen* to be done[40], it appears that we are, ultimately, exchanging administrative arbitrariness for judicial arbitrariness.

39. It is pertinent to note at this point that all the cases examined, have been largely summarily disposed of in five to six pages, and almost none of them even look into the reasons given by the authority's for giving the decisions they did.
40. This maxim has, ironically enough, been quoted in almost every decision dealing with the principles of natural justice. See Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180, J. Mohapatra v. State of Orissa, AIR 1984 SC 1572.