



NALSAR Law Review

Volume 2

Number 1

2004-2005

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Price Rs.300 (Rs. Three Hundred) or US\$ 50 (Fifty)

Mode of Citation: 2 *NLR* 2004-2005

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Message from the Patron

“It is a mistake to suppose that he (the barrister) is the mouthpiece of his client to say what he wants : or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice.”

Lord Denning M.R.

The lawyer's role is to maximize the utility of his abilities and knowledge in the interest of the society, sometimes overriding his own choices says Judge E.Maurice Brasmell. Legal Education and Legal Profession played an unenviable role in the freedom struggle. The Bar-at-laws went behind bars to get the freedom for this country. Krishna Iyer is of the opinion that a strong independent, competent legal profession is imperative to any free people. One role of the lawyer in a common law system is to be a balance wheel, a harmonizer, and a reconciler. He must be more than simply a skilled legal mechanic. He must be that but in a larger sense he must also be a legal architect, engineer, builder and, from time to time, an inventor as well.

The Knowledge Commission has recommended that, “the vision of legal education is to provide justice-oriented education to the realization of values enshrined in the Constitution of India. In keeping with this vision, legal education must aim at preparing legal professionals who will play decisive leadership roles, not only as advocates practicing in courts but also as academics, legislators, Judges, policy makers, public officials, civil society activists as well as legal counsel in the private sector, maintaining the highest standards of professional ethics and a spirit of public service. Legal education should also prepare professionals equipped to meet the new challenges and dimensions of internationalization where the nature and organization of law and legal practice are undergoing a paradigm shift. Further, there is a need for original and path breaking legal research to create new legal knowledge and ideas that will help meet these challenges in a manner responsive to the needs of the country and the ideals and goals of our constitution.”

There is a need for original and path breaking legal research to create new legal knowledge and which in turn would create a new generation of legal professionals. Research publications of a University are an important cornerstone to disseminate the research undertaken. A journal has a wider audience. It is in this context that NALSAR Law Review would serve as a platform for serious and thought provoking ideas.

NALSAR Law Review is a step forward in this direction. I congratulate the Editorial team for bringing out this issue packed with critics, which are contemporary in its context and insight and I also congratulate all the contributors for the journal. We look forward to your valuable feedback and contributions.



Prof. Ranbir Singh
Vice-Chancellor

Editorial

The inaugural issue of NALSAR Law Review intended to forge an interactive relationship with its readers. The reviews/comments which the journal received, bears testimony to the fact that the journal succeeded in this endeavour beyond all expectations, for which the editorial team, that brought out the inaugural issue, deserves to be complimented. This enthusiastic response has encouraged us to come out with the second issue of the journal.

The second issue largely traverses the path of the inaugural issue, maintaining its generalist garb. The articles and other writings indicate an effort to keep abreast with developments in law as well as analyze the effect of these developments on the society. It is hoped that like the inaugural issue the readers would candidly put forward their ideas/opinions/comments about this issue as well so as to allow us to improve the journal and take it further on the road to success.

Ghanshyam Singh

LEGAL ISSUES CONCERNING NATIONAL SECURITY

*Ranbir Singh**

Introduction:

There is little need to elaborate on the assertion that there is a current and chronic crisis of national security in India. An unending succession of events has made this far too obvious to demand argument or illustration. Terrorism, organised crime, caste and communal violence, the immense and increasing criminalisation of politics, the growing numbers of the poor and rootless, accumulating pressures of population and consumerism on limited natural and national resources, and a widening area of abject non-governance – once associated only with Bihar – have all combined to make internal security the most urgent issue of our time. Where optimists find some evidence of improvement, such illusions are brutally swept aside by some new crisis. The record of declining communal violence over the past decade was one such datum that lulled some into a sense of temporary security and a feeling that, at least on some variables, there was a positive process of political evolution – till Godhra and the carnage in Gujarat reminded us of how close to the edge we actually live.

The essence of the argument is that the unending search for an elusive ‘consensus’ that has stalled all national security legislation in this country, even as criminal audacity expands exponentially in a legislative vacuum, is an unacceptable and potentially disastrous response to the rising crises that confront us. Parties will have to rise above partisan interests and legislate on crucial issues in this context, and will have to do so quickly in order to stem the rising tide of anarchy and the growing power of those who threaten not only the state, but civilisation itself. All such legislation would and must remain open to amendment in the light of evolving experience – and such processes of review must not be structured around a one-time and all-or-nothing approach that has characterised debates in the past. If elements of a law are found to be susceptible to abuse or to have caused unacceptable hardship to the innocent, these – and not the law in entirety – must be rejected and redrafted.

Governments adopt various means of maintaining national security, these broadly categorized under the following heads:

1. International Conventions and General International Law,
2. Military Force,
3. Diplomacy,
4. Implementation of anti-terror legislations, and

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5. Economic Sanctions,
6. Legislative framework
7. Judicial functionalities and activism
8. Maintenance of efficient policies regarding vigilance methods.

Appraising the Present Scenario:

There are, of course, many and complex reasons for the state of permanent and rising tensions that has become the essence of our way of being. One, at least, of the most significant, is the progressive burden on Indian Judicial System. The truth is, today, the link between crime and punishment has almost entirely been severed. This is true for almost all types of crime, but is most unambiguously the case among those who harness criminal violence to political or sectarian ends. Here, even the moral imperative of punishment is compromised, if not rejected, as every case becomes an exception to the rule. Perverse arguments of a populist sanction are advanced to protect political players from criminal prosecution; and Prime Ministers meet, or send their emissaries to negotiate with, terrorists, warlords and mass murderers.

Accountability:

The abdication of responsibility goes much further. Indeed, in situations of persistent mass violence, the entire system of civil administration is effectively suspended. The only agencies of the state that continue to function, at varying levels and with varying degrees of effectiveness, are the uniformed services – the police, the paramilitary forces and the Army– and it is these services that come in for the greatest measure of abuse and harassment once a degree of order is restored. With the agencies of civil administration either withdrawing from areas afflicted by widespread violence, or even evolving complicit arrangements with the forces of violence and subversion, the entire gamut of the tasks of development and governance are simply abandoned.

These are natural consequences, on the one hand, of gradual processes of erosion within all institutions of government in the country and, on the other, of dramatic transformations in the nature and range of the internal security threats that confront the modern state. The tectonic shift in the character and scale of these threats was brought home dramatically by the 9/11 attacks in USA, as also by mounting evidence thereafter that many terrorists groups have been exploring the possibilities of the acquisition and use of a range of weapons of mass destruction (WMD). What is needed, consequently, is a comprehensive reappraisal of all contemporary threats to national security, and a refashioning of the nation's responses in terms of the legislative and institutional framework, and of executive action.

Organised Crime:

Underlying any such reassessment must be a clear understanding that, today, very small minorities can directly and significantly threaten, undermine and, through determined, persistent and extreme violence, even destroy the edifice of the state and the integrity of the nation – and this is especially true where they act with foreign support and safe havens. The arguments that the manifestations of terrorism are located in ‘root causes’ of poverty and popular discontent, though they may have some grains of truth, are consequently far from an accurate reflection of reality. Terrorist movements today can be sustained by minuscule groupings, sometimes composed entirely or predominantly of foreigners, often exclusively supported by hostile states, and increasingly indifferent – if not inimical – to the hopes and aspirations of local populations [More than 85 per cent of the civilian victims of terrorism in J&K, for instance, are Muslims, something of a problematic for ‘Islamic mujahiddeen’ to consistently explain away in terms of a ‘struggle to protect oppressed Muslims’].

Unfortunately, on every occasion when the issue of internal or national security legislation, or any of its components, such as counter-terrorism legislation or legislation against organised crime, have been discussed in the recent past, an entirely irrational, even hysterical response has greeted any such proposals, and it has generally been argued that the IPC is capable of dealing with every existing and emerging challenge. This is interesting, and ascribes to the IPC something of a sacred and immutable character – which no statute book in a changing world can ever enjoy. This is particularly the case where patterns of criminal action have assumed proportions that undermine the very fundamentals of the institutions of democracy and of civil society. It is high time we understood the dangers and possibilities of a terrorised society, and the inadequacy of the conventional law – which approaches criminal conduct as an individual infraction violating individual rights – to deal with movements that collectively subvert and disrupt the structures of governance and enforcement themselves.

Confronted by such movements demands not only ‘more stringent’ laws; but real-time legislative responses that accommodate each significant transformation of criminal conduct. We may disagree with the basics and content of such legislation, but the speed and proportions of the American legislative response to the 9/11 attacks, and before these, to the attacks on the World Trade Centre in 1993, are what will be necessary if democracies are to defend themselves effectively against fanatical forces that accept no limits of law or conventional morality on the violence they are willing to inflict on others to secure their ends. This does not imply a blind and submissive acceptance by

all Americans to every legislative excess of the Bush administration, and a vigorous democratic discourse is certainly in evidence on the new legislation, and its provisions can be expected to be amended and diluted over time, and in the light of the evolving experience. What is missed, however, is the fact that this swiftness and scale of response made it possible to avert many potential follow-up strikes that had evidently been planned by the Al Qaeda, and as new cells and evidence is uncovered, it is clear that at least some lives have been saved and possible catastrophes averted, without extraordinary and irreversible harm being inflicted.

Institutional Mechanism:

A review of the institutional mechanisms and processes for the protection of these rights to ensure that it is these that are, in fact, protected, and that their protection does not inadvertently extend to criminal intent and operations. If we are to take human rights even half-way seriously, we will have to recognize that terrorism, low intensity warfare and their linkages with organised crime have created new and unprecedented dangers to the unity and integrity of the country, to the survival of democratic governance, and to the very possibility of human rights.

It must, of course, be accepted that the possibility of abuse of laws will always exist, and we will have to define safeguards with each legislation to limit the possibility and scope of such abuse. We must, however, understand at the same time that weak laws, or the absence of appropriate legislation, yields greater dangers, both of the victimization of innocents by wrongdoers, and – bluntly put – in the form of resort to extra-legal solutions by those charged with the protection of lives and property, and the preservation of order. Without order, and without a concomitant security of life and property, there can be no freedom and no rights.

Conceptualizing and Contextualizing the issues:

Defining – and perhaps constantly redefining – possible legislative solutions to our present predicament will demand enormous sagacity on the part of the nation's collective leadership. It is neither possible nor the intent, here, to enumerate some simple solutions or preconceived formulae that will magically resolve all problems. A fair beginning can, however, be made if the areas that demand urgent legislative attention and reform are reasonably and clearly identified.

A comprehensive set of counter-terrorism laws, as well as laws to combat organised crime must be drafted and given a permanent place in our statute books. Terrorism and organised crime are not transient crises, but have emerged as stable long-term threats to national security, and it is delusional to believe

that 'special' and temporary laws are adequate to deal with the problem. The proposed laws would need to take into account, at least, the following areas of concern:

A clear conceptualisation and definition of the complex patterns of crime that constitute 'terrorism' and 'organised crime.' It is crucial, here, to bear in mind that these are unique categories of criminal behaviour. While the actions – murder, intimidation, extortion, possession and use of illegal arms, etc. – that terrorists and organised criminal gangs carry out may be separately covered by existing laws, their character and context is fundamentally transformed by the element of massive, often transnationally coordinated activities. The threat these activities constitute, and the damage they inflict, is incalculably greater than any pattern of individual criminal activity – the whole, to borrow the gestaltist principle, is greater than the simple sum of its parts. These threats can only be contained if this is explicitly recognised, and legislation targets not only the executioners of terrorist action, but the entire network of support that makes such action possible.

The transfer and use of illegal revenues is the lifeblood of both terrorism and organised crime, and stringent laws must be devised to deprive criminal and subversive groupings of funds. This will require the implementation of harsh penalties on illegal transfers and money laundering, as well as the criminalisation of a range of economic offences, including the use of such resources in legitimate businesses.

The activities of the 'fellow travellers of terrorism' must also be brought under scrutiny. This includes a range of front organisations, political actors, non-governmental organisations, businesses, etc., who provide the needed 'overground' support that makes the 'underground' activities of extremists possible.

The framework of counter-terrorism policy must be clearly articulated. This is not just a question for the political executive to determine, some limits of law must be placed on what is or is not permissible. Elected governments have, in the past, made every principle of rule of law and constitutional governance negotiable under threat of terror. Statutory limits must now be placed on how much governments can actually 'put on the table' or 'negotiate' in such situations. The present system has created a structure of incentives that actually reward terrorists and extremists, and this will have to be dismantled. Those who intercede with terrorists on the government's behalf must also be statutorily prohibited from any negotiations or commitments that would require constitutional changes. Such changes are an exclusive prerogative of Parliament, and cannot be offered or discussed by any emissary of government without

prior Parliamentary approval.

Existing 'surrender' policies must also be brought under statutory review. Current practices have created more problems than they have solved. There must be some limitations on the 'rewards' and incentives that attach to the surrender of terrorists, to amnesty or dropping of prosecution for criminal offences against those who surrender, etc., and practices must be brought in line with the principles of the rule of law.

There is now a strong international mandate for effective laws against terrorism, and this includes various United Nations resolutions that impose a duty on all member states to legislate effectively to control the activities of terrorists and their support organisations. It is now time to bring Indian laws into conformity with this mandate, and also to establish efficient structures of international co-operation and exchange of intelligence to counter the international threats and networks of terrorists and organised crime actors.

The burgeoning wave of terrorism that is sweeping across the country – and indeed, the entire world – demands a suitable, coherent and comprehensive 'use of force' doctrine. It must be clear that the ideas and orientation that were devised to deal with civil riots and transient political violence are entirely inadequate to confront the scale, intensity and character of contemporary terrorist violence. As the lethality and the linkages of terrorist groups grow, this orientation will become more and more a hindrance to a co-ordinated and effective response.

Terrorism and low intensity warfare have imposed new structural challenges on law enforcement that we are yet to accommodate even at a conceptual level. Our police and paramilitary forces continue to operate under mandates and legal provisions drafted by the British colonial government, and these have, at best, been tinkered with after Independence. The Evidence Act is another anachronism in need of urgent amendment, and must swiftly incorporate the use of emerging technologies and devices in the prosecution of crime.

Although low intensity wars and widespread terrorism have ravaged many parts of the country for decades now, these conflicts are still conceived of by the national leadership and the so-called 'intelligentsia' as 'non-military threats', and an ill-equipped Home Ministry is required to deal with them. The entire orientation to low intensity conflicts is of 'emergency deployment' – stop-gap arrangements to deal with what are still thought of as transient emergencies. The result is that the Army is repeatedly called out in these conflicts, supposedly to 'aid civil authority'. The fact is, neither the police nor the army, by virtue of their basic orientation and training, is properly equipped

to handle these crises. In view of the future threat potential of low intensity wars, it is crucial that a radical reformation of internal security forces be initiated, creating the skills, knowledge, attitudes and infrastructure necessary to confront this danger, and possibly raising entirely new forces to grapple with this specific hazard.

The parameters within which each agency of government must respond to such challenges need to be clearly assessed, and the powers, the range of extraordinary actions permitted in these situations, and the applicable legal criteria and context of evaluation of these actions - whether these are the same as those applicable in peacetime or are to be akin to articles of war, or are to be redefined in terms of the new category of 'low intensity wars' - have to be clearly determined and suitably legislated. In the absence of such legislative intervention, enforcement agencies and security forces will continue to fight with their hands tied behind their backs - and this situation is not only entirely unacceptable, it is suicidal.

The legislative framework must provide for the suppression and containment of subversive and extremist activities by religious institutions and organisations. The present system has made a 'holy cow' out of any group or organisation that claims religious inspiration or affiliation, virtually placing these outside the bounds of the law. While Constitutional freedoms, including the freedom of belief, must be vigorously protected, the abuse of such freedoms for activities and ends that lie outside the intent and objectives of these Constitutional provisions must be punished with equal vigour. This will be something of a tightrope, but it has to be walked.

Existing provisions and penalties on mass communal violence are also far from sufficient. The record of convictions for major riots in this country is abysmal. Even where thousands have been killed - as in 1984 - there have been virtually no convictions. This is not just a matter of 'political will', but is, in fact, evidence that existing laws are insufficient. Current provisions look upon the riot as an individual transgression. There is no legal instrument available to contain the processes of violent religious mobilisation and engineered mass riots. Worse, where political and state collusion are a fact - as they inevitably have been in most recent cases of mass rioting - there must be some overriding legislation that initiates mandatory processes of prosecution and extraordinary penalties. ..

Border management and the illegal movement of populations across international borders is another problem that has been neglected for decades in search of a 'consensus' that will never be found. In the interim, the demographic destabilization that has taken place, particularly in India's Northeast, has already resulted in enormous violence, and threatens to acquire proportions that are far more dangerous to the nation's security and integrity than any existing threat.

This is, again, an area that demands immediate legislative attention and the imposition of statutory obligations on governments to prevent and punish such illegal movements of populations.

Legislative provisions and statutory penalties are necessary to ensure that judicial and government officers who fail to meet their constitutional obligations under threat or fear are penalized and removed from their positions, and that the institutions of civil governance do not systematically collapse at the first signs of personal risk to the privileged cadres of these instrumentalities of the state.

Judicial Reform: There is an imperative need to introduce immediate judicial reforms so that the judicial action will have a deterrent impact, specially on the hardened cadres of terrorists and organized crime groupings. The present judicial system which is under so much of stress and strain because of the every mounting number of cases, that it find extremely difficult to deliver speedy justice. These results in long delays which boost the morale of the terrorists and persons engaged in organized crimes. If decisions would be fast, and conviction rate high, situation will certainly change for the better. The Judiciary has done a commendable job inspite of great pressure of work load. Still there is long way to go as there is much need to be done in the paradigm of judicial reforms.

A proposal to establish a Central Law Enforcement Agency has been languishing with government for some time now, once again, in search of the 'elusive consensuses. It must be recognized that state governments do not have either the resources or the powers to tackle contemporary patterns of terrorism and crime, and the intervention of a national agency is becoming an increasing and urgent imperative.

Clearly, police reforms, the strengthening of the law enforcement, investigative and intelligence structures, and enormous investment in internal security are now necessary. It is time to abandon the idea that such investments constitute 'non-productive expenditure'. There is a peace dividend that comes with good law and order administration, and this is reflected in higher productivity in every other sphere of economic activity. The national budget and various economic policies should take these factors into consideration at the time when allocations for policing are taken up.

Much has already been stated above about existing Human Rights practices and processes. It requires a simple reiteration here to underline the need for a review of these practices and processes to restrict the existing and enormous potential of abuse by unscrupulous and criminalized elements.

Non-governmental organizations in India have been passionate advocates of 'transparency' in governance, and equally passionate opponents of transparency in their own activities. There is now mounting evidence of NGO malfeasance and collusion with terrorist and subversive organizations in various theatres of conflict in India, and it is high time statutory obligations of transparency were imposed on these entities.

The bureaucracies of the 19th and early 20th Century continue to dominate our internal security and law enforcement apparatus into the 21st Century, and have now become obstacles to the fundamental objectives of efficient law enforcement. The decision-making processes at the highest levels are oriented to a diffusion of responsibility and a complete failure to understand the time-frames of contemporary crisis management. There is an urgent need to create new and responsive structures of administration and accountability that are geared to the time-frames imposed by modern technologies, and to radically transform existing command, control, communication and information systems, both internally within specific agencies, and in the multi-force scenarios that are becoming increasingly common. Since initiatives for appropriate change have not emerged from the executive – which has strong vested interests in the perpetuation of the existing system – such initiatives must be legislatively imposed.

What will be the character of conflict and internal security challenges ten, or even twenty years from now? And what will be the nature of the responses that will be required to cope with these? Our answers to these questions will define the structure and composition of the Forces that we believe can help us cope with these future challenges. And the degree to which, and the detail in which, we are, in fact, able to correctly assess these future challenges, and to generate appropriate responses before they become an overwhelming threat to the existing order, will be the only measure of the success of the present leadership. This process of projection, moreover, must be continuous and will need to be institutionalized as part of the basic structures of law enforcement and internal security. In addition, there is a strong case for a Parliamentary advisory board & secretariat on internal security. The existing processes and official mechanisms of information dissemination among Parliamentarians are too slow, cumbersome, and partisan to serve as a adequate and quick source of information on rapidly transforming events. There is urgent need to create an institutional mechanism that would keep all parties and the Parliament continuously apprised of various aspects of the internal security situation, and to create an apparatus – under Parliamentary control – to secure data and information on, research and analyze various aspects of existing and emerging internal security crises. Indeed, the Parliamentary Committee on Internal

Security must also have a permanent research committee or consultancy attached to it to ensure that its deliberations go beyond the information provided by the government, on the one hand, and the popular media, on the other.

Finally, at the very heart of the problem, is the question of defining a coherent and comprehensive policy framework on internal security. In the absence of a coherent vision of the nation's larger strategy, specific initiatives, especially where they are fire-fighting responses to current crises, tend to cancel each other out and often, in fact, prove counterproductive.

The very first imperative of an effective policy on internal security, consequently, requires the definition of the basic principles on which all action and policy is to be constructed. No such principles are reflected in our present policies, and there is little evidence to suggest that they exist. Once defined, these principles must be strictly adhered to, circumscribing the range and content of actions and negotiations that any government or official may engage in with regard to, for instance, terrorists or organized crime syndicates, or in situations of crisis generated by the actions of such agents of disorder. Our responses to terrorism in the past have not been reality-based. The Indian state must start educating itself on how it is to tackle individuals and groups trying to destroy it. And it must learn how to arm and protect those who put their lives at stake in the defense of India's unity and integrity. This demands a massive and unprecedented effort, one that has to be exerted within a timeframe that grows shorter by the day if it is to have a hope of success.

Conclusion:

Any political system must change with the times and not stagnate. Legal means for redress must always remain open. Whereas conciliation amongst disparate sections of society is desirable, appeasement and compromise on principles is not. Neglect, persecution and exploitation are but some of the factors responsible for leading to a feeling of alienation amongst people. A situation of this kind provides an ideal breeding ground for anti-social elements that often hijack the ideology of the majority and manipulate it to suit their own sinister designs. The best way to defeat an insurgency or a terrorist grouping is to prevent it. Therefore the foremost duty of the government is to stamp out official indifference and callousness, provide opportunities, and inspire a sense of nation building and national integration and to resolve all disputes, especially those amongst States within a federal setup in an impartial manner. Actions such as these would go a long way in preventing the growth of the terrorist ideology amongst certain disaffected sections of the populace by ensuring that no effort is spared to eliminate the reasons leading up to this disaffection in the first place. Prevention is infinitely better than the cure, and this adage finds particular resonance in the opposing spheres of terror and counter-terror.

Moving beyond an elementary (albeit crucial), definitional pit stop, there are a number of other key issues that remain unsolved and are further complicated by the emergence of new forms of threats to national security. The challenge facing the nation is translating the statements and well elaborated declarations of condemnation of terrorism into concrete measures (legal, political, military) that can effectively address the very negative effects and consequences of terrorist activities. The ideas of democracy, freedom of expression, free trade and respect for human rights have after the end of the Cold War expanded and gained ground with a breathtaking speed. Some groups feel threatened by this challenge. The new threats have acted in what they perceive as a defensive mode and as a counter-attack. The selection of target has been calculated to have an optimal and symbolic effect. Freedom, democracy – respect for the dignity and worth of the human being, these are the values which are under attack. In this chapter, the authors of this paper purport to look at the various challenges that national security poses today. Given that it is a multidimensional issue, its constantly changing legal status is also dependant on the same. In order to not be reduced to a mere toothless tiger, a convention, while being drafted, would need to remember the fluidity that envelops the subject.

National Security Legislation is not just a question of definition of crimes or new patterns of criminal conduct and the prescription of penalties. It relates to the entire system, institutional structures and processes that are required to prevent and penalize such crimes, to preserve order, and secure the sphere of governance. The mounting failure on these counts is clear evidence that the system has deficiencies – and this should be sufficient grounds for a pragmatic and comprehensive reassessment.

STATE CONTRACTS IN THE CONTEXT OF GLOBALIZATION

*Guiguo Wang**

Globalization is the general trend today. It is a great and irresistible trend. As such globalization has successfully changed the attitudes of the people, forced members of the international community to reshape their policies toward economic development, foreign investment as well as administration of their internal affairs. Many matters that were regarded as purely domestic or internal affairs in the past now have been given international dimensions. Another characteristic of the globalized world is that every country is highly dependent upon others, regardless whether they are rich or poor, developed or less developed countries. This is more so with regard to economic development. Having said that members in the globalized international community are highly interdependent does not mean that all countries are equally independent of others or to the same extent, as different states are in different stages of economic development and has its own comparative advantages.

In the highly globalized world, transnational corporations play a more and more important role in particular in the development of natural resources by the developing countries and government procurement in the construction of large projects. It is in this connection that State contracts still play an important part today. Traditionally, State contracts refer to investment contracts signed by a State and foreign investors. Most of these contracts take the form of license or concession agreements and are related to the host country authorizing foreign investors to explore natural resources such as oil, coal and minerals. State contracts are sometimes called Economic Development Contracts. The term emphasizes that these contracts are related to the economic development of the host country and that the parties to the contracts are State government and foreign private investors. Recently, some academics have broadened the scope of State contracts to embrace the long-term energy exploitation agreements between foreign investors and the State companies owned or controlled by the State. This is a wide definition of the concept of State contracts indicates the characteristics thereof: large amount of investment capital is involved; long duration of contract which varies from 30 to 50 years; the host country promises not to pass legislation, administrative regulations or take other government actions during the validity of the contracts, which may have adverse effect on

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the foreign investors, so as to safeguard the contractual rights of the foreign investors. With regard to applicable law, some earlier contracts stipulated to be either the general principles of law or the common provisions of the laws of the host country and international law. In return, foreign investors promised to invest in the host country. Some contracts also included processing and business management in connection with exploitation of oil and minerals. The reason for State contracts to receive a lot of attention from the international community is that many cases of nationalization and expropriation in the mid-twentieth century were related to State contracts. Another reason is that, up till now, the international community has not yet reached consensus on the basic theoretical issues relating to State contracts. This article is to discuss and analyze the nature, characteristics and terms of State contract, the applicable law and other issues in connection with State contracts.

Nature of State Contracts

Unlike private contracts, State contracts have the following in common: (1) the subject matter has a broad coverage, which not only includes individual sale and purchase transactions, but also includes transfer of technology to the host country; (2) the long duration of contract requires close cooperation among the parties as well as the acceptance of extensive responsibilities by the investors; (3) the parties emphasize their contractual obligation so as to strike a balance between the goal of the public interests of the sovereign state and the profitability pursued by the private investors; and (4) most State contracts have implied terms so as to safeguard the interests of the investors from the changes of laws and policies of the host country.¹ If State contract is not a normal investment contract, then what is the nature of such contracts? The importance of the nature of State contract lies in the direct intervention of the host country through its rights to amend and abrogate the contract.

The famous dictum of 1929 judgment of the Permanent International Court of Justice which is regarded as the authoritative pronouncement of the nature of State contracts reads: “Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to what this law is forms the subject of that branch of law which is at the present day usually described as private international law or the theory of conflict of laws.”² In fact, this dictum is not free from doubt. For instance, it is not clear whether the statement that “every contract... is based on the municipal law of some country” means the capacity of the parties to contract or the applicable law governing the contracts. This is

1 See the arbitral award of *Texaco Overseas Petroleum Company/ California Asiatic Oil Company and the Government of the Libyan Arab Republic* (“Texaco”) 17 I.L.M. 16-17 (1978).

2 *The Case Concerning Various Serbian Loans Issued in France* 1 P.C.I.J. No. 20, at Vol 1, p41.

the precise reason why Professor Dupuy held in the Texaco case that contracts between States and private persons of foreign nationality could be subjected to the law of a truly international character, because the above award of the Permanent International Court of Justice also includes the words: “the rules may be common to several States and may even be established by international conventions or customs, and in the latter case, may possess the character of true international law”.³

One of the tests to distinguish State contracts from private contracts is whether the contracting parties are of equal bargaining power and whether one of the parties has the public power and obligations of a sovereign state. This is because only sovereign states have the power to legislate and the obligations to manage its natural resources. From an international perspective, the host country should also enjoy the right of immunity. Foreign investors do not have these powers and thus are in a comparatively disadvantageous position. To address this imbalance, some advocates that State contracts should be governed by international law.

This argument however only reflects a partial and incomplete picture of the nature of State contracts. In practice, many transnational corporations have the manpower, resources and negotiation skills comparable, if not better, to most of the developing host countries. They are now even in a more favourable negotiating position as most countries are competing for foreign investment by granting preferential policies and measures. Needless to say, under the circumstance, it is during the negotiation stage that foreign investors, including transnational corporations can demonstrate their strongest position. This is also the time when foreign investors can gain the most favourable contractual benefits. The negotiating power of foreign investors weakens with more and more capital being invested. To maximize their profits, most investors demand to incorporate all the terms agreed upon at the pre-investment stage into the contract with the host country. The disparity in the status of the contracting parties naturally leads to divergence of demand and expectation of the contract. Foreign investors hope that the contract can be complete and that the terms thereof will not be unchanged during the life of the contract. However, the host country hopes to preserve a certain degree of flexibility so as to facilitate the amendment of the contracts when necessary. This reflects exactly the conflict of interests between the contracting parties of State contracts.

The objective of transnational corporations is obviously maximization of profits. The main driving force of foreign investment is therefore the immense profits derived therefrom. By making investments, transnational corporations also play a role in promoting the economic development of the host country.

3 See the award of Texaco case by R.J. Dupuy.

Some critics pointed out that it was unrealistic to regard foreign investment by transnational corporations as pure assistance to the economic development of the host country as their aim of investment was the potential profits: “The argument based on the view that they bring benefits to the developing states only shows the paucity of justifications possessed by international lawyers, all of whom, of course, will claim a high degree of rectitude, scholarship and impartiality, in formulating theories to advance the cause of foreign investors belonging to their states.”⁴ It goes without saying, this view only considered the motive of transnational corporations in foreign investments. In addition to the motive, it is necessary to consider the risks involved and whether the host country can provide adequate protection before embarking on an investment venture. In this regard, Fatourso said, “In some cases... investors may be willing to take the risk of a future worsening of investment conditions, especially when they are reasonably confident of their ability to defend effectively their own interests or when the expected profits are high enough to warrant taking the risk... But in other cases, and in particular with respect to those industries whose establishment is sought by capital-importing states... some assurance as to the future is needed. The investor must be made to believe that there is little or no possibility that an unfavourable legal situation will be created at a later date... In the case of most underdeveloped countries today, however, it is impossible to predict with confidence that conditions of stability and security will exist during the period of dynamic change ahead. Thus arises the need for legal guarantee to be given by the State or states concerned to foreign investor... Foreign investors have to be assured that they will receive, both today and in the future, a definite legal treatment, specified in the relevant legal instruments, and that consequently they need not fear any major changes in local legal or political conditions that would be unfavourable to their interests”⁵

Most of the State contracts are long term agreements which regulate the relationship between the host country and foreign investment companies at various stages, including the exploitation of natural resources, sale of goods and other financial arrangements and that some host countries, especially developing countries, regard conclusion of such contracts as part of their public policy, that is they regard such contracts as part of its economic development strategy. These transactions hence constitute the framework for joint investment in public infrastructure. Under this framework, the government and foreign investors cooperate in the development of public resources which have strategic value and other related important public interests. The host countries which

4 M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press, Cambridge, 1994, p342.

5 Revere Copper and Brass, *Incorporated Overseas Private Investment Corporation, American Arbitration Association* (“Revere Copper Case”), 17 I.L.M. 1337 (1978).

are developing countries regard such activities as being regulated by public law as opposed to private contracts. Thus, the traditional framework for regulating private commercial activities and the rules to regulate the movement of goods in markets are inapplicable to such investment contracts.⁶ In other words, the host countries are in fact exercising both contractual and public powers (i.e. the exercise of sovereign power) when performing contractual obligations. Hence, the host countries should have the power to amend or abrogate the contracts unilaterally.

Those who support the view that the host countries have the power to re-negotiate and amend State contracts believe that “instead of a contract in the traditional sense, an investment agreement could be regarded as no more than a broad framework in which the government and the transnational corporation declare their basic commitment to a particular undertaking or project, but a framework which admits of a continuous process of revision and redefinition of their relations when circumstances require.... In short, a long-term transnational agreement can only provide a basis for a viable and enduring relationship between a host government and a transnational corporation rather than a body of fixed rights and obligations impervious to political, economic and social changes.”⁷ The former Secretary General of the International Centre for Settlement of Investment Disputes (ICSID) of the World Bank pointed out that “The starting point is the contract and in our context this means a long-term contract. Whatever might have been thought in the past, it is now common ground that unequal contracts are not viable. However, it may well happen over the life of an investment that what was fair and reasonable and equitable at the beginning may no longer be so in the light of changed circumstances. In such a case, revision or renegotiation may be called for. Many long-term agreements have in fact been revised in favour of host countries, sometimes as a result of voluntary renegotiation, in other cases by unilateral government action which was in the end accepted by the investor.”⁸ This reflects the realities of the international community. Many concession agreements are signed when the host countries could not deal with their own affairs independently. Thus, once these countries gained independence and sovereignty, they started to demand amendment of the concession agreements. A case in point was the *Kuwait v. American Independent Oil Co* (“Aminoil”).⁹ Aminoil was an American Company incorporated in 1947 in the State of Delaware with the object of exploring, producing, refining and selling

6 K.B. Asante, “Stability of Contractual Relations in the Transnational Investment Process” 28 Int’l & Comp. L. Q. 401 (1979).

7 Ibid, p 418.

8 Annual remarks to the Administrative Council, Centre for the Settlement of Investment Disputes 1980; Annual Meeting, Annex 2, 2 October 1980, p. 3.

9 Arbitration Award of *Kuwait v. American Independent Oil Co*. 21 ILM. 976 (1982).

petroleum, natural gas and other hydrocarbons. On 26 June 1948, Aminoil was granted a Concession by the British Government for the exploration and exploitation of petroleum and natural gas in what was then called the Kuwait “Neutral Zone”. Kuwait was then a British protectorate. Later, Kuwait and Saudi Arabia concluded a Treaty by which they shared the Neutral Zone, known as the “Divided Zone”. Aminoil’s Concession was situated in the Kuwait side of the Divided Zone. Kuwait declared independent in 1961 and on 11 November 1962, the Constitution of Kuwait was promulgated, which read: all of the natural wealth and resources are the property of the State. Any concession for the exploitation of a natural resource or of a public utility shall be granted only by law and for a determinate period.

After Kuwait gained independence, it immediately started negotiations with the Aminoil about the concession agreement and reached agreements respectively in 1961, 1971 and 1972, requiring, inter alia, the increase in tax obligations of the latter. One of the reasons for the Kuwait Government to amend the concession agreement with Aminoil was that the original agreement was signed when Kuwait was a British protectorate, thus reflected a strong flavour of colonialism.¹⁰

One of the legal justifications for the host countries to amend concession agreement is the change of circumstances. The former Secretary General of the ICSID also supports the argument that a host country has such a right. He said, “I have expressed the view that long-term investment agreement should recognise the possibility of changing circumstances, that they should provide for renegotiation at the initiative of either the host country or the investor, and that they should seek to establish criteria which will permit a determination whether the change in circumstances has been such as to upset the contractual equilibrium. I am glad to say that the initial resistance on the part of investors to such renegotiation clauses is gradually disappearing.”¹¹ This view is similar to that of the UN Centre on Transnational Corporations. The Draft Code of Conduct on Transnational Corporations states that contracts between governments and transnational corporations should be negotiated and implemented in good faith. In such contracts or agreements, especially long-term ones, renew or re-negotiation clauses should normally be included. In the absence of such clauses and where there has been a fundamental change of the circumstances on which the contract was based, transnational corporations, acting in good faith, should cooperate with host governments for the review or re-negotiation of such contract.¹² Overall, both the former Secretary General of ICSID and UN Centre on Transnational Corporations were of the view that

10 See the Defence of Kuwait Government in *Kuwait v. American Independent Oil Co.*

11 Annual remarks to the Administrative Council, Centre for the Settlement of Investment Disputes 1980; Annual Meeting, Annex 2, 2 October 1980, p. 3.

12 See Article 12 of UN Draft Code of Conduct on Transnational Corporations, Feb 1, 1988.

sovereign states had the power to choose their economic system free from intervention by other States.¹³

In practice, both developed and developing countries have relied on the principle of state sovereignty, especially the principle of sovereignty over natural resources, to abrogate or amend unilaterally state contracts. For instance, before the Revere Cooper Case was submitted to arbitration, the Jamaica Government expressed that it was necessary to re-negotiate with the transnational corporations regarding the original contracts because it was both a sovereign right and an obligation toward its citizens. Compared with the principle of inviolability of State contracts, the implementation of the sovereign power as sovereign states are much more important.¹⁴

Although western scholars always criticize the practice in State contracts by the developing countries, developed countries like Britain and Norway also employed the principle of sovereignty to unilaterally amend their agreements with private investors for the exploration and exploitation of oil in the North Sea. In these cases, the private investors suffered various degrees of losses. In the Norway cases, the Philip Oil Company which suffered adverse effect appealed to the High Court of Norway. The main arguments of the Philip Company included: the acts done by the Norwegian government constituted a breach of contract, a breach of administrative rules and the principle that laws did not have retrospective effect, thus its action were invalid. Ultimately, the High Court of Norway held in favor of the Philip Company and the Norwegian government was held liable to pay US\$18,200,000 compensation to the Philip Company.

To a large extent, the debate on the nature of State contracts involves ideological issues. It is submitted that State contracts are different from international treaties because one of the parties to the contract is not a country or international organization, thus the laws applicable to international treaties and agreements do not necessarily apply to State contracts. Secondly, State contracts are not private contracts in the normal sense as they involve a State and that the signing and implementation of the contracts are related to the economic development of a host country. Thirdly, the nature of State contracts must be considered separately from their applicable law. In many State contracts, the contracting parties choose the applicable law. Another reason for State contracts not to be international treaties or agreements is that most of them involve political and macro-economic issues, despite the fact that they are concerned with economic development of the host countries.

13 The International Court of Justice confirmed this principle in the *Nicaragua Case*. See I.C.J. Report (1986) at 186.

14 See Revere Copper Case.

State Contracts and Contract Law Principle

The essence of the nature of State contracts and the status of the parties thereto is whether state contracts can be amended. If the answer is “yes”, the next question will be to what extent State contracts may be amended which will be followed by the question whether the principle of *pacta sunt servanda* applies to State contracts. There have been two opposite views to this question. The ruling of Aminoil’s answer is negative. In that case, the Kuwaiti government pointed out that it was a well-established principle of international law that the State had permanent sovereignty over its natural resources¹⁵ and accordingly State governments had no power to grant concession to foreign investors for the exploitation of natural resources. Those who support the positive view advocate for the inviolability of State contracts. The basis for this argument is that *pacta sunt servanda* is a general principle of law. Some academics argue that State contracts embrace the characteristics of both private and public law. This view is affected by the tradition of common law countries such as the United States and Britain where there is no distinction between private and public law.¹⁶ It is also affected by the international arbitration practice such as the decision of the Sapphire case.¹⁷ In those cases, the arbitration tribunal recognized that State contracts had the characteristics of public law.

With regard to whether concession agreements are contracts, there appears to be a consensus at international level. In the *Saudi Arabia v. Arabian American Oil Company*, it was pronounced that the concession agreement signed between sovereign state and foreign investors was based on the principle of sovereignty, according to which the State had legal power to grant concession to foreign investors and promised not to withdraw the concession before the expiration of the agreement. “When a sovereign state is exercising its sovereign power, there is nothing to prevent him from promising to grant concession to and never regret later.”¹⁸ Certainly, the fact that state contracts are manifestation of the principle of sovereignty is conditional, i.e. the signing of State contracts is not affected by other factors. In other words, the host country is free of foreign interference and independent in exercising the sovereign power.¹⁹

The practice of international arbitration shows that there is little dispute over the contractual nature of State contracts. “The writings of renowned

15 See *Aminoil case*.

16 Some academics regard the distinction between public and private law of the continental countries as an invention. See Geiger, *Unilateral Amendment of Economic Development Contracts* 23 Int’l & Comp. L.Q. 73 (1974).

17 *Sapphire International Petroleum Ltd v. National Iranian Oil Company* (“Sapphire case”), 35 ILR 136 (1967).

18 *Saudi Arabia v. Arabian American Oil Company* (Aramco) 27 ILR 117 (1958).

19 As mentioned before, the Kuwait Government, in its Defence, argued that when the Concession Agreement was signed, Kuwait was a protectorate of Britain, thus could not exercise its sovereign power independently. See *Aminoil case*.

academics of international law and the cases show that there is now no serious dispute over the contractual nature of concession contracts. Judges and international arbitrators do not need to show the contractual nature of concession contracts but merely declare that concession contracts have contractual characteristics. This trend is consistent with the practice among countries and international organizations on contracts. In the past, International legal documents compared concession agreements to contracts. Later, the discussion of the United Nations on 14th December 1962 regarding the 18903 Resolution on Permanent Sovereignty over Natural Resources, the contractual nature of concession agreements was not on the agenda, even the advocates of state sovereignty have not raised any question on the issue.”²⁰ Professor Dupuy, the arbitrator of the Texaco case, said that “The Tribunal must consider this question in the light of the general principles of law and the teachings of comparative law: a contract is defined as an agreement of one or several wills for the purpose of creating legal obligations. It appears therefore that, from a formal point of view and prima facie, the Deeds of Concession in dispute were of a contractual nature since they expressed an agreement of the wills of the conceding State and of the concession holders. Furthermore, the contractual nature of the Deeds of Concession corresponds to the standard accepted both by international practice and by international theory.”²¹ “International practice” referred to by Dupuy obviously includes the ICJ judgment on British Iraq Oil Company case and the fact that many judges and arbitrators regard concession agreements as contracts in international arbitration.²²

Recently, some suggest that the State, as a public authority, has the responsibility to amend or abrogate contracts with private companies when necessary. For example, for the sake of the safety and welfare of the society, it may be necessary for the State to implement corresponding measures. When implementing these measures, personal interests, including those of the private investors, will be subordinated to public interests, so that contracts between the government and private companies may be amended or abrogated unilaterally. This commonly referred to as lawful amendment and abrogation. To put it the other way round, it would be that if the host country acts not for the public interests nor in exercising public power or the measures concerned are discriminatory, the related amendment or abrogation will be illegal. Applying this principle to the principle of sustainable development which is gaining international attention and becoming one of the mandatory rules of international law and international economic law, it is predictable that State has every reason to amend or refuse to implement the contracts it signed with private companies.

20 M.Cohen Jonathan, *Les Concessions en Droit International Public*, these, 1966, p133-134.

21 Texaco case, p10.

22 1952 I.C.J. 111-112.

This is one of the consequences of globalization on State contracts.

Apart from the above examples, it is generally agreed that the state is bound by the principle of good faith in signing contracts with private companies. The basis for this argument is that the state has a dual personality of public authority and ordinary merchant. "The notion of permanent sovereignty can be completely reconciled with the conclusion by a State of agreements which leave to that State control of the activities of the other contracting party. As regards the question of permanent sovereignty, a well-known distinction should be made as to enjoyment and exercise. The State granting the concession retains the permanent enjoyment of its sovereign rights, it cannot be deprived of the right in any way whatsoever, the contract which it entered into with a private company cannot be viewed as an alienation of such sovereignty but as a limitation, partial and limited in time, of the exercise of sovereignty. Accordingly, the State retains, within the areas which it has reserved, authority over the operation conducted by the concession holder, and the continuance of the exercise of its sovereignty is manifested, for example, by the various obligations imposed on its contracting party, which is in particular subjected to fiscal obligations that express unquestionably the sovereignty of the contracting State."²³ The purpose of distinguishing the enjoyment from exercise of sovereign power is to illustrate that the granting of concession to foreign investors by a State is the exercise of sovereign power, and like bilateral treaties between countries, is a voluntary restriction of that power. Thus, they are both binding on the sovereign states and other contracting parties.

With regard to the contractual characteristics of State contracts, there is no dispute. However, opinions differ as to how to distinguish and safeguard the effectiveness of State contracts. Apart from internationalization of State contracts, some suggest that State contracts should be treated as administrative contracts within the public law regime, or apply the administrative law principles to State contracts. According to this view, under all the main legal systems, State governments and organizations may enter into contracts with private parties, which contracts are subject to public interests, i.e., the relevant state governments or governmental organizations may amend or abrogate contracts based on public need. Those who hold the opposite view claim that administrative contracts are the products of the French law without any special meaning. Professor Dupuy, for instance, stated that although Libyan law had inherited the French tradition, the concession agreement in question did not have all the characteristics of administrative contracts.²⁴ However, a few years

23 See *Texaco case*, at p26.

24 The reasoning of Dupuy is that: administrative contract is essentially unequal and enables the State legal entity which has executed it to amend unilaterally the provisions thereof, and even to decide in certain cases - subject to the requirements of public interest - that it shall be abrogated. Accordingly,

ago, a French lawyer pointed out that the abrogation of State contracts based on public interest was a common characteristic of all the legal systems.²⁵ It is fair to say that at the moment the mainstream view does not regard State contracts as administrative contracts. If the conclusion by Audit is correct, the principle that the State can abrogate State contracts based on public interests, *pacta sunt servanda* and change in circumstances are all general principles of international law. In dispute settlement concerning State contracts, the choice of applying any particular principle by the courts or arbitral tribunals will depend on with whom the burden of proof rests. In other words, the one who proposes applying the principle may later find that the application of the general principle of law is not favourable to him. Besides, if there is evidence to prove that any party has abused its power, political, economic or otherwise, the validity of the contract itself may have problems. Under these circumstances, it is a logical and legal step to amend or abrogate the contract. Needless to say, deceit, duress or corruption will lead to the abrogation of contracts in almost all legal systems. This is more so with the ever-increasing integration of legal concepts, values and principles in this globalized world.

Internationalization of State Contracts and Compensation

Internationalization of State contracts was first advocated by western academics. According to their view, State contracts are transnational in nature and as one of the parties is a sovereign state, they have the elements of treaties in international law and therefore should be treated as international contracts. Internationalization of State contracts in effect is to take such contracts out of the jurisdiction of domestic law. This proposition is contrary to the traditional international law principle. As mentioned earlier, the Permanent International Court of Justice pointed out in the Serbian and Brazilian Loans Case, the contracts signed between a State and private persons should be governed by domestic law as stipulated in private international law. This principle was also recognized in the practice of some developed countries. For instance, in *Kahler v. Midland Bank*, the British Court of Appeal held that where the contracts between a State and a foreign private company stipulated that the governing law was that of the host country, then the law of the host country not only gave validity to the contract, but also gave the State the power to “amend or abrogate their contractual obligations”.²⁶ The basis of this principle is that every State

administrative contract has the following three components: (1) for the management or the exploitation of a public service; (2) being entered into by administrative authority; (3) conferring upon the administrative authority rights and powers which are not usually found in a civil contract, such as the power to amend unilaterally or abrogate unilaterally the contract if the public interest so requires. See *Texaco case*, p19.

25 B. Audit, *Transnational Arbitration and State Contracts*, Dordrecht: Martinus Nijhoff, 1988.

26 *Kahler v. Midland Bank*, AC 56 (1950).

has the power to contract with another State or private company. It has been recognized in the teachings of international law, international cases such as the Wimbledon case of the Permanent International Court of Justice. In Wimbledon case, the Permanent International Court of Justice emphasized that signing treaties was a manifestation, not a negation of sovereignty. Accordingly, the economic development contracts signed between a State and private companies are not negation but exercise of sovereignty.

In *Texaco*, however, Dupuy pointed out that the judgement of the Serbian and Brazilian Loans was no longer applicable because of new developments in international law.²⁷ He said that “This tends more and more to delocalize the contract, or if one prefers, to sever its automatic connections to some municipal law: so much so that today when the municipal law of a given State, and particularly the municipal law of the contracting State, governs the contract, it is by virtue of the agreement between the parties and no longer by a privileged and so to speak mechanical application of the municipal law.”²⁸ Moreover, according to Dupuy, State contracts were not necessarily governed by domestic law of the host country as such contracts had been internationalized either by reference to the settlement of disputes by general principles of law or by the character of the contract itself. In the latter respect, Dupuy referred to the special features of State contracts including the broad subject matter involved, the introduction into the developing countries of foreign investment and technical assistance, the importance in the economic development of the host countries, the long duration which implied “close cooperation between the State and the contracting party” and required “permanent installations as well as the acceptance of exclusive responsibilities by the investor” and the close association of the foreign contractor “with the realization of the economic and social progress of the host country”. Because of the required cooperation between the contracting parties and “the magnitude of the investments to which it agreed”, the contractual nature of the legal relations was “intended to bring about an equilibrium between the goal of the general interest sought by such relation and the profitability which was necessary for the pursuit of the task entrusted to the private enterprise.”²⁹ However, when one considers the applicability of the general principle of law to State contracts, or equilibrium of the interests of the parties concerned, the contractual behaviour of the host country may in no way be considered as a negation of sovereignty, nor may it be regarded as negation of the right empowered by private international law to choose the governing law. From this perspective, the argument of Dupuy is not without doubt nor is sufficient.

27 *Serbian and Brazilian Loans Case*, 1 P.C.I.J. No. 20 (1929) p41.

28 *Texaco case*, at p12.

29 *Revere Copper case*, at p1334

The purpose of the internationalization of State contracts is to put the host country and private investors on the same footing. The effect is that where there is a dispute between the foreign investors or their home country and the host country, it can be resolved according to the principles of international law. This is stated clearly by Mann who advocates for the internationalization of State contracts, “Under normal circumstances, State contracts are governed by the laws of the particular country, there is another formula suggested a few years ago. According to this formula, the contracts between a State and foreign private persons can be internationalized, that is putting contracts under another legal system i.e. public international law. It does not mean that State contracts shall be governed by public international law in the same way as treaties or other transactions between countries. What we are saying is that contracting party of State contracts can choose public international law as the governing law of contract.”³⁰ Why should one choose public international law as the governing law? It is because one of the characteristics of the current international relations, especially that of the international economic relations, is that it is becoming more common for States to involve directly in commercial activities which are originally carried out by private persons or companies. Under these circumstances, “the public international law regime regulating the interests of private persons sometimes afford greater protection than the private international law.”³¹ The basis of the argument is that private enterprises such as transnational corporations also enjoy certain legal personality in international commercial activities.³²

An extreme example of internationalization of State contracts is the *Revere Copper* case in which the arbitration tribunal held that the nature of State contracts required such contracts to be governed by transnational law.³³ The basis of the argument was that “it was incontestable that these contracts were international contracts, both in the economic sense because they involved the interests of international trade and in the strict legal sense because they included factors connecting them to different States, an international contract having been recently defined as being ‘that contract whose elements are not all located in the same territory’...”³⁴ Besides, State contracts were agreements which fell “within the international legal order since the contracting State agreed to submit the agreement not to the exclusive, and unlimited in time, application of its municipal law, but to rules falling at least in part within the framework of international law or of general principles of law.”³⁵ Dupuy’s argument was

30 F.A. Mann, *A Theoretical Investigation of the Applicable Law of Contracts between State and Private Persons* Rev. Belge D.I. 1975, p564-565.

31 F.A. Mann, at 615.

32 For discussion on the legal identity of transnational corporations, see Guiguo Wang, “New Neo-Confucianism: International Economic Law” 13 *Journal of Comparative Law* 299-334 (1999).

33 See *Revere Copper case*.

34 See *Texaco case*, at p11.

35 See *Texaco case*, at p23.

later adopted by other writers and in arbitration practices. It is now a standard statement of internationalization of State contracts. In practice, as early as in *Armco* in 1958, the arbitration tribunal regarded concession agreement signed between the Saudi Arabian government and a private American company as having an international element. Having considered the status of the two parties, one being a State and the other a private company, the long duration of the concession agreement and the fact that it related to the exploitation of natural resources, the arbitration tribunal held that the concession agreement was an international contract.³⁶

Internationalization of State contracts is also referred to as delocalization of State contracts. Whether it is called internationalization or delocalization of State contracts, the result is the same, that is privatization of the contracts between host countries and foreign private companies. The internationalization or delocalization of contracts has the effect of raising the status of foreign private investors to that of a State, at least with respect to the performance and breach of contract. It has therefore undoubtedly neglected the public law obligations of the State. Thus, even Dupuy, who was the strongest advocate of internationalization of State contracts, admitted that concession agreements were different from ordinary private contracts in certain respects. He pointed out that, unless the contract in question stated otherwise, the host country concerned should be regarded as having reserved its privileges and powers, i.e. the right to amend the contract.³⁷

Some academics do not emphasize the internationalization of State contracts or compare State contracts with international treaties. Instead, they claim that the host countries unilateral amendment or abrogation of contracts constitute a breach of contract in international law, regardless of whether the governing law chosen is the law of the host country, the international law or the laws of other countries.³⁸ This view is, in fact, similar to that of the Digest of International Relations of the U.S., which states that: “any State which breaches the contracts signed with a foreigner shall be liable for breach of contract in accordance with the laws of the country concerned, but it does not mean that all the breaches of contract (regarding contracts with foreigners) committed by a State constitute a breach of international law”. According to this statement, only when the breach of contract by the host country is discriminatory or is based on non-commercial considerations and the host country refuses to give compensation will the U.S. government consider using diplomatic means to assist. In other words, the U.S. recognizes the power of the host country to refuse to perform the State contracts, but the latter has an

³⁶ See *Aramco case*.

³⁷ See *Texaco case*, at p20.

³⁸ R.Y. Jennings, *State Contracts in International Law* 37 Brit.Y.B. Int'l L. 156 (1961).

obligation to pay compensation. It does not mean that the U.S. government will intervene in every contractual dispute between a U.S. company and a foreign government. It is stated clearly in the Digest of International Law by Hackworth that, "Generally speaking the Department of State does not intervene in cases involving breaches of contract between a foreign state and a national of the United States in the absence of a showing of a denial of justice..... The practices of declining to intervene formally prior to a showing of denial of justice is based on the proposition that the Government of the United States is not a collection agency and cannot assume the role of endeavoring to enforce contractual undertakings freely entered into by its nationals with foreign states."³⁹ The view of the Digest of International Relations and Digest of International Law represent exactly the view of the United States and other developed countries in the 1950's. With the growing conflicts with the Eastern European countries like the former Soviet Union and other socialist countries, mass scale nationalization after the independence of the former colonies and greater participation of the State governments in commercial activities, the developed countries with the United States taking the lead began to abandon the principle of sovereignty and acts of State doctrine, and to adopt a restrictive approach. The advocate for internationalization of State contracts reflected this change in policy. The purpose is to enable the foreign investor's home country intervene directly into the contractual disputes between the foreign investor and the host country.

The reason why State contracts are related to nationalization is that, traditionally, nationalization was carried out in accordance with domestic laws of the nationalizing state. If State contracts are under the total control of the domestic laws of the host country, the nationalization or expropriation of the assets of foreign investors, whether a breach of contract or not, does not necessarily lead to international responsibilities of the host State. Strictly speaking, it is only when State contracts are regarded as having an international character, and the host country in question nationalizes the property of foreign investors disregarding its contractual obligations, could the State be held responsible for breach of contract in accordance with international law. In *Texaco*, Dupuy mentioned the relationship between nationalization and the international responsibility of the host State. He said that when the State and foreign investors signed economic development agreements, "the State has placed itself within the international legal order in order to guarantee its foreign contracting party a certain legal and economic status over a certain period of time. In consideration for this commitment, the partner is under an obligation to make a certain amount of investments in the country concerned and to explore and exploit at its own risk the petroleum resources which have been conceded

39 Hackworth, *Digest of International Law*, Washington D.C., 1943, Vol 5, p611.

to it. Thus, the decision of a State to take nationalizing measures constitutes the exercise of an internal legal jurisdiction but carried international consequences when such measures affect international legal relationships in which the nationalizing State is involved.”⁴⁰ This conclusion is very similar to the principle emanated by the UN Resolution No. 1803 regarding permanent sovereignty over natural resources by the State adopted in 1962. According to the Resolution, a State cannot by reason of sovereignty refuse to perform its international obligations; a State cannot enact domestic laws or implement government measures to invalidate the rights of the other contracting party which has already performed the contract.

The International Law Commission also expressly stated that a State could negate its international responsibility based on domestic laws in its Third Report on State Responsibilities to the United Nations. The report reads: “the fact that some particular conduct conforms to the provisions of national law or is even expressly prescribed by those provisions does not make possible to deny its internationally wrong character when it constitutes a breach of an obligation established by international law... a state cannot plead the provisions (or deficiencies) of its constitution as a ground for the non-observance of its international obligation. It is indeed one of the great principles of international law, informing the whole system and applying to every branch of it.”⁴¹

To recognize State contracts as binding on the contracting State, the State concerned must bear legal responsibility for breach of contract. In this respect, academics both supporting and opposing the State responsibility in relation to compensation agree that *restitutio in integrum* is not the best mode of compensation for the breach of contractual obligations by the State. Even the strong advocates of *restitutio in integrum* as a principle of international law agree that this principle is inapplicable to State contracts.⁴² The sole arbitrator in *Texaco*, Professor Dupuy, stated on the one hand that *restitutio in integrum* was a principle of contract law and, on the other hand, pointed out that it was very seldom in international arbitration practice to adopt this mode of compensation. The same conclusion was arrived in the *Libyan American Oil Company v. Libyan Government*. In that case, the arbitration tribunal ordered the Libyan government to *restitutio in integrum* but at the same time pointed out that this remedy was not a normal means of compensation in international arbitration because the arbitration tribunal had no means to enforce the award against the host country.⁴³ *Restitutio in integrum* is therefore not yet a common

40 See *Texaco case*, at p22.

41 Yearbook of the International Law Commission, 1971, Vol 2, p227.

42 *BP Exploration Co. Libya Ltd v. The Government of the Libyan Arab Republic*, 53 ILR,303 (1988).

43 *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic (LIAMCO case)* 20 ILM 1 (1981).

standard in international arbitration. Under these circumstances, monetary compensation is naturally a better choice.

Monetary compensation normally includes the market value and foreseeable profits of direct investment of foreign investors. It is always controversial as to what constitutes the market value. The foreseeable profits are much more difficult to determine. Foreseeable profits must have a certain degree of certainty and must have a direct relation with the contracts. In other words, the parties must prove that the breach committed by the host country has directly led to the non-realization of profits. From this perspective, the calculation of loss of profits must be reasonable. In *Libyan American Oil Company v. Libyan Government*, it was held that there was no conclusion as to whether the concession holder could obtain compensation for the loss of profits expected during the validity of the contract.⁴⁴ The arbitration tribunal used the judgment of the *Asylum* case to explain that it was the political factors which led to the failure of forming customary law in this area.⁴⁵ The tribunal held that the then international law and practice had not formed any principle on compensation. "In such confused state of international law, as is evident from the foregoing precedents and authoritative opinions and declarations, it appears clearly that there is no conclusive evidence of the existence of community or uniformity in principles between the domestic law of Libya and international law concerning the determination of compensation for nationalization in lieu of specific performance, and in particular concerning the problem whether or not all or part of the loss of profits (*lucrum cessaus*) should be included in that compensation in addition to the damage incurred (*damnum energens*)".⁴⁶

International practice shows that the calculation of the amount of compensation should include consideration of the long duration of the contract in question and the expectation of the parties, so as to balance the rights and responsibilities, opportunities and risks. Besides, under normal circumstances, assessment of real assets should be calculated by accounting or taxation methods. The net book value is only applicable to recent investments, as the cost of such investments is close to the substitution cost. For earlier investments, other means of compensation should be adopted.⁴⁷

The Forms of State Contracts

Like any other law, international law is also a two-edged sword. A principle, a regulation, a precedent of international law, may in certain point of

44 *LIAMCO case*, p144.

45 The International Court of Justice pointed out in the *Asylum* case that "The practice has been so much influenced by considerations of political expediency in various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule." ICJ Reports , 1950, p3.

46 *LIAMCO case*, p149-150.

47 See *Aminoil Case*.

time be favourable to certain countries, individuals or companies. However, the lapse of time may render the same principle, regulation or precedent unfavourable to such countries, individuals or companies. The internationalization of State contracts is obviously unfavourable to the developing host countries. However, the same principle also affects the developed countries. As Judge Higgins of the International Court of Justice pointed out, in discussing the nationalization measures of Libyan Government, that in the case of breach of concession agreements and deprivation of property rights, the international arbitration practice tended to give the affected party the power to obtain compensation in international law; "such findings would undoubtedly command the sympathy of western national governments of oil companies. But as recent legislation in some of those western countries who are oil producing countries shows, techniques are now in place for avoiding the impact of these principles of international law. New mining rights in developing countries are entirely likely to follow the model offered by such western example."⁴⁸ The international practice confirms that the view of Judge Higgins is quite far sighted. In order to avoid unfavourable treatment in international dispute settlement, and having learned the experience from the developed countries, most modern State contracts on exploitation of natural resources do not take the form of concession agreements.⁴⁹ Besides, more and more countries treat foreign investment agreements as contracts governed by public law rather than private law. This situation is remarkable in Europe.⁵⁰

Compared with earlier State contracts, nowadays, there is a marked change in the way State governments or government organizations participate in economic development contracts. Firstly, as an attempt to avoid the problem of governing law, many hosts which are developing countries began to cooperate with foreign investors through companies formed by the host governments. By doing so, the host government is in a supernatural position. Strictly speaking, the formation and enforcement of these contracts have to be approved, recognized and supported by the host government concerned. Besides, the way of investment and profits making by foreign investors have also changed concession agreements to cooperative ventures, division of products, service agreements and technological assistance agreements, etc.

Joint Ventures are also called joint shares companies. Under this arrangement, the host government may hold the shares directly or through State

48 R. Higgins, *The Taking of Property by the State: Recent Developments in International Law* Recueil des Cours, Vol 176, 1982, p314.

49 Certainly, the change in the mode of State contracts is directly related to the emphasis on sovereignty by the developing countries.

50 R.W. Bentham, *The International Legal Framework of Oil Exploration* in J. Rees and P. Odell (ed.), *The International Oil Industry*, Basingstoke: Macmillan Press, 1987, at p57.

enterprises, or stipulate in the laws the proportion of shares to be held by local enterprises. To safeguard the right of veto in the joint venture, many developing host countries prefer to hold more than 50% of the shares. This form is widely used in the exploitation of oil and natural resources ventures. It does not however mean that the host countries play a dominate role in the joint ventures as exploitation of natural resources normally involve a lot of technical issues and the host countries or local enterprises must rely on the experience and knowledge of the foreign investors. Under these circumstances, the foreign investors can play a key role in decision making of the joint ventures despite their minority shares.

Division of products is also a popular form of exploitation of natural resources ventures. In this respect, many countries adopt the Indonesian model, under which, transnational corporations are responsible for the provision of technology and expenses and take all the risks. The Indonesian government allowed foreign investors to take 40% of the products as payment for the annual expenses of the venture. In case the amount was insufficient, the difference must be transferred to the coming year. For the remaining 60%, Indonesian company had 65% while foreign investor had 35%. The foreign investor obtained full property rights to the oil when it started to be exported. The exploitation of oil agreement signed by Nigeria in 1973 basically adopted the Indonesian model, but it allowed the foreign investor to obtain property right to the oil when it first came out of the oil field. Besides, a good number of product division agreements stipulate that the host countries have the power of supervision over the foreign investment in question. The reason for the express provision of supervision by the host country is to avoid the arbitrary interpretation of the meaning of the agreement by international arbitration tribunals.⁵¹

At the present, there are a lot of similarities between service trade agreements and technological assistance agreements. Under a typical service and technology assistance agreement, the foreign company provides all the required capital, while its subsidiary provides all the technologies. The parent company will buy a certain quantity of oil or other products at a pre-determined price. The host country authorizes the foreign investor to be responsible for the international sales of all the products. The foreign investors have their investment paid back with the profits earned therefrom. In a pure technological assistance agreement, the foreign investors only provide technological assistance without the input of capital. In return, the host country may pay a lump sum to the foreign investors or allow the foreign company to purchase a certain amount of products at a pre-determined price.

51 For instance, in the Sapphire case, the arbitration tribunal held that the intervention of the host country constituted a breach of contract.

The change in the form of State enterprise is directly related to the practice of the international community, and is a response to the dispute resolution concerning State contracts in the last 50 years, especially through international arbitration. This is also reflected in multilateral treaties on exploitation of energy resources, such as the Energy Charter Treaty.

Article 10(1) of the Energy Charter Treaty states that each contracting party shall observe any obligations it has entered into with an investor or an investment of an investor of any other contracting party. This requirement supersedes the traditional framework of bilateral treaties. Firstly, the word “any obligations” may mean any kind of agreements, including State contracts, entered into between the host country and foreign investor. Secondly, the Energy Charter Treaty requires each contracting party to ensure that its regional and local governments have observed all the provisions of the Treaty.⁵² It has therefore considerably broadened the scope of “any obligations”. Thirdly, the Energy Charter Treaty provides that foreign investors and the host country may submit their investment disputes to international arbitration.⁵³ According to this requirement, if a host country breached the contract it entered into with foreign investor, it will constitute a breach of “any obligations”, thus the affected foreign investor may submit the disputes to international arbitration. It does not mean that the host country cannot refuse to perform its obligations under the contract, including State contracts. The question is whether the host country has an obligation to appear before the international arbitration tribunal first. International practice shows that the outcome of the arbitration is a balance between the permanent economic sovereignty of a State and the binding nature of a contract. Some pointed out that “The most realistic interpretation of the intention underlying the last sentence of Article 10(1) is that the drafters, in view of this debate, wanted the Treaty to weigh in on the side of the advocates of ‘sanctity of contract’ versus ‘permanent sovereignty’ and channel such disputes to the Article 26 arbitration method.”⁵⁴

Stabilization Clauses and Change in Circumstances

Stabilization clauses are common in State contracts. The purpose is to strike a balance between the rights and obligations of the host country and the foreign investor. Under this arrangement, the host country provides the foreign investor with “a certain stability which is justified by the considerable investments which it makes in the country concerned. The investor must in particular be protected against legislative uncertainties, that is to say the risks

52 Articles 22 and 23 of the Energy Charter Treaty.

53 Article 26 of the Energy Charter Treaty.

54 T.W. Walde, *International Investment under the 1994 Energy Charter Treaty* 29 J. of World Trade 40 (1995).

of the municipal law of the host country being modified, or against any government measures which would lead to an abrogation or rescission of the contract. Hence, the insertion, as in the present case, of so-called stabilization clauses: these clauses tend to remove all or part of the agreement from the internal law and provide for its correlative submission to international law system.”⁵⁵ Normally, the stabilization clause states that the host country promises not to amend the contract by way of legislative amendments, not to damage the interests of the foreign investors by legislative or administrative means, nor to change the legislative environment as of the date of the contract. The meaning of “not to damage the interest of the foreign investors” includes not to nationalizing their property. A typical example of stabilization clause is in the Aminoil case, the concession agreement of which stated that “the period of this Agreement shall be sixty (60) years”, “The Shaikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement”. The concession agreement also stated that, “no alteration shall be made in the terms of this Agreement by either the Shaikh or the Company except in the event of the Shaikh and the Company jointly agreeing that it is desirable in the interests of both parties to make certain alterations, deletions or additions to this Agreement.”⁵⁶ Obviously, the provision against unilateral alteration of the agreement was mainly targeted at the Kuwait Government.

The advocates of internationalization of State contracts generally support the view that stabilization clause requires the host country to fulfil its contractual obligations, regardless of whether the provisions are excessively restrictive on the legislative or administrative power of the sovereign State. The reason is that the host country enjoys sovereign power and can amend the contract by legislative means. Thus, stabilization is necessary for the safeguard of the interest of private investors. This deduction is not free from difficulties. In general, State contracts and economic development contracts are entered into by the administrative organs of the host country. In a host country with relatively independent administrative, legislative and judicial branches, it may contravene the constitution of the host country if the contract between the administrative organ and foreign investor restricts the power of the legislative branch. If that is proved to be the case, is the stabilization clause valid? Some hold the view that a State cannot declare a contract signed with foreign investors invalid based on its own domestic laws. The basis of this argument is that one cannot expect foreign investors to have expertise in the domestic law of the host country.⁵⁷

55 *Texaco case*, at p17.

56 *Aminoil case*, p1020

57 See *Sapphire case*.

Some western commentators subdivide stabilization clauses into two categories, one being contractual and the other statutory. Contractual stabilization clauses refer to those under which the treatment given to foreign investors is in accordance with the foreign investment laws and the Constitution. Statutory stabilization clauses refer to those under which the host country may unilaterally amend the law irrespective of its effect on foreign investors, unless the laws of the host country have been incorporated into the contract and the host country has approved the contract. Statutory stabilization clause can be further divided into general stabilization clause and intangible stabilization clause. Under the general stabilization clause, the host country promises that only the law in force at the time of signing the contract will be applicable to the contract. Under the intangible stabilization clause, although the host country has not abandoned its legislative power by reason of stabilization clause, the host country promises not to unilaterally amend the contract during the validity of the contract, i.e. not to use sovereign power and privilege to enact laws to amend the contract.⁵⁸ The concession agreements entered into by Libyan government with foreign investors often provided “unless the parties otherwise agree, the express provisions of this concession agreement cannot be changed or amended.” This kind of provision is generally regarded as intangible stabilization clause.

The theory of superiority of international law over national law serves as the basis for the validity of stabilization clauses. Some scholars argue that there is a basic legal system above the laws governing the State contracts, the former determines the validity of the latter.⁵⁹ The domestic law of the host country may apply to the State contracts, while the basic legal system i.e. international law applies to the stabilization clause. Needless to say, to divide the applicable law of State contract into domestic law and international law is not with a solid theoretical basis. That is why up till now, this theory has not received much support. As a matter of fact, putting stabilization clause under international law cannot prevent the host country from breaching the contract. Its effect is only to elevate the breach committed by the host country to the international level, which enables the home country of the foreign investor to offer diplomatic protection under international law and demand for compensation from the host country.

Generally speaking, there is a direct relationship between the debate on the validity of stabilization clause and the debate on the nature of State contracts. Those who advocate for the superiority of the stabilization clause argue that State contract is a legal arrangement which safeguards the rights and obligations

58 Weil, *Contracts entre Etats et particuliers* 128 Recueil des Cours 212 (1969).

59 See *Texaco case* and *Contracts entre Etats et particuliers*.

of the parties. It is an independent legal system free from the domestic law of the host country and the parties must abide by the principle of the sanctity of contract. This argument is not free from ambiguity. It is generally known that the validity of all contracts, agreements and treaties are stemmed from a higher level of law. Otherwise, they will be without legal basis and cannot have legal effect. State contract is no exception. It is without legal basis if State contracts form an independent legal system and are immutable and cannot be amended. In other words, if one argues for the independent legal system of State contracts, what is the legal basis for its unchangeability?

The opponents of the theory of independent legal system for State contracts or stabilization clauses argue that *pacta sunt servanda* does not apply to long-term economic development agreements. In their views, the duration of state contracts are in general more than 20 years and often involve complicated commercial arrangement. During such a long time, it is inevitable that there will be tremendous changes in the political, economic and other environment of the host country as well as the international community and international market. Whilst the circumstances of the host country and international community and market keep changing, the insistence on the immutability of State contracts will put the contracting parties, especially those of the developing countries, in a disadvantageous position. Thus, they oppose the mechanical application of *pacta sunt servanda* to State contracts, especially the long-term investment agreements such as concession agreements.

The *pacta sunt servanda* is a generally accepted principle of international law and widely accepted by the international community. However, it is undeniable that international law and the general principle of law also recognize the principle of change in circumstances, i.e. change in circumstances after a treaty or contract is entered into. And if the changes are unforeseeable or unforeseeable at the time of the making of the treaty or contract, the affected party can refuse to perform the contract or amend the terms of such documents. Thus, even if the principle of *pacta sunt servanda* is applied, it does not mean that the host country cannot amend the contract it has entered into with a foreign investor. In *Revere* case, the Jamaica government's refusal to perform the contract was apparently based on the principle of change in circumstances. This can be derived from Prime Minister Manley's speech to the Jamaica Teachers Association, in which he addressed the critical energy situation. He said, "Contracts for products like sugar, banana and bauxite had been signed when oil was \$2.00 per barrel and not the current \$14.00." As "all the fundamental equations have changed", the original contract cannot be performed.⁶⁰

60 See *Revere Copper case*, p9. Manley stated "The Government of Jamaica cannot be bound by them

Currently, both the common law and civil law countries recognize the rights of sovereign states and other public authorities in re-negotiating or unilaterally amending, in special circumstances, their contracts entered into with private persons or enterprises based on the principle of sovereignty.⁶¹ Thus, the principle of change of circumstances is both a principle of international law and a principle of the laws of various countries. According to the traditional international law or the general principle of law, the host country may therefore amend investment agreements, including the long-term economic development agreements in the form of State contracts. As a matter of fact, there is no absolute principle of *pacta sunt servanda* or sanctity of contract. Under all legal systems, the principle of *pacta sunt servanda* goes hand in hand with other principles. Moreover, the contract law practice of many countries shows that there is no such a thing as absolute freedom of contract. In determining the validity of a contract, the courts or arbitration tribunals must consider the bargaining power and status of the contracting parties, economic duress, the principle of irreversibility, etc.⁶²

As mentioned above, one of the characteristics of State contracts and economic development contracts is the long duration. In the last few decades, both domestic and international environment changed. These changes not only affected State contracts, but also the political and legal systems of the countries concerned and other fundamental interests. Under these circumstances, the stabilization clause can no longer be stabilized and hence the western scholars began to advocate for putting the stabilization clause above the domestic legal system. This is exactly the purpose of internationalization of State contracts. Internationalization of contracts takes the stabilization clause out of the jurisdiction of the host country and at the same time the theoretical basis for internationalization of State contracts is the existence of stabilization clause. Therefore, any over-emphasis on stabilization clause is incompatible with the reality of State contracts.

The international community seems to have realized the above difficulty and has adopted a restrictive interpretation of the stabilization clause. For example, in the Aminoil case, the arbitration tribunal pointed out that it was theoretically possible for the stabilization clause to prohibit nationalization. Taking into consideration the particular importance of the undertakings, unless it was expressly stipulated in the contract itself, it might not be presumed that

any longer. For Jamaica to survive we must negotiate new contracts and new benefits for our things sold abroad.”

61 M. Singer, *The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Doctrine* 175 Am. J. Int'l L. 283 (1981).

62 P. Atiyah, *The Rise and Fall of the Freedom of Contract*, Oxford: Clarendon Press, 1979.

the host country had accepted that obligation. In addition, the inclusion of the stabilization clause must be in conformity with the regulations governing the conclusion of State contracts and that it should cover only a relatively limited period.⁶³ Several principles have been derived from the Aminoil case: (1) The effect of the principle of contractual undertakings cannot supersede the principle of sovereignty, including nationalization; (2) the general stabilization clause does not have the effect of restricting the sovereign power to nationalize, unless there is express restriction in the contract which is in accordance with the domestic law of the sovereign state; (3) the restriction on the sovereign power in the stabilization clause must be limited in time and the duration should not be long.

The principles pronounced in Aminoil case have also been followed in contractual practice. For example, in 1984, Ghana government and Kaiser Aluminum & Chemical Co. successfully re-negotiated its long-term contract on the supply of electricity. The new contract abolished the original broad provisions of stabilization clause which were replaced by a five-year restrictive provision on Ghana.⁶⁴ The Kaiser Aluminum & Chemical Co. also successfully re-negotiated with Jamaica Government regarding bauxite in the 1970's.⁶⁵

The international practice of State contracts in the past 30 years shows that the principle of *pacta sunt servanda* has the tendency of being replaced by the principle of sovereignty. Many host countries and transnational corporations have had experience in amending their contracts. Although many contracts were amended after the independence of former colonies,⁶⁶ a number of contracts were renegotiated and amended at the initiative of transnational corporations. The practice of international arbitration also demonstrates this trend. In the well known the U.S. and Iranian claims cases, the tribunal recognized the principle of change of circumstances. The Questech Inc. case is an example. In that case, the Iranian government and an American company entered into a contract in which the latter was responsible for developing the electronic information system for the former. After the new Iranian government was established, it refused to perform the contract based on change of circumstances. The arbitration tribunal considered: "The fundamental changes in the political conditions as a consequence of the Revolution in Iran, the different attitude of the new government and the new foreign policy especially towards the United States which had considerable support in large sections of

63 *Aminoil case*, p1023

64 The re-negotiated agreement between Ghana and Kaiser Aluminum & Chemical Co. was signed in July, 1984.

65 See Samuel K. B. Asante, "*International Law and Investments*", in Mohammed Bedjaoui (ed) *International Law: Achievements and Prospects*, Martinus Nijhoff Publishers, Paris, 1991, 687, at 681.

66 See *Aminoil case*.

the people, the drastically changed significance of highly sensitive contracts... especially those to which United States companies were parties.”⁶⁷ Thus, the arbitration tribunal upheld Iran’s refusal to perform the contract.

It goes without saying that to argue that the host countries have the right to amend State contracts, including the stabilization clause, does not mean that the principle of *pacta sunt servanda* is not important. In order to attract foreign investment, it is necessary for the host countries to abide by the promise they make with foreign investors. Besides, when exercising the sovereign power to amend the contracts, the countries concerned must abide by the principles of international law, including adequate protection of foreign investors and the principle of non-discrimination. Regarding this point, the sole arbitrator of Shufeldt, P.W. case (United States v Guatemala) wrote, “it is perfectly competent for the Government of Guatemala to enact any decree they like and for any reasons they see fit and such reasons are no concern of this Tribunal. But this Tribunal is only concerned where such a decree, passed even on the best of grounds, works injustice to an alien subject, in which case the Government ought to make compensation for the injury inflicted and cannot involve any municipal law to justify their refusal to do so.”⁶⁸

Taking into consideration the special characteristics of State contracts, a number of politicians, including the former Secretary General of ICSID and academics generally support the view that long-term economic development contracts should stipulate the mechanism for amending contractual obligations in case of change of circumstances. This is the mainstream view of the international community and reflects the reality of this highly globalized world.

The Applicable Law

The determination of applicable law is an important issue. According to the recognized principle of private international law, if there is no express choice of applicable law in the contract between a host country and a foreign investor, the interpretation of the contract should be based on the law of the country which has the closest connection with the contract. As the subject matter of most State contracts are located in the host country, and the contracts are performed in the host country, the law of the host country should be the governing law. The earlier international arbitration practice supported this view. For example, the arbitrator of the Qatar case pointed out that, having considered the subject matter of the contract in question and that one of the contracting parties was a State, the applicable law should be Islamic law.⁶⁹ In the Abu

67 See the discussion on *Questech, Inc. v. Ministry of National Defence of the Islamic Republic of Iran*, 80 Am. J. Int'l L 362 (1986).

68 See Digest of International Law, Vol 6, p47.

69 20 ILR, 534 (1953).

Dhabi case, the arbitral tribunal held the same view. He said, “This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi.”⁷⁰ Nevertheless, in all the above cases, the arbitral tribunals refused to apply the Islamic law for the reason that Islamic laws lacked provisions on concession agreements. It is, however, very debatable whether or not the Islamic law was capable of resolving the disputes at that time.

Regarding the choice of applicable law of State contracts, the effect of the Aramco case is considerable.⁷¹ In that case, after the concession agreement between Saudi Arabia and Aramco was entered into, it was subsequently assigned to a third party. Aramco considered the above act by the host country as having breached their contract. However, the concession agreement had no express provision governing the applicable law and arbitration proceedings. After the dispute arose, Saudi Arabia and Aramco agreed to submit the dispute to international arbitration. The two parties agreed that the dispute should be decided in accordance with the Saudi Arabia law in so far as matters within the jurisdiction of Saudi Arabia are concerned, and in accordance with the law deemed by the Arbitral Tribunal to be appropriate in so far as matters beyond the jurisdiction of Saudi Arabia are concerned. The arbitration tribunal ruled “The law in force in Saudi Arabia should also be applied to the content of the Concession because this State is a Party to the agreement, as grantor, and because it is generally admitted, in private international law, that a sovereign State is presumed, unless the contrary is proved, to have subjected its undertakings to its own legal system. This principle was mentioned by the Permanent Court of International Justice in its judgments concerning the Serbian and Brazilian Loans.”⁷² However, the tribunal added that the law of Saudi Arabia must be interpreted or supplemented by the general principles of law, by the customs and practices in the oil business and by concepts of pure jurisprudence.

The above cases show that while the law of the host countries should be the applicable law, the arbitral tribunals considered the law of those countries as imperfect and had no relevant provisions on concession agreements. Thus the arbitral tribunals must refuse the application of the law of the host countries and instead adopt the general principles of law to fill the gap. Strictly speaking, it was not an invention of the arbitral tribunals that the general principles of law should apply in the absence of relevant legal provisions in the law of the host country concerned. As early as 1900, this rule was applied in the Delgoa Bay Railway case which concerned a Railway Construction Agreement in

70 18 ILR 144 (1951).

71 *Aramco case*.

72 *Aramco case*, at p1125-1126.

Portugal. The arbitration tribunal held that the law of the host country should be the applicable law but pointed out that the Portuguese law on the subject matter was not different from the general principles of law of the modern countries.⁷³ In another case of 1973, the relevant agreement stipulated the law of Guatemala to be the applicable law. The arbitration tribunal held that the law of Guatemala was consistent with the laws of other countries.⁷⁴ As a matter of fact, the above two arbitral tribunals merely mentioned the general principles of law without actually applying the same. What they were trying to do was that the same result would be arrived at even when the law of other countries was applied. The purpose of taking such an approach was of course to evade potential criticisms.

In a word, in the 19th century and the earlier 20th century, it was common for the State contracts on international investments entered into by host countries, especially the developing host countries with foreign private investors to require the law other than that of the host country in question to be the applicable law. For example, the Consortium Agreement of Iran entered into in 1954 provided that “In view of the diverse nationalities of the parties to this Agreement, it shall be governed by and interpreted and applied in accordance with principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated, and in the absence of such common principles, then by and in accordance with the principles of law recognized by civilized nations in general, including such of those principles as may have been applied by international tribunals.”⁷⁵ This provision was in fact copied from the third source of international law within Article 38 of the Statute of the International Court of Justice. As most of the arbitrators of international arbitration are from developed countries, they always regard *pacta sunt servanda* as part of the general principles of law. In other words, the host country of international investment may not refuse to perform or unilaterally cancel the contract. Any analysis of international arbitration must take into consideration this background.

Parties to State contracts sometimes may, by mutual agreement, choose international law as the applicable law. In this regard, the amended oil exploitation agreement between the Libyan government and the Libyan American Oil company read: “This Concession shall be governed by and interpreted in accordance with the principles of international law, and in the

73 Delgoa Bay Railway Case in M. Whiteman (ed), *Damages in International Law*, Washington DC., Vol 3, 1976, p1694.

74 Decision of the Arbitrator in Claim by the United States of America on behalf of P.W. Schufeldt v the Republic of Guatemala, 24 Am. J. Int'l L 799 (1930).

75 Cited from E. I. Nwogugu, *Legal Problems of Foreign Investments, Collected Courses of The Hague Academy of International Law* (1976), Martinus Nijhoff Publisher, 1983, The Hague, at 216.

absence of such common principles then by and in accordance with the general principles of law as may have been applied by international tribunals”⁷⁶ Some commentators regarded such arrangement as having taken into consideration the interests of the host country and the needs of foreign investors. “Their choice served the interests of the State by submitting the contract initially to the State’s own legal system and by placing activities that are to be undertaken in a large measure in Libya within its legal system. The provision also protected the private foreign entities contracting with the State by requiring that only principles of Libyan law common to international law be applicable, which ensured against unilateral and arbitrary changes in, and eliminated aberrational aspects of Libyan law.”⁷⁷ The characteristic of the above oil exploitation agreement is that only when the law of the Libyan and international law were the same would the former be applied. Any principles of Libyan law which were inconsistent with international law would not be applied. This provision in fact did not intend to apply the law of the host country. Another question is the ascertainment of international law. It is always controversial as to what are the principles of international law or the general principles of law. The most commonly recognized principle that is considered as having acquired the status of the principle of international law should be the principle of sovereignty. It could be presumed that the Libyan law also had such a principle. According to the principle of sovereignty, the Libyan government should have the power to nationalize or expropriate foreign investment despite the above provision of the agreement. Nevertheless, such an interpretation would be unfavourable to the foreign investors and would therefore not be the intention of the contracting parties. As result, only could the international arbitration tribunal decide what were the common principles of international law and Libyan law (This was what happened later). Should the international arbitration tribunal be unable to decide what were the common principles of Libyan law and international law, the applicable law would then be the general principles of law. In the circumstance, the issue will go back to square one, i.e., internationalization of State contracts. Needless to say, the fact that the contract entered into was in the 1960’s made a big difference, as at that time, it was not inconceivable to have the above provisions incorporated into economic development contracts between transnational corporations a developing host country. Yet with the world being increasingly globalized and especially the developing countries competing for foreign investment today, one should not be surprised if similar arrangements are made between foreign investors and a host country.

76 The Oil Exploitation Agreement between Libyan government and Libyan American Oil Company (20th Jan 1966 amended).

77 *LIAMCO* case.

The issue of choice of law of the *Revere Copper* case also merits attention. The agreement in question had no stipulation on the applicable law. According to the recognized principle of private international law on choice of law, the arbitration tribunal should have applied the law of Jamaica which was the host country. The arbitration tribunal on the one hand accepted that Jamaican law was the applicable law, but on the other hand emphasized that Jamaican law did not preclude “the application of principles of public international law”, according to which States must be liable to pay damages for breach of contracts. The case involved an issue that Jamaica refused to perform the contract it entered into in conflict with “its prior undertakings and assurances given in good faith to encourage foreign investments.”⁷⁸ As the agreement did not have a choice of law clause, and the agreement was entered into and performed in Jamaica, Jamaican law should have been decided the applicable law. Then why did the arbitration tribunal rule the applicable law not to be that of the host country? The arbitral tribunal stated “In recent years, however, a series of decisions by Arbitration Tribunals, applying the views of outstanding international jurists, has developed an exception to this narrow approach where contracts fall within a category known as long term economic development agreements. In such cases, the question of breach is not left to the termination of municipal courts applying municipal law. The reason for this is that such contracts, while not made between governments and therefore wholly international, are basically international in that they are entered into as part of a contemporary international process of economic development, particularly in the less developed countries. The very reason for their existence is that the private parties entering into such agreements and committing large amounts of capital over a long period of time require contractual guarantees for their security; governments of developing countries in turn are willing to provide such guarantees in order to promote much needed economic development. Moreover, while the agreements are entered into between governments and private parties, the governments of such parties are very much interested in such agreements and in promoting their conclusion. In this instance, the government of the investor provided its own guarantee for the investment in addition to the contractual guarantee furnished by the foreign government.”⁷⁹ The arbitration tribunal of *Revere Copper* case held that the agreement between Jamaica and the American investors fell within the category of long term economic development agreement and that principles of public international law should apply insofar as the state government which was a party was concerned. This conclusion was no different from treating transnational corporations on the same footing with States. Besides, the basis of this conclusion that otherwise foreign investors could not

78 *Revere Copper case*, p1331.

79 *Revere Copper case*, p1331.

receive fair and equitable treatment under the law of the host country was not without doubt.⁸⁰

In *Sapphire* case, the agreement did contain a choice of law clause but it also stipulated that the parties must perform the contract in good faith. The arbitration tribunal in that case considered the contract as having the quasi-international character and therefore it should not be governed by the domestic laws of any country or by any special legal system. It concluded that the general principles of law based on the customs of the civilized nations should apply. This was because the principle of *pacta sunt servanda* was the basis of all contractual relations. In other words, the principle of *pacta sunt servanda* was equally applicable to concession agreements and state contracts.

Some other commentators argue that the municipal law chosen by the contracting parties to State contracts “does not therefore apply in itself but as a law of renvoi. The presence in the contract of a provision referring to the municipal law of the host State does not therefore necessarily mean that internationalization must be ruled out: if such internationalization results from the other characteristics of the contract - and this is the case with most economic development agreements.”⁸¹

Recent literatures also supported the applicability of the general principles of law in concession agreement. The early authority McNair once pointed out in his article that if the law of the host country lacked some important principles, then the general principles of law should be applied.⁸² It should be pointed out however that McNair made a precondition for applying the general principles of law i.e. the law of the host country lacked some important principles. Nevertheless, he has always been regarded as the first advocate of the theory by the supporters of internationalization of concession agreements.

In any event, both international practice and theory manifest that the contracting parties to State contracts have the full autonomy in choosing the applicable law, including the law of the host country and the general principles of law. If there is no express choice of law clause in the contract in question, the applicable law should be the law which has the closest connection. This private international law principle has been increasingly recognized by the international community. International practice does not negate this principle either.

80 The arbitration tribunal quoted the opinion of academics by stating “Whatever the position may be under municipal law, it would be contrary to well established principles of international law to leave the question of State responsibility to the alien party to the determination by that State as to what it lawfully could or could not do. “ See *Revere Copper case*, p1331. Strictly speaking, the above views have not received wide support from the international community. It can, at best, represent the interests of transnational corporations.

81 See *Texaco case*, p18.

82 McNair, *The General Principles of Law Recognized by Civilized Nations* 33 Brit.Y.B. Int'l L, 1 (1957).

Conclusion

In conclusion, the nature of State contracts, internationalization of State contracts, liability of the State to compensation, the effect of stabilization clause and the applicable law are all important issues in the contemporary international law. This is more so with the widespread of globalization from economic sectors to other frontiers. The direct causes of disputes over the theory of State contracts included the de-colonization activities in the mid 20th century and the subsequent nationalization and renegotiations of concession agreements. After debating for more than half a century, opinions on many issues are still divided and no consensus can be reached. This is because in the past, every theory represents the interests of a specific economic group or a specific state group. On the whole, such theories focused on the obligations of and were therefore unfavourable to the developing host countries. However, as norms governing the behaviour of the international and national community, any principles of international law and municipal law must have a certain degree of objectivity and stability. From this perspective, some principles which are advantageous to some States or economic groups may turn out to be disadvantageous tomorrow to the same states or groups. Besides, with the growing globalization, the exercise of the principle of sovereignty is being restricted. Matters that were originally regarded as internal and therefore under the absolute control of states have now been directly or indirectly governed by the norms of international organizations and international treaties. This phenomenon will have an important repercussion on the attitude of the states towards State contracts. In the past few decades, the developing host countries have gained much more influence in the international community. Yet, with the world being fast globalized, its power structure has changed and is still being changed. Such changes will have important effects on direct foreign investment, the principles of sovereignty, the attitudes of developing countries toward transnational corporations and the formation and performance of State contracts.

CERTAIN FACTORS WHICH DECREASE THE EFFICACY OF ARBITRATION AND MEDIATION IN SETTLING INTERNATIONAL COMMERCIAL DISPUTES

*Syed Khalid Rashid**

Introduction

Recent years have seen a dramatic increase in the size and complexity of international commercial transactions. Parties to these transactions try to avoid disputes, but differences inevitably arise, needing speedy and inexpensive resolution. Unfortunately, international commercial litigation suffers with maladies like uncertainty, protractedness and costliness, all of which are anathematic to trade and business. Various ADR processes like arbitration, mediation and a combination of the two provide some refreshing and a reasonably quicker and inexpensive alternatives to resolve such disputes, but certain self imposed restrictions and other problems come in the way of their more effective use. There is a need to liberate these processes from un-necessary restrictions and also to make arbitration bias-free.

This paper briefly deals with four problematic issues connected with the use of arbitration and mediation in the settlement of international commercial disputes. These are: (i) problem created by localization of international arbitral proceedings; (ii) the problem of ethnic bias in international arbitration; (iii) reluctance to utilize equity and *amiable composition*; and (iv) reluctance to combine mediation and arbitration in the settlement of international commercial disputes.

The Problem of Localization of International Arbitration Proceedings

Today, a major problem confronting international commercial arbitration is the localization or varying power of intervention in arbitral proceedings given to national courts under the local laws of different countries. Article 5 of the UNCITRAL Model Law¹ has tried to set a uniform standard of judicial intervention, but many a government show reluctance in faithfully following the letter and spirit of this provision. Only 28 countries in the world have fashioned their arbitration laws on the lines of Model Law.² Consequently in more than 100 countries, the national courts are empowered to intervene in

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1 Article 5 of Model Law says: "In matters governed by this law, no court shall intervene except so provided in this law".

2 These countries are: Australia, Bahrain, Bermuda, Bulgaria, Canada, Cyprus, Egypt, Germany, Guatemala, Hong Kong Special Administrative Region, Hungary, India, Iran, Ireland, Kenya, Lithuania, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, Russian Federation, Singapore Sri Lanka, Tunisia,

domestic as well as international arbitrations, creating lot of problems especially for the latter type of arbitration.

International arbitral proceedings must be exempted from the reckless use of *lex loci arbitri*. Jurisdiction of the local courts may be allowed when enforcement of the award is sought, or to facilitate arbitral proceedings. It is to be accepted that international commercial arbitration is sufficiently regulated by Conventions and its own rules, either adopted by the parties themselves or drawn up by the arbitral tribunal. The extent of judicial regulation and control exercised by the national courts allowed under the Model law should be regarded as adequate.³ But very often this is not followed in practice.

One country that opted in favour of a substantial or rather excessive degree of delocalization is Malaysia. Section 34, inserted in the (Malaysian) Arbitration Act, 1952 through an amendment in 1980, provides as follows:

“34. (1) Notwithstanding anything to the contrary in this Act or in any other written law but subject to sub-section (2) in so far as it relates to the enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration held under the convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur.

(2) Where an award made in an arbitration held in conformity with the Convention or the Rules specified in subsection(1) is sought to be enforced in Malaysia, the enforcement proceedings in respect thereof shall be taken in accordance with the provisions of the Convention specified in sub-section(1) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, as may be appropriate.

(3) The competent court for the purpose of such enforcement shall be the High Court.”

Section 34 has come under judicial scrutiny in four cases.⁴ In all of

Ukraine and Zimbabwe. In addition, in part of U.K. (Scotland); USA (California, Connecticut, Oregon and Texas). *Source*: www.un.or.at/uncitral

3 See, Redfern, Alan and Hunter, Martin, *Law and Practice of International Commercial Arbitration*, 3rd ed., p.90 (Sweet & Maxwell London, 1999).

4 See, *Klockner Industries – Anlagen GmbH V. Kien Tat Sdn. Bhd.* [1990] 3 MLJ 183 (K.L. High Court, per Dr. Zakaria Yatim J., as he then was); *Soilchem Sdn. Bhd. v. Standard - Elektrik Lorenz AG* [1993] 3 MLJ 68 (K.h.High Court, per Abu Mansor J.); *Sarawak Shell Bhd. v. PPES Oil & Gas Sdn. Bhd.* [1998] 2 MLJ 20 (Court of Appeal, per Mahadev Shankar, Abdul Malek Ahmad and Mokhtar Sidin

these cases the courts held in effect what Zakaria Yatim J held in *Klockner*:⁵

“... the words in S.34 are ‘plain, clear and precise’. Reading the clear language of the section I am of the view that the section excludes the court from exercising its supervisory function under the Arbitration Act 1952 or under any other written law, including the Companies Act 1965, in respect of arbitrations held under the Rules of the Arbitration Centre. The words “written law” has been defined in S.3 of the Interpretation Act 1967 to mean Acts of Parliament and subsidiary legislation made thereunder; ordinances and enactments and subsidiary legislation made thereunder; and any other legislative enactments, or legislative instruments. ‘Written law’, therefore, includes the Companies Act 1965.

Therefore, the question for capacity or locus standi of a party to the arbitration the question of security for costs, or the issue of pleadings before the arbitral tribunal, cannot be determined by the court by virtue of S.34. These are issues which the arbitral tribunal has to decide and the court cannot and will not interfere with the proceedings of the tribunal. The function of the court is confined only to the enforcement of the arbitral award if the award is sought to be enforced in Malaysia”.

Such a complete exclusion of the supervisory jurisdiction of the court could sometime become a worrisome matter. In *Jati Erat*,⁶ for example, the High Court ruled out the possibility of issuing a *Mareva* injunction due to reason that section 34 applied to the arbitration. The court fully agreed with the need of issuing the *Mareva* because of the imminent danger of the flight of assets, that is, the subject-matter of arbitration. This case sharply focused public attention on the negative aspect of section 34 and the possible adverse effects of total delocalization.

Justice Mahadev Shankar of the Court of Appeal in his judgment in *Sarawak Shell’s Case*,⁷ cited with approval Lord Diplock’s following remarks in *Bremer Vulkan’s Case*,⁸ where the extent and scope of judicial intervention in arbitration is defined:

“For the moment, I confine myself to rejecting the notion that the High Court has a general (inherent) supervisory power over the conduct of arbitrations more extensive than those that are conferred

JICA); *Syarikat Yean Tat (M) Sdn Bhd v. Ahli Bina Pamong Sari Sdn Bhd* [1996] 5 MLJ 469 (Shah Alam High Court, per Abdul Wahab Patail, PK.)

5 *Klockner Industris – Anlagen Gmb H v. Kien Tat Sdn Bhd & Ors.* [1990] 3 MLJ 183 at 185.

6 *Jati Erat Sdn. Bhd. v. City Land Sdn. Bhd.*, [2002] 1 CLJ 346 per Low Hop Bing J.

7 *Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd* [1998] 2 MLJ 20 at 27

8 *Bremer Vulkan v. South India Shipping Corp.* [1981] 1 All ER 289 at 296

on it by the Arbitration Acts; nor do I suppose that the assertion of such an open ended power of intervention in the conduct of consensual private arbitration would be likely to encourage resort to London arbitration under contracts between foreigners which have no other connection with this country (England) than the arbitration clause itself.”

What has been said above in the context of England and approved by Mahadev Shankar JCA and two of his colleagues in *Sarawak Shell* with reference to Malaysia, is indeed true for the whole of the world.

Provisions similar to S.34 of the (Malaysian) Arbitration Act, 1952 but stated in a more balanced manner so as not to exclude the helpful judicial intervention may be inserted in the arbitration law of any country which has the political will to liberate the arbitral proceedings, particularly international arbitral proceedings, from the shackles of mandatory court intervention at every stage. Countries which do not like to deprive the national courts of the ‘supervisory’ jurisdiction over arbitral proceedings in international disputes may thus opt for a legal regime on the lines of Art. 5 of the Model Law and should clearly identify the number of occasions on which intervention shall be allowed. They should also resist the strong temptation to breach the limit set in Article 5.

Delocalization as allowed under Model Law or under Malaysian law has now become a fact of law and does not represent the vague idea of anational, floating arbitral process that was the target of ire of traditionalists.⁹ This concept is now being supported by many.¹⁰ The time has come to see a change in the views of those few who hold that even international arbitrations should be subject to the law of the place of arbitration (*lex loci arbitri*).¹¹ The correct view seems to be that international arbitration should not be completely regulated by the mandatory procedural law of the forum.¹² Minimal assisting role of courts, coupled with review power given to them at the time of

9 For instance, Park, William W., “The *Lex Loci Arbitri* and International Commercial Arbitration”, 32 I.C.L.Q. 2(1983); Mann, F.A., “England Rejects ‘Delocalised’ Contract and Arbitration”, 33 I.C.L.Q., 193 (1984)

10 For example, Shindler, A., “*Arbitration Sill Bound*”, 102 L.Q. Rev. 500(1986), Paulsson, Jan “*Delocalisation of International Commercial Arbitration; When & Why It Matters*”, 32 I.C.L.Q. 53-61(1983) Read, Pippa, “*Delocalization of International Commercial Arbitration: Its Relevance In the New Millenium*,” 10 *Am. Rev. International Arb.* 177(1999)

11 For example. Mann, F.A., “*Lex facit Arbitrum*”, in Sanders Pieter (ed.), *International Arbitration: Liber Amicorum For Martin Domke*, (1967), p.159; Mann, F.A., “*England Reject ‘Delocalised’ Contracts and Arbitration*”, 33 I.C.L.Q. 193 (1984); Park, W.W., “*The Lex Loci Arbitri and International Commercial Arbitration*”, 32 I.C.L.Q.2(1983)

12 Paulsson, Jan, *Arbitration Unbound: An Award Detached from the Law of the Country of Origin*, 30 I.C.L.Q. 358(1981); Paulsson, Jan, “*Delocalisation of International Commercial Arbitration: When and Why It Matters*”, 32 I.C.L.Q. 53 (1983); Avenessian, A.B., “*The New York Convention and Denationalised Arbitral*

enforcement are enough as suggested in Article 5 of the New York Convention, which allows denial of enforcement if the award negates procedural fairness, or public policy of the State or where the dispute deals with a matter which is unfit for arbitration.

The Problem of Ethnic Bias in International Arbitration

International arbitration culture means that universal notion of arbitral neutrality, lack of bias and absence of any notion of superiority complex in either the arbitrator or the parties which is recognized everywhere but sometimes not followed faithfully. A few who do not follow the above norms bring bad name to arbitration. In some cases, such a conduct creates very negative sentiments against international arbitration as such. Many of the arbitrations in the Third World countries are held under pre-drafted arbitration clauses contained in contracts signed by countries which cannot afford to refuse the terms of the contract. For instance, the release of some assistance fund is dependant on the signing of the contract that contains the arbitration clause, specifying some very inconvenient clauses. Such a party remains very uneasy and reluctant to settle its dispute through arbitration, for example, at a place not of his liking and choice. Such reluctance is not confined to the parties alone. There is also a general reluctance on the part of multi-national corporations to accept arbitration in which the venue is in the Third World countries. A fact which is hard to deny is that the AAA International Centre for Dispute Resolution in New York, and all the other most popular international arbitration centres are either in Geneva, or The Hague, London, Paris, Stockholm or Vienna. The establishment of arbitration centers in other parts of the world has not much affected the pre-eminence of the European venues. The establishment of Euro-Arab Chambers of Commerce to facilitate international commercial arbitration between the Arab and the ten European countries¹³ also failed to erode the importance of the above-mentioned European venues. This monopolisation of venues inevitably brought in the monopoly of European arbitrators, some of whom show distinct signs of haughtiness and a sense of ethnic superiority.

International commercial arbitration venues must be distributed equitably all over the world. Arbitral institutions must consciously make efforts to convince the parties to accept Third World venues, because the climate in many countries of this World is fast becoming more conducive for holding arbitral proceedings. It is necessary to do so because according to Redfern and Hunter,

Awards (with Emphasis on the Iran-United States Claims Tribunal), 8(1) J. Int'l. Arb. 5(1991); Read, Pippa, "Delocalization of International Commercial Arbitration: Its Relevance in the New Millenium", 10 American Review of International Arbitration, 177 (1999).

13 The countries are: Austria, Belgium, France, Germany, Greece, Ireland, Italy, Portugal, Switzerland and U.K

many less-developed nations in Africa and Asia “fear that arbitral tribunals, established under the auspices of arbitral institutions based in the world’s major trading nations, will have an in-built cultural and social bias against them... the problem is a real one; and one of which the international arbitral institution have become increasingly aware”.¹⁴ It is therefore not surprising to find Judge Mbaye of Nigeria, who was Judge of the International Court of Justice, saying that many Africans, Asians and Latin Americans-

“... see arbitration as a foreign judicial institution which is imposed upon them. In Africa ... everybody knows, in fact arbitration is seldom freely agreed to by developing countries. It is often agreed to in contracts of adhesion the signature of which is essential to the survival of these countries.”¹⁵

Prof. Ahmad Mahiou, Dean of Law, Alger University, expressed his lack of faith in arbitrators coming from the First World, because -

“They have a tendency to consider that the arguments of the Third World client are devoid of any legal basis, and to hold them ineffective once they fail to correspond with their own conception of the Law”.^{15a}

For reasons more serious than this, the Arab nations once lost confidence in international commercial arbitration. The self-righteous, contemptuous and haughty behaviour of certain Western arbitrators had been responsible for this calamity. They ridiculed the *Shari‘ah* (Islamic law) as a legal system, un-mindful of the fact that *ta‘ġlīm* (arbitration) has been a well developed component of *Shari‘ah* (Islamic law) and its roots go back into its 1400 years old history. Yet, Lord Asquith, the sole arbitrator in a dispute between the Sheikh of Abu Dhabi (where *Shari‘ah* is the law of the land) and the Petroleum Development Co. had the arrogance to make the following remarks in his award:

“If there exists a national law to be applied, it is that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran, and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.”¹⁶

14 Redfern, and Hunter, *Supra*, n.3 at 207

15 Mbaye, Judge of ICJ, in *60 years of ICC Arbitration – A Look at the Future*, ICC Publication no. 412 at p. 295(1984)

15a Cited in Redfern and Hunter, 3rd ed. *Supra* n.3 at 207, citing *60 years of ICC Arbitration – A Look at the Future*, ICC Publication No.412, pp. 235, 242, 243.

16 Ann. Dig. (1951) p.149; also Ahmad Abdel Hamid Achuch, *Le Regime Jwridique des Accords Pe'troliers dans les Pays Arabes* (1975), p.663, cited in El-Ahdab, Abdul Hamid, “General Introduction On Arbitration in Arab Countries”, in *Intl. Handbook on Commercial Arbitration, Supplement 27*, December 1998, p.1 at 14.

Similar were the remarks made by Sir Alfred Bucknill in the arbitration between the Governor of Qatar and the International Marine Oil Co. Ltd. (1953), betraying his ignorance of and contempt for *Shari'ah*:

“I need not set out the evidence before me about the origin, history and development of Islamic law as applied in Qatar or as to the legal procedure in this country. I have no reason to suppose that Islamic law is not administered there strictly, but I am convinced that this law does not contain any principles which would be sufficient to interpret these particular contracts”.¹⁷

A very hostile arbitral award given against the Government of Saudi Arabia in a dispute between the Government and ARAMCO prompted the Saudi Council of Ministers to issue the famous Decree 58 of 1963 prohibiting arbitration of disputes involving the Saudi Government, or any Ministry, Department or any of its agencies. Soon afterwards Libya followed the example of Saudi Arabia.¹⁸ In the words of the leading authority on the law of arbitration in the Arab countries, Abdul Hamid El-Ahdab:

“Many Arab countries now refuse the insertion of arbitration clause in their contracts with foreign countries. Also, in many of the Arab countries that acceded to the New York Convention, the courts refuse or delay granting a leave to enforce international arbitral awards, putting forward apparently legal reasons but the truth is different.”¹⁹

The above sad episodes and equally sad reactions in the history of arbitration in the Arab countries betray an utter disregard, on the part of arbitrators, for the principles of equal treatment of parties and ethnic neutrality. Such violations may play havoc with the emerging culture of international arbitration in the Third World countries. Russell reports ICC's practice to appoint as chairman a national of a different country from the countries of both the parties and the party-appointed arbitrators. “Some would go further, and insist that the Chairman does not come from the same kind of country as well. This might, we suppose, produce the following result: in an arbitration between, for instance, an African party and a United States party, the chairman of the tribunal could not be a national of any African country or of the United States: on the basis of this doctrine the United Kingdom, and possibly other countries in Europe, might also be excluded; the choice might be of a national of one of the

17 See, El-Ahdab, Abdul Hamid, *General Introduction on Arbitration in Arab Countries*, Int'l Handbook on Commercial Arbitration, supp. 27 (December, 1998), pp. 14 –15.

18 *Id* at 15

19 El-Ahdab, Abdul Hamid, *Arbitration With the Arab Countries*, 2nd ed., p.1(Kluwer Law International, The Hague, 1999)

Pacific Rim Countries”²⁰. However, it is rare to find rules like ICC rules and such a concern for neutrality as shown by a few.

The above stated facts bring us face to face with certain truths which must be confronted by every successful international arbitration: that the arbitrators must consciously remind themselves of and accept the equity of the cultural differences of the parties; that they must be competent to undertake a comparative analysis of the differences existing between major legal systems; that they must be culturally open minded, un-biased and thoroughly professional; that they never allow their personal background and training to dominate their approach to the issues under dispute.²¹ Any disregard of these principles may seriously compromise the future of international arbitration. Prof. Bernini, the Honorary President of the International Council for Commercial Arbitration, is full of misgivings about the prospects of the emergence of an international arbitration culture so long there is cultural and legal bias and continued emphasis, conscious or unconscious, on nationalistic supremacy. To quote his words:

“Building an international arbitration culture is the pre-requisite to the internationalization of international arbitration. This is not an utterance of facetious semantics: it is a warning.

At the present time, one may really doubt whether international arbitration is always international: national influences often remain paramount. This is true for a number of major systems where arbitration, inspite of the tendency to go international, still bears the stigma of strong domestic philosophies.”²²

Reluctance to Employ Equity and ‘Amiable Composition’ in International Arbitration:

Lord Mustill, the former Lord Justice and author of the famous book on arbitration, now turned into a very active international arbitrator, shows his extreme displeasure with the excessive amount of technicalities now forming part of international commercial arbitration. In his view, arbitration is now suffering from excessive flatulence of procedural rules and legal technicalities. He then makes the following amusing but correct remark:

“Nobody has yet discovered why the dinosaurs become extinct, but it is a reasonable surmise that their bulk was a significant

20 *Russell on Arbitration*, 21st ed. by Sutton, Kendale and Gill, (Sweet and Maxwell, London, 1997), p.123.

21 See, Lalive, “Enforcing Awards”, *60 years of ICC Arbitration A Look at the Future*, ICC Publication No. 412, p. 317.

22 Quoted in, Bernini, Giorgio, “Is there a Growing International Arbitration Culture?”, in Berg, Albert Jan Van(ed.), *International Dispute Resolution: Towards An International Arbitration Culture*, (International Council of Commercial Arbitration, The Hague, 1998), p. 44

factor. It would be pity if arbitration went the same way.... a course of slimming might be in order.”²³

It is indeed true that arbitral proceedings are fast becoming a carbon copy of litigation. But whereas in litigation the judge possesses the power to apply equity wherever he feels that the law is creating hardship and injustice; an arbitrator has no such power and is legally bound to strictly apply the applicable law, even though it may appear to cause hardship or injustice. His personal sense of equity and fair play are regarded irrelevant. The attitude of English courts on this point is clearly reflected in the following remarks made by Megaw J in *Orian Cia's Case*:

“... it is the policy of the law in the country that, in the conduct of arbitrations, arbitrators must in general apply a fixed and recognizable system of law, ... and that they cannot be allowed to apply.... equitable principles”.²⁴

Notwithstanding the fact that the English courts have upheld the validity of ‘equity clauses’ in arbitral agreements in some rare cases,²⁵ the overall stand of the English judiciary and law continues to be against the application of equity in matters of arbitration. This attitude is naturally reflected in all the Common law countries.

The complexity of contemporary international disputes calls for a variety of ways to tackle them. One such way could possibly be to allow the use of equity by the arbitrators in situations where he finds no definite guidance in the existing law, or the application of existing non-statutory principle is found to give rise to injustice. His authority to rely on equity in such circumstances should be there irrespective of the fact whether or not he is allowed by the parties to do so. It is so because equity is an inherent part of law, and its function is to interpret law in the context of facts so as to give it vitality. Equity’s function is “not to destroy law but to fulfill it.” Equity is not abstract justice, but justice according to law. Thus, such criticisms of equity that it is too subjective, intuitive and abstract that it can be measured by the length of the Chancellor’s foot, may

23 Mustill, Michael John, “*Arbitration: History and Background*”, *Journal of International Arbitration*, Vol. 6 (1989), p. 43 at 56.

24 Per Megaw J in *Orion Cia Espanta de Seguros v. Belfort Maats* [1962] 2 Lloyd’s Rep 257 at 264; see also, *Czarnikow v. Ruth, Schmidt & Co* [1922] 2 Kb 478. A slight relaxation of the rule was done by Lord Denning MR in *Eagle Insurance Co. Ltd. v. Yuval Insurance Co. Ltd.* [1978] 1 Lloyd’s Rep 357. But the judgment merely ousted ‘technicalities and strict construction.’

25 See, for example, *Home and Overseas Insurance v. Mentor Insurance Co. (UK) Ltd.* [1989] 1 Lloyd’s Rep. 433 (CA); *Deutsche Schatbau-und-Tiefbohr-rgesellschaft mbH v. Ras Al Khaimah National Oil Co* (*DST v. Takoil*), [1987] 2 All ER 769;

not be taken seriously.²⁶

It would be unwise to disregard such suggestions as made by Grotius, that law “includes everything, which it is more proper to do than to omit, even beyond what is required by the express rules of justice.”²⁷ What equity had succeed to do in the past and continues to accomplish in the present, justifies the remark made by Lord Denning M.R. that “equity is not past the age of child bearing.”²⁸ It is an undeniable fact that principles of equity have constantly developed and found new fields of application. This equally applies to the law of arbitration, which also has its strengths and weaknesses as any other law. To say that equity has no role to play in the realm of arbitration would not be realistic and correct.

The arbitrators should, therefore, be entitled in their own right, to have recourse to equitable principles of construction as well as power to apply notions of equity and justice wherever it appears necessary in adjudicating a dispute. To do so should not be interpreted as empowering an arbitrator to select and apply any rule in accordance with his whims. On the contrary it will simply allow him the discretion to refrain from applying strictly principles of law if doing so may create hardship to the parties in a particular case.²⁹ The occasions to do so may indeed be rare, but an arbitrator’s capability to do so would certainly add a new meaning to the arbitral process.

Acceptance of ‘amiable composition’ and ‘*ex aequo et bono*’ should facilitate the acceptance of ‘equity’:

Amiable composition and *ex aequo et bono* are identical concepts.³⁰ It confers an authority on the arbitrator to depart from the strict application of rules, and to decide according to broader notions of justice and fair play. However, in doing so he cannot leave behind rules of natural law, terms of contract between the parties and usages of the trade applicable to the parties.³¹

26 See, Judge Manfred Lacks, “Equity in Arbitration and in Judicial Settlement of Disputes”, in Muller, Sam (ed.in chief) and Mijs Wim (ed.), *The Flame Rekindled: New Hopes for International Arbitration*, p.127 (Martinus Nijhoff, Dordrecht, 1994); Molniss, Art “The Arbitration Bill and Equity Arbitration in England”, in Odams, A Martin, Higgins, Jodnna, *Commercial Dispute Resolution*, pp.109-134.

27 Grotius, H., *De Jure Belli ac Pacis*, III, Cap.xx at 47 (New York ed.1901) cited in *supra* n.25 at 131

28 Lord Denning, MR in *Eves v. Eves* [1975] 1 WLR 1338

29 See, Jarvin, S., “The Sources and Limits of the Arbitrator’s Powers”, in Lew, JDM.,(ed.) *Contemporary Problems in International Arbitration*, p.50 at 70 (1986)

30 According to Redfern and Hunter, an arbitral agreement drafted by an ordinary lawyer will say that the arbitrator is to act as “*amiable compositeur*”, but “if the agreement has been drafted by public international lawyers or scholars”, then *ex aequo et bono* is used. Redfern & Hunter, *supra* n.3 at 43

31 See, Jarvin, “The Sources and Limits of the Arbitrator’s Powers”, in Lew (ed.) *Contemporary Problems in International Arbitration*, 1986, p.50 at 70, cited in Yu, Hong-Lin, “*Amiable Composition – A Learning Curve*,” *Journal of International Arbitration*, vol.17, No.1(2000), p.79 at 80

This concept is nearly identical to the concept of equity, but with the difference that application of amiable composition is possible only where parties have empowered the arbitrator to it. That is, he is not empowered to do so in his own right. If we remind ourselves of the history of equity, it is very clearly evident that equity would never have developed if the Chancellor or the Courts were subjected to similar requirement of obtaining King's permission to apply a principle of equity and justice. Why the same should not be applicable to arbitrators. His position is equally precarious as that of the Chancellor in England of the past or a court of today. Arbitration today is dying under its own dead weight of rules, lengthy procedures and technicalities. Equity may help the law of arbitration to liberate itself from this cob-web of rigid technicalities. Lord Mustill complains of this flatulence in and bulkiness of the law of arbitration and recommends a drastic reduction in this dead weight. Authorising arbitrators to use equity and *amiable composition* will certainly help to streamline the law of arbitration.

Equity and Arbitration Under Islamic Law:

The position which Islamic law takes on the application of equity to arbitration emanates from the following Quranic verse:

“... and when ye judge between man and man, that ye judge with justice...”³²

According to El-Ahdab:

“The prevailing opinion in Moslem law derived from this (Quranic) text, is that arbitrators must settle disputes according to the rules of fairness and with respect to the public order. Their position is rather close to that of the ‘amiable compositeur’, in, say, French law, who has to settle a dispute in an analogous spirit to that which the parties would have had, had they been able to agree on a compromise..³³ some writers even held that in the *Shari'ah*, arbitration in ‘amiable composition’ is the rule and arbitration proper is the exception.”³⁴

However, when a Muslim arbitrator is empowered to judge fairly, it does not mean that he may ignore principles of Islamic law applicable to the dispute, or refuse to take into account such of those Islamic commercial practices which form an integral part of the Islamic commercial law.³⁵

32 *S̄irāh Al-Nisā (4), āyat 58*

33 El-Ahdab, *supra* n.14 at 48

34 Id. at 17, citing Omar El Kadi, *L'Arbitrage International entre le Droit Positif Francais et Egyptian*, pp. 190-191, these de doctorat, University of Paris

35 For details, see, for example, Beekun, Rafik Issa, *Islamic Business Ethics*, (International Insitute of Islamic Thought, Herndon, Virginia, 1997); Al-Qaradawi, Yusuf, *alāl and • arām in Islam*, Eng. Tr. by

Occasions which might prompt the arbitrator under Islamic law to apply equity to seek a just result may include:

change in economic climate or condition of a country or person which may render the performance of some contractual obligation unduly burdensome;

things done in good faith affecting the best interest of a party adversely; diligent, though not strict, performance of a contractual obligation by a party;

hoarding or making excessive profit or concealing defect in some commodity; etc.³⁶

Such occasions may confront any arbitrator in a common law country, but nothing could be done by him except to apply the rule as he finds it, ignoring the ill consequences which might be produced by such an application. This is what is required of him in the existing law.

It may not be correct to assume that uncertainty would be brought to the law of arbitration if equity is allowed to be applied to it. If certainty of law does not mean perversion of law certainty in its literal sense was never regarded as a stumbling block for considerations of justice, fair play and good conscience, and equity was allowed the ability to prevail over law. If it was true in the past and is still true today when courts are allowed to apply equity in appropriate circumstances, why the same could not be true today for the law of arbitration. If equity has not been allowed by the English jurists to be applied to arbitration, it should not be used as the reason to disallow its application to arbitration today.

Reluctance to Combine Arbitration and Mediation

Unlike the position in the Civil law jurisdictions,³⁷ arbitrators in the Common Law tradition cannot even think of mediating between the parties. If they do so, they become guilty of misconduct in the eyes of law and for this they may be removed. "I am a firm adherent to the school of thought", says Sir Laurance Street, "that denies acceptability of a person who has mediated subsequently filling the role of arbitrator, notwithstanding statutory recognition of this possibility."³⁸

Kamal Siddiqui and Shukry (Al Books, Delhi, 1988)(Chap.5); *Al Ghazali's Ihyâ Ulûm id-dîn*, vol.II, Eng. Tr. by Fazlul Karim (Kitab Bhawan, Delhi, 1982), pp.53-96

36 El-Ahdab, *supra* n. 14 at 49.

37 See, Koch, Christopher and Schafer, Erik, "Can it be Sinful for an Arbitrator actively to Promote Settlement?". *The Arbitration and Dispute Resolution Law Journal* (ADRLJ), pp.153-184 (Sept. 1999)

38 Street, Sir Laurance, "The Language of Alternative Dispute Resolution", [1992] ADRLJ 144

There are several reasons for this hostility, which on a closer examination appear very simple. For instance, it is alleged that in mediation, parties disclose many secrets to the mediator during caucus meetings, which he is not allowed to reveal without so authorized to anyone including to the other party. If the same mediator acts as arbitrator, he will naturally be carrying in his mind an unverified version of facts narrated by each party about itself and each other. It is contended the practice may affect the neutrality of the person who is converted from mediator to arbitrator. It is also said to violate due process and natural justice, as parties are deprived of their right to defend themselves. Sometimes, the negative allegations may affect the best judgment of the arbitrator.

However, these are not insurmountable problems in the sense that remedial measures can not be take care of these. For example:

- (i) Caucus may not be allowed, thereby eliminating the possibility of disclosure of secret informations to the mediator.
- (ii) Caucus may be allowed, but on a fully informed basis, that is, all the information received by the mediator-turned-arbitrator in private from a party shall be disclosed fully to the other party before the arbitration proceedings start; (Art. 10 of the UNCITRAL Conciliation Rules, 1980 provides that a conciliator may disclose the substance of any factual information received by him so that the other party may defend itself, unless the party giving the information requires him to keep it secret) or alternatively,
- (iii) Parties may appoint a different person as arbitrator.

Once these options are put to use, it may make the debate about the impartiality of med-arbitrator as only of academic interest.³⁹ The actual working of med-arb model and the success achieved in Asia and Europe by med-arb makes a strong case in its favour. It is worth mentioning that arbitration legislation in Australia⁴⁰, China⁴¹, Japan⁴², Hong Kong⁴³, India⁴⁴, Singapore⁴⁵,

39 Shilston, "Med-Arb- Can It Work?", 60 *Arbitration*, p.1(1994); Newman, "Mediation-Arbitration (Med-Arb) Can it Work Legally", 60 *Arbitration*, p.173(1994); and the correspondence on Med-Arb in 60 *Arbitration*, pp. 178-183 (1994); Buhning-Uhle, Christian, *Arbitration and Mediation in International Business: Designing Procedures for Effective Conflict Management*, p.209 (Kluwer Law International, The Hague, 1996)

40 Uniform Commercial Arbitration Act, S.27 (adopted by 5 of the 6 States and both of the Internal Territories).

41 Rules of the CIETAC (China International Economic and Trade Arbitration Commission) Arts. 45-50; also Arts. 51 and 52 of the Arbitration Law, 1994: See, Xiaobing Xu and George D. Wilson, "One Country, Two- International Commercial Arbitration – Systems", *Journal of Int. Arbitration*, vol.17, No.6(Dec. 2000), p.64

42 Rules of the Maritime Arbitration of Japan Shipping Exchange Inc. (Ordinary Rules), 1964, Section 24: Xiaobing Xu and George D.Wilson, *supra* n 40 at 65

43 Hong Kong Arbitration Ordinance, 1990, Sections 2A, 2B, 2C.

44 The Arbitration and Conciliation Act, 1996, section 30 (this section is similar in content as ss.2A, 2B & 2C of Hong Kong Ordinance).

45 International Commercial Arbitration Act, 1994

Korea⁴⁶, Bermuda⁴⁷, California and Texas⁴⁸ in USA and several Canadian Provinces and Territories⁴⁹ recognize med-arb.

If we take look at the provisions of the Hong Kong Arbitration Ordinance, 1990 it may give a broad idea of the contents of a model med-arb provision.⁵⁰

Combining arbitration and mediation may go a long way in helping to settle many international commercial disputes (i) speedily (by saving time wasted on undertaking the two separately), (ii) cheaply, and (iii) efficiently (by ensuring the judicial enforcement of mediated settlement as an arbitral award). The success achieved in China is quite revealing. More than 1000 disputes every year, representing the largest case load in Asia, are settled through med-arb under the aegis of CIETAC (China International Economic and Trade Arbitration Commission).⁵⁰

In Islamic law, combining mediation with arbitration is regarded as something normal as it treats arbitration as a forum for reconciliation.⁵¹ The

46 Commercial Arbitration Rules (approved by the Supreme Court) Art. 18(3) and 53: Branson, Cecil Q.C., "Alternative in Dispute Resolution", in Hartwell, GM Beresford (ed.), *The Commercial Way to Justice*, 191 at 206 (Kluwer Law International, 1997)

47 International Conciliation and Arbitration Act, 1993, ss. 3-21, 14(1): Branson, Cecil QC supra n. 45 at 206

48 California Conciliation Act, Cal. Civ. Proc. Code 1297. 341(West 1994); Texas International Commercial Arbitration and Conciliation Act, Tex. Rev. Civ. Stat. Ann. Art 249-34 (West 1994): Branson, Cecil Q.C., supra n. 45 at 206

49 Arbitration Acts of Alberta, British Columbia, Saskatchewan, Yukon, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Newfoundland

50 **Section 2A.** "Where an arbitration agreement provides for the appointment of a conciliator and further provides that the person so appointed shall act as an arbitrator in the event of the conciliation proceedings failing to produce a settlement acceptable to the parties (a) no objection shall be taken to the appointment of such persons as an arbitrator, or to his conduct of the arbitrator, or to his conduct of the arbitration proceedings, solely on the ground that he had acted previously as a conciliator in connection with some or all the matters referred to arbitration."....

Section 2B

- (1) If all parties to a reference consent in writing, and for as long as no party withdraws in writing his consent, an arbitrator or umpire may act as a conciliator.
- (2) An arbitrator or umpire acting as conciliator –
 - (a) may communicate with the parties to the reference collectively or separately;
 - (b) shall treat information obtained by him from a party to the reference as confidential, unless that party agrees or unless sub- section (3) applies.
- (3) Where confidential information is obtained by an arbitrator or umpire from a party to the reference during conciliation proceedings and those proceedings, disclose to all other parties to the reference as much of that information as he considers is material to the arbitration proceedings.
- (4) No objection shall be taken to the conduct of arbitration proceedings by an arbitrator or umpire solely on the ground that he had acted previously as a conciliator in accordance with this section."

Section 2C. ".....the settlement agreement shall, for the purpose of its enforcement, be treated as an award on an arbitration agreement and may, by the leave of the court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect."

51 Uscinski, Su and Zhang, "Alternative Dispute Resolution: China", in *Asia Business Law Review*, No. 21 (July, 1998), p.30 at 33, and Shinjian Mo, John, "Non-Judicial Means of Dispute Settlement", in

following Quranic verse is the one in which conciliation and arbitration are mentioned as parts of the same process:

“If ye fear a breach
Between them (husband & wife) twain
Appoint two arbitrators
One from his family
And the other from her’s;
If they wish for peace,
Allah will cause,
Their reconciliation...”⁵²

Thus, Islamic countries are all in favour of med-arb. A look at the arbitration laws currently in force in these countries shows the general acceptance of this concept.

Conclusion:

Problems discussed above are only indicative of the maladies with which arbitration and mediation suffer. These problems inevitably affect the rate of success achieved in the settlement of international commercial disputes. Some of the measures like *amiable composition* and med-arb are rarely used, probably due to lack of ADR culture or some latent suspicion lingering in the minds of traditionalists against these initiatives.

Those who are entrusted to search for better ways to settle international commercial disputes, must show willingness to embrace new ideas. Such an attitude is a pre-requisite for starting a new era in dispute resolution.

The misplaced insistence of the Western arbitral institutions to separate arbitration and mediation need to be reviewed. This practice has already created the unintended result of relegating mediation to a secondary position *vis-a-vis* arbitration. For instance, the insistence of the ICC to have separate rules for arbitration and mediation created the consequence whereby it received 2, 049 requests for arbitration and only 49 for conciliation during four years between 1993 and 1997.⁵³ At the Regional Center for Arbitration, Kuala Lumpur, which has separate rules for mediation and arbitration, not even a single dispute has been put to mediation/conciliation since the time of inception of separate rules a decade ago.⁵⁴ No possible harm may result out of combining mediation and

Guiguo, Wang and Mo, John (eds.) *Chinese Law*, p.757 at 775 (Kluwer Law International, The Hague, 1999)

52 See, Art. 1850 of *Mejelle*, Eng.tr. of Ottoman Civil Code, *Majallah al Ahkâm Al-Adliyah*, by Tyser, et al. (Lahore, 1980; reprint of 1901 ed.)

53 *Surah Al Nisâ* (4), *âyat* 35

54 Schwartz, Eric A., “*International Conciliation and the ICC*”, *5 ICC International Court of Arbitration Bulletin* (1994), cited in Koch and Schafer, *supra* n.36 at 162

arbitration.

There is ample of justification for the application of equity in the law of arbitration. As equity is applied to reduce the harshness and inequity of law, its application should logically be extended to arbitration law also where it is found to be harsh or inequitable. An arbitrator deserves to be vested with power to apply equity in situations where he finds it to be just. Arbitrator's ability to apply equity should be treated as an extension of the already accepted principle of allowing arbitrators to apply *amiable composition* and *ex aequo et bono*.

As party autonomy and minimal judicial intervention are the basic norms of the law of arbitration, in particular, international commercial arbitration, the continuing readiness of many nations to enact laws which allow excessive intervention by national courts in international arbitration poses a big problem and should be discouraged.

There is a need to have a fresh look at the settlement of international commercial disputes to find ways and means to better utilize mediation and arbitration, unhindered by avoidable hindrances⁵⁵.

55 The information is based on author's personal enquiry at the Centre. Upto 2001, the rules of arbitration and conciliation were published together by the Centre in a booklet. Now, these are printed separately.

**REPARATION OF THE WRONG:
PROBLEMS AND PERSPECTIVES**
[An Evaluation on the Compensation for the
Breach of Fundamental Rights]

A. Raghunadha Reddy*

Introduction:

The term 'reparation' denotes payments of money, restitutions of property, liberation of persons or other act by a person or State legally responsible for injury to another in order to repair that injury. The object of reparation is compensation of the victim and not punishment of the guilt. It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.¹ Restitution is the normal form of reparation. It is only when restitution is not possible, the aggrieved party is indemnified through damages or compensation.

Reparation is sometimes used in International law interchangeably with indemnity. Indemnity, however, has a narrower connotation in that, it refers only to monetary payments. Since World War I, the term 'reparation' has been used with reference to war claims in preference to the term 'war indemnity' reflecting the efforts of victorious belligerents to rest their demands on legal grounds. Among primitive people the victor in a war often paid reparation to the vanquished² on the theory that, the latter, having suffered the humiliation of defeat, should be compensated to assuage his wounded feelings, mitigate his desire for revenge, and thus restore conditions of peace. The situation after World War II resembled that common among primitive societies. The victor contributed heavily to building up the vanquished, though perhaps more from political expediency than concern for human welfare and general peace.³

Damages or compensation are to be measured by pecuniary standards.⁴ Grotius has pointed out that money is the common measure of valuable things.⁵ Compensation implies a complete restitution of the *status quo ante*.⁶ The

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1 See Oppenheim, *International law, vol. I (English Ed.)* at 353; *Chorzow Factory (Indemnity) case*, (1928) P.C. I. J. series A, No. 17, p.29

2 For details see Phillipson, Coleman, *Termination of War and Treaties of Peace* (London 1916)

3 see Moulton, Harold G, and Pasualsky, Leo, *War Debts and World Prosperity* (New York, 1932)

4 see *Arbitral Award in the Lusitania case (1923)*, 7 RIAA 32 at 34

5 V.M.Shukla, *Legal Remedies* at 67 (1991)

6 see *The Encyclopedia Americana*, Int. Ed. Vol.23, 384-6 (1974); see also *Norwegian Ship owner's Claim (1992)*, RIAA, 309 at 338.

problems connected with reparations concern (1) the justification of such demands; (2) the measurement of reparations in accordance with the justifications; (3) the problems of collection; (4) distribution of available reparations among allies and individuals and (5) the problem of the economic effects of reparation payments etc. Theoretically speaking the consequences of the wrongful act of a State may be end less but there must be an end to its liability. State responsibilities during the wars have been generally accepted in Art. 3 of Hague Convention, 1907.

The wrongs or injuries giving rise to State responsibility may be of original and vicarious. It arises for international delinquency⁷; for injuries to aliens; for acts of private individuals; for acts of mob-violence⁸; in respect of injuries suffered by persons serving the U.N.⁹; for acts of insurgents; for contracts with foreigners; for acts of government organs¹⁰; for breach of treaty or contractual obligations¹¹; in respect of expropriation of foreign property¹²; liability for acts of multi-national corporations¹³; and State responsibility for environmental pollution etc.¹⁴ States have a right under international law to protect the life, liberty, property and honour of their nationals living abroad¹⁵. Similarly a State has a duty under its Constitution to protect its citizen's life, liberty and property at the domestic level. How far a State is liable for the torts committed by it or by its servants against citizens? Is the State vicariously liable for the torts committed by it, that has resulted in violation of fundamental rights of the citizens? Does the century old feudal doctrine "king can do no wrong" apply to this situation? In other words, how far the doctrine of 'Sovereign Immunity' is applicable here? Are the courts empowered to award compensation to the victim without recourse to 'vicarious liability'? Can the State proceed against the errant official subsequently? In the research paper all these issues raised above are addressed and solutions/suggestions are mooted at the end. The study is confined to the Indian context though the author traces the historical origin of State tortious liability in other Common law and Continental countries.

7 Ian Brownlie, *Principles of Public International Law*, second Ed. At 442 (1973)

8 Charles, G.Fenwick, *International Law* at 338 (Third Indian Reprint, 1971)

9 Reparation for injuries suffered in the service of the U. N., *ICJ Rep* at 174 (1949)

10 W. Friedmann, *Law in Changing Society* at 337 (1970)

11 see *I' am Alone*, *PCIJ (1928) Series, A No. 17 (I) W.C.R. 646; Anglo Indian oil company case*, *ICJ Rep* (1952) at 93.

12 *General Assembly Resolution*, 626(vii) of 21st Dec. 1952.

13 See *Union carbide Corporation v. Union of India*, AIR, 1990 SC 1480.; *M.C.Mehta v. Union of India*, AIR1987, SC1086

14 see R.P.Anand "Development and Environment: the case of Developing Country", *IJIL* Vol. 20 at 1 (1980); C.G.Weeramantry, "The Right to Development", *IJIL* vol. 25.

15 J.G.Starke, *Introduction to International Law*, at 234 (1994)

State Tortious Liability – Historical Retrospect:

In Roman thought, the Emperor was above the law. The whole power of the State was concentrated in one single individual namely, the ruler whose will is law. Gradually the king himself became the State¹⁶. Political theoreticians from ancient times through middle ages and modern times, have provided divergent and sometimes diametrically opposite ideas about the nature, functions and relationship with the individuals of the State. While Aristotle¹⁷ had given justification for the origin of the State with an ethical purpose of preservation of life Hegel propounded the theory that the State is an end itself. Hegel's philosophy leads to the view that the State is immune, unaccountable and has no duty or liability to its citizens¹⁸. On the other hand, Locke¹⁹ propounds that the State has got a duty towards the citizens if not liability. Adam Smith recognizes to a limited extent the liability of the State. It is Laski who clearly postulates duties and liabilities of the State and provides a firm basis for government liability.

The position in England:

According to Bodin, sovereignty was supreme power over citizens and subjects, un restrained by the laws. The sovereignty was absolute and bound by the law of God and of nature. He was not responsible for tortious acts of its agents in his own courts unless he consented for that²⁰. The reason is based on the common law doctrine that "The king can do no wrong". Just as in feudal system no lord could be sued in the court, the king at the apex of the feudal pyramid was not sueable. Thus, the impact of feudalism is distinctly visible on the doctrine of sovereign immunity²¹. The social conditions of England were responsible for the non-accountability of the king. There the feudal lords were supreme. The theory that "the king can do no wrong" found expression in the *Blackstoneon Commentaries* as well²². The prerogative of the crown extends not to do any injury. It is created for the benefit of the people and therefore cannot be exerted to their prejudice²³.

Maitland, on the other hand, explained the maxim thus "English law does not provide any means whereby the king can be punished or compelled to make redress."²⁴ However, Ludwick Ehrlich pleads that the maxim has been

16 see Kelson, *Absolutism and Relativism in what is Justice*, at 201

17 Aristotle, *Politics*

18 Hegel, *The Philosophy of Law* (1821)

19 Locke, *The Treatises of Civil Government*.

20 Holdsworth, *History of English Law*, vol.4 at 192.

21 Pollack and Maitland, *History of English Law*, 2nd Ed. At518.

22 Blackstone: *Commentaries*, 10th Ed. (1887)

23 Blackstone, Sir William, *Commentaries on the laws of England*, vol.I, 245 (1844)

24 Maitland, F.W. *The Constitutional History of England*, 482 (1st Ed., 1955 Reprint)

misunderstood by Blackstone.²⁵ The maxim merely meant that the king was not privileged to do wrong. If his acts were against the law, they were wrongs. Professor H.W.R. Wade says that the true meaning of the maxim “the king can do no wrong” is that the king has no legal power to do wrong²⁶. The king was subject to law because according to Bracton it is the law that makes the king. The courts were the king's courts and he like other feudal lords could not be sued in his own courts. He could be a plaintiff but could not be made a defendant.

With the increase in the functions of the State, the crown in England became one of the largest employers of labour. Under these circumstances, the rule of immunity of the crown became highly incompatible with the demands of justice. It was in the thirteenth century only when a new development in the field of liability occurred. The Petition of 1258 demanded that the royal courts be endowed with new and anti-feudal powers²⁷. Thus, this may be taken as an attempt for seeking remedy against the feudal lords in the king's courts. Indirectly it was also an effort to make feudal lord who had hitherto been absolved of liability by virtue of his status, liable in law.

The monarchical superiority introduced by Norman kings favoured the king and exempted from liability. The king, however, allowed suits at pleasure. Lord Somervell traces the origin of king's legal liability in tort in *Mary de Shepey's* case of 1322²⁸. However, the king could waive his privilege of non-suability²⁹. The early remedy in tort cases against the king was not through a writ, but through a petition. It was only in 1843 when it was decided that a petition of right did not lie for tort³⁰. The king gradually lost his power after the revolution of 1688. The circumstances compelled the Crown to accede to the genuine claims in tort cases and the practice of nominated defendant emerged which was justified by the Privy Council³¹. However, House of Lords³² and the Court of Appeal³³ strongly denounced the practice and stimulated the Parliament to abolish the general immunity in tort. Position had changed entirely after passing of the Crown Proceedings Act, 1947. Now the Crown is vicariously liable to pay compensation for a tort committed by its servants just like a private individual³⁴.

25 Ludwick Ehrlich, “Proceedings against the Crown”, 42-49 (1921) Monograph extracted from 34 *Yale law Rev.* 2

26 Wade, H.W.R. *Administrative Law*, 664 (Fourth Ed., 1997)

27 Clause 29, petition of 1258 quoted in Pollock and Maitland.

28 Lord Somervell, “*The State as Defendant*”, 33 *ALJ*, 148-49 (1959)

29 First Statute of Westminster, 1275.

30 *Viscount of Counterbury v. Attorney-General* (1843) 1 Phill, 306; see *Tosin v. the queen* (1864) 16 C.B.N.S., 34

31 *Thomas Eales Rogers v. Rajendra Dutt*, 8 MIA, 103 (1860)

32 *Adams v. Naylor* (1946) 2 All.E.R. 241

33 *Royster v. Cavey* (1946) 2 All.E.R. 642

34 see Chapman, *Statutes on the Law of Torts*, 385 (1962)

The American Position:

The doctrine of foreign sovereign immunity is a part of customary international law, according to which no independent foreign sovereign can be sued in domestic courts without his consent³⁵. In the latter part of nineteenth century, the personified concept of sovereign immunity metamorphosed into “State immunity” with the emergence of republican form of governments in Europe and United States of America³⁶. However, the law of sovereign immunity has been undergoing far reaching changes since last few decades in the State practice of many States including America. Despite the absence of historical or philosophical justification, the doctrine of sovereign immunity made an inroad in American law perhaps because of necessity, expediency and syllogistic reasoning. In order to save the U.S. from bankruptcy as it owed huge debts contracted in the prosecution of the war, the U.S. Supreme Courts’ decisions³⁷ favoured the doctrine of State immunity on the basis of dichotomy of functions namely ‘governmental’ and ‘proprietary’. Under the Federal Tort Claims Act, 1946, now the U.S. is liable for the torts committed by its servants though the State is escaped from liability of tort arising out his discretionary function³⁸.

Tort Liability in France:

In France, liability of the State in its beginning, dates back to the Declaration of the Rights of Man in 1789. Before that time, France denied any responsibility of the State under the theory of the absolute monarchy. A combination of the Roman idea of ‘Imperium’ and feudal lordship for which the lawyers of the king like Bodin worked out the theoretical foundations, was attached to the position of the king and prevented suits in tort against him or the State which he represented. The famous and prevailing doctrine of that time was *le roi ne fait mal* which corresponds to the English principle “The king can do no wrong”. Since the creation of the Civil Code by Napoleon, sec. 1384 establishes the liability of the State³⁹. *The Conseil d’Etat* as early as 1855, began to claim exclusive jurisdiction over this area as against Civil Courts.⁴⁰ *Tribunal des conflits* ultimately decided that administrative courts

35 see P.M. North (ed.) *Cheshiers Private International Law* 98-9 (9th ed. 1974); H.Lauterpacht, “The problems of Jurisdictional Immunities of Foreign States”, *British Year Book of International Law*, vol. 28, p. 220-72 (1951); see also *Schooner Exchange v. M.C.Faddon*, (1812) 7 *Canch* 116; *Parliament Belge*, (1880) 5 P. D. 197; *Ex Parte Republic of Peru*, (1943) 318 U.S. 578.

36 S.Sucharit Kul, *State Immunities and trading Activities in International Law*, 1-3(1959); N.Ch.Dunbar, “*Controversial Aspects of Sovereign Immunity in the case of some States*”, *Recuil Des Cens* 203 (1971)

37 See *Cohens v. Virginia*, 19 U.S. 264(1821); *Gibbons v. U.S.*, 75 U.S. 269 (1868); *Kawwankoo v. Polyback*, 205 U.S. 347

38 see, “The Discretionary Function Exception of the Federal Tort Claims Act, (1953), 66, *Harv.L. Rev.* 488 (1953); *Dalehite v. U.S.*, 346, U.S. 15 (1953)

39 see Street, “*Governmental Liability: A Comparative Study*”, 22-23 (1953)

40 see *Rothschild case*, *Conseil d’Etat*, 1885, Rec 707

should have jurisdiction over State liability and not the civil courts⁴¹.

While in the beginning the French courts adopted the notion of 'fault' as the basis for public tort liability, its character was fundamentally changed with the gradual introduction of 'service-connected' faults and 'personal faults'. It is only in the case of service connected fault, the State is liable.⁴² It is submitted that the State liability rests on the idea that the 'State is an honest man' and does not evade responsibility for damage done by wrongful acts by raising the shields of immunity. The State represents the community and the government means a group of individuals who, are at the helm of affairs.⁴³ The ever increasing functions of the State are discharged by the Government with the help of a large number of employees. Service in the Government does not make men free from their human fallibility. Excluding the State from legal responsibility is fraught with danger which may ultimately threaten liberty⁴⁴. Infact, the problem of the State liability for tortuous actions, as Friedman points out, has long ceased to be a major juristic problem in Continental Jurisdictions.⁴⁵

Tortious Liability of the State in India:

In ancient period, the law was supreme and the king was not only responsible for his own deeds, but he had to be accountable for any transgression perpetrated by any other man within his administration. He could be chided by an ordinary citizen if he ignored his liability. Thus, there was no legal immunity for the king. The common law rule of immunity had no place in the Indian kinship⁴⁶. According to Manu, the king must restore the stolen property when recovered and must compensate when not recovered⁴⁷. Like wise, the prince and the servants of the king were all liable in law for the wrongs done to their subjects⁴⁸. In the Muslim period, the officers of the State were accountable for the wrongs committed during the course of their employment. A police officer was personally liable to pay compensation for the wrongful arrest of a citizen⁴⁹. After the commencement of the Constitution Art.300 defines the extent of Government liability for the torts committed by its employees.

41 see, *Blanco* decision, T.C. 8th Feb. 1873, Rec, Ist sup 61

42 *Pelletier case*, Sirey 1905, 3, 113 cited by street; see also *Tomasco Creco case*; *Auxerre case*, Dall.per 1906, 3, 81; *Anquet case* Dall.per.1913, 3, 26 cited by street.

43 F.Ridley and J.Blonder, *Public Administration in France*, 148 (1964)

44 see Herold J.Laski, *A Grammar of Politics*, 394 -95 (1960 Reprint)

45 W.Friedman, *Law in a Changing Society*, 300 (Abridged First Indian Reprint. 1970)

46 Radhabinodpal, *The History of Hindu Law*, 180 (Tagore Law Lectures, 1930) 1958

47 Sarkar U.C., *Epochs in Hindu Legal History*, 99 (1958); *Arthasastra*, Ch. XVI; see also Max Muller, *The Sacred Books of the East*, vol. XXV, Ch. VIII at 260 (1886)

48 Nariman F.S., "Government Liability in Civil Law", *Law and Commonwealth*, 361, (First ed. 1971)

49 Ahmad M.D., *The Administration of Justice in Medieval India*, 24(1941); see also *Haji Zahid and Pirji v. State*; *Sher Muhammed v. State*, where decrees were passed against the State.

Emerging Compensatory Trend: Death Blow to Sovereign Immunity:

The question of State liability for wrongful acts of its employees has assumed considerable significance in the latter half of the twentieth century, particularly in the context of the State donning innumerable functions for promoting welfare of its citizens. Misuse or abuse of power by these employees of their negligence may cause injury to person or property of the citizen and involve even an assault on his fundamental rights. Such a situation calls for an adequate mechanism for determining liability of the State and compensating the victim. It is unfortunate that, the State which has extended its tentacles practically into all spheres of activities has not thought it fit to enact a statute for determining the citizen's claims against the all powerful State. Indeed, the absence of such a mechanism has put an onerous task on the judges who have evolved in their own way some principles and forged new tools for meeting the aforesaid situation.

The Government of India was made liable for the acts of its servants in *P&O. Steam Navigation*⁵⁰ where Peacock C.J., seemed to hold that Government immunity had no place in Indian tort litigation. It is in this case that the distinction between sovereign and non- sovereign functions of the East India Company appears to have been first made after the Government of India Act, 1858. Infact, the general liability of the Company for suit either in England or in India was never in doubt⁵¹. Peacock C.J., who delivered the judgment held that for the negligence of its servants in doing acts not referable to sovereign powers of the East India Company would have been liable and so the Secretary of State for India was equally liable. This observation later on created confusion as to classification of Governmental functions into 'sovereign' and 'non-sovereign' categories.

It may be pointed out here that most of the sovereign functions enumerated in the above case were referable to the 'act of state'. However, the Madras⁵² and Bombay High Courts⁵³ expressed the view that the Government would also be liable for torts committed in the exercise of sovereign functions. It is submitted that the view expressed by these High Courts at a time when imperialism reigned supreme is more in consonance with the modern ideal of protecting the individual against the caprice of the State than some of the decisions of the recent times, thus, highlighting the fallacy of the classification of 'sovereign' and 'non-sovereign' functions.

50 *P&O Steam Navigation Co. v. Secretary of State for India*, (1868-1869) 5 B.Com H.C.R. App.1, p.1

51 The only statute which did provide for the immunity of the East India Company and its officers was the Act of settlement of 1781 which provided immunity only for "acts done in connection with the collection of revenue".

52 *Secretary of State for India v. Hari Bhanji*, I.L.R. (1882) 5 Mad. 272

53 *Rao v. Advani*, AIR, 1949 Bom. 277. The Supreme Court approved this view in *Province of Bombay v. Khushal Das*, AIR, 1950 S.C. 222

In *Rajasthan v. Vidyawati*⁵⁴, the Supreme Court observed that there was no justification in principle or on the ground of public interest for not holding State liable vicariously for tortious acts of its servants. However, in *Kasturilal* case,⁵⁵ the State was absolved from liability for torts committed by police officers in the exercise of delegated sovereign powers. The 'sovereign' and 'non-sovereign' dichotomy was again openly supported by the Court. This is no longer tenable in the present day changed social context. The very concept of sovereignty has been changed and the people therefore, are the real sovereigns⁵⁶. As a result of the decision in *Kasturilal* the hapless victims are at the mercy of uncertain judicial law-making. The defence of sovereign immunity and water tight compartmentalization of the functions of the State as sovereign and non-sovereign is highly reminiscent of *laissez-faire era*. It is out of time with modern jurisprudential thinking and unworkable in practice.

The defence of sovereign immunity was not taken up by the State when reparation claims were founded upon violation of the fundamental right to life and personal liability under Art. 21 of the Indian Constitution. The question was considered by the court, for the first time, involving an inhuman act by the police⁵⁷. The Court conceded the State liability but did not pronounce on the issue of compensation. The Supreme Court has evolved the remedy of compensation to the victims for the first time in *Rudal Shah*⁵⁸ case where the petitioner was illegally incarcerated. *Rudal Shah* is a landmark in Indian human rights jurisprudence where the Supreme Court articulated compensatory jurisprudence for infraction of Art.21 of the Constitution⁵⁹. The Court made it clear that the State must repair the damage done by its officers to the petitioner's rights. The expansive interpretation of Art.21 has imposed a positive duty upon the State for protection of people's liberties. This duty of the State to protect the individual's property was considered by the Court in *R.Gandhi v. Union of India*⁶⁰. The compensation was claimed for destruction of property of the victims due to arson and looting. The High Court upheld the compensation claims for rehabilitation of the affected persons following *Pavement Dwellers*⁶¹ case, where the Court observed that the deprivation of the right to property would amount to deprivation of right to life under Art.21 of the Indian Constitution. Because, no person can live without the means of livelihood to the point of abrogation.

54 AIR 1962 S.C. 933

55 *Kasturilal Raliaram Jain v. State of U.P.*, AIR, 1965 S.C. 1039.

56 *Union of India v. Harbans Singh*, AIR, 1959 Punj. 39; *Baxi Amrit Singh v. Union of India*, 1973, 175 PLRI

57 *Khatri v. State of Bihar*, AIR, 1981 S.C. 928; 1068.

58 *Rudal Shah v. State of Bihar*, AIR, 1983 S.C. 1086; see also *Sebastian M.Hongray v. Union of India*, AIR, 1984 S.C. 571; *Bhimsingh v. State of J & K*, AIR, 1986 S.C. 494

59 Art.21 of the Indian Constitution deals with a persons right to life and personal liberty.

60 AIR, 1989 Mad. 205.

61 *Olga Tellis v. Bombay Municipal Corporation*, AIR, 1986 S.C. 180

It is submitted that wherever there is a question of violation of fundamental right particularly right to life, the role of the courts hitherto was no more than the protector and custodian of the indefeasible rights of the citizens. Now-a-days, the courts are empowered to proceed further and give compensatory relief under the public law jurisprudence within the constitutional scheme for the wrong done due to the breach of public duty by the State in not preserving the life or liberty of the citizen. Award of compensation for the breach of Art.21 of the Constitution is therefore, not only to civilize public power but also to assure the citizens that they live under a legal system wherein their rights and interests are protected and preserved. Further, the courts have the obligation to satisfy the social obligations of the citizens. Since the courts and the law are for the people they are expected to respond to their aspirations⁶².

Public law proceedings serve a different purpose than the private law proceedings. The primary source of the public law proceedings stems from the prerogative writs and the order of monetary relief is therefore to be read into the powers of the Supreme Court under Art. 32 and of the High Courts under Art. 226 of the Indian Constitution. Hence, the grant of compensation for the violation of Art.21 is an exercise of the courts under the public law. It is for penalising the wrong doer and fixing the liability for the public wrong on the State which failed in the discharge of its public duty to protect fundamental human rights of the citizens. Though there is no express constitutional provision for the grant of compensation when right to life is violated, the Supreme Court has judicially evolved the constitutional remedy by way of compulsion of judicial conscience. This is the only effective remedy to apply as balm to the wounds and give much solace to the family members of the aggrieved or victims. It is the only practical mode of enforcement of the fundamental rights with a view to preserve and protect the rule of law⁶³.

Basically the idea was that a person should be held responsible for his own fault. This was also asserted by Plato⁶⁴ in his laws that a person should be made liable for his own sins. However, in England, after the Norman conquest, it was firmly established that the master would be liable for his servants or slaves torts only when there is an express command of the mater to the servants wrong. In the seventeenth century this limited form of liability was found inadequate due to rise in commercial transactions. Consequently, a new development took place when sir John Holt in the case of *Tuberville v. Stamp*⁶⁵

62 *D.K.Basu v. State of West Bengal*, AIR, 1997 S.C. 610 at 625

63 see *Nilabati Behera v. State of Orissa*, AIR, 1993 SC 1960; see also *N. Nagendra Rao & Co. v. A.P.*, AIR, 1994 SC 2663.

64 Plato, *Republic*.

65 (1967) 1 Ld. Raym. 267

held that “master would be liable for his servants tort if he had given his implied command”. This ‘implied command’ can only be inferred from the general scope of the servants employment. Accordingly, a master would be liable for his servants’ tort if he had committed it during the course of employment. Justice Holt was therefore, the founder of the modern law of vicarious liability.

Vicarious liability is based on the maxim ‘Respondent Superior’ which means superior is responsible or let the principal be liable. It also derives its validity from the maxim *Qui Facit per Alium Facit per se*, which means he who does an act through another is deemed in law to do it himself⁶⁶. Further, if a person commits a tort while acting on behalf of another but without his authority and that other subsequently ratifies that act, he thereby becomes responsible for it. Such an act becomes the act of the principal in the same way as if it were done with previous authority⁶⁷.

Now, the State is the biggest employer of servants who are discharging multifarious functions touching various fields. In view of transformation of police State into welfare State, the Government will necessarily have to interfere in varied activities through its servants. In doing so, the servants commit torts while acting on behalf of the State. However, the court in *Saheli*⁶⁸ came to the rescue of the State by showing a way to recover compensation so paid from the recalcitrant officials without recourse to ‘vicarious liability’ and rejected the defence of sovereign immunity laid down in *Kasturilal*. It is submitted that the State after paying the amount of compensation is entitled to be indemnified by the wrongdoer. Otherwise, the State exchequer would dry out of funds on the ground of vicarious liability for ‘no fault’ of the State. On the other hand, the new trend would fix up responsibility also on the part of the employee and prevent him from abdication of duties.

The whole question of sovereign immunity was again examined by the Supreme Court in *Common Cause, a Registered Society v. Union of India*⁶⁹ where the doctrine was rejected. The State liability rule as laid down in *P&O Steam Navigation* case is outmoded as the people are real sovereigns in a democracy. The increased activities of the State have made a deep impact on all facets of citizen’s life and therefore, the liability of the State must be made co-extensive with the modern concept of a welfare State. The Apex Court rightly observed that in this process of judicial activism, *Kasturilal* has paled into insignificance and is now no longer of binding value.

66 see *Baxi A. Singh v. The Union of India*, PLRI (1973) 75

67 Every ratification of an act relates back and there upon becomes equivalent to a previous request. For details see *Wilson v. Tumman*, (1845) 6 M&G 236.

68 *Saheli, A Women’s Resources Centre v. Commissioner of Police, Delhi*, AIR, 1990 SC 513

69 AIR 1999 SC 2979.

*D.K.Basu v. West Bengal*⁷⁰ is an important case in which the Supreme Court considered a public interest litigation for dealing with the complaints of custodial violence and deaths in police lock ups. Monetary compensation is based upon the principle of strict liability and the State is not allowed to avail the defence of sovereign immunity. The relief is in addition to the traditional remedies without prejudice to civil suits. The forum awarding compensation may take into consideration the economic conditions and other humanitarian grounds of the victim. Recently, the court awarded compensation to the parents of the deceased who died in the judicial custody in *Ajab Singh v. State of U.P.*⁷¹ Likewise the Supreme Court allowed compensation claim to the members of the family of deceased in 'fake encounter' in *People's Union for Civil Liberties v. Union of India*⁷². In *Forum v. Union of India*⁷³ the court awarded compensation to the rape victim. The court went to the extent of directing the State to pay compensation to a patient for its failure in providing emergency medical assistance and for non-availability of bed in a State run hospital⁷⁴.

In *M.C.Mehta v. Union of India*⁷⁵ (Olium Gas leak case), the Supreme Court held that the scope of Art.32 is wide enough to include the power to grant compensation for violation of fundamental rights. The power of the court under Art.32 is not merely preventive but also remedial in nature, i.e., power to grant compensation. However, compensation only in 'appropriate cases' and not in every case. The 'appropriate cases' are those cases where the infringement of fundamental right is 'gross and patent' that is incontrovertible and *ex facie* glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons or it should appear unjust, harsh and oppressive on account of their poverty or disability or socially or economically disadvantaged position to require the person affected by such infringement to initiate and pursue action in civil courts.

The court in *Nilabati*⁷⁶ made it very clear that the doctrine of sovereign immunity has no application to the constitutional system and is no defence to the constitutional remedy under Arts. 32 and 226 of the Constitution. The court, further, fixed strict liability as the basis in Public law for the award of relief when right to life is violated. Following *Nilabati Behra*, the court held that the provisions of Art. 9 (5) of International Covenant on Civil and Political Rights, 1966 are enforceable which say that any one who has been victim of

70 AIR 1997 SC 610.

71 AIR 2000 SC 3421.

72 AIR 1997 SC 1203.

73 (1995) 1 SCC 14; see also *Bodisathwa Gautam v. Subrachakraborty*, (1996) 1 SCC 490.

74 See *Paschim Banga Khet Majdoor Samithi v. State of West Bengal*, (1996) 4 SCC 37; see also *Paramannada Katara v. Union of India*, AIR 1989 SC 2039.

75 AIR 1997 SC 3021.

76 See *supra* note 63.

unlawful arrest or detention shall have an enforceable right to compensation for enforcing fundamental rights. It is surprising to note that the Supreme Court has read the international treaty provisions into the constitutional field. It is to be noted the courts of Ireland⁷⁷ and the Privy Council⁷⁸ while interpreting the Constitution of Trinidad and Tobago and the court of Appeal in New Zealand in *Baigent* case⁷⁹ were influenced by these judicial trends. They echoed the same sentiment when faced with similar situations. The rule of strict liability was formulated by the House of Lords in *Rylands v. Fletcher*⁸⁰ thereby recognizing 'no fault' liability. The Supreme Court in *Olueum Gas Leak* case expressly stated that such liability will not be subject to exceptions as have been recognized in *Rylands v. Fletcher*.

Similarly liability is to be fixed on Union Carbide Corporation – a multinational corporation registered in U.S.A. for violation of right to life in Bhopal due to leakage of MIC gas⁸¹. In 1991, as a legislative sequel to the ruling of the Supreme Court in the *Olium Gas Leak* case and the *Bhopal* litigation, the Indian Parliament passed the Public Liability Insurance Act, 1991(PLIA) that purported to provide immediate relief to the victims of industrial accidents and incidents occurring as a result of handling of hazardous substances. The Act makes it mandatory for every owner to take out insurance policies before handling any hazardous substances for coverage against any liability that may arise on account of accident or incident involving these substances⁸². In effect, the Act is also an answer to reflections of the Supreme Court in *Charan Lal Sahu's* case⁸³ where a call had been made to enact such a legislation. In 1995, National Environmental Tribunal Act was passed providing strict liability for compensation arising out of damage to the environment caused due to accident. The Act imposes liability on the basis of non-fault. This clearly shows how the courts in India have been concerned with corrective justice and to that end formulating an overall social policy. Change in the law and indeed in the legal ethic has therefore been achieved through the legal institutions.

Conclusion:

In Indian democracy, there is no ruling class and ruled. The State represents the community, and the injury gets distributed amongst all members of the community in case of injury to a private individual due to wrongful act

77 *Byrne v. Ireland*, (1972) 113 IR 241 at 264.

78 *Maharaj v. A.G. of Trinidad and Tobago* (No.2) 1978, 2 ALL. ER 670.

79 *Simpson v. A.G.* 1994 NZIR 667.

80 1868 L.R. 3 H.L. 330

81 *Union Carbide v. Union of India*, Bhopal Gas case is still pending in the American Courts though compensation was paid through judicial settlement of the Supreme Court, 1996 (2) *Scale* 410.

82 For literature on the PLIA see generally S.N.Singh, *Public Liability Insurance Act*, (1991).

83 *Charan Lal Sahu v. Union of India*, 1 SCC 613

of the State. Therefore, the State should compensate the injured person for any type of governmental action. This is the ideal which has inspired the common law and continental jurisprudence. The judicial trends in India in the matter of awarding compensation for violation of fundamental rights is a wholesome development in the field of State tortuous liability. One can witness shift of the State immunity doctrine into the doctrine of strict liability by judicial polemics. The absence of legislation in this field has left the question to the judicial adjudication. Hence, it is suggested that a parliamentary legislation is the only a way out in remedying the situation.

ANALYSIS OF ORISSA RELIEF CODE AND DISASTER PREPAREDNESS DURING ORISSA SUPER CYCLONE 1999

Bhavani Prasad Panda and Minati Panda***

Introduction:

In a welfare State, the government accepts the responsibility of risk management and corresponding relief operations. Accordingly positive measures are undertaken to alleviate the distress of human beings and life of living creatures in the disaster affected areas. The success or otherwise of relief measures is to be determined by the criterion to what extent distress can be mitigated rather than financial indicators. The subject of 'disaster management' does not find mention in any of the three lists appended in the 7th Schedule of the Indian Constitution. The basic responsibility for undertaking rescue, relief and rehabilitation measures in the event of natural disasters is that of the concerned state governments. The role of the central government is supportive, in terms of supplementation of physical and financial resources and complimentary measures in sectors like warning, transport, interstate movement of food grains and deploying the defence forces like army, navy and air-force in rescue operation. By the time of Orissa disaster the central government has been contemplating to have an integrated approach and to this end to initiate an appropriate legislation and associated rules to achieve an overall national competence and self reliance vi-a-vis international initiatives. It was ever since realized that a critical input required for a comprehensive and coordinated approach in the adoption of a multi-dimensional approach in involving all concerned agencies in the risk-management scheme of operation. A high powered committee (HPC) was constituted in August 1999 by the Central Government with Mr. K C Pant as Chairman; the members were drawn from other ministries, States, NGOs and experts from relevant fields¹.

In disaster situations, official routine need be relaxed to meet requirement of the abnormal situation while at the same time it also is necessary to guard against unnecessary and reckless expenditure of public funds. In this direction the Orissa Relief Code 1980 (hereafter 'the Code') is a comprehensive document brought out by the State government of Orissa on 6th February 1980, and operated from 29th March 1980². The Code supercedes the Bihar and Orissa

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1 HPC in August 1999 was the first attempt in India towards a centralized, uniform, systematic, comprehensive and holistic treatment to all possible types of disasters. The original mandate was confined to preparation of management plans for natural disasters only. Later into the scheme the man-made disaster situations were also referred.

2 The Commissioner & Secretary to Governor Shri RK Mishra submitted the draft on 6th February 1980 with an introduction to the code wherein it was stated that the Government decided to frame a fresh relief code after the catastrophic cyclone of 1971, and the work was entrusted to Shri KK Mishra,

Famine Code, 1930³. The Code was put to test during the devastating Orissa Super Cyclone-29th-31st October 1999, which left the state of Orissa poorer by several thousand crore of rupees and with a death toll of 10000 human lives and greater many cattle life (official figures), over night. In this article an effort will be made to critically review the various provisions of the Code 1980 relating to Cyclonic and Tidal Disaster in particular vis-à-vis Orissa Super Cyclone 1999 disaster preparedness.

History and layout of Orissa Relief Code⁴ :

The disaster management and mitigation mostly are being a series of integrated administrative actions, and the Relief Code 1930 being a British vintage appeared outmoded due to Independent Indian shift of administrative emphasis from law and order to social welfare and economic development by virtue of the constitutional commitments. This brought about a phenomenal change in the concept of relief. In the past the primary object of relief was confined to save life, the government was expected to make every effort save the population from starvation, extremity of suffering, or danger to life, ensuring at the same time that there was no tendency towards indiscriminate government charity; it was primarily a rescue operation.

To supplement the Code 1930, the exigencies of drought, flood and cyclone situations the government had issued executive instructions as-

1. Circulars and Instructions on Flood Relief Measures 1960
2. Handbook of important Circulars on Drought Relief Measures 1966
3. A compilation of Circulars and Orders issued by Revenue Department 1972

The Code 1980 has the primary object not only to ensure that no one dies of starvation, but also to prevent physical deterioration in living standard and destitution of people, assistance has to be provided to enable them to resume their, normal or ordinary pursuits of life on return of better times and

OAS(I), who prepared the first draft code, subsequently Shri PS Chandra produced another draft code, and later on the recommendations of 6th Finance Commission with the changed objectives the Code 1980 was made ready; the final draft was completed on 31st March 1978 by Shri DG Kar, meanwhile the 7th Finance Commission issued revised instructions for financing relief expenditures in their letter no.43(1)-P.F1-79 dated 25th April 1979. The aspects of 7th Finance Commissions were incorporated with the consultation of Finance department, CD &SW department, I&PR department, and the Board of Revenue (SR). The Relief Code was put to operation by the Addl. Chief Secretary K S Chandrasekharan on 29th March 1980.

3 The Government of India appointed a commission, to enquire into the administration of relief during famine of 1899-1900. The report of the Commission was published in 1901. In the light of recommendations of the Commission several of the then provinces took steps either for framing or for the revision of their Famine Codes. The Bihar and Orissa Famine Code, 1913 was having provisions mostly to meet situations arising out of the famine conditions and flood, this was revised in 1930. The Code 1930 was in force when Orissa as a separate was formed in the year 1936.

4 Ibid. note 1&2

simultaneously encourage the village community in making concerted and continuous effort to fight common misfortune. Approach to relief has become both preventive and curative⁵.

In the Code 1980, the onus for relief was squarely put on the State and extends not only to prevention of drought or flood but also maintenance of a certain standard of economic health of the people. The code was amended from time to time with newer executive directions supplementing the 1980 provisions; the same was published by the State Government of Orissa in the year 1996.

The Orissa Relief Code 1980 as updated on 16th January 1996 consists of 280 sections spread in XVII chapters, appended with XLVII government orders and circulars and appropriately designed annexure containing various forms and tables of records, returns and reports. Chapter-V deals exclusively with 'Cyclone and Tidal Disaster'. While matters concerning to relief works, gratuitous relief and feeding programme, administration of relief given by other governments, semi-governments, non-official organisations and individuals, care of orphans and destitute, health and veterinary measures, agricultural measures and provisions of credits, strengthening of Public distributions systems and stocking of food stuff in vulnerable areas, special relief to weavers, artisan and others are provided independently in later chapters of the code.

The Code 1980 is applicable for administration of relief measures in the entire state of Orissa in respect of natural calamities which are fairly widespread e.g., drought, flood, cyclone & tidal disasters, earthquakes, volcanic eruptions, heavy rains, etc and also those that are localized, e.g., gale winds, whirl winds, accidents relating to communications and transport services, lightning, thunder squall, violent epidemics, forest menaces, etc.

The relief operations should be viewed as an integral part of rural welfare and development, and any isolation scheme of dealing should be avoided. The general principles of relief measures are:

- i. Provisions for labour intensive work;⁶ -(this provides for preparation of Contingency Plan, hereafter CP)

5 Section 3: Boosting of the morale of the public in times of disaster is very necessary and is therefore, an important objective of the relief operations.

6 Section 6 (i); in view of the increasingly large funds which are spent for combating natural calamities, arrangements are aimed at integration of development and relief planning of the affected areas. This pre-proposes having a bundle of schemes / contingency plan ready to be switched into operation on the striking of any natural disaster. The normal; programme are either remains suspended if necessary or slowed down, or modified to fit the emergency needs and intensified programmes. The normal programmes assume secondary status to the contingency plan and operation. The 'shelf of schemes or contingency plan' may include employment-oriented works like reclamation and management of saline land, raising of shelter belts in the coastal areas, plantation works under the conservation programmes, schemes of plantation of economic species in forests, mining, irrigation, digging and renovation of tanks and walls,

- ii. Provisions for Food and Drinking water⁷;
- iii. Gratuitous relief⁸;
- iv. Assistance to cultivators to retrieve loss⁹;
- v. Assistance from non-Government sectors¹⁰; and
- vi. Best utilization of resources¹¹.

The Code-1980 speaking of 'nature of relief measures' lays down the principle that 'speed is the essence of relief operation'. As soon as a major natural calamity strikes or a particular area is declared by the government to be 'distress' or affected from such calamity one or more of the following measures, as deemed fit, may be undertaken subject, to the directive of the Board of Revenue (BoR hereafter) / Special Relief Commissioner (SRC hereafter) and then the scales of relief are given as per the modifications to be effected by government from time to time:

- a. Labour intensive works including relief works;
- b. Gratuitous relief;
- c. Nutrition supplementary feeding programme;
- d. Relief measures by Non-official organisations;

setting up of village industries by artisans, and the like. While preparing the contingency plan, special schemes provided under IRIP, SFDA, MFAL, DPAP, TDA/ITDP, HAD, CAP etc. should be taken into account.

- 7 During the times of scarcity of food and drinking water, the impact is keenly felt in the rural affected areas by the landless as well as small and marginal farmers. Scarcity of food and drinking water may lead to deterioration of physical health. By implementation of the contingency plan, which mostly comprises of programmes of development and rural employment to equip agrarian community to withstand better the rigors of recurring natural calamities and to make the area flood and drought proof, both the problems of food and drinking water can be adequately solved.
- 8 Grant of gratuitous relief as a matter of principle may not be resorted to. But there may be certain vulnerable sections of the people who cannot be supported in any other way at a time of serious natural calamity, in such situation gratuitous relief has been advised.
Similarly, children both non-school going and school-going and expectant mothers have to be provided with a supplementary feeding programmes in order that their physical conditions may not deteriorate.
- 9 In situations of major natural calamities, it becomes impossible for individual cultivators to take either preventive or remedial measure by themselves. The state comes to their assistance to retrieve the loss suffered in kharif crops by way of increasing production in next rabi and kharif crops providing –
 - a. easy availability of seeds and seedlings for re-sowing and transplantation of the crops or for raising alternative crops;
 - b. arrangements for quick supply of pumps for lifting water from rivers, nallahs etc.,
 - c. quickening the operation of irrigation tube wells;
 - d. adequate supply of credit for purchase of seeds, fertilizers, pesticides, bullocks etc., and
 - e. undertaking prompt and effective measures for eradication of widespread pest attack if any.
Other aids in the forms of remission and suspension of both collection of land revenue and collection of loans given to cultivators are recommended.
- 10 The assistance of non-government institutions and voluntary organisations to augment the government efforts in carrying out relief measures should always be listed.
- 11 The Situation must be assessed constantly and the limited resources of men and materials available utilized to the possible extent.

- e. Care of orphans and destitute
- f. Strengthening of public distribution system;
- g. Health measures and veterinary measures;
- h. Agriculture measures including provisions of credit supply;
- i. Special relief to weavers and artisans;
- j. Arrangements of foodstuffs and stocking of food grains in strategic places;
- k. Provisions of drinking water;
- l. Provisions for immediate irrigation facilities;
- m. Remission and suspension of collection of land revenue and loans;
- n. Grant of educational concessions;
- o. Enquiry into starvation cases and prompt action taken on such reports; and
- p. Action on press reports.

Relief Fund and Finance:

The policy and arrangement of finance with regard to relief operation was reviewed by IX Finance Commission, on their recommendation, to meet exigency and emergency in the relief action plan without waiting for Central assistance, the Orissa government was provided for 'Calamity Relief Fund' (hereafter CRF) with a corpus fund of Rs.47crores during each of the years of 1990-1995 plan period¹². The X Finance Commission revised the corpus of CRF for the period from 1995-2000 in which the corpus for each year is enhanced as- for 1995-96: 46.25; for 1996-97: 49.01; for 1997-98: 51.72; for 1998-99: 54.36; for 1999-2000: 56.67 and during the total plan period of 1995-2000; 258.01crores were provided. Government of India issued instructions¹³ that the corpus of CRF is to be funded by the government of India and state government in three and one ratio¹⁴; further the norms were set that the corpus amount should be kept outside the Public Account of the State and invested in the pattern prescribed in the 'Scheme for Constitution and Administration of the CRF'.

The scheme for constitution and administration of the CRF and investment there from was clearly spelled out by the government of India in

12 Government of India letter No.43(1) – PF 1/90 dated 25th January 1991, vide this letter 'the Calamity Relief Fund' from the financial year 1990-91.

13 Letter No 43(1) PF – 1/95 dated 27th July 1995 issued by AK Pradhan, Joint Secretary to the GOI.

14 Centre's share in CRF: for 1995-96: 34.69 for 1996-97:36.76; for 1997-98:38.79; for 1998-99:40.77; for 1999-2000: 42.50and during the total plan period of 1995-2000; 193.51crores, while State's share in CRF: for 1995-96: 11.56 for 1996-97:12.25; for 1997-98:12.83; for 1998-99:13.59; for 1999-2000: 14.17and during the total plan period of 1995-2000; 64.50crores

details with respect to:

- a. Title of the scheme: Calamity Relief Fund
- b. Period of operation: 1995-2000
- c. Constitution of CRF¹⁵
- d. Contribution to the fund¹⁶
- e. Relationship of CRF with general revenues
- f. State Level Committees (SLV)¹⁷, Composition of State Level Committees, Sub-committees, Functions of SLV, Expenditure of Committee,
- g. Administration of the CRF; Investment of the Funds¹⁸ after receipt from the Centre; Pattern of investment from the Fund¹⁹; Accounts of investment transactions etc.
- h. Monitoring by the Ministry of Agriculture: The MOA shall collect information about the expenditure and investment from the CRF of each state and may advise SLV in this regard if deemed necessary.
- i. Unspent balances in the Fund: The unspent balance in the CRF as at the end of the financial year 1999-2000 will be available to the State Government for being used as resource for the next plan.
- j. Accounts and audit: The AG of the State shall maintain the accounts in ordinary course, whereas the SLV will maintain subsidiary accounts in such manner and details as may be considered necessary by the State Government in consultation with the Accountant General.
- k. Savings.

15 The fund is classified under the head '8235-General and Reserve Funds-111 Calamity Relief Fund'

16 The share of the GOI of the total contribution to the fund shall be paid to the state government as *Grants in aid and accounted under the head '3601- grants-in aid to the state government-01 Non-plan grants- 109towards contribution to calamity relief fund'*.

The State governments shall take these as receipts in their budget and accounts under the '*1601-Grants –in –aid from the Central government-01 Non-plan Grants-109 grants towards the contributions to Calamity Relief Fund*'. The budget provisions on the expenditure side of State Government budget under the head '*2245- Relief on Account of Natural Calamities -05 CRF-101 Transfer to Reserve Funds and Deposit Accounts – Calamity Relief Fund*'

17 The Chief Secretary of the State shall be the ex-officio Chairman of the SLV. The committee would consist of officials who are normally connected with relief work and experts in various fields in the affected by the State Government.

18 The investment of funds shall be carried out by the branch of Reserve bank of India at the headquarters of the state.

19 The prescribed pattern of investment is as follows-

- a. 10% in Government dated Securities (it would be the best to invest in varying maturities);
- b. 10% in State Government Securities;
- c. 25% in auctioned treasury Bills (i.e., at present 91 days and 364 days bill are auctioned; 182 days bill are no longer being issued in Orissa State)
- d. 30% as interest earning deposits and certificates of deposits with Public Sector Banks (PSBs);
- e. 15% as interest earning deposits in State Cooperative Banks (SCB);
- f. 10% in Public Sector Bonds and Unit Trust of India and other Mutual Fund which provide for repurchase facilities.

As regards expenditure on relief and repair and restoration of public works following flood and cyclone and other calamities of this nature, central assistance would be made available as non-plan grant not adjustable against the Plan of the State to the extent of 75% of the total expenditure in excess of the margin money. Where a calamity is declared as 'rare severity', the Central Government is to extend additional assistance to the State for which a separate fund at the level of Government of India namely 'National Fund for Calamity Relief' (hereafter NFCR) has been created to which the centre and the State would subscribe and will be managed by a National Calamity Relief Committee under the Chairmanship of Union Minister of Agriculture. The Contribution to the NFCR has been fixed at the ratio of 75:25 by GOI and State government respectively annually in the beginning of the financial year. The Scheme and the Constitution of the NFCR has been laid down by the central government.²⁰ NFCR is meant for dealing with Calamities of 'rare severity', it would be classified in the accounts of the GOI under the major head '8121- General and other Reserve Funds' in the sub-section 'Reserve Funds bearing interest' by opening two minor heads of accounts'²¹.

The State shall contribute their respective share of 25% to the NFCR²² in the beginning of the year, the Central Government may in case of non-receipt, adjust State's share out of the grants payable to States by the Ministry of Finance.

The National Calamity Relief Committee (hereafter NCRC) will have representations from both central and states to manage the NFCR, and will be headed by the Union Agriculture Minister and would comprise of Dy. Chairman, Planning Commission and two Union Ministers and five Chief Ministers to be recommended by the Prime Minister annually in rotation²³. The department of Agriculture would provide the Secretariat assistance. The NCRC will consider and decide whether a calamity of rare severity that would qualify for relief from the NFCR, and decide the quantum of allocation for relief.

20 GOI letter No.43(5) PE 1/95 dated 24th October 1995. This is in accordance with the recommendations of X Finance Commission for the creation of NFCR and is deemed to have come into force w.e.f 1.4.1995

21 i. National Fund for Calamity Relief (minor head)

Receipt side	Payment side
a. Share of the Central Government	a. Payment to State Government
b. Share of the State Government	b. Transfer Revenue Accounts
c. Interest Receipts	c. Loss on realization of securities
d. Gain on realization of securities	d. Incidental Charges
e. Other receipts.	e. Other payments

ii. National Fund for Calamity Relief – Investment Account (minor heads)

Receipt side : Sale of securities; and Payment side: Purchase of securities

22 The share of Orissa during 1995-2000 has been fixed at Rs.5.17crore to the total of NFCR Rs.700crores

23 The Nomination of the Chief Ministers would be done in March of each year for the next financial year.

A periodic quarterly information relating to expenditure and utilization from CRF and NFCR are to be furnished to the Ministry of Agriculture, GOI.

Control Room: Opening and Functioning²⁴

A common feature in combating disaster of any type whatsoever is centralized control system, for the purpose one of the first steps is opening and operating the Control Room (hereafter CR). The Code 1980 provides for standing preparation which includes logistics of Control Room. It is mandated that notwithstanding occurrences of any natural calamity, Control Room functions in the Revenue Department all round the year, similar control rooms are envisaged in all concerned offices of Collectors, Revenue Divisional Commissioner especially active from 1st May to 30th November each year. The Control Room is to be under the operational command of a senior officer to be nominated by the concerned head of the office. CRs may also be opened in subdivisions and other offices according to the direction of the Collector. The CR in the revenue department shall be under the charge of the Deputy Secretary in charge of Relief who shall inspect the CR frequently and report to the Secretary about the short comings.

The function of the CRs shall be to collect, collate and transmit information regarding matters to the natural calamities and relief operations undertaken, if any, and for processing and communicating all such data to concerned quarters. The CR shall be manned round the clock during the peak period of emergency till the relief operations are over, for the purpose one officer, one assistant and one peon will be on duty in suitable shifts. The service of Leave Reserve Officer may be utilized for this purpose in District and Sub-divisional Offices. The particulars of information received and action taken should be entered in the Station Diary hour to hour for every date, and daily report should be furnished to the head of office. The head of office shall indicate the particulars to be released for public information.

Administrative Relief Organisation:

In times of widespread distress, the entire Government machinery is switched on to render relief to the people. The Revenue Department and Board of Revenue coordinates work of all the Departments of Government and Heads of Departments in regard to relief operations. Following departments are generally associated with relief work and accordingly responsibilities are assigned to them as below:

Agriculture Department coordinates supply of seeds, seedlings, fertilizers, insecticides, credit facilities, for agricultural operations including purchase

24 Section 9 & 10 of ORC 1980.

of bullocks, purchase of pumps, soil conservation, plantation works, control of sand-cast lands, construction of dug wells, post control measures, submission of periodical crop statistics, collection of statistics of damage and restoration works etc.

Panchayati Raj Department and Women & Child Development Department: Organizing employment oriented labour intensive works including Food for Work schemes, drinking water supply programme, feeding programme, collection of statistics of damage, restoration works under the Department etc.

Higher Education & Youth Services Department and Mass Education Department: Measure of relief to students and educational institutions in the affected areas mobilizing student volunteer force when needed, restoration of damages to educational institutions and buildings etc.

Forest and Environment Department & Fishery and Animal Resources Department: Veterinary measures (both preventive and curative), afforestation programmes, supply of forest materials for housing, provision of fodder, fodder banks, cattle food, mobile health unit for cattle, works on forest roads, other employment programmes, restoration works, etc.

Health & Family Welfare Department: Health measures (both preventive and curative), formation of Health squads in case of necessity, mobile health units, establishment of temporary hospitals, health units, establishment of temporary hospitals, prevention of epidemics, disinfection of wells and other drinking water resources, care of children's health, collection of damage statistics and restoration works etc.

Home Department: Law and Order problem at the time of distress provision of police help for protection of weak points in embankments and transport of relief goods, calling for army assistance in case of need, gearing up information and publicity machinery for relief work, utilizing Home Guards for relief measures, installation of wireless stations, collection of damage statistics and restoration measures etc.

Water Resource Department: Energising Lift Irrigation Points supply of pumps to cultivators, communication of gauge reading and flood forecasts, watching over weak points in river and other flood protection embankments, long term measures for harnessing river systems for irrigation and flood protection works for elimination drought conditions and flooding, collection of damage statistics and restoration measures etc.

Planning & Coordination Department: Regulation of plan and non plan

schemes and release of funds for such schemes, formulation of 'Contingency Plans' by the concerned Departments of Government as alternate programme for implementation at the time of distress etc.

Rural Development Department: Undertaking minor irrigation works in large scale and road programmes for providing employment opportunities technical supervision of works undertaken by the Block agency as needed, collection of damage statistics, restoration programmes etc.

Food and Consumer Welfare Department: Opening of fair price shops and retail sale centres in affected areas with adequate stock of food stuff, opening of depots and sub-depots in vulnerable or strategic areas prior to occurrence of natural calamities, supply of food stuff for relief operation, regulating prices line, anti-smuggling, and anti-hoarding measures as may be decided by Government etc.

Harijans & Tribal Welfare Department: Provisions for drinking water, labour employment programmes for Adivasis and Harijans in distressed areas, collection of damage statistics and restoration programmes, repair and restoration works of Sebashram and Ashram School etc.

Housing & Urban Development Department: Control of relief work in urban areas, ensuring necessary drinking water supply, completion of existing water supply schemes and laying of temporary water supply at times of scarcity, temporary pump houses, provisions of employment opportunities etc.

Works Department: Keeping the network of roads improper order for movement of traffic and relief goods, effecting speedy repairs to damage done to roads, ensuring employment facilities for the unemployed people in the distressed areas through road network, collecting damage statistics soon after the natural calamity and undertaking restoration work quickly.

Revenue and Excise Department: Besides coordinating the relief measures, RD is the administrative department for opening Relief Housing Schemes undertaken due to heavy damages on account of flood or cyclone, regulating relief measures financed from CRF and those undertaken by voluntary organisations, corresponding with the Government of India and other State Governments in matter relating to natural calamities and relief measures, and submitting reports and returns to the Government of India.

Board of Revenue BoR / Special Revenue Commissioner SRC: The Member, Board of Revenue and Special Revenue Commissioner is directly responsible to Government of India for all kinds of relief operations in the

affected areas²⁵. Member, BoR in empowered to transfer any gazetted or non-gazetted officers working in connection with the relief operation from one place to another; to requisition the services if gazetted or non-gazetted officers working in the affected areas for administering urgent relief operations; to empower the Collectors to make requisition of vehicles of their department for efficient execution of relief measures in similar terms during the Elections; to sanction detailed schemes approved in principle with in the Relief Budget; to call information from all the concerned and periodically review and coordinate the activities of relief operations. In case of extensive and acute distress arising out of any natural calamity, which may necessitates extensive relief measures, the State Government may appoint separately a SRC for expeditious and effective relief measures and delegate to him and powers exercisable by the Member, BoR for effectively meeting the situation.

The Block is the unit of Relief Organisation and the BDO shall be in-charge of the unit. This depends on the degree of distress. If the distress is acute and extensive relief measures are undertaken by the Collector, who may divide the Block into two units and deploying an additional BDO.

People's participation with the administration of Relief Operation:

In order to ensure people's participation, provisions have been made in the Code 1980 for constitution of Committees as various levels of risk management and relief operation – State Level Committee SLC²⁶ and District Level Committee DLC²⁷ on Natural Calamities. The function of the SLC committee includes:

- a. to advice the government regarding precautionary measures to be taken in respect of flood, drought and other natural calamities;
- b. to assess the situation arising out of such calamities;

25 The BoR has statutory powers and responsibilities under section 4 of the Orissa Board of Revenue Act, 1951 to exercise supervision of the work done by RDC and Collectors and this applies to relief operation also. Further powers have been delegated to the Member, BoR for relief operation.

RDC, under clause xiii of Rule 9 of the ORDC Rules 1959 are responsible for advising the government in matters connected with disaster and distress situations. They have a statutory responsibility to regulate and coordinate relief operation in areas under their jurisdiction. And the hierarchy of the revenue Department such as District Collector, Sub Collector, Tahashildar and Block Development Officers are responsible to undertake the relief measures.

26 During the year 1996 vide the letter no. IVF(M)- 2/95 – 55920 – R Dtd.13.12 1996, the Government of Orissa, through its Revenue & Excise Department reconstituted the State Level Committee on Natural Calamities with 54 listed members, which included Chief Minister, a list of Ministers, certain Members of Parliament, a list of MLAs, Chief Secretary, and Secretary from certain other related departments.

27 In accordance to ORC1980 Paragraph (Rule)- 19 (10)(b) vide letter no 21317 –IVF (M)- 3/74 – R and Resolution No 5367/R dated 24th January 1989, the Government reconstituted the DLV for Natural calamities with following members: District Collector (Chairman), two members form Voluntary Organisation nominated by the Collector as Chairman of the Committee, MLA and MP of the concerned area, CDM, O/D, VO/SE(Irrigation), Sub-Collector of the District, District Emergency Officer (Member Secretary).

- c. to recommend to government the nature and the quantum of relief; and
- d. to recommend to government the policy to be adopted in giving such relief in areas affected by such calamities.

The function of the DLC shall be:

- a. to advise on the precautionary measures to be taken in respect of flood, drought and other natural calamities;
- b. to assess the situation arising out of such calamities;
- c. to advise on appropriate relief measures and location of relief works.

The Panchayat Samities and Grama Panchayats are associated in organisation of relief measures in the Blocks. The Officer-in-charge of the Relief Circles should see that the people's representatives are associated with all relief measures.

The SLC & DLC though recommended with a sprit of integrating more of people outside the government from among the general public, the Committees in constitution has more or less the same group of members of the government who are otherwise responsible for running the government as well as governing the relief operation. This makes the very purpose of the SLC and DLC redundant and non functional in the sprit of the purpose²⁸.

ORC 1980 and Cyclone and Tidal Disaster Management Scheme:

The cyclonic storms are a general feature in Orissa. They strike the coastal areas generally before and after the rain season. October is the categorized month for the cyclonic disasters. Cyclones ordinarily bring in their trail heavy rains causing severe floods, tidal disasters and saline inundation. Disasters of this kind cause heavy mortality, untold suffering and damage to private and public properties. Cyclones have been striking quite often, while in 1971 most severe cyclone with intensity of 1000 kms wide struck with a death toll of 10,000 human live and 50,000 cattle death affecting a total of about 6 lakh acres land area and a population of 59 lakhs. In view of excessive damages to life and property, the GOI, Ministry of Irrigation, and Power appointed a Committee²⁹ to examine various measures to mitigate human suffering and to reduce the loss of life and property in the event of recurrence of such cyclone in future. A committee with Dr. P K Koteswaran, Director General of Observatories, India Meteorological Department as chairman was constituted. The Koteswaran Committee conducted a very elaborate study and submitted a brief summary of 59 recommendations on the cyclone distress mitigation. Most of the recommendations are categorical with respect to early information and warning from the IMD, the logistics about the prevention measures and

²⁸ Ibid.

²⁹ Memorandum No. FC 6 (12)/71 dated 15th November 1971.

preparedness also found predominance and things like cyclone code and educating the general mass and cyclone fund at the nation and centre level found place. Most of the recommendation found acceptance at the national level and incorporated appropriately by the Central and State governments including the Orissa Relief Code 1980.

In Orissa the whole of the coastal belt and those adjoining area are designated as 'cyclone prone area'. As far as the measures against cyclonic storm disturbances³⁰ are concerned both 'preventive' and 'protective' operations are adopted. More importance is being given to protective measures whereas the preventive measures like USA experiment of 'storm curing project' with huge investment is simply unthinkable in an economically backward state like Orissa. The protective measures are intended to mitigate the damage and suffering due to the onslaught of cyclones depends on the action before and after the cyclonic storm which includes:

- a. pre-cyclone measures³¹;
- b. post-cyclone distress mitigation measures; and
- c. Community preparedness programme.

Pre-cyclone measures particularly during both the pre- & post- monsoon period are spelled out the code 1980 include the following:

- a. Detection and tracking of storms³²: The IMD takes measures for detection and tracking of cyclones sufficiently before their impact is felt in the coastal main land;
- b. Dissemination of cyclone warnings³³: Visual Storm Warning Signals,

30 GS Mandal, 'Orissa Super Cyclone (SuCS), its Special Characteristics and Future Strategies for Mitigation Measures', -The classification in India with regard to various intensity of cyclonic disturbances:

Categories (Weather Systems)	Abbreviations	Wind Speed	(in kmph)
1. Low Pressure Areas	L	< 17 knots	31
2. Depression	D	18-27 knots	32-49
3. Deep Depression	DD	28-33 knots	50-61
4. Cyclonic Storm	CS	34-47 knots	62-88
5. Severe Cyclonic Storm	SCS	48-63 knots	80-117
6. Very Severe Cyclonic Storm	VSCS	64-119 knots	118-220
7. Super Cyclonic Storm	SuCS	>119 knots	221 and above

31 Pre-cyclone measures shall be taken by the Collectors in anticipation of the occurrence of cyclones or storms, with or without tidal disasters and high floods, both during the pre-monsoon and post-monsoon periods.

32 The meteorological department at Bhubaneswar also communicates not only the forecasts and warnings but also of whirl winds, gales storms and heavy rainfalls etc. generally sufficiently before their occurrence to the concerned authorities viz.- the press, the All India Radio, Doordarshan, for giving wide publicity and warning to the people against the impending calamity. A statutory list of more than 53 officials and other related categories of officials are mandated under Rule 98 of ORC 1980.

33 The IMD issues weather bulletins as a routine to merchant ships and it maintains a port warning service by which the Port Officers are warned by high priority telegrams, it also issues warnings to

Distant Cautionary³⁴, Distant Warning³⁵, Local Cautionary³⁶, Local Warning³⁷, Danger-1,2&3levels³⁸, Great Danger-1,2,&3 levels³⁹, (This signal is also hoisted when a severe storm is expected to skirt the coast without actually crossing it.);

- c. Failure of Communications⁴⁰;
- d. For the safety of road transport services and bus depots, the transport organisation should be kept apprised of the cyclone warnings by the Collector.⁴¹ Mean while the people should be advised to shift to safer places or to the cyclone shelters already notified by the Collectors in advance;
- e. Cyclone Shelters⁴²: Annually the Collector shall undertake a survey of the coastal areas vulnerable to storms, cyclones and tidal inundations

officers of the Fisheries Department in the Coastal Districts against approaching storms/cyclones.

34 This signifies that *'there is a region of squally weather in which storm may be forming'*.

35 This indicates that *'a storm has formed'*.

36 Local cautionary indicates that *'the port is threatened by squally weather'*.

37 *'The port is threatened by a storm, but it does not appear that the danger is yet sufficiently great to justify extreme measures of precaution.'*

38 Danger-1: *'the port will experience weather from storm of slight or moderate intensity that is expected to cross the coast to the south of the port.'*

Danger-2: *'the port will experience severe weather from a storm of slight or moderate intensity that is expected to cross the coast to the north of port.'*

Danger-3: *'The port will experience severe weather from a storm of slight or moderate intensity that is expected to cross the coast over or near the port.'*

39 Great Danger-1: *'the port will experience weather from storm of great intensity that is expected to cross the coast to the south of the port.'*

Great Danger-2: *'the port will experience weather from storm of great intensity that is expected to cross the coast to the north of the port.'*

Great Danger-3: *'the port will experience weather from storm of great intensity that is expected to cross over or near the port.'*

40 Communications with Meteorological Warning centre have broken down and the local Officers considers that there is danger of bad weather then a system of two stage warnings has been introduced by the IMD by which Collectors of coastal districts are given warning of depressions and cyclonic storms. The first warning is generally issued 48hours before the commencement of bad weather and the second about 24hours. When a depression and a cyclone is expected to affect a certain area on the east coast, the public in the area are warned through the regional AIR stations and Doordarshan which are requested to broadcast and telecast special storm bulletins at frequent intervals. These special weather bulletins are supplied to the press for publication in the daily newspapers.

Rapid dissemination of cyclone warning is a basic need of the cyclone distress mitigation scheme. As the telegraphic and other landline communications are invariably the first victim during stormy weather, radio and television are the only dependable medium of speedy dissemination. The police wireless grid is another medium for dissemination. In addition to the permanent police wireless station and temporary wireless station are installed in the vulnerable areas for the purpose.

41 Buses and other transports (other than those used for evacuation purposes) which happen to be in the area likely to be directly hit by the cyclones should be asked to move out of the danger zone quickly. Generally transportation should be prohibited on sections of roads and bridges which are imminent danger of inundation due to flood water or are direct targets of the cyclone winds.

The CR which functions round the clock through out the year also communicates such warnings, soon after their receipt, to the subordinate offices by the quickest means of communication. The Collectors will supervise the dissemination of information to all the related subordinate staff.

42 Para 100, ORC-1980: In choosing these buildings the tidal inundation areas, special care should be

- prior to the cyclone seasons and select suitable buildings for the purpose of emergency shelter;
- f. Evacuation⁴³: Once the cyclone strikes, there is no way of escape but to take shelter in a suitable storm proof building or to run away from the storm. Evacuation of people, cattle, livestock become necessary from these areas where storm proof elevated shelters are not available, during a cyclone no evacuation operation is possible. The only alternative is to persuade the people through radio broadcasts and TV telecasts to vacate from low lying areas in the coastal belt, as well as other areas threatened by cyclones on receipt of the 'alert' warning from the meteorological centre and take shelter only in the cyclone shelters selected by the Collector to save lives as well as their cattle and other livestock and property;
 - g. Emergent –Relief⁴⁴ is to be provided to people who have shifted to cyclone shelters, so also the fodder for cattle and other livestock shifted by the people to cyclone shelters are to be arranged through the Veterinary Officers;
 - h. Other precautionary measures include arrangement of vehicles, boats and organisation of relief parties for evacuation of people, arrangement of dry food stuff and other necessities of life giving emergent relief, provision of drinking water supply. It is always apprehended that the drinking water sources are polluted at the time of cyclone, arrangement of disinfectants etc, arrangement of disposal of dead bodies and carcasses (the designated departments should make prior arrangement), precautionary arrangements against epidemics and other health hazards, advance arrangements for army assistance. The Collector should ensure these arrangements using his intelligence discretion to circumvent the crisis and mitigate sufferings;
 - i. Review of pre-cyclone arrangements⁴⁵;

taken to select strong building in elevated places which can withstand both tides and high winds. Ordinarily community buildings, temples, mosques, churches, school buildings, storm shelters and such other strong built buildings of public nature in the vulnerable areas may be selected as cyclone shelters.

The Collector shall then prepare a map indicating the location of the emergency shelters and safe buildings and display them in public offices, schools and community centres, Railway station and such other places which are frequented by the people for their information. A copy of such map or list of such places, whichever can be arranged conveniently, may be supplied to the DPRO for educating the people about the safe places for taking the shelter in the event of a storm, cyclone, or tidal bore.

43 Para 101, ORC-1980

44 Para 165 defines 'Emergent Relief'

45 The Collector and the RDC shall undertake the review of pre-cyclone arrangement and furnish a consolidated report to the Revenue Department, during the pre & post monsoon months of May, June and October and November.

j. Reporting of occurrence Cyclone, Tidal inundation⁴⁶ etc.

The Post-Disaster Measures mandates the Collector and the designated officers to undertake immediate inspection of the affected area to be fully aware of the damage that has been caused by the cyclone and take appropriate protective and restorative action within the ambit of their budgetary provisions as considered necessary. And when the cyclone is accompanied with high flood or tidal bore, no damage statistics can be compiled separately for the flood and cyclone etc. The important activities include:

- a. Clearance of Road for the movement of traffic⁴⁷ ;
- b. Rescue of and relief to marooned people⁴⁸ ;
- c. Disposal of dead bodies and carcasses⁴⁹ ;
- d. Reconnaissance flights and army assistance;
- e. Restoration of communication;
- f. Problem of drinking water;
- g. Missing list of fishermen and fishing crafts;
- h. Restoration of power;
- i. Assessment of crop loss, human causality, loss to livestock, and other damage caused by cyclone tidal bore, floods etc⁵⁰ ;
- j. Submission of preliminary and final damage report;

46 As soon as possible within 24 hours of the occurrence of Cyclone the front-line officers should intimate the Collector by the quickest means of communication available or through special messenger, if necessary about the occurrence of the disaster, giving date and time of occurrence, details of the affected area, crops and other losses sustained etc. as readily available. The Collector should onward transmit the same to concerned authorities and more detailed report should follow within three days of the first report. The BoR/SRC shall furnish the consolidated report to the Government with its recommendations. P.106

47 It is likely that a large number of trees might be uprooted causing obstruction to traffic; the first measure that should be undertaken up is to clear up these roads for movement of vehicles. The Works Department and the Rural Development Department should undertake the task and the lowest executive should discharge the responsibility without waiting for the orders from the authorities. The Collector may expedite the clearance work in pursuance of this mandate.

48 The Sub-Collector shall see that a search and rescue parties with necessary boats, food stuff etc. are immediately deputed to the affected areas both for rescue and relief purposes especially to the aid of any people those have been marooned due to cyclone. And other emergent relief material including tents, tarpaulins, bamboo mats etc if necessary should follow.

49 Dead bodies of human beings found in cyclone affected areas shall ordinarily be made available to their relatives and friends, if available, for cremation or burial, as the case may be, according to their customary practices. Where there are no claimants for dead bodies, those (dead bodies) should be cremated or buried at the cost of the Government i.e., Health and Family Welfare Department. Similarly the carcasses of cattle and other animals shall be buried by Fisheries & Animal Resources Department. The Collector shall see that all the dead bodies are disposed of forthwith and any difficulty faced by him shall be brought to the notice of RDC, BoR / SRC and the Revenue Department.

50 The Range Deputy Director of Agriculture will undertake an immediate survey to ascertain the following statistics:

- i. average under crops and acreage damaged;
- ii. Approximate loss in rice, wheat, ragi, maize etc. in metric tones and value thereof;

- k. Submission of report to the Government of India;
- l. Declaration of area affected by cyclone: Usually the State Government issue a declaration indicating the areas affected by cyclone, etc. in order to enable the Government employees and others to get necessary help permissible under the Rules. This declaration cannot be issued due to delay in submission of necessary reports by the field officers. Such delay should be avoided by assessing the damage promptly⁵¹ ;
- m. Relief Measures⁵² ;
- n. Assistance of Police: After a disastrous cyclone or a tidal bore, the law and order problems may arise in certain spheres, police may, therefore, be vigilant to the situation; for proper conducting of relief operations police help may be usefully taken; Traffic control arrangements should be tightened so that relief parties and trucks may get preference in clearance and movement; Many buildings in the affected areas might have been collapsed to the ground, while others might be in a state of dangerous inclined position, the broken electrical wires are another sources of hidden danger. Such dangerous spots should be identified and condoned off by the police; Assistance of police may be required for enforcing the orders of Public Health authorities; night patrolling in affected areas may be enforced and intensified as necessary. Police may also take care of the salvaged and unclaimed properties; Police assistance will be needed in enquiring into the causes of death during and after a disaster and in disposing of the dead bodies; Police assistance may required for guarding relief articles and in maintaining law and order at he time of distribution of relief;
- o. Community preparedness programme and long term measures:
 - 1. A devastating cyclone is swift decisive and damaging. In the twinkling of an eye, large number of people may become homeless or even lose their lives. Untold miseries may be brought about. Community preparedness programme re necessary to lessen the

iii. Cropping pattern both alternate kharif and rabi programmes to be adopted and acreage in each case;

iv. Requirement of seeds, seedlings, fertilizers, pesticides, ground and aerial spraying arrangements in case of pest attack and pest epidemic;

v. Availability of seeds, seedlings etc., and procurement of purchases needed;

vi. Funds needed, funds available and net additional requirement of funds;

vii. Cropped area sand cast, depth of sand, area from which sand can be removed and cost thereof; waterlogged and possibility of reclamation and introducing any alternate crop, orchard etc.,

The Deputy Director Agriculture and Food Production shall receive the above report with in one week after the abatement of the crisis with a copy to Collector (detailed forms are specified for the purpose)

51 The BoR / SRC shall submit a list of cyclone etc., affected areas, Grampanchayats wise, indicating Block and District, along with the damage report, for consideration of Government for declaring such areas as distress or affected areas.

52 Rules149-162 ORC 1980, deals categorically about the Relief Work and procedure regarding.

disastrous impacts and to build up resistance to calamity and to afford necessary emergency protection. Such programmes envisage educating the people and for taking timely action in face danger.

2. No advance warning of cyclones will be effective unless the public are properly educated about the action to be taken on receipt of such warnings and cooperate fully with the evacuation measures arranged by the government agencies. In order to impart broad practical background knowledge of the disaster information pamphlet and brochures are to be widely distributed. Books in local languages written on natural calamities and relief operations may be given to the rural libraries in villages of the calamity prone areas. Audio-visual materials also be shown to the public in convenient gatherings.
3. Before the beginning of the cyclonic prone seasons, the Collector organize meetings in April and September each year, by the DPRO and staff in rural areas and explain to the people the procedure for evacuation as well as measures to be taken for the safety of life and property.
4. The Information and Public Relations Department have prepared documentary films on cyclones, the Oriya version of the films should be exhibited widely I the coastal areas prior to and during the cyclone seasons.
5. The Information and Public Relations Department may also prepare some sample slides giving important information and instructions regarding actions to be taken during cyclones, which may be shown in cinema houses or by mobile vans in coastal areas. Educative posters should also be exhibited.
6. Before the onset of the cyclonic seasons, there should be a series of talks over AIR and Doordarshan by the meteorological and Administrative Officers on Natural Calamities like cyclones and actions to be taken to face the problems. Conversational talks on cyclones in the rural programmes of AIR and Doordarshan should be arranged from time to time.
7. Instructive materials on tropical cyclones and protective measures to be taken may be included in the educational syllabus in the school level.
8. People should be discouraged to live in low-lying and vulnerable areas and to shift to safer locations. In doing so, nothing should be done to make the people feel panicky, or to lose morale.

- p. Model cyclone plan for coastal areas⁵³: The model cyclone plan for coastal area in Orissa includes in the table of its content the following – (i.) Preface; (ii.) General information and Weather warning details; (iii.) Cyclone Committee- constitution, responsibility of the Cyclone Committee, Meetings; (iv.) Educating the Public- Educational media radio, Press, and Advice to the Public; (v.) Emergency Preparedness- Emergency control centre (ECO), Observatory, Shelters, Inspection of communication and meteorological equipment; (vi.) Emergency Action- Action on receipt of preliminary (first Stage) Cyclone Warning, Action on receipt of Final (Second Stage) Cyclone Warning; (vii.) Post-Cyclone Measures- Instruction to Public, Actions regarding rescue and relief of affected population and restoration of communications; (viii.) Post-Cyclone Review.
- q. Removal of old and dead trees⁵⁴;
- r. Permanent cyclone shelters: (1). Ordinarily no strong buildings are found in the tidal inundated or cyclone prone areas. It becomes difficult to provide storm or cyclone shelters in such areas. As a permanent measure, community buildings, schools etc., should be designed in such areas keeping in view that these buildings may also be used as emergency shelters in times of necessity. Departmental and other public sector buildings to be constructed in these areas may also conform to the specification of these shelters. (2). These shelters should be of two types i.e., (a.) for the areas vulnerable to tidal inundation and (b.) for other areas prone to storms cyclones and high winds. The area subject to tidal inundation may be the coastal belt of about 15 kms width from the sea coast while the area subject to cyclone may be 15-60 kms further inland. The structures in tidal inundation area and in the other cyclone wind area (i.e., two storeys and one storey) may be adopted on competent technical advice. (3). While constructing new buildings in the tidal inundation area people should be instructed to have high plinths so as to withstand tidal inundation. Similarly farmers may raise platforms (mounds) to stock the harvested crops to protect from being washed away by tidal inundation.

53 The Model Cyclone Plan adopted by the Orissa Government were issued vide the Revenue Department Communication nos. IICy(TMS) – 70/75 58135-37R., dated 7th September 1973 and no 58259/56 R dated 8th September 1973. This plan is intended to be reviewed every year and revised whenever necessary in the light of experience, the Collector is empowered to review the working of the plan and suggest revision, if any, to the BoR/SRC

54 During a cyclone many old and dead trees are uprooted and block the traffic. Such trees in vulnerable areas (ie., in the coastal strip upto a depth of 60kms) should be removed every year before the cyclone season. The designated department shall make necessary endeavour.

- s. Construction of tidal breakers, shelter belt plantations and coastal afforestation: The entire coastal area had large forest growth. With the growth of population these forest growths have been gradually eliminated. As a result of this the coastal belt has been subjected to the direct impact of the cyclones, storms and tidal surges. The designated department should take protective and preventive measures for safeguard bands and embankments. Plantation and afforestation programmes are very much necessary in these areas Agriculture and Forest Departments have launched necessary schemes for the purpose. Departmental as well as private efforts may be encouraged in these directions. The available forest covers may be about one kilometer deep from the coast line to act both as a wind breaker as well as tide breaker. Some amount of publicity on the good effects of these plantations and afforestation works among the people is necessary to enlist their cooperation in preservation of these assets.

Relief Works:

In case of a widespread natural calamity there may be urgent need of providing employment to be able-bodied persons or the un-skilled rural labour who have been thrown out of employment due to such calamity. Employment oriented relief works are undertaken out of CRF. These are normally called as 'relief works'. For the purpose of relief works following mandates have been made:

1. Fixation of priority in the selection of relief work;
2. Preparation of the list of relief works;
3. Location of works;
4. Procedure of execution;
5. Departmental and non-departmental execution;
6. Payment of advances;
7. Wage Structure;
8. Food for work;
9. Grain for work;
10. Restrictions in employment;
11. Waiving of payment of departmental charges;
12. Monthly return of physical financial achievement on works.

Gratuitous Relief and Feeding Programme:

Gratuitous reliefs are of three types, viz., first- Emergent relief; secondly- Ad hoc gratuitous relief, and thirdly- Gratuitous relief on cards. When people

are in cute distress due to a severe natural calamity, it becomes impossible for them to procure food, their belongings are washed away and houses damaged. It becomes necessary for government to provide them with dry or cooked food, clothing, shelter and other necessaries of life. These articles are generally transported to the affected areas by waterways as road communications stand disrupted. Air dropping is also made if the people are marooned for days together. This kind of relief is categorized as 'emergent relief'.

Emergent relief is sanctioned irrespective of the consideration of status, caste or religion as at such a juncture the haves and the have-nots are levelled to the same position. Emergent relief may include distribution of Chuda, Muddhi, Gur, salt, Kerosene, Match boxes and other bare necessaries of life, including cooked food and clothing. It may include provision of improvised shelter with timber, bamboo, tarpaulins, straw, etc. In case non-official organisations come forward to extend emergent relief as is usually the case at the time of a grave natural calamity, assistance from government to the extent may be temporarily suspended. For emergent relief rice, wheat, chuda, mudhi, ragi, maize, etc., may normally be sanctioned at the rate of 500 grams per adult and 250 grams per child below 12 years age per day. The Collector is competent to sanction such relief himself and can delegate the powers of sanction to the Sub-Collectors to exercise the power in their respective jurisdiction for a period of three days only. And for more number of days it is the RDC and BoR/SRC are empowered to sanction. The emergent relief normally should not extend beyond 15 days.

Ad hoc Gratuitous Relief:

Ad hoc gratuitous relief can be given to the people affected by a natural calamity to avoid starvation, extreme hardship etc., as in the following cases;

1. Persons whose attendance on the sick or infant children is absolutely necessary making impossible for them to go out and earn their livelihood.
2. Able-bodied persons but temporarily rendered weak due to want of food, malnutrition or as a result of illness,
3. In case, the people are deprived of cooking their food due to inundation and if they are marooned.

Gratuitous Relief on Cards:

This facility is extended by the government for a longer duration on the basis of need and intensity of a natural calamity on conditions as may be prescribed. It shall ordinarily be limited to villages where there has been crop loss of 50% or above, and private charities cannot cope up with the need.

Eligibility criteria for availing the gratuitous relief on card have been defined⁵⁵. The BDO is made responsible for preparing the list of deserving persons for gratuitous relief on cards and indicate the same in a stipulated format.

Provisions regarding the location of Gratuitous relief Centres, supply of relief cards, Issue of gratuitous relief, Maintenance of GR Register at the Relief centre, maintenance of register of abstract of issues of gratuitous relief by BDO, Supply of food stuff by Food & Consumer Welfare Department, Stocking of food stuff at different centres, Payment of costs of transport, Disposal of residue stock, submission of monthly return of Gratuitous relief. For Women & Children, supplementary feeding programme has been stipulated.

Apart from the governmental relief measures, 'the aspects of administration of relief given by other governments, semi-governments, non-official organisation and individuals' are systematized. Assistance from Prime-Minister's Relief Fund and from other Governmental sources is rooted through the Chief-Minister's fund, and administered by the General Administration Department who shall submit the detailed utilization report. The activities of semi-government and non-governmental organisations and individuals shall be coordinated by the BoR/SRC⁵⁶. The gift materials and cash shall be regulated through the stipulated procedure as laid down in R.190 of ORC 1980. Provision has also been made to distribute the relief through honorary workers or organisations. Among other details the funds from Charitable Trusts, special relief operation by non-governmental organisations, etc are provided.

Care of Orphan and Destitute:

Special provisions have been made empowering the District Collector to act as temporary guardian of children found deserted in his district. Particularly in times of cyclonic disasters there remains a situation for sudden raise of orphans and destitute. The ORC 1980 stipulates the Collector to maintain a register of all children found destitute in a prescribed format. The procedure of registering the details of the way in which each child eventually disposed of is made mandatory. General Rules as to the disposal of orphans, Obligations of private orphanages, free access to orphanages, Disposal of old orphans, destitute, expenditure incurred on orphans, submission of monthly reports etc. are elaborated in Rules 195-203 of ORC1980.

Health Measures:

Health measures include (a.) Medical and Public Health Administration and (b.)Veterinary Measures. MPHA plays a vital role during times of distress,

⁵⁵ R.169 of ORC1980.

⁵⁶ Government Resolution no. IVF(II)- 38/79- 10890-R dated 7th February 1979 and Revenue & Excise Depts. Order no. 33087/R dated 13th May 1981.

particularly during the post-cyclonic phase there is increasing incidence of diseases and possible outbreak of epidemics like Cholera, Typhoid etc., in the affected area which have potential to take a huge toll of human lives. CDMO and the Collector are to remain vigilant and attend to the need. Preventive measures are spelled out. Health department is obligated to maintain certain records and ensure measures to submit periodic reports to the district administration. Reserve of doctors and special staff and medicines are stipulated. A special health care programme for mother, children and vulnerable category is spelled out. The assessment of damage and restoration work with respect to PHC is stipulated in the post-cyclonic phase at the affected areas. The Health and Family Welfare department still issues derailed instruction for the guidance of their field officers to effectively tackle the situation that may arise due to any major natural calamity.

The Director, Veterinary Services and Animal Husbandry shall make arrangements for prevention of cattle epidemics at the time of distress. Necessary animal health squads with medicines, vaccines and other equipments will make rounds in the affected areas. Loss of cattle and other animals shall be reported and adequate arrangement of fodder shall be made by the designated officers. Special report on shortage of fodder, location of fodder banks, arrangements for emergency production of fodder, cattle camps, forest grazing is to be undertaken.

Agricultural Measures and Provisions of Credit Facilities:

The Code 1980 envisages following 'Agricultural Measures' for ensuring production against the vicissitudes of natural calamities the visit the State almost every year- Kharif programme, supply of seeds, supply of fertilizers, dug-well irrigation scheme, precautionary measures before cyclonic floods, pest attack control measures, problem of sand cast lands, Rabi programmes etc. The Agriculture Department will make an assessment of the outcome of these programmes at the end of the year and make available a copy of such assessment to the Revenue Department. The 'credits facilities' provides on the basis of 'the Bihar and Orissa famine Code, 1913 under section 155 a set of Special Rules and under the Land Improvement Act XIX of 1883 for grant in an area declared by the Local Government under section 74 'as affected by distress', the same provisions are updated in Bihar and Orissa Loans Manual reprinted in 1971 read with the Bihar and Orissa Famine Code 1930 section 47. These special rules are applicable when the extensive distress due to distress and calamity is imminent or is present. These provisions have been adopted in the Code 1980. Stipulations are also made to 'Taccavi Loans' i.e., sagging of the morale of the people is inevitable on the occurrences of a wide spread calamity including disasters like cyclone and tidal inundation. It is of great importance

on such occasions, to have recourse to an early adequate distribution of loans, both as an act of moral strategy to give confidence to the people and also with the object of stimulating agriculturist efforts. In the circumstances, liberal advances may be given under the Agriculturist Loans Act 1884 until normal conditions are restored. The extent of loan is dependent on the degree of distress caused by natural calamity. Institutional loan facilities are stipulated during the time of natural calamities which may be a substantial amount for not only purchase of seeds, bullocks, fertilizers and insecticides but also for various other purposes like provision of water for irrigation (dug wells), capital employment of labourers, removal of sand from sand-cast lands, and land improvements. The Agriculture department will take steps for providing institutional credit in time for all such purpose.

Strengthening of Public Distribution System and Supply of Food Stuff for Relief Measures:

The PDS is the normal channel for distribution of essential commodities among people. Free flow of staple commodities like rice, wheat, products and other necessities of life of people are made available through this system at affordable price. This envisages also labour intensive works in order to provide employment to the rural population and in continuum opening of fair price shops or retail centres quite contiguous to the relief operation areas to avoid long distance movement of the consumers to avail the facility. This facility in addition to the gratuitous relief measures (supra). The concerned officers are required to avail adequate stock to face any contingency that may arise during the distress times. A report of the working of the PDS should be made immediately available to the BoR / SRC immediately after the occurrence of natural calamity.

Special Provisions in matters of 'Relief to Weavers and other Backward Artisan Class of People':

The rural artisan class like weavers, the fishermen, the potters, the blacksmiths, the carpenters, the cobblers, the tailors and similar others who are engaged in specialized trade are considered for liberal extension of relief measures. The BDO shall prepare a detailed list of these class persons and the damages they suffered including the loss of their equipments, implements and instruments and indicate the value thereof; the BoR / SRC on receipt of the same shall define a policy and sanction such relief measure as deemed proper. The Relief may be in the form of free grants for purchase of raw materials, tools and implements, including boats or nets to fishermen; for repair to workshop or shed; or giving of cash grants or loans. Special relief to distressed weavers and other artisans may be as far as possible given, if they are:

- a. Unfit, by the practice of their profession and hereditary habits, for hard outdoor labour; or
- b. Physically incapable of earning a sufficient livelihood in relief works; or
- c. Unable to submit to the labour tests on relief works without risk or impairing their normal skills or the delicacy of touch necessary for their arts and crafts.

Miscellaneous Relief Measures envisages that *mutatis mutandis* the government should follow ORC1980 stipulated procedures about the occurrence of natural calamities and the standing preparations in the event of any such natural calamity and keep vigilant watch over the situation and in the event occurrence of any such disaster, prompt action for rendering necessary relief to the affected people should be taken, Government Orders wherever needed may be sought for promptly.

Relief to bereaved families for Selfless Service:

While saving or trying to save human life from flood, cyclone or any such natural calamity or disaster, if any person dies accidentally, relief shall be given upto the maximum of Rs.10,000/- to the bereaved family as a token of recognition of the selfless service. Relief for other loss of life includes the cases of any member of the family dies to such natural calamities relief shall be given upto a maximum of Rs.05,000/- to the bereaved family⁵⁷. The Collector is empowered to sanction the relief. An elaborate procedure of record and registration of such sanctions of relief is also mentioned.

Sanction of Reward for showing exceptional bravery in rescue operations: A reward may be sanctioned in favour of an individual showing exceptional bravery in the rescue operation undertaken in connection with natural calamity.

The ORC 1980 has taken care to provide a very stringent '**Accounting and Auditing**' procedure which includes:

- a. Policy and arrangement for financing Relief Expenditure;
- b. Provision of fund in the annual budget for Relief Expenditure;
- c. Allotment of funds for relief measures;
- d. Supplementary allotments;

57 Rule 254 vide Revenue & Excise Department Resolution No. 24143/R dated 5th May 1992 and resolution No.38277/R dated 1st September 1995 and Resolution No. 52854 dated 24th November 1995 in ORC 1980 further provides for the cases where more than one member of a family dies due to such natural calamities, relief shall be given to the bereaved family as follows:

- i) Rs.10,000/- in case any member of a family dies,
- ii) Rs.06,000/- in case the second member of the family dies,
- iii) Rs.04,000/- in case of the third member of the family dies,
- iv) Rs.02,000/- in each case of death of an additional member of the family.

- e. accounts Registers;
- f. Drawl of money from treasury in case of emergency;
- g. Sanction of permanent advance;
- h. Expenditure statement and control;
- i. Reconciliation of departmental figures of relief expenditure with Accountant General's figures;
- j. Application of the normal accounting procedure and rules in respect of relief expenditure
- k. Audit of relief accounts;
- l. General points requiring attention of Audit;
- m. Classification of relief expenditure.

The concluding portion of the relief operations in the risk- management scheme is the '*Reports and Returns*': Like information dissemination and intelligence in undertaking of relief operation the vital finale to all the activities done 'prompt reporting' finds the crucial place. It is envisaged that all the concerned right from the field staff to policy making authority to quickly write down a report of the part played in disaster management depicting the facts and figures of the distress report and role play with in the stipulated time. The report should reach through the proper channel to the BoR / SRC. In appropriate cases a '*Memorandum of Natural Calamities*' will be submitted to the Central Government by the State Government. The Government of India prescribed⁵⁸ certain outlines and formats for use in drafting the memorandum and supplying information therein. Submission of monthly return on physical and financial achievements to the Government of India, utilization of advance plan assistance, report on flood damage required by the Central Water Commission, submission of weekly report on flood damage to the Government of India. A list of 28 reports⁵⁹ are prescribed with details of to whom they should furnished and the period of submission is also stipulated.

58 Letter no.12-1/77-(SR) dated 4th July 1977. the Letter written by S P Mukherji, Additional Secretary to the Government of India writes 'it is felt the task of central teams will be considerably facilitated if the memoranda submitted by different state governments conform, as far as possible, to the outlines (suggested)...' This includes:

1. Back ground of the natural calamity
2. Nature and extent of damage caused by the Natural calamities
3. Loss of revenue, if any
4. Measures taken by the State Government- emergent rescue, preventive health, relief etc.
5. Overall agricultural situation in the State
6. Requirements of Financial assistance for housing, fodder, fertilizer etc
7. Review of position for food grain
8. Summary

Formatted tables (11 numbers) are stipulated for filling up the appropriate columns depicting the above details.

59 The Following Reports are to be submitted by the District Collector:

1. Weather and Crop Situation – *Fortnightly*

Issue of White Paper: In case of a Major Calamity the legislators, the Press as well as the public express concern over the situation prevailing and relief measures undertaken, in order to present authentic information, the State Government usually lays a White Paper containing all the material particulars of the floor of the assembly for the information of the Members, copies thereof being circulated to the Press. When Government decides to take this step, the Revenue Department shall compile the White Paper after obtaining necessary material from the BoR /SRC.

Cyclones in Orissa:

The coast line of the State of Orissa stretches to 480 kms length on the east of Indian peninsula with the Bay of Bengal interface. The districts of Gajapati, Ganjam, Puri, Jagatsinghpur, Kendrapara, Bhadrak, and Balasore enjoy the sea line. Orissa located at lat.17.31°N – 20.31°N / long. 57.30°E - 81.31°E with an area of 1,55,707 square kilometers. The frequency of cyclonic storm during 1891-1989 is that the district of Balasore struck with 19 Cyclones, while the district of Cuttack with 17, and the southern most district of Ganjam with 7 cyclones. During the years, Orissa suffered following ‘severe cyclones’:

1. 1831- at Balasore – more than 22,000 people lost life
2. 1885 – False Point – more than 5,000 people died
3. September, 1971- nearly 10,000 people died due to severe wind and

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2. Situation Report for April, May & June – 10th July
 3. Monthly Situation Report from July to October- Special Situation Report – 10th of succeeding month/ October.
 4. List of Flood Circle Officers – 1st week of June.
 5. List of Places where Food Stock stocked – 30th June
 6. Review of Pre-Flood arrangements- 5th July
 7. Submission of daily situation report during Flood- daily
 8. Preliminary Flood damage – immediately after assessment.
 9. Final Flood Report- within one month from the abatement of Flood.
 10. Review of Pre-Cyclone arrangement – end of September
 11. Occurrence of Cyclone- within 24hours
 12. Post-cyclone disaster measures – quick review and submission of report on damage – within three days of occurrence.
 13. Preliminary and Final of Cyclone Damage Report – immediately after assessment and after abatement of Cyclone respectively
 14. Monthly return on work – 20th of succeeding month
 15. Monthly return of gratuitous relief – 25th of the month
 16. Monthly return on feeding programmes – 15th of succeeding month
 17. Monthly return of private Charity – 10th of succeeding month
 18. Monthly return of Orphans – by the end of the month
 19. Director of Health & FW Services : Weekly report on Health Measures – 7th, 14th, 21st and last of the month
 20. Director of Animal Husbandry and Veterinary Services: Weekly report on veterinary Measures - 7th, 14th, 21st and last of the month
 21. Irrigation and Power Department to Revenue Department: Progress in Clearance of damage works- 30th June 7, 2003
 22. Irrigation Officers to Collector: Weak points in flood control : Last week of May

tidal surge.

4. September, 1985 – 84 people died and 2600 cattle were lost, Land of 4.0 hectare damaged.
5. June, 1989- 61 people died and 27,000 cattle lost life, 145,000 houses devastated.
6. October, 1999 – two cyclones struck, while the first cyclone killed 100 people and devastated one whole of the district of Ganjam, while the later distinguished as ‘Super Cyclone’ took a toll of 10,000 human live and proportionate high toll in cattle and other animal extinction with widespread destruction of property and infrastructure in 12 of its districts, bringing the state of Orissa to its knees.

Orissa had the history of being a victim of ‘severe’ to ‘very severe’ cyclones during the years 1942, 1971 before suffering the disaster of Super Cyclone in 1999. The killer Cyclone of 1999 rendered nearly 90 percent of the mud and thatched dwellings and 6million marginal and small farmer landless agricultural workers, fisher folk, and artisan jobless for more than 180 days. The inundation by saline water with tidal wave rising above 10 meters at many places, left most of the drinking water sources dysfunctional for days. About 350,000 cattle perished and paddy crop worth Rs.1,750 crore, spread over 24 lakh hectares, was destroyed by high velocity winds with speed ranging between 100-250 kmph. Most affected districts are Paradip, Jagatsinghpur, and Kendrapara where a scene of total destruction appeared after the continuous three-day cyclone visit. The green cover of the state estimating to 9 million trees was destroyed. Most of the cyclone victims did not find the warning and information any different from the past and as such did not take the anticipated precaution as stipulated. This cyclone has been rated by the Meteorologists and Oceanographic scientists as the severest cyclone of the century, both in terms of intensity and trail of destruction that ever occurred in India. In Orissa, it was compared to ‘False Point Cyclone’ which ravished the State during the dates 19th - 23rd September 1885; the scientists in India explained that it was severer to that of Cyclone in Andhra Coast in 1977, where it killed 8547 people and 40,000 cattle and disrupting the life and infrastructure facilities of the State for more than 30 days.

Pre-Cyclone Measure: Cyclone Warnings and state of Preparedness during Super Cyclone:

Cyclone Warning Dissemination System CWDS did transmit the disaster warnings directly to the community using INSAT satellite, but no information about the destructive nature, the ferocity, the violent status was forth coming.

There were about 28 operational active warning sets functioning on the Orissa coast until 28th October 1999 as confirmed by the IMD⁶⁰. The AIR and Doordarshan did broadcast and telecast the warnings as per stipulations. The print media brought out the IMD bulletin as per the information indicated.

Government of India through the Department of Agriculture and Cooperation (DAC) functioning as the nodal agency for relief and rehabilitation measures in the wake of natural calamities convened pre-cyclone emergency meetings with the Chief Secretaries of all the three vulnerable State Governments of Andhra Pradesh, Orissa and West Bengal, as early as on 26th October 1999, and took stock of the alert status.

The National Crisis Management Committee (NCMC) under the Chairmanship of Cabinet Secretary reviewed the status preparedness in the meetings held at 2200hours on 27th October '99 and at 16hours & at 23hours on 28th October '99. The representatives of various ministries and departments of GOI viz., Defence, Home Affairs, Power, Telecom, Shipping, Road Transport, Railways, Petroleum, and Natural Gas, Information & Broadcasting, IMD and Resident Commissioners of the concerned states were all present in the meeting and gearing up for preparatory measures⁶¹. The NCMC communicated the Chief Secretary of Orissa to take necessary measures including evacuation of the people, stopping of drains in the vulnerable areas.

60 Managing Disasters in Orissa, Orissa State Disaster Mitigation Authority (OSDMA), 2002, Pp.34. – The IMD officials in Kolkata first sighted the depression near the western coast of Malay Peninsula as early as October 25, 99. The fact that the system posed a potential threat to the Indian Coast line was brought to their notice three days in advance. A series of Cyclone alerts and regular cyclone warning bulletins were issued. The ACWC issued warnings for north Andhra Pradesh, Orissa, West Bengal Coast. The CWC commenced warning from the late evening of 27th October, 99. The bulletins indicated ongoing intensification of the cyclonic storm, occurrence of gale winds varying from 100-200 kmph, heavy to very heavy rainfall in the coastal districts, high to phenomenal state of sea and advice to fishermen not to venture into the sea. As the system approached Orissa coast and intensified into a super cyclonic storm, the warnings are upgraded to indicate gale wind speed reaching 240-260 kmph and storm surge reaching 4-5meters above the astronomical tide level at the time and point of landfall.

61 The preparatory measures taken were:

1. Cancellation of rail services in some routes and diversion of trains in other routes in order to eliminate the loss of life.
2. the Armed forces and paramilitary forces were alerted to remain in readiness and to be available to the state government for the help.
3. A team of senior officers from the Ministry of Health was deputed to Orissa.
4. The port authorities at Paradip, Kolkata and Visakhapatnam were alerted to take all preparatory measures.
5. Department of Power alerted to remain in state of readiness.
6. Department of Telecom informed all its local organisations.
7. The Doordarshan and RIR were informed to issue special cyclone bulletins in various languages including local languages.
8. The Ministry of Petroleum was advised to ensure availability of Kerosene and other petroleum products.
9. A decision was taken to send a rapid Action Team comprising the officials of the Ministries of Agriculture, Power, Roads, Telecom, Defence, and Shipping.

Regarding the 'event prediction', the IMD conformed prediction that the cyclone would be very severe and make landfall on the night of 28th October between Puri and Balasore⁶². The prediction was accurate and was available more than 75 hours before the event, providing ample time for 'risk-avoidance action'. The State Government communicated the warning to district Collectors and alerted Army. Over the next 48hours the Collectors were kept posted about the cyclone's movement and were asked to evacuate people residing within 10 kms of the sea. At about 7.30 AM on 29th October '99 the states' communication system got disrupted to the ferocity of the super cyclone creating chaos in monitoring the event. The breakdown of the power and communication network has brought the state administration to a grinding halt, depending totally for help and assistance from neighboring states and other agencies. The Army launched 'operation sahayata'; Initial relief came from government of Andhra Pradesh⁶³ and Care India. The NCMC started monitoring the disaster management from Krishi Bhavan by establishing a 'multi-disciplinary control room.

When the cyclonic system took the shape and attained the ferocity of super cyclone range and made a landfall near Paradip⁶⁴, the whole of the Coastal Districts plunged into sudden darkness, being bitten by the high velocity wind and heavy rain at places. In no time the state became poorer by several million rupees infrastructure, agriculture facility, and huge toll of human life due to storm surge and torrential rain and ensuing flood⁶⁵. The worst affected area was Ersama, where public warnings were broadcast on the electronic media

62 The Orissa Meteorological Department had issued a warning in the afternoon of 26th October '99.

63 An iridium global satellite phone sent by the AP Chief Minister Mr.Chandrababu Naidu to his counterpart in Orissa Mr.Giridhari Gomang was of immense use in communication, the AP relief team helped in clearing the road, the APTRANSCO assisted in restoring power, the medical team from Andhra Pradesh joined the relief action plan.

64 Landfall point: Between Ersama and Balikuda (southwest of Paradip)

- Time of landfall: 10.30 AM of 29th October '99.
- Storm surge: 7-10meters
- Eye of storm: Paradip
- Diameter of cyclone: 200kms
- Central pressure of the storm: 926hpa
- Storm intensity 6.5 in Beuforte scale
- Wind speed; 200-260kmph

(Source: White Paper on Super Cyclone, Chapter-2 p.22)

65 Super Cyclonic Storm (October 29th -30th '99) damage statistics:

- Population affected: 15,68,11,072
- Number of villages affected: 14,586
- Districts affected: 12
- Human lives lost: 9,893
- Livestock perished: 4,44,531
- Houses damaged: 16,61,683
- Cropped area damaged: 18,43,047

(Source: White Paper on Super Cyclone, Chapter-2 p.22)

more than 50 hours before the disaster struck and even the remote villages were covered through battery-operated radios and TVs. The warning categorically advised evacuation of certain areas⁶⁶. The cyclone warnings were 'timely', reached the vulnerable people, and appropriately disseminated in view of the impending disaster, however the aspects of 'decisiveness', 'credibility', and 'specificity' about the risk information was not upto the mark, for the weather information puts the onus of taking decisions on the people, emergency action information instructs people in certain ways both together leaving the people indecisive as to act on their own judgment or to follow instructions. The ill fated people preferred status quo, and remained confined to their mud-walled home on the flat low-land only to be swept away by the tidal waves which made larger inroad because of larger storm surge and inundation⁶⁷. Ersama people were not aware of any 'risk avoidance action' to act swiftly and to exercise choice for mitigating the disaster.

The infrastructure that Orissa had at its command was in contrast to all the policy, executive orders formulated in the subordinate legislation ORC 1980. Orissa was having only 23-Cyclone Centres (constructed by Red Cross Society), where as it should have had at least 480 for 480kms coastline. The wireless system failed during the cyclone for want of radio masts that could withstand high wind velocity. The ham radio network as a backup communication link is almost absent in Orissa. The fail-proof communication system was near to naught in Orissa during the cyclone. The criticism is being made to the ORC for not distinguishing 'weather information' and 'emergency action information' in the warnings issued. Emergency-action level based on predicted cyclone intensity is not stipulated in the Code and the third of the criticism is targeted to 'the revenue department', who are empowered with the task of the coordination of the disaster mitigation services. The activated emergency plan though started at Ersama came to a grinding halt for want of effective transportation system and appropriate cyclone shelter. There however remains a need for a specialist emergency management agency to handle such situation instead of overburdened District Collector and the Revenue Department.

The large scale destitution that followed the cyclone was made worse by the fact that education, health, situation and drinking water facilities remained damaged and non-functional for months after cyclone. The economy of the state was shattered, although the districts in the coastal belt are considered prosperous, a large segment of the population was already vulnerable and living

66 Ibid at p.35.

67 Ibid at page 36 – The destruction was complete by the incessant rain and strong winds that smashed houses, uprooted trees, power and telephone poles and felled all that came across the storm's path.

below the poverty line before the cyclone hit. The most important failure was resulted from the community based disaster preparedness, perception and people involvement to reduce the catastrophe. There is an imminent need to infuse a disaster reduction component into development activities of the state so that the objectives of restoration and reconstruction as well as building up the capacity to face future calamities.

Reference has to be made to the extremely poor and inadequate communication systems affected areas for consideration of improvement of the road networking, electricity, warning systems and other forms advanced communication. The preventive and preparedness measures to combat the disasters should form an integral part of all the developmental plans irrespective of departments to whatever they relate.

Risk Reduction Measures commences from risk assessment. The evaluation of risk from a tropical cyclone has to be made through a hazard map, by analyzing climatologically records of previous cyclones, by studying the history of wind strength, frequencies, the height and location of storm surges and frequencies of flooding, by building a data base of information about occurrences of cyclones in the past 100 years over the Bay of Bengal and their intensity, track, impact and lessons learnt from each of the occurrences. The OSDMA prescribes the following specific preparedness measures as a lesson learnt from the Super Cyclonic disaster:

1. An integrated warning / Response System
2. Effective Public Warning System
3. Fail-proof Communication net-work
4. Building a cadre of specialist risk management agency
5. Community Awareness, Training, and Participation
6. Creation of trained personnel at the village level in search & rescue operation
7. Planned cyclone shelter centres
8. Improvised housing structure
9. Stock piling of relief material, medicine, and drinking water
10. Post-disaster arrangements such as-
 - Evacuation
 - Emergency Shelter
 - Search & Rescue
 - Medical assistance
 - Provision for short term food and water
 - Water purification

- Epidemiological surveillance
- Provision of temporary lodging
- Reopening of roads
- Reestablishment of communication networks and contact with remote areas
- Debris clearance
- Disaster assessment
- Provision of seeds, other livelihood support, restoration and construction of damaged buildings and other infrastructure.

There appears that the ORC 1980 designed with its updated executive directives and mandates till 1996 were in order. Any law relating to disaster mitigation, risk management has to essentially include all the policy directives as conceptualized in the Orissa Relief Code. The shortcomings in the Code can be augmented by updating with the advancements made in the knowledge and technology all around the world in the field of 'risk management'. The thrust in the prevailing circumstances should be more on community awareness, people participation, and formation of village self-help squads. The people awareness programmes should be repetitive, continuous and targeted for internalization, and involvement. The Orissa Super Cyclone largely tells a tale of economic backwardness, poor infrastructure networking contributed to the aggravating situation of human loss interalia the property damages. The disaster-mitigation-law in the books is both apt and at appropriate place but there has been a crisis in learning, understanding, and making effective use of the well articulated policy and propositions. From the analysis of the research reports of the meteorologists, oceanographers, and disaster managers it appears the Cyclone visited Orissa in a very very furious animosity, which never happened in India any where earlier, as such the bite of the cyclone would have caused the similar disaster and distress any where around a third world nation.

COPYRIGHT LAW AND ROLE OF COPYRIGHT SOCIETIES IN EXPLOITATION OF ECONOMIC RIGHTS

*R.R. Gupta**

‘Copyright’ means the exclusive right, given to authors or creators of works, like books, films, computer programs, to control the copying or other exploitations of such works. Copyright begins automatically on the creations of work without the need for compliance with any formalities. The only prerequisites for protection which apply to all works are that the work must be of a type in which, copyright can subsist, and that either the author is ‘qualifying person’¹, or the work has been published or broad cast, in an appropriate manner. The work must also be original and it must be recorded in some form i.e. written or stored in computer memory. The author or the creator has the exclusive right to communicate the work to the public.

This exclusive right is granted in respect of all works under various sub-sections of section 14. Section 14(a) (iii) of the Act confers on the owner of the copyright in literary, dramatic or music work the exclusive right to communicate the work of the public. Under section 14(b) (i) read with 14 (a) (iii) the owner of the copyright in computer programmes has the exclusive right to communicate the work to public. Section 14 (c) (ii) provides in respect of artistic work the exclusive economic right to communicate the work to the public. Similarly, section 14 (d) (iii) provides in respect of cinematograph films the exclusive right to communicate the film to the public. Finally section 14 (c) (iii) provides in respect of sound recording the exclusive right to communicate the work to the public. Berne Convention reiterates this right at international level. Article 11 of the Berne Convention grants the author of literary and artistic work the right to enjoy, exclusive right of authorising the broadcasting of their work or communication thereof to the public by any means of wireless, diffusion of signs, sounds or images.

In certain cases, the author, director or creator of a work may be entitled to exercise certain right which may include the right to be identified with a work and to object to distortion or unjustified treatment of the work. Where any of the various exclusive rights which collectively make up copyright in a

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1 The drafting practice for amendments to the Copyright Act has been different from the amendments in other Acts in India. Normally in other laws the old provisions have been omitted by omitting those sections with numbers and instead new provisions have been inserted with new section numbers. In Copyright At the far reaching changes have been made in various provisions by totally deleting and adding completely a new section in its place. The progression of clauses is also different. Generally after clause (f) by amendment (fa) is inserted but in copyright law (ff) has been inserted. Similarly (xx) is inserted after (x). This is not to criticize the drafting but the persons trained in finding the law in a particular manner may have to look at least twice to confirm that they have not skipped definitions in some of the clauses and after (f) in this Act is (ff).

work have been exercised without permission, civil remedies may be available and in certain cases the criminal action may be brought up by such owner or author where the copyright is being infringed with a view to commercial gain.

In India, the first legislation in this regard was Indian Copyright Act, 1914 which was mainly based on the U.K. Copyright Act, 1911, with a view to fulfill International obligation in the field of copyright, the Copyright Act, 1957 was enacted. The new Copyright Act was put on the statute book by mid-1957 and was brought into force from 21 January 1958. The Act did not break away from the past, but had renovated and built upon the solid old foundation. This accounted for its affinity with the U.K. Copyright Act, 1956 (replaced by 1988 Act). It was no longer a replica of the British legislation and had acquired its own distinctive features.

For the first time it established a Copyright office under the immediate control of the Registrar of Copyright, a civil servant in charge of administrative matters pertaining to the Act, and provided for the maintenance of a Register of Copyrights. The Act also established a quasi-judicial Copyright Board under the Chairmanship of a sitting or retired judge of the Supreme Court of India or of a High Court, or a person qualified to be so appointed, and vested the Copyright Board with important powers. The Act gave recognition for the first time to Cinematograph films as a distinct class of work eligible for copyright protection and to a special right called 'broadcast reproduction right' in programme broadcast by radio and television. It is to be noted that present broadcast reproduction rights are completely different from those recognized in 1957. The Act also recognized for the first time the 'moral rights' of the author, which are described in the Act as 'special rights'.

The revision of both the Berne Convention and the Universal Copyright Convention (U.C.C.) at Paris in 1971 made available special provisions to developing countries enabling them to grant compulsory licences for translation and reproduction of works of foreign origin when required for educational purposes. In 1983 the Act was amended inter alia to avail the special concessions. This was soon followed in 1984 by another amending measure to protect the Cinematograph film industry from the rapidly growing menace of unauthorised video-reproduction of films, and the record² industry from the then-growing record piracy. Provision was made for more effective prosecution and deterrent punishment of offenders. In 1991 the Act was amended to extend the term of copyright to sixty years instead of fifty years³. The Copyright Act, 1957, as amended in 1983, 1984 and 1992 and major amendment in 1994 and again in 1999 which relates to information technologies and computer programmes.

2 As it was referred at that time. Now they are protected as Sound recordings.

3 The term was extended by an Ordinance on 28.12.1991 and was made into Act 13 of 1992.

Meaning of Copyright

To understand the meaning of copyright, it is essential to state the provisions of section 14 of the Act. The section provides:

For the purpose of this Act, “copyright” means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:-

- (a) in the case of a literary, dramatic or musical work, not being a computer programme,-
 - (i) to reproduce the work in any material form including the storing of it in any medium by electronic means;
 - (ii) to issue copies of the work to the public not being copies already in circulation;
 - (iii) to perform the work in public, or communicate it to the public;
 - (iv) to make any cinematograph film or sound recording in respect of the work;
 - (v) to make any translation of the work;
 - (vi) to make any adaptation of the work;
 - (vii) to do, in relation to a translation or an adaptation of the work; any of the acts specified in relation to the work in sub-clauses (i) to (vi);
- (b) in the case of a computer programme,-
 - (i) to do any of the acts specified in clause (a);
 - (ii) to sell or give on commercial rental of offer for sale or for commercial rental any copy of the computer programme :

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

Thus , “copyright” means the exclusive right, subject to the provisions of the copyright Act 1957, to do or authorise the doing of any specified acts in respect of a work or any substantial part thereof, as elaborated under Clauses (a) to (e) of Section 14 of the Act. The Act lays special emphasis on the concept of “Ownership” and “rights” of the owner of the copyright. Though registration of a right with the Copyright Office is optional and not essential, however, the Act provides for compulsory registration of copyright (Section 14) in order to get legal protection under the Act. In the Register of Registration, the names or titles of works and the names and addresses of authors, publishers and owners of copyright and similar other related prescribed particulars are stated for future

record and legal protection of owner's interest. A copyright owner has five, exclusive rights in copyright work : Reproduction right, modification right or derivative works right, distribution right, public performance right and public display right or broadcast right Registration is the prima-facie evidence of ownership of the copyright. Anyone who violates any of the exclusive right of a copyright owner is known as infringe of copyright. Copyright owner is known as infringe of copyright. Copyright shall be deemed to be infringed (section 51) when any person having no such proprietary license, does anything or permits for the sake of profit, for which the exclusive right is conferred on the owner of the copyright. Similarly owner's copyright shall also be infringed when any person makes sale or hire or sells or lets for hire or distributes for trade etc. affecting the rights of the owner of the copyright. Explanation to Section 51 further clarifies that the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an "infringing copy". Restrictions are also imposed on publishing a sound recording or a video film in respect of any work unless prescribed particulars are stated and procedure is followed (Section 52-A). In order to restrict such misuse and infringement of copyright of the owner, the Act prescribes certain civil remedies and declares offences to be' penally punished according to prescribed judicial process.

When any person produces a work in the context of Copyright Act, 1957 (herein after Act) there are two logical steps⁴. The author may make other copies of the work himself or he may communicate the work to other persons from the public, which can be done either by supplying a copy of the work or the work may be communicated without supplying a copy. For supplying a copy reproduction of the work is necessary. There can be various forms of communicating the work of public.

Communication of the work can take place when the work is heard, seen or otherwise enjoyed or the work may be performed as it is or it may be allowed to be incorporated in a sound recording or cinematograph or in a performance or broadcast. All such actions in relation to the work are in exclusive domain of the author or copyright holder. When an owner does one or the other of such actions, the work is said to be published. In other words the exercise of one or the other of the economic rights is the vindication of copyright. When the right is exercised the work is said to be published. Publication is important for determining the ownership and duration of rights in relation to work. In s 3 of the Act which defines publications of the work, the two yardsticks have been used for defining publication. Publication of a work is complete if the work has been made available to the public by issue of copies or if the work is

4 Third is performance of the work, which is a bit on periphery of communication of work.

communicated to the public⁵. It is also clear by proviso to s 6 that if the issue of copies or communication to public is of insignificant nature then such making available of the work would not be treated as publication of the work. Thus after the 1994 amendment the expression “communication to public” has equal importance as “the issue of copies” which had been popular all these years in the definition of publication. It is so because of changing, modes of publication electronically. This changes reflects the recognition that now the works may be “made available” not by conventional means of issuing copies but they will be made available more and more by communication to public. The incorporation of the work in a sound recording and making it available to public would amount to publication. The possibility of making the work available by posting the work on Internet sites is going to be more common. It is submitted that once a work has been made available for viewing or hearing or otherwise enjoying in a computer resource with connectivity to Internet, it will be sufficient communication to the public, regardless of whether any member of the public actually sees, hears or enjoys such a work.

Economic Rights as Business Opportunities

Section 14 of the Copyright Act confers economic rights on the copyright owner. The economic rights include such rights which have pecuniary value. Exploitation of the work by the exercise of these rights bring economic benefit to the owner of the copyright. The owner of the work may exploit the work himself or licence others to exploit any one or more of the rights for consideration.

These rights do not enable the owner to undertake anything in particular. They are negative rights that the owner has a right to prohibit others not to do any such action with the work of the owner. Exclusive rights include the following :

- the right to reproduce the work and making the copies available
- the right to communicate to the public by means of, for instance, public performance and broadcasting by cable, wireless, internet or mixed modes of convergence, which appear to be covered in the present words of the Act.
- The copyright confers on the owner of copyright the sole right to perform and any person does this without the consent of the owner he infringes his right.
- the right to make any translation, adaptation, re-arrangement and transformation of work.
- to right to reproduce the artistic work in any material form including depiction in three dimensions of a two dimensional work or in two-

5 For certain purposes of the Act, the performance of the work is deemed to be publication.

- dimensions of a three-dimensional work;
- the right to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;
- the right to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme.

Thus section 14 grants a variety of rights to the owner of copyright. It is interesting or curious that when such a right is exercised excepting those things which amount to publication of the work, if any action (right) is undertaken, it produces a new work which is likely subject matter of copyright. However issue of copies produces a good in which the work is incorporated. A book should be comparable to a sound recording or a film, but it is not. Even the additional ingredients are much lesser in the book. As there is no separate right for the publishers the authors and publishers have to share the economic rights available to the author-owner. This also gives rise to a tense relationship between authors and book publishers. The publisher even though does not normally exercise any of the rights mentioned in s 14 except issue of copies, desires to obtain all (he rights. In the process the possibility of wealth generation by exploiting the same work through publication on other media is compromised. Transfer of those rights which for sure are not to be exercised is to kill the entrepreneurship of author-owner also. This is true even as the publisher might be justified in apprehending the exploitation of the work by other media as cutting into his sales.

The economic rights may thus be seen differently by authors. A person who is exposed to these rights may actively look for opportunities to exploit each and every medium mentioned in the rights. Thus these rights or media might give an insight to the owner for wealth generation or business opportunities emerging from the knowledge of copyright law.

Basic copyright means the right to copy or reproduction of work in which copyright subsists. The authors, composers and artists are to be protected from the public that it should not reproduce the original works of the authors resulting in financial loss to them. The objective of the Copyright is to encourage authors, composers and artists not only to create original works by rewarding them with the exclusive rights for a fixed period⁶ but to encourage them to reproduce the works for the benefits of the public and indeed to exploit all the economic rights as far as possible. Necessarily there is required a large scale licensing activity on the part of the author as the multiple exclusive rights for different mediums need to be effectively exercised.

6 In India after 1992 it is 60 years from the beginning of the calendar year next following the year in which author dies.

Need for Copyright Societies

It is very difficult for an individual writer, composer or musician or other person to sell his original work in the country or abroad without any risk of shutting out the potential licensees or buyers or mis-use by such persons and getting the appropriate commercial benefit. It is also not practical for an individual to sell his work and fixing of the royalty and collecting of the fees and to keep track of the copies or frequency of display or use of the work. An individual is also not a technical and commercial person to evaluate the potential of the work. The selling of the products, getting the agreements signed, negotiations for royalty and collection of royalty fees are considered to a business. The business is supposed to be done through technical experts in the field of business. It is also not possible for an individual to check any infringement of his original work and getting the matter legally objected in the right forum. It was in this background the need of an agency, who can look after the interest of the whole community of right holders in a particular field to combinedly form a society to take a common interest and cause for their benefit.

The Berne Conventions and TRIPS

The Berne Conventions in 1886 laid down rules for providing the protection to the original works in the member countries. Article 1 of the Convention laid down that the countries to which these convention applied constitute a union for protection of the right of the authors in their literary, artistic works. Article 2 defined the expression "Literary and Artistic Work". It includes every production in the literary, scientific, and artistic domain, whatever the mode or form in this expression, such as books pamphlets and other rights Lectures, address dramatic or musical work, choreographic work and cinematographic work.

The convention also laid down how a member country would treat, if there is an infringement of Copyright provisions. The provisions of the International Convention had been revised from time to time to include certain field or area for extending the copyright laws. The latest representation of the Berne convention was finalised in the Berne Convention of Promotion of Literary and Artistic Work (Paris Act) 1971.

India is one of the members of both international conventions, meaning thereby India has to grant protection to the works of the member countries in India and has a right for Copyright protection in those member countries. Now more prevasive than the Berne Convention is the TRIPS whereby the Berne convention has to be applied in a definite manner. TRIPS has introduced consequences for the nation-state if Berne or other IP conventions are not followed.

Copyright problems in some respects are international problems. International problem can travel from one country to another more easily and quickly than other kinds of property and amongst International problem it is cheapest and easiest for copyright materials to travel and now with Internet it is just a click away. Technological progress has made copying of copyright material easy and simple. Books, recorded tapes, or video cassettes of films or computer programmes can be taken from one country to another without any difficulty and thousands of copies made from it and distributed on the click of a mouse. Unauthorised home taping of radio and television programmes have become common all over the world. Photocopying has made unauthorised copying of copyright material simple and inexpensive. Consequently the control of copyright infringement has become very difficult and often impossible. It is submitted that the only possibility for controlling infringing copies is to make authorized copies available at reasonable prices and at all possible places. It is advisable to use all those methods and materials, which are used by pirates to make official copy available. Licensing out at reasonable price is the answer and it is the copyright societies, which can do it effectively.

Copyright Act- 1957 and Copyright Societies

With a view to grant copyright protection the Government of India got enacted the Copyright Act 1957 in Parliament and up-dated it from time to time according to the requirements of the International Conventions. The Central Government of India passed the latest International Copyright Order 1981, as amended in March, 1997. Prior to Amendment Act of 1994 the provisions under sections 33 to 36 for setting up of Performing Rights Societies were concerned with forming societies which could only issue or grant licences for performances in India of any work in which copyright subsisted. These Societies had a limited field of operation viz. granting licences for the purposes of literary, dramatic or music work, which is of such a nature that it can be performed in public i.e. a stage play based on a novel etc.

By the Copyright Amendment Act 1994 the provisions under section 33 to 36 and has extended the operation of the legal provisions to all classes of work, in which copyright may subsist under the Act, Section 33 of the Act provides that no person or association of persons are allowed to carry on the business of issuing or granting licence in respect of any work in which copyright subsists. The Central Government has been empowered to register copyright societies in subsection (3). It shall have regard to

- (i) the interests of the authors and other owners or rights under this Act,
- (ii) the interest and convenience of the public and
- (iii) in particular of persons, who are most likely to seek licences (prospective licences) in respect of the relevant rights,
- (iv) the ability and professional competence of the applicants

(association), if satisfied as to above the central Government may register such associations of persons as copyright society, subject to such conditions as may be prescribed⁷.

The chapter, “copyright societies” (chapter VTI:ss 33-36A) has been inserted by 1994 amendment w.e.f. 10 May 1995. It provides for the registration of copyright societies by the Central Government⁸. From the above date no person or association of persons shall commence or carry on the business of issuing or granting licences in respect of any work in which copyright subsists or in respect of any other rights conferred by this Act except under or in accordance with the registration granted under sub-section (3) by the Central Government

Thus the copyright societies may not only deal in copyright but they may also be established for performers rights and broadcast reproduction rights. Any association of persons who fulfill such conditions as may be prescribed may apply to the Registrar of Copyright for permission to do such business. The Registrar is required to submit the above application for permission to the Central Government. Central Government may register such association of persons as a copyright society subject to such conditions as may be prescribed.

Ordinarily not more than one copyright society shall be registered by the Central Government to do business in respect of the same class of works⁹. Existing performance rights societies are to be deemed to be copyright societies and should get themselves registered within one year from the commencement of Amending Act of 1994. The Act has given the overriding power to the Central Government that if a copyright society is managed contrary or detrimental to the interest of the owners and is detrimental to the interest of the owners of the right concerned it may, after satisfying itself through an enquiry in the prescribed manner, cancel the registration of such society¹⁰. The Central Government has also got authority in the interest of the owners of rights to suspend the registration of such a society, pending enquiry for a period not exceeding one year. The government in such a case shall appoint an administration to discharge the functions of the copyright society under sub-clause (5) of section 33.

Powers and Procedures of Copyright Society

Section 34 of the Act enacts various rights, powers and procedure of the copyright society as under Copyright Society may accept from an owner of rights exclusive authorization to administer any right in any work i) by issue of license or ii) collection of license fees or both.

7 S 33(3).

8 S 2 (ffd) and 33(3).

9 Proviso to s 33(3).

10 S 33(4).

The owner of rights shall have the right to withdraw such authorisation without prejudice to the rights of the copyright society, under any contract. It shall be alright for a copyright society to enter into an agreement with any foreign society or organization administering the rights, corresponding to the rights under this Act. The agreement with such a foreign society may include administration of those rights which are being administered by the concerned Copyright Society in India in the foreign country and administration in India on behalf of the foreign society the rights being administered by such foreign society in relation to foreign works.

However, no such Society shall permit any discrimination in regard to the terms of the licence, disbursement of fees collected between Indian and other works¹¹.

Copyright Society is entitled to issue licenses, or collect fees in pursuance of such licenses, and distribute such fees among the owners of the rights, after making deductions for its own expenses. There is a residuary power wherein the Society may perform any function which is not inconsistent with the basic norm that Copyright Society has to subserve the interests of owners of rights.

Copyright Society shall be subject to the collective control of the owners of the rights under the Act, whose rights it administers. The Society shall submit to the register of the copyright such returns, as may be prescribed by the Central Government. Section 36A, has made a clarification about the rights, or liabilities in any work in connection with the Performing Rights Society, which had accrued or were incurred before the commencement of the Copyright Amendment Act 1994 on 10 May 1995 or any legal proceedings in respect of such rights or liabilities pending on the day.

Procedure

Copyright Rules (amendment 1995) laid down the conditions and procedures for submission of application for registration of Copyright Societies. There are available in Chapter V of the Rules. The conditions provide that any association or persons which may be incorporated or may not be incorporated and if it comprises 7 or more owners of granting licences in respect of any class of works in which copyright subsists or in respect of any other right, such an association may file an application in the prescribed form to the Registrar of Copyrights for submission to Central Government for the grant of permission to carry on such business and for its registration as a copyright society¹². The Central Government within 60 days from the date of its receipt by Registrar may take decision, as such or reject the application after giving the applicant an opportunity of being heard.

11 Proviso to s 33(2).

12 Rule 12 of Copyright Rules 1958.

The Central Government may be order suspend the registration of a Society for a period for a period of not exceeding one year and shall appoint an administrator to discharge the functions of Copyright Society. The Central Government has also authority to cancel the registration of a Copyright Society, after holding proper enquiry if the society had furnished incorrect and misleading particulars in the application for registration. Every society has to file returns and audited accounts to the Registrar within one month from the conclusion of every annual general meeting of the owners of the rights which are owners of the society¹³.

As mentioned above, the Copyright Amendment Act 1994 provides for setting up of separate Copyright Society for different categories of works. In India three Copyright Societies have been registered, one Indian performing Right Society Limited (I.P.R.S.) for Musical work, second is the requirements of Cinematograph Film Producers and third Producers and Phonographic Performance Limited (P.P.C.) in the field of sound recordings.

The Indian Performing Right Society Limited is a Company Limited by guarantee and is a registered company under the Companies Act, 1956. It is a non-profit making body and has been given carry on copyright business in musical works or any action during song, or performed with the music. The Society came into existence on 23rd August 1969. The Society administers and controls the performing rights in music work, musical rights in any musical works and synchronize rights in music work on behalf of its members and those of its sister societies with which it has reciprocal agreements. Nearly all composers, song writers and publishers of musical works are members of the Society. Its members control nearly 97 percent of Indian Music Society, as a direct reciprocal agreement with the similar societies in foreign countries, such as APRA, MACP, ACI, COMPASS and CASH, IPRS serves both as owner and user by acting as a bridge between the owner and the users.

The Society has become an indispensable mechanism for collecting royalties from various users of copyright works of their members and fixing the royalties for payment to such members after deducting 15% as its administrative expenses.

The copyright societies are proceeding in the right direction, serving and giving relief to the individual writers, composers, etc. and industries engaged in such fields all over the world. Copyright societies appear to be only saviors for authors and owners so that they are protected and are equipped to fight with global menace of piracy and counterfeiting through these new institutions which license out and also protect owners from infringement of their rights.

13 Rule 14 P of the Rules.

HUMAN RIGHTS AND WOMEN - A STUDY WITH SPECIAL REFERENCE TO SEXUAL HARASSMENT OF WOMEN AT WORK-PLACES IN INDIA

*Madhu Shastri**

“The Human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in the political, civil, economic, social and cultural life, at the national, regional and international levels and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.

Gender based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international traffic. King are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economics and social development, education, safe maternity and health care, and social support.

The human rights of women should form an integral part of the United Nations human rights activities including the promotion of all human rights instruments relating to women.

The world conference urges government, institutions, intergovernmental and non governmental organizations to intensify their efforts for the protection and promotion of human rights of women and the girl child¹ .”

The status of women in a society has always been a indicator of the development of the society. A cursory study of the *Vedas* and other post *Vedic* scriptures reveal that women of that time did occupy a very high position and were always treated at-par with man. Women were placed on a high pedestal by the society it has rightly been observed that “God dwells where women are respected.” *Brahamvadini* used to preach and teach the Society. There are several instances which show that various *Vedic* Scriptures in *Rig Veda* and other *Vedas* were written by women. Sages, *Vedic* and post *Vedic* literature have enough evidences to prove that women were free to roam in the society without any fear of criminal assault and molestation. In the *Ramayaena*, *Rowan* and *Bali* were punished for inordinate behaviour, and an act of impertinence by *Sri Ram*. With the advent of foreign invasion the higher place occupied by women could not be maintained and various restriction were put on the movement of women.

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1 Para 18: Vienna Declaration and Programme, 1993.

A study of last two thousand years have many instances which show that women used to fear in case they went above and public places, or places of work. There were instances of Criminal assault & kidnapping if they were found alone or without guard. Such instances of criminal assault in public places and work place has now become a matter of routine. Nowadays, newspapers often carry the story relating the Criminal assault on women. It is true that men go wild with women in tender age/any age. Some of these stories tell in details where the employees of organized or unorganized sector has always tried to take undue advantage of situations and have exploited the weaker sex. The women in an unorganized sector are some time treated as cattle and most of the heinous crimes committed at work places go unnoticed and unreported.

Recently, much publicized settlement of \$ 3 million in a case of filed by Reka Maximovitch former executive assistant in US Court against Phaneest Murthy former head of Global Sales & Marketing of Infosys has compelled the society to take substantial and serious to take effective steps to check sexual harassment of women at workplace. It was alleged that Murthy repeatedly sought sexual gratification from her but refused to sustain the relationship. It led to her being fired from the company in December 2000. It was further alleged she was traced down to her new job. Ultimately, Murthy resigned from the company and the company entered into a settlement of \$ 3 million with Reka Maximoovitch in April 2003².

1. The Universal Declaration of Human Rights, 1948.
2. The International Human Covenants on Civil & Political Rights, 1966.
3. The International Covenants on Economics, social and cultural Rights, 1966.
4. The International Covenants on the elimination of All form of Racial Discrimination Against Women, 1979 (CEDAW)
5. The American Convention on Human Rights, 1969.
6. The African Charter on Human Rights and People Rights, 1981
7. The Vienna Convention, 1993.
8. The Beijing Declaration, 1995 (Fourth World Conference on Women)

Out of the above mentioned Covenants, the Convention on Elimination of All Forms of Discriminations Against Women (CEDAW) of 1979, Vienna Convention of 1993 and Beijing Declaration of 1995 are relevant regarding sexual harassment of women at work place. The CEDAW (1979) has specifically point out this problem and under Article 22, it provides that 'equality in employment on be seriously impaired when women are subjected to gender

2 Times of India, Infosys get "Phaneeshiog" Course, May 5, 2003, Page 1.

specific violence, such as sexual harassment in the workplace'. This convention has also defined the term 'sexual harassment' elaborately and has also recommended to the State Members to evolve 'effective complaints, procedure³ and remedies, including compensations. Therefore, this has been referred by the Supreme Court of India in *Vishaka Case* and in other cases.

The UN General Assembly adopted a Convention on the Political Rights of women in 1952, and the work of the United Nations (*Commencing with the establishment of a commission on the status of women in 1946*) has covered a vast area of issues of equality and development of women.

The Vienna Declaration, 1993

Adopted by the United Nations World Conference on Human Rights on 25th June, 1993 emphasizing the responsibilities of all States in conformity with the charter of the United Nations, to develop and encourage respect for human rights and fundamental freedoms for all, without distinction as to race, sex language or religion. The world conference on Human Rights reaffirms that everyone without distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from per section, as well as the right to return to one's own country. In the *Vienna Declaration* it was declared that the human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights.

The Beijing Declaration, Fourth World Conference On Women, 1995

The Beijing Declaration's slogan⁴ 'women's rights are human right's has come to be formally acknowledged and adopted at the intergovernmental level. This declaration prevents and eliminates all forms of violence against women and girls, and promote and protect all human rights of women and girls such as Equal rights, opportunities and access to resources equal sharing of responsibilities for the family by men and women.

The increasing ratification of the covenants on the Elimination of All forms of Discrimination Against Women following Vienna and Beijing Conference has created the illusion that the state parties have indeed recognized that gender based violations constitute human rights violations and need serious intervention on their part to address it, Gender based human rights abuse would refer to denial or violation of rights on the ground of being female.

Position in India

Some of the above mentions International Declarations and Covenant have been widely quoted by the Supreme Court of India time and again. For

3 Article 23, Convention on Elimination of All forms of discrimination Against women, 1979.

4 Article Para 14 Beijing Declaration, Fourth World Conference on Women, 1995.

stance Chief Justice of India J.S. Verma observed in *Vishaka v. State of Rajasthan*⁵ that international covenants are very pertinent in cases of right to work, right to life, and cases of sexual harassment, of working women at all working places and they are very “significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in articles 14,15,19 (1)(G) and 21 of the Constitution and to safe guard against harassment at workplaces”. It was further declare “gender equality includes protection from sexual harassment and right to live with dignity, which is a universally recognized basic human right. The common minimum requirement of this right has received global acceptance. The International Conventions and norms are, therefore, of great significance in the formulations of the guidelines to achieve this purpose⁶”. The Chief Justice in this case also quoted the Fourth World Conference of the Women in Beijing, ‘now it is accepted that regard must be had to international convention and norms for construing domestic law where there is no inconsistency between them and there is a void in the domestic Law.’

In the above mentioned case, a social worker was gang raped in a village of the State of Rajasthan. The incident reveals the hazards to which a working women may be exposed and the depravity to which harassment can degenerate and urgency for safeguard by an alternative mechanism in the absence of legislative for safeguard measures. Thus, the Supreme Court laid down detailed guidelines to fulfill legislative vacuum.

The High Court of Australia in *Minister for immigration and Ethnic Affairs v. TEOH*⁷ has also declared that the concept of legitimate expectations must be recognised in the absence of contrary legitimate provision, or in the absence of the bill of rights in the Constitution of Australia.

A cursory survey of *Indian Criminal Law* would prove that there are various provisions in the *Indian Penal Code of 1860* which can be made use of to protect the women from sexual harassment at work place, but none of these directly and explicitly deal with this problem⁸. As a result of which the Supreme Court of India has to deal with situation separately and declared that there is a absence of enacted law on the subject. It was also recognised by the court that protection of women from women harassment at work place is a basic human right of gender equality. Thus an *Vishaka v. State of Rajasthan*⁹, the court defined the term ‘Sexual Harassment’ and laid down the guidelines and norms to prevent sexual harassment at work place.

5 AIR 1997 SC 3011, Also See Gourav Jain v. Union of India AIR 1997 SC.

6 Para 10 Sarkar’s Supreme Court on Women’s Law., 390.

7 126 ALR 353.

8 The Indian Penal Code, 1860 Sections 228-A, 294, 323, 341, 342, 354, 363, 363-A, 364, 366, 366-A, 369, 370, 372, 376, 376-B, 376-C, 376-D, 498, 509.

9 (1997) 6 SCC 241.

Definition of the harassment given by the Supreme and the other Courts.

The term sexual harassment undermines the dignity of women; it also implies that their working environment is less favourable than that of men. It includes all forms of conduct designed to vex, annoy or bother another person by means that fall short or serious physical injury or threat thereof.

The development of law on sexual harassment is of very recent origin in India. One of the significant pronouncement of the Supreme Court of India is *Vishaka v. State of Rajasthan (1997)* and the subsequent one *Apparel Export Promotion Council v. A.K. Chopra. (1999)*. The later case has followed *Vishaka Case* in which a Bench of three Judges of the Supreme Court, by a rather innovative Judicial Law making process, issued certain guidelines.

Work place because of a particular norm or practice being followed. The Court has, referred to a 1993 ILO Seminar held at Manila, Which recognizes the sexual harassment of women at work place as a form of 'gender discrimination against women'. The case of AEPC was case of molestation and the defence was that the person only tried to molest and there was a want of actual assault or touch. The Supreme Court repelled this argument and held that it was a case of sexual harassment and the person was rightly punished.

While defining the term sexual harassment in *Vishaka Case*, the Supreme Court provides that the term 'Sexual harassment' means and also framed guidelines to handle it. For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

- a) Physical contact;
- b) A demand or request for sexual favours;
- c) Sexually-coloured remarks;
- d) Showing pornography;
- e) Any other unwelcome physical verbal or non-verbal conduct of sexual nature.

In the definition of sexual harassment as adopted in the judgement all instances form (a) to (e) can be categorized as the cases of hostile work environment. The Supreme Court did not distinguish between the cases of discrimination against women in work places as against the cases of sexual harassment.

A Pathfinder

The Court made it clear that at present Civil and Criminal Law in India do not adequately provide for specific protection of woman from sexual harassment in work places and that enactment of such legislation will take considerable time. Therefore, it was found necessary and expedient by the Court to ensure prevention of such type of harassment. Since the decision of

the Supreme Court in 1997, till today no steps have been undertaken by the Central Government or any appropriate legislative body on this issue. Therefore, the decision has become a pathfinder for the Court to decide the cases which involve sexual harassment at place.

Preventive Steps

The court also suggested that all the employers-whether private or public or individuals, incharge of work place should take appropriate steps to prevent the happenings of sexual harassment such steps may include the notification, publication or circulation of (a) prohibited kinds of sexual harassment behaviour against; (b) public rules/regulations with penalties against such offender. The private employees should take such steps under the Industrial Employment (Standing Orders) Act, 1946. It was also provided in the guidelines that appropriate working condition should be provided and there should not be any hostile environment towards women at work place.

Further, the court also suggested that the female employees should be made aware of their rights and should be allowed to raise issues of sexual harassment at workers meeting and at other appropriate forum¹⁰.

Compliant disposal Mechanism

The Court also provided that a 'Compliant Committee' should be constituted which should decide/dispose of the complaints within a stipulated time - that it should ensure time bound treatment of the complaints. Such Committee should be headed by a woman and not less than half of the members be woman. Further, NGO or other body who are familiar with the issues of sexual harassment should also be involved to ward-of the possibility of undue prossue of female employees.

It is to noted that the court has left open the right to seek remedy under the protection of Human Rights, 1993.

The above mentioned *Vishaka Case* was quoted with approval by the Supreme Court in *Apparel Export Promotion Council v. A.K. Chopra*¹¹ and pointed out the in adequacies of Indian Civil and Criminal Law. It was opined that 'sexual harassment is a form of 'sex discrimination' and it creates an intimidating or hostile working environment for female employees. Thus, it results in violation of The Fundamental Right of gender equality and right to life¹². The court also referred to the ILO Seminar held in 1933 at Manila which recognized sexual harassment as gender discrimination against women; and various international convention mentioned in last pages.

10 *Vishaka v. State of Rajsthan*, AIR 1997 SC 387, at 394.

11 AIR 1999 SC 625.

12 Ibid at 634.

International Obligation

While referring to various provisions of the international conventions, the court declared that ‘these international instruments cast on obligation on the Indian State to gender sensitise its laws and the courts are under an obligation to see that the message of the international instruments is not allowed to be drowned.’ Further, ‘the courts are under an obligation to give due regard to international convention and norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law.’ Moreover, sexual harassment is a case of violation of human rights.

Thus, the court reiterated that this growing social menace of sexual harassment of women at the work place must be checked by making proper legislation in this field at the earliest. Moreover, leniency and late tender of apology by the erring person in such cases would demoralize the working women and working environment of the offices.

Constitutional Protection:

Inadequacy of civil and criminal laws in the country was also pointed out by the Supreme Court in *Apparel Export Promotion Council v. A.K. Chopra*¹³ and it also felt the need to have a law regarding the menace of sexual harassment at the work place. It also pointed out that ‘an early as in 1993 at the ILO Seminar at Manila, It was recognized that sexual harassment of women at the work place was a form of ‘gender discrimination against women.’ The court also quoted with approval various International Conventions and instruments as they give a message to take appropriate steps to deal with such gender discrimination against women. It was reiterated by the Court that each incident of sexual harassment, at the place of work, results in violation of the Fundamental Rights to Gender Equality and Right to life and Liberty.

Constitutional Safeguards:

The Right to equality (Art. 14, 15 & 16) of the Constitution of India ensure ‘gender equality’ and prohibit discrimination {Art. 15(1)} in general and equality in matters of opportunity under Article 16(1). Any form of discrimination in matters of opportunity and offices have always been declared violative of gender equality by the respective courts. For example, in *Air India v. N. Mirzaj*¹⁴, the Supreme Court struck down the down the discrimination clause in the service condition which were humiliating for female hostesses. Similarly, the Supreme Court in *C.B., Muthamma v. Union of India*¹⁵ declared

13 AIR 1999 SC 625, The Court quoted with approval its pronouncement in *Vishaka v. State of Rajasthan* (Supra 13)

14 1981 SC 1829.

15 AIR 1979 SC 188868; In *Rupam Deol Bajaj v. KPS Gill*, AIR 1996 SC 309 the court found the slapping on posterior as a case of sexual harassment against a senior police officer of Punjab.

the clause which declares that 'no married women was entitled as of right to be appointed in the Indian Foreign Service', transparent discrimination against women. As a result of which she was appointed on an Indian Ambassador to many countries.

Article 16(2) specifically provides that the State shall not discriminate on the basis of race, religion, sex, place of birth and descent in matter of employment under the State. Above mentioned case of N. Mirza was decided by the Supreme Court under Article 16(2). Similarly, Article 23 also prohibits traffic in human in human being & forced labour. Further, Article 43 also declares that, 'the State shall endeavour to secure by suitable legislation to all the workers, a living wage, condition of work ensuring descent standards of life'.

This all also attracts Article 51-A(c) which, has made it a 'fundamental duty of every citizen of India 'to renounce practices which are derogatory to the dignity of women'. Thus, harassment at work place is almost a violation of this fundamental duty as sexual harassment is a practice, which is derogatory to women.

Some of the other law which directly or indirectly provide protection to women against harassment at the work place are as follows:

1. The Factories Act, 1948
2. The Prevention of Immoral Traffic Act, 1956
3. The Maternity Benefit Act, 1961
4. The Bidi & Cigar Workers (Condition of Employment) Act, 1966
5. The Equal Remuneration Act, 1976
6. The Indecent Representation of Women (Prohibition) Act, 1986
7. The Mines & Minerals Act, 1987

There are also various provisions in the *Criminal Procedure Code, 1973* {Section 47(2), 51(2), 53} and in the *Evidence Act of 1872* (Section 151,152) which also have bearing on the protection of women against harassment.

The Criminal Procedure Code, 1973

The Criminal Procedure Code, 1973 provided some provisions in favour of women because harassment of women increasing at work places in day by day. Section 47(2) protects the female from the entry of Police Officers in their apartment without giving any prior notice.

Section 51(2) and Section 51 are related to search of arrested person. Section 51(2) provides that whenever it is necessary to cause a female to be searched the search shall be made by another female with strict regard to decency. Section 53 provides examination of accused by medical practitioner at the request of Police Officer, whenever a female is to be examined, it should

be done under the supervision of a female registered medical practitioner.

The National Commission for Women Act, 1990.

“Women have been given unequal position in every sphere. Many reformists and social workers fought for the redressal of these grievances. An age long agitation against the discrimination of women, inside and outside the parliament has been waged by parliamentarians, by common men and women by organisation and societies. Several commissions have been set up by the Government to look into the matter of status of women in the Indian society. All the commissions reported about unequal treatment, realising the need of setting up an agency to fulfill the surveillance functions as well as to facilitate redressal of the grievances of women, the government decided to set up a commission for women and passed the National Commission for Women Act, 1990. It extends to the whole of India except the State of Jammu & Kashmir¹⁶.

The Commission has been empowered with the powers of civil court trying a suit. It has been very much instrumental in raising sexual harassment issues at national level and on any platform. Recently, it also submitted draft bill to prohibit sexual harassment at work place and about domestic violence which have taken up well by the Central Government. Thus, the commission have proved to be a very important body for the protection of women against indecency and indignity.

Similarly, the National Human Right Commission Act, 1993 is also a welcome Venture in this direction. It is also empowered to entertain such complaints or to take cognizance so-mutu regarding the acts, which are derogatory to the dignity of women. It should not be forgotten that the Vienna Convention of 1993 has declared that ‘all women rights are human rights.’ Section 2 of the Act specifically provides that the term ‘human right’ also includes all the rights embodied in international covenants. The Commission can enquire into the complaints and recommend the concerned Government or authority to initiate the proceedings for prosecution of to pay compensation/relief to the aggrieved party.

Suggestions

Above discussion and a study of various matters of sexual harassment at work place as reported¹⁷, reveals that sexual harassment of women at work place is the violation of human right which must be prohibited at all costs. As the Supreme Court has declared that there is no domestic law in this regard, it becomes the obligation of the State of uphold the dignity of women. This is not

16 S.R. Myneni, Women and Law, 22.

17 ‘10% of India Inc gender-sensitive’, Times of India, May 25, 2003; ‘Taking a Beating’, Times of India, May 31, 2003, Page 16; ‘Infoscions get Phanee Shing’ Course, Times of India, May 31, 2003, Page 1; ‘Women Serpanchas high light their plight’, Times of India, April 15, 2003, Page 4.

only the need of time but cry of the international community to prohibit such type of gender inequality and protect the right to work with dignity-without fear and favour. It has already recognized at many international convention that discriminatory treatment against as it is humiliating and may constitutes a healthy and safety problem for them. It also anuonntso 'hostile working environment'. India is also participatory and signatory to these international conventions and at Beijing conference, in 1995, made it a official commitment to formulate and operationalise national policy on women and to set up a commission for women's right to work as a defender of women's right. It has also committed to institutionalize a national level mechanism to monitor the implementation of programme for action.

The Case of Vishaka was decided on August 13, 1997 and since than much water has flown but no serious thinking has been given by the Central Government to Check the menance of sexual harassment at work place. The court's advice to enact domestic law on the subject has fallen on deaf ears and the government does not seem serious about this social evil. The result of which, as against 30% reservation of seats for women in the government, only 7% employees of the central government are female employees. This tell the whole story of 'hostile work environment' in government offices. Complaints by the female employees always goes in the favour of perpetrator of the crime and proves humiliating to female employee. Therefore, this is strongly recommended that before situation goes bad to worse, as per guidelines of the Supreme Court in Vishaka Case, necessary law must be passed by the Indian parliament relating to sexual harassment of women at workplace. Some of the left out issues must be covered by the proposed law such as the punishment in such cases be very strict and the name & particulars of such person must be made public.

TOWARDS BRIDGING THE GAP BETWEEN PEOPLE AND THE CONSTITUTION: A COMMENT ON THE NCRWC REPORT

*P. Ishwara Bhat**

Introduction

It can be seen from the Report of the National Commission to Review the Working of the Constitution (NCRWC), 2002, that the Commission carried out an impressive social science discourse of the whole constitutional experience with a responsibility of national level self-introspection rather than confining to a lawyer's law analysis. A prominent theme exhorted by the Commission is enhancing the participative role of the people in working the Constitution and strengthening the constitutional orientation for human development, welfare and harmony. The present paper focuses on this facet of the agenda given by a national body. Before launching into this exercise, some elaboration on the linkage of the Constitution with people is appropriate.

A Constitution is enacted at a landmark stage of nation's life, and reflects the major policy choices of the political society. It is a system of enduring values and a design to approach immortality as nearly as human institutions can approach¹. People are the ultimate makers of the Constitution for moulding their destiny and by reflecting their collective determination for reform. As said by Chief Justice Marshall, "It is the creature of their will, and lives only by their will." Success of a Constitution depends much upon the constant and organized support from the people. Since the live veins of society should nourish a state founded on the Constitution, it is to the society's organic solidarity that one should look for its means of success². People not only feel but also think about the quality of the governance to which they are subjected. Hence, their role is not confined to the task of mere voting. Although they may not be good judges of legislative proposals because of lack of expert political intelligence to foresee the effects, any exclusion of them from the information process relating to policy making or from the task of policy implementation would obstruct the polity's attainments³. According to Lord Irvine of Lairg, "Constitutional paramountcy reflects the notion of social compact, of a population which is engaged in the political process, and upon whose license

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1. Justice John Marshal in *Cohens v. Virginia*, 6 Wheaton 264, 5 L. Ed.257 (1821)

2. B. A. Masodkar, *Society State and the Law*,(Bombay:N.M.Tripathi,1979)pp.x to xii

3. See C.S.Emden, *The People And The Constitution*, Second Ed. (Oxford:

Clarendon Press 1959) pp.312-314; for the proposition that this enhances legitimacy and contractarian perspective of the Constitution and enables transformation of self-interest into collective interest in the process of making constitutional choices, see Dennis C.Muller, *Constitutional Democracy*, New York: Oxford University Press, 1996 pp.60-69

the continued existence of the institutions of government depends. Thus it invokes the idea of participatory democracy.”⁴

The Constitution of India has been a product of national consensus on the method of governing the country with a commitment to the enduring values of democracy, human rights, social justice, and national unity. The preamble’s invocation of popular power – We the People of India-symbolizes continuous mass support to the values and works under the Constitution and solemn commitment to the constructive politics of welfare and unity. Over the last fifty years of crucial constitutional developments, people have identified themselves with the Constitution, internalized its values in their conduct and expectations, and contributed to its fruitful working. Constitutional values have become part of their culture, a new *dharmashastra* for public life⁵. It provided a system that could hold the multicultural society together even at the face of difficult challenges. As Granville Austin viewed, “ The Constitution, above all, has been the source of the country’s political stability and its open society⁶.”

Constitutional consensus⁷ underlying the Indian Constitution is to be gathered in the background of historical events and contingencies of a century old national movement. Love of liberty, yearning for equality, protest against repression and exploitation, urge for self-government and effort towards country’s unity were working in the minds of the Constitution Makers when they enacted the Constitution. These liberal principles of justice and development were incorporated into the political institutions. Steps towards constitutional consensus were meticulously taken by them inside and outside the Constituent Assembly by taking the people into confidence. People accepted these principles as enduring values by acquiescence because they considered them as suitable to the well being of the nation and conforming to their aspirations, which were nurtured over the decades. People’s role through the performance of fundamental duties is significant although it is late recognized and oft ignored. But, in spite of vast illiteracy and poverty, people of India exhibited their acumen to restore constitutional democracy after the internal emergency. The common people, the intelligentsia and the voluntary organizations began to use the Constitution as a sword for redressal of the people’s grievances. Large number of public interest litigations brought the

4. Lord Irvine of Lairg, *The Development of Human Rights in Britain under an Incorporated Convention on Human Rights* (1998) Public Law 221

5. Granville Austin, *Working a Democratic Constitution*, (New Delhi: Oxford University Press, 1999), p.635

6. *Ibid*

7. John Rawls views, “ A constitutional consensus at the level of principles viewed apart from any underlying conception of society and citizen -each group having its own reasons-is consensus taken literally”. John Rawls, *Political Liberalism*, 1993 extracted in M.D.A.Freeman, *Lloyd’s Introduction to Jurisprudence*, Sixth Ed.(London:Sweet & Maxwell,1996), p.483

system of participative justice to the forefront and expanded the scope of right to life. It is a creditworthy achievement that participative justice has been instrumental in vindicating human rights and environmental justice. The advantage of moulding the Constitution into people's Constitution is clear from this development. Added to these are the 86 Amendments, which aimed to accommodate the socio-economic changes and political expediencies within the national system. Understanding the Constitution as a product of common conscience of the community and a value document that musters popular support for fair management of multicultural society is an imperative to appreciate the interaction between people and the Constitution. While full sovereign power culminated in the constitution making process as a *metajuristic* fact, the paramount values undergirding the Constitution and those which are consciously developed by them in response to socio-economic changes continue to operate as inherent limitations on the process of change in the Constitution.

It is a noteworthy fact that delicate balance between competing claims of equality and liberty, fundamental rights and directive principles and democracy and economic justice is consciously contemplated and developed in constitutional law. Equal liberty of all at both individual and community levels is one of the parameters employed towards this end. Non-arbitrariness in hierarchisation of competing values is another factor that helps in this process. The idea of activist state rightly beckons all the organs of state to promote the conditions of dignified life.

Hence, any change-oriented stock taking of the constitutional experiences, after a half century of a republican system's working, should inquire: Keeping in view the fact that people are the ultimate constituencies of the Constitution how to promote a better relation between people and the Constitution? How to continue or restore harmonious balancing of competing values mentioned above without pampering any section of the society? How to enhance the competence of the Constitution to promote cultural pluralism within the framework of national unity? How to integrate democratic principles with federalism and broadbase the popular participation in the country's governance? An effort is made in this paper to understand the approach of the NCRWC towards these objectives. The analysis is confined to recommendations for constitutional amendments suggested by the Commission, and does not deal with legislative and administrative measures in support of constitutional reform.

The basic approach

At the outset, the Commission aimed to further the constitutional objectives and avoid the derogation into basic features of the Constitution. Inferring from the past experiences it said, "The society has not been able to

use the great gifts of Human Rights, Human Security, Rule of Law, Secular Values to bring about a just, caring and inclusive society. Democratic sentiments and institutions need to be strengthened by civic- education, identifying and striving for common purpose and keeping the areas of private and public life separate. The sociology of pluralism is not inimical to strong democracy, but, on the contrary, is in itself a strong sustaining factor of democracy. It is essential to promote participatory institutions.”⁸

About the interlinks of key concepts, it thought, “Democracy, rule of law, constitutionalism and respect for minority rights are essential, collective, inter-dependent, indivisible elements of a pluralist society. They together assure the dignity of the individual and unity and integrity of the nation. The Constitution promised a social revolution and the democratic means for its achievement. The reality of a constitution is not merely its adoption which, in and of itself, does not necessarily signal a state’s commitment, even in theory, let alone in practice, to constitutionalism”⁹

Concerning the new role of the Constitution, it viewed, “In the changing context of globalised economy, the Fundamental law should address itself in action to relocate the sources of the social obligations of the State. This is a complicated exercise. Central to the process of development is the realization of rights. It means that consideration of human rights, equity, equality, equal justice and the accommodation of diversity are central to the conceptualization, design, implementation, delivery, monitoring and evaluation of all developmental processes. The problems of social exclusion, more virulent in India on account of the hierarchical structure of its society, need systemic solutions”.¹⁰

In view of failure to redeem the constitutional pledge and the consequent evils flowed therefrom, it said, “The first and the foremost need is to place the citizens of this country at center-stage and demonstrate this prioritization in all manifestation of governance. Human dignity, human rights, literacy, health, social security and other public goods are not to be seen as ultimate rewards of development; but are quintessentially crucial to the developmental process itself.”¹¹

In the background of maladministration and enormous corruption that have paralysed the creative energies of the people and pushed people and their day to day living more and more into extra-legal systems, it considered that the foremost requirement was the restoration of confidence in the institutions of democracy.

8. NCRWC Report para 2.4.3

9. NCRWC Report para 2.9.1

10. NCRWC Report para 2.3.6

11. NCRWC Report para 2.1.2

“Good systems can and do change men. Good governments can earn their confidence. It is only when we fulfill the basic duty of politics and restoring the power of the Constitution and its institutions back to their legitimate owners – the people – that things will begin to change.”¹²

Considering development as freedom, it looks to the ways for harnessing economic growth to improve human development by broadbasing the economic growth and to ensure universal access to basic social services like education and public health. It regards human development as a process of enhancing the capabilities, enlarging the choices, and expanding the freedoms. It expects people to be active agents of change as a measure of social dynamics. A happy convergence of human rights, human development and human duties is relied upon as a panacea for a variety of social and economic problems.

Amendments suggested to Part-III of the Constitution

Many of the Commission’s suggestions for incorporating amendments to the chapter on Fundamental Rights have the potentiality of bridging the gap between people and the Constitution. Firstly, an effort is made to expand the reach of fundamental rights by suggesting that in Art.12, the expression “other authorities” shall include any person in relation to such of its functions which are of a public nature.’ Since the proposed Explanation makes state action a function-centered concept, the term person calls for suitable interpretation to include Educational Institutions of all categories, societies, and associations in addition to corporate and natural persons. It is to be remembered that along with the expansion of ‘person of incidence’ or ‘burden’ of rights, benefit of right also increases. People are the ultimate beneficiaries in such healthy growth model.

Secondly, the judicial task of humanizing the criminal justice system is carried on further by suggesting incorporation of provisions on protection against torture and cruel punishments, compensation in case of illegal deprivation of right to life and personal liberty, speedy and effective justice, legal aid and implementing the changes contemplated by the 44th Amendment in the procedural safeguards in preventive detention. These not only add to the dependable quality of the legal system, but also enhance the dignity of the human community.

Thirdly, the Commission rejected the proposal of reservation to minorities and general provision about affirmative action for disadvantaged sections. The Commission noted that the ultimate aim of affirmative action of reservation should be to raise the levels of capabilities of people of the disadvantaged sections and to bring them at par with the other sections of society. Its concern for integration of the backward classes into the mainstream of the society is clear in this approach.

12. NCRWC Report para 2.28.6

Fourthly, the positive rights of life and methods for their enforcement suggested by the Commission contemplated an intensive participation by the people for their successful guarantee. Of all the positive rights of life, it is only right to education upto the age of 14 years, right to drinking water and environment. and right to security of rural wage labour for 80 days in a year that were selected for inclusion in the Constitution. Concerning enforcement of right to education, it relied on the active role of local self-governments and parents. It reaffirmed, "Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is a primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities".

The suggestion for incorporation of right to safe drinking water, prevention of pollution, conservation of ecology and sustainable development hinted inter-generation equity and justifiable socio-economic development. A unique positive right evolved by the Commission is a modest rural wage security right, which is a substitute for right to work, a blend of human development policy and the human right principle, and a provider of access to food and health. According to the Commission, it is in the rural sector that widespread poverty, underemployment, malnutrition, lack of access to healthcare and oppressive social customs that bear down heavily on women and children create a social landscape of appalling misery. It is here that a major action plan has to be launched to create additional jobs, to enhance incomes of those at the bottom rung of the social ladder and to create the physical and social infrastructure of a vibrant economy. The list of people-oriented rural employment schemes like water conservation, social forestry, integrated horticulture, calls for high level of people's participation.

Fifthly, the ideas of safeguarding right to information, protection of right to family life and conferment of habeas corpus jurisdiction upon district courts have the potentiality of adding to people's participation in human right protection. Check against abuse of ninth schedule is another factor that contributes to constitutional democracy.

Amendments suggested to the Directive Principles of State Policy and Fundamental Duties

The Commission was inclined to give an active role to the Directive Principles of State Policy by adding the words 'and Action' to the heading and by planning it to make a benchmark for administrative and popular auditing. It gave a list of people-oriented rural employment opportunities and suggested for developing right to work on the pedestal of community's conscience by realizing and exploiting the enormous potential in creating employment opportunities.

Realizing the inextricable relationship between Part III and Part IV of the Constitution, the Commission suggested for activating Part IV by all levels of government. In the view of the Commission, there must be a body of high status which first reviews the state of the level of implementation of the Directive Principles and Economic, Social and Cultural Rights and in particular (i) the right to work, (ii) the right to health, (iii) the right to food, clothing and shelter, (iv) Right to Education upto and beyond the 14th year, and (v) the Right to Culture. The said body must estimate the extent of resources required in each State under each of these heads and make recommendations for allocation of adequate resources, from time to time. For ensuring that the Directive Principles of State Policy are realized more effectively, the following procedure is suggested:-

- (i) The Planning Commission shall ensure that there is special mention/emphasis in all the plans and schemes formulated by it, on the effectuation/realization of the Directive Principles of State Policy.
- (ii) Every Ministry/Department of the Government of India shall make a special annual report indicating the extent of effectuation/realization of the Directive Principles of State Policy, the shortfall in the targets, the reasons for the shortfall, if any, and the remedial measures taken to ensure their full realization, during the year under report.
- (iii) The report under item (ii) shall be considered and discussed by the Department Related Parliamentary Standing Committee, which shall submit its report on the working of the Department indicating the achievements/failures of the Ministry/Department along with its recommendations thereto.
- (iv) Both the above Reports *i.e.* (ii) and (iii) above shall be discussed by the Planning Commission in an interactive seminar with the representatives of various NGOs, Civil Society Groups, etc. in which the representatives of the Ministry/Department and the Departmental Related Parliamentary Standing Committee would also participate. The report of this interaction shall be submitted to the Parliament within a time bound manner.
- (v) The Parliament shall discuss the report at (iv) above within a period of three months and pass a resolution about the action required to be taken by the Ministry/Department.

The Commission recommended that an independent National Education Commission should be set up every five years to report to Parliament on the progress of the constitutional directive regarding compulsory education and on other aspects relevant to the knowledge society of the new century. The model of the Finance Commission might be usefully looked into.

It also contemplated for effective performance of state's duty towards food distribution through the Public Distribution System. Further, it suggested for inclusion of a new Directive Principle for control of population.

Concerning enforcing fundamental duties, it favoured enhanced role of value-based education and parental duty to imbibe the spirit of duty amidst children. It suggested to include a new clause in Art.51A "To foster a spirit of family values and responsible parenthood in the matter of education, physical and moral well-being of children".

The Commission tried to broaden the secular mindset of people by suggesting that under the aegis of the NHRC inter-faith committee shall be established at different levels to promote religious tolerance and communal harmony. Early symptom warning, prompt action and follow up measures would avoid large-scale communal disharmonies, the Commission felt. It observed, "More than five decades of experience with the working of our Constitution and the laws has borne out that democracy in a meaningful sense, depends on a pluralistic ethos permeating the polity. Our national life must be accommodative of the myriad variegations that make up the unique mosaic of India's society. The framework of our many and elaborate structures of government must exemplify the architecture of an inclusive society and one of the means is to promote civil society initiatives for inter-religious and social harmony."¹³ Education in its broadest and best sense can provide the corrective to the aberrations that have occurred.

Amendments suggested to the system of Parliamentary Democracy

The Commission recommended that the provisions of the Tenth Schedule of the Constitution should be amended specifically to provide that all persons defecting - whether individually or in groups - from the party or the alliance of parties, on whose ticket they had been elected, must resign from their parliamentary or assembly seats and must contest fresh elections. In other words, they should lose their membership and the protection under the provision of split, etc. should be scrapped. The defectors should also be debarred to hold any public office of a minister or any other remunerative political post for at least the duration of the remaining term of the existing legislature or until, the next fresh elections whichever is earlier. The vote cast by a defector to topple a government should be treated as invalid. The Commission further recommends that the power to decide on questions as to disqualification on ground of defection should vest in the Election Commission instead of in the Chairman or Speaker of the House concerned.

13. Ibid para 3.32.3

The Commission further recommended for an amendment in the Rules of Procedure for adoption of a system of constructive vote of no confidence. For a motion of no-confidence to be brought out against a government at least 20% of the total number of members of the House should give notice. Also, the motion should be accompanied by a proposal of alternative Leader to be voted simultaneously.

The Commission also recommended that article 105(2) may be amended to clarify that the immunity enjoyed by Members of Parliament under parliamentary privileges does not cover corrupt acts committed by them in connection with their duties in the House or otherwise. Corrupt acts would include accepting money or any other valuable consideration to speak and/or vote in a particular manner. For such acts they would be liable for action under the ordinary law of the land. It may be further provided that no court will take cognisance of any offence arising out of a Member's action in the House without prior sanction of the Speaker or the Chairman, as the case may be. Article 194(2) may also be similarly amended in relation to the Members of State Legislatures.

Amendments suggested in the domain of Union-State relations

By suggesting that Inter-state council shall be activated for resolving the problems of co-ordination, that prior consultations with states shall be held in the context of making treaties affecting the vital interests of states, and that by an integrated river board system inter-state water dispute shall be resolved, the Commission has tried to invoke popular participation and wider consensus of states for establishing amicable Union-state relationship. Thought is also paid to bring in democratic element in the working of Art.356 of the Constitution. It recommended for empowering the House of People to pass a resolution disapproving the continuance in force of proclamation under Art.356. Such resolution is binding upon the President for revoking the proclamation. Special sitting of the House on the basis of notice by not less than one-tenth of the total members of the House is also contemplated. In order to recognize the democratic principle of protecting the identity of state legislatures, the Commission recommended that article 356 should be amended to ensure that the State Legislative Assembly should not be dissolved either by the Governor or the President before the proclamation issued under article 356(1) has been laid before Parliament and it has had an opportunity to consider it.

Decentralization and devolution

An important step in linking people with the Constitution is strengthening the grass root democracy. The Commission took such step by recommending for constitutional amendment to ensure regularity in elections, to protect their identity as 'institutions of self-government', to have access to financial

resources, and for procedural safeguards against pre-mature dissolutions or supercessions. Suggestion for making state election commission free from the control of state government is directed against undue interference of the state governments in the matter of panchayat elections. Restructuring of powers under the Eleventh and Twelfth schedules to the Constitution for establishing separate fiscal domain is also suggested. In integrating panchayat raj system into the system of tribal councils in North Eastern part of India, an effort is made to give due regard to the unique traditions of the region and genius of the people. It insisted that positive democratic elements like gender justice and adult franchise should be built into these institutions to make them broad based and capable of dealing with the changing world.

Other suggestions

Other notable suggestions from the perspective of people's linkage with the Constitution include: thrust towards good governance, avoidance of judicial delay, victim compensation system in deserving cases, legal compulsion on political parties to abide by the Constitution and the policy of giving adequate representation for women, passing of Lok Pal Bill and law on governmental liability in torts. An elaborate discussion is conducted about enhancing the pace of socio-economic development by using the constitutional power. Since statutory and administrative reforms are supplemental to the constitutional process, there is the need for holistic understanding of them in realizing the Commission's recommendations.

The Commission has expressed strong desirability of associating the civil society initiatives in building constitutionalism. It pleaded for energetic effort to establish a pattern of cooperative relationship between state and civic society to regenerate the springs of progressive change. It observed, "Dispersal of power through local autonomy maximizes opportunities for popular participation and helps change the nature of the relationship between the State and civil society. Instead of being merely passive recipients of welfare, citizens become active agents. A democratic society cannot function properly if everything in it is left only to the State or even to statutory bodies. Statutory action itself will be infructuous if it is not underpinned by voluntary action. The exercise of political power through civil society opens the way for concomitant democracy."¹⁴ Civil society consists of open and secular institutions that mediate between the citizen and the State. It makes people self-reliant, involves in socializing process especially of the vulnerable sections, and fills the gap left out by withdrawal of state's role in the context of partial collapse of traditional welfare state in the background of liberalization. Civil society

14. Ibid. para 6.5.1

brings welfare pluralism and cultural pluralism to the forefront.¹⁵ From this perspective, the Commission recommends that energetic efforts be made to establish a pattern of cooperative relationship between the State and associations, NGOs and other voluntary bodies to launch a concerted effort to regenerate the springs of progressive social change with their commitment to human rights, welfare and social justice. State and civil society are not to be treated antithetical but complementary.

Conclusion

The NCRWC Report attains a great importance in constitutional reform or in objective estimation of the constitutional experience because of its emphasis laid on, and way shown towards, bridging the gap between people and the Constitution, a theme of paradigmatic significance. In the background of mixed scenario, viz., substantive success of the Constitution in keeping intact the national unity, in broad basing the roots of democracy and guiding the state engine towards social justice, and the non-attainment of goals in the matter of eradication of poverty, illiteracy and corruption and communalism, the position depicted about linkage between people and the Constitution is one of partial fulfillment. The Commission's suggestions for tapping the full force from the linkage between people and the Constitution by constitutional, legislative and administrative reforms are laudable because of happy blend of vision and pragmatism in its approach..

There are welcome suggestions for expanding the concept of state action, specific inclusion of freedom of information and for incorporating procedural due process norms and right to privacy. Suggestions for inclusion of right to education, right to environment and right to rural wage security appear to be convincing, keeping in view their intrinsic value, their assistance to other positive rights and their not so 'costly' character. The notion that society's effort of human development should take care of human rights in general and that the present practice of judicial enforcement of positive rights shall not be disturbed is the solace for other positive rights. Linking of human development and human duty to the cause of human rights and vice versa is a significant theoretical input made by the Review Commission in filling the gap between people and the Constitution. Concerning religious tolerance, respect for women and amelioration of backward classes, nurturing of a supportive role from the side of people has been sought. The unique method of supervising implementation of Directive Principles of State Policy also falls back on popular

15. See Adalbert Evers, *Part of the welfare mix: the third sector as an intermediate area*, Vol.6: 2, 159-182; Rajesh Tandon and Ranjita Mohanty, *Civil Society and Governance*, New Delhi: Sanskriti, 2002, pp.131-3; Rajesh Tandon, *Voluntary Action, Civil Society and the State*, New Delhi: Mosaic Books, pp.96-99

participation. The emphasis laid by the Commission on education, civil society's initiative and participative role of private and non-profit sectors indicates the importance of building the human rights system strong from the very bosom of community's conscience.

Its suggestions for removing the defect in anti-defection law, for redefining the extent of privileges of legislature, and for evolving the system of constructive vote of no confidence are towards the direction of reinforcing parliamentary democracy. By suggesting that joint management of inter-state river through River Board should be used to solve inter-state water dispute, that states shall be consulted before signing international treaties affecting the interests of States, and that in case of proclamation under Art.356 dissolution of state legislature shall not take place as far as possible but House of People shall have power of revocation of President's rule, the Commission has tried to integrate democratic elements into Union-State relationships. The amendments suggested in the matter of grass root democracy are likely to go a long way in making the local self- government bodies, virtual institutions of people. On the whole, a paradigm shift towards center staging the people in the Constitution's working basically suits the avowed constitutional objectives aspired by 'We the People of India.'

SOCIAL ORDER AND THE LIMITS OF LAW

*Parmanand Singh**

Introduction

We are witnessing mushroom growth of social-action groups to espouse the interests of the victimized and the oppressed individuals and groups. Societal reliance on court-recourse for enlarged justice is being given added impetus by pro-active judges. Legal aid and Public Interest Litigation (PIL) has become an “urban folklore” adored largely in seminars, scholarly comments and judicial rhetorics and continues to be a source of enchantment and sanguine optimism about the effectiveness of judicial initiative as a means of social change.

But the masses are still bewildered by dramatic increase in lawless violence and standardless use of force both by the agents of the government and dominant groups. Trust in law and legal methods is fast declining. The governors of the people are perceived to be unable to control the oppressors and violators and are believed to be susceptible to all kinds of illegitimate pressures. Tendency to use direct action strategies like *Chakkajams, marches, morchas, bandhs, gheraos, amaran anshan*, and other non-violent means of mass protest are increasing. Impressive gains and successes of many direct action strategies confirm the cynicism about court-recourse as a means of the redressal of grievances.

For the poor and the victimized, the state, law and its agents are still present as oppressors. Promise of liberation is seen as empty. Enduring loyalties to Anglo-Indian adversary jurisdiction, colonial structure of the bar, bench and police, shocking instances of administrative deviances, and non-compliance of legal directives have remained the pervasive feature of the Indian public life. One is, quite often reminded of the saying of Karl Marx that at times the state and law may itself “create circumstances of reckless terrorism” and may display a “purely *policemaniac* character in dealing with the subjugated ‘classes’¹. The puzzle, therefore, is that we are seeking to use the law for the liberation of the masses, through judicial intervention, and in this we seek to turn to one organ of the state to reform another organ of the state, both operating on a superstructure sustaining and legitimising domination and power.

Deficiencies of Indian Legal Profession

The ineffectiveness of the legal activism derives largely from the organisation of the Indian legal profession itself. Studies of Indian legal

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1 Upendra Baxi, “*Law Struggle and Change : An Agendum For Social Activists*” social action, Vol. 35, April- June 118-130 (1985).

profession portray the picture of the supply of legal services largely by “solo” practioners locked in the traditional modes of lawyering. The concept of corporate lawyering or collaborative lawyering is yet to reach the Indian legal milieu. A typical Indian lawyer is oriented to court-room advocacy where he spends the whole of his life. There is almost no attempt to operate in other legal settings. The legal profession is highly stratified by skill, wealth, and prestige at each level of hierarchy. There is almost no incentive or willingness to develop new expertise except the centuries old civil-criminal-revenue distinction. Happily few lawyers are trying to specialize in cyber laws and cyber crimes in order to face the challenges of globalization. Arid conceptualism, rule-mindedness, verbal-textual analysis of the law, taught in almost all the law schools in India, is carried over to the court settings and lawyering². An Indian lawyer is generally perceived as a mere wordmonger, parasitic, serving the dominant interests, and thriving largely on caste, community kinship, village notables and tout-networks³. He has little to contribute in the developmental processes. The prestige of the bar has quickly declined in the post-independence era although the profession had played a crucial role in the freedom struggle.

A lawyer has to wait passively for clients. He works in the conditions of chronic oversupply of lawyers. Keen competition, dependency on senior lawyers, sense of insecurity in the profession hinder the growth of any ideology of voluntarism or social commitment among the lawyers for the relief of the oppressed. Skilled and experienced lawyers devote their time in the remunerative work. Consequently, with notable exceptions legal aid cases are handled mostly by the unspecialized and substandard lawyers and that too just routinely and unaggressively.

So we get a picture of legal service supplied by “solo” “individualized” lawyers taking up discrete cases of isolated individuals. This kind of “atomized” legal service is inevitably matched by most of the legal aid programmes pursued by the state legal boards, law school clinics, or the voluntary groups manned by legal academics, social activists or advocates. Legal aid in this sense, refers to the bringing of a case by a poor litigant to the legal aid centres to be pursued in a court through oral and written arguments. These centers handle isolated cases of the individuals, who are able to reach the centers after overcoming several hazards (psychological distrust in free legal service, money spent in the journey, taking off a day from the work place, fear of retaliation by the opponent, fear of non-selection by the centre being not a legal case or being too diffuse or trivial issue to be pursued in a court, etc.).

2 J. Gandhi, *LAWYERS AND TOUTS: A STUDY OF SOCIOLOGY OF LEGAL PROFESSION* (1982).

3 Marc Galanter “*Making Law Work For The Oppressed*” the other side, Vol. 3, No. 2, March 1983.

The traditional mode of legal services is passive in the sense that the legal aiders do not reach out to the clients. The clients remain passive spectators depending on their luck and the skill of their advocates. Legal aid of this type does not undertake massive publicity about the services offered by them. The “atomistic” legal aid schemes, therefore, offer a very narrow range of services in isolation of the total environment of the client but the dynamic legal aid strategy planned by the Legal Aid Service Authority and legal-aid rulings, demand wide range of services from the professional lawyers. They demand collaborative lawyering and corporate advocacy. They expect the professional lawyers to detach themselves from atomistic lawyering and operate in legislative, educational, administrative, and political settings as advisors, negotiators, social planners, researchers and social investigators, espousing the cause of the poor and the unserved. They demand a new creative social role of the lawyers to make legal aid socially meaningful.

Rather than operating exclusively through litigation, new strategy should pursue the interest of the poor and the victimized in legislative, administrative, educational, social and political settings. Such types of programmes should be oriented both to long range and immediate legal gains on matters that affect groups rather than isolated individuals. They would be in search of test-case-litigation and seek structural reforms in legal institutions including jail, police, and beauracratc organisations. The proactive-structure-oriented, community action legal strategies involve considerable gains of mobilization, participation, politicization, education, planning, social investigation, research, advising, negotiation and collaboration. These strategies would attack the real causes of social inequality and mass poverty pervading our social life.

The pro-active strategies try to reach out to the potential clients to make them realize that the miseries and environmental hardships of the poor and their routine victimization both by the agents of the State and the dominant elements in the community is basically due to unequal social structure sustained by the very superstructure of the State and the legal system which must be transformed drastically. Thus, the constitution can be used both, symbolically and substantively, as a medium of non-revolutionary struggle against domination and abuses of power.

Limits of Judicial Intervention

PIL significantly departs from the traditional mode of legal aid and lawyering in its pro-active stance. It refers to test-case litigation pursued in a High Court or the Supreme Court, with the collaboration of professional lawyers and social activists, to win a favourable judicial response on behalf of the poor and victimized groups such as bonded labourers, tortured prisoners, degraded

inmates of protective and mental asylums, dislocated slum and pavement dwellers, victims of the polluters and politicians, and many others.

PIL is pro-active as it focuses on matters having social dimensions. It seeks to liberate the classes of the disadvantaged groups through test-case litigations. Typically, PIL encourages mobilisation, specialization, social investigation, participation, innovative remedies, etc. It heightens the expectations of the poor and the oppressed from the judicial process and seeks to enhance State accountability towards constitutional values and social justice. It addresses larger questions of policy, particularly, the vindication by the government of its commitment of the relief of the poor and the victimized.

Temporary, incidental, episodic, casual success stories, therefore need not blind us to the harsh realities. The following flaws accompanying PIL activism may be mentioned here.

- (a) PIL also emphasizes litigation and enhances dependency of the victims on middle class social activists and hired professional lawyers. It cannot generate any effective participation of the beneficiaries who remain passive depending on their good luck only.
- (b) PIL is controlled by elites who utilize legal resources by their own priorities and choices. PIL is largely episodic reaction to a particular outrage or victimization exposed in the newspapers. Scattered, unplanned, uncoordinated, and numerous social action groups have different agenda and different ideologies. There is almost no effort to promote collaboration among various sectors of people's groups pursuing similar interests. There is almost no effort to aggregate claims of similar interest groups benefited by a favourable liberative decision. Perhaps, most of the rural groups are located in tribal areas and many of them are believed to survive on foreign charities.
- (c) It is feared that PIL too is giving rise to a new kind of constitutional politics presided mainly by metropolitan leaders, eminent legal academics, well-known politician-cum-lawyers, noted journalists and social scientists-cum-legal sociologists. Many thoughtful persons are fearing the return of a new kind of "feudalism" growing out of public interest advocacy. One witnesses the growth of "priesthood" or *Brahammanism* among the social activists just for self-aggrandizement including the lust for power, eminence, recognition and wide media coverage.
- (d) PIL cannot be pressed into service to force the executive or the legislature to initiate or pass a reformist legislation notwithstanding too

much of the exaltation of the directive principles on doctrinal or verbal level. PIL can be pressed into service only if there is already an existing ameliorative measure and the same has not been faithfully implemented by the legal actors. PIL, should therefore, not expect the justices to fill the void created by decline in public and political morality.

- (e) Through PIL activism the justices are free to engage themselves in mass production of rights and entitlements broadside to the poor but all the judicial commitments might not easily be fulfilled by the government given the scarcity of resources and government's own priorities and choices.
- (f) Finally the effectiveness of the judicial decisions are powerfully affected by several interlocking factors too remote from the knowledge and control of the courts, such as traditional resistance to change, alliances of the implementers with vested interests (local *dadas*, politicians and other dominant elements), improper dissemination or transmission of the judicial symbols or directions to the various environments (police, jail, administrative authorities, lower courts, members of the bar, social activists, clerks), and ambiguous judicial decisions. Weak communication channels accompanied by well-nurtured and well-structured barriers to access to legal information may also lead to the cancellation, diffusion or defiance of liberative judicial directions by lower echelon legal actors⁴.

There is a need for innovative social action strategies including wider social movements through non-litigious means. This kind of strategy also solves many pitfalls accompanying atomistic legal services. The underlying idea here is to operate at the grassroot levels and to enhance the governmental accountability towards human rights. For example, community action programmes may rescue the poor and the victimized from routine exercise of victimization by the police, revenue officials, co-operative societies, village headmen. Social action can force the master to pay the statutory minimum wages to the landless workers. It can ensure adequate supply of drinking water, electricity for irrigation, essential commodities from fair price shops and so on. It can mount pressure on police to make a proper investigation of a crime committed against tribal or *harijan* girls. Perhaps PIL cannot effectively be used in all these situations. It can perhaps, be used when the violation of the legal or constitutional rights have already occurred by acts or omissions of the State agencies.

4 Parmanand Singh, "Protection of Human Rights Through Public Interest Litigation In India", 47, Journal of the Indian Law Institute 263 (2000).

One can hardly disagree with Jagat Narain⁵ that legal actions should try to bring about a “conflict-situation” between urban and rural poor and hierarchy (Establishment) so as to compel the latter to be responsive to human rights. The Indian State has to be “negotiated” at several ideological and institutional levels not by middle-class entrepreneurs but by the poor and the disadvantaged themselves. But how these poor people can be organized and made capable to launch their own struggle is problematic given the existing power relations in the village India⁶.

Whether one favours litigative (in the sense of public law litigation) strategy or non-violent/non-revolutionary direct action strategy, both entail dependency of the poor and the oppressed. And both may fail. Judges may stop responding favourably by undue constriction of PIL jurisdiction; social activists may stop activism due to fear of reprisals. But there is no point to lose heart. So long as India remains a liberal democracy, both the bureaucrats and the political executive will have to respond to the values enshrined in the Constitution of India with an overarching appeal to social justice. In any case the choice will have to be made between political dependency (for insulation and protection from terror, force and lawlessness of the State law) and professional dependency. Some dependency on the very political and legal superstructure which legitimizes exploitation of the poor is historically inevitable in a non-revolutionary strategy of social change through voluntary community action. The choice relates not to the factum of dependency but rather its forms.

Conditions of Legal Effectiveness

When we employ law and legal activism as a mean of social change we somehow tend to think of law as an autonomous and self-sufficient force upon which the rest of the social order depends. Thus we oversimplify the nature of law and exaggerate its power. But law is neither autonomous nor self-sufficient but is heavily dependant upon other institutions to accomplish its tasks. We rely heavily on formal structure of law composed of the *documents* i.e. constitution, statutes and precedents, the *apparatuses* i.e. legislatures, courts, executive departments and the *personnel* i.e. judges, lawyers, administrators, policemen. We begin to believe that a legislative enactment or a judicial decision aimed at social change would automatically be translated into corresponding social actualities.

5 Jagat Narain, “*Legal Aid: Litigational or Educational*”, 28 JOURNAL OF THE INDIAN LAW INSTITUTE 72 (1986).

6 Parmanand Singh, “*Judicial Socialism and Promises of Liberation: Myth And Truth*”, 28 JOURNAL OF THE INDIAN LAW INSTITUTE 336 (1986).

This is however a mere delusion. We exaggerate the power of law because we have inadequate notion of both what law is and how it acts. Positive law supervenes upon an established social order which is supported by prior facts such as caste, religion, family, morality, habits, beliefs, attitudes, emotions and traditions. Law has to perform the task of repairing the deficiencies in the social order. For instance law and legal action tries to eliminate social and economic inequalities, social oppression, gender-injustice, sex-exploitation, delinking of crime from politics and removing several social practices such as untouchability, child-marriage, sati, bonded labour and caste-domination. These deficiencies in social order are rooted in various social and religious institutions which law seeks to repair. Traditionally the most conspicuous and important of these institutions have been family, education and religion which perform the crucial role of transforming human nature. These institutions exert a powerful influence upon the attitudes and behaviour of the people.

In our respectful submission the effective operation of law as an agent of change depends largely upon the support extended by other social institutions. If the institution of family, religion and education have not been doing their job properly, law shall be missing support from them and all our attempts at social reconstruction through law will be thwarted or delayed. The disappointing performance of the law and legal doctrine prohibiting untouchability, dowry, sexual exploitation, torture, rape and caste-discrimination support our contention that legal effectiveness depends upon the effectiveness of other agents of social order. Law and legal action can never provide the conditions of cultivation, socialisation, sense of obligation, responsibility, sympathy, fellow feeling, and other factors that mould human character in definite ways. These undertakings have to be carried on by other social agencies because they lie within the province of morality rather than law.

The question is to what extent law can solve social problems and achieve social goals? It is interesting here to point out the change in the attitude of Professor Roscoe Pound in the twenty years between his 1922 Storrs lectures and 1942 Mahlon Powel Lectures. In 1922 Dean Pound expressed his unconditional confidence in the power of law to bring out social change by the techniques of "social engineering"⁷. By 1942 he recognised the limits to the reach of law. He remarked⁸:

When we have got so far we must pause to inquire how far, after all, the law in any of its senses can achieve this purpose (of harmonizing human demands, maintaining a social order, and furthering the course of civilization). We must ask how far social control through politically organized society,

7 Roscoe Pound, AN INTRODUCTION TO THE PHILOSOPHY OF LAW, 97 (1922).

8 Roscoe Pound, SOCIAL CONTROL THROUGH LAW, 54 (1942).

operating in an orderly and systematic way by a judicial and administrative process applying authoritative grounds of or guides to decision by an authoritative technique, can stand by itself as self sufficient and equal by itself to the maintaining and furthering of civilization. Thus we are brought to consider the limits of effective legal action, the practical limitations which preclude our doing by means of law everything which ethical considerations or social ideals move us to attempt.

Dean Pound then proceeds to cite various ‘sets of limitations’ that weaken the force of legal action for social reform⁹. The first limitation of the legal action is that redressal of grievance through legal proceeding is limited by “the necessity of appealing to individuals to set the law in motion”. Thus the redressal of grievances depends on individual initiative and sustained legal action. Secondly, the law sets rigid standards of testimony making it difficult to ascertain the facts at issue. Despite relaxed standards of evidence and procedure, the legal process still insists on legal formalism and adherence to accepted rules of evidence and procedure. Thirdly, and finally, Pound refers to the inability of law and legal apparatus to enforce duties, protect rights and secure redress even by a well disposed judiciary. Here he refers to the intangibility of many duties which are normally of great moment but defy legal enforcement. He gives examples of gratitude, benevolence, and obligation to help those in distress which cannot be enforced by law. Then there are certain rights and interests which are often infringed in ways that are so subtle and difficult to establish that the law and courts cannot protect against them. Alienation of affection, domination and invasion of privacy fall under this category. Pound refers to the inability of law and legal apparatus to inculcate moral righteousness. Legal machinery, according to him, cannot remedy many phases of human conduct and human relations. He asserts that one cannot legislate morality¹⁰. Law would be helpless to impose many traits of character, and modes of conduct which are morally desirable and socially useful. For character building we have to rely upon other institutions and agencies the family, religion, education, professional and economic organisations to instill in men, the habits and attitudes, the modes of behaviour and the mutual respect and cooperation. It is beyond the law and legal apparatus to inculcate morality and instill the habit of conformity and obedience in men women and to make them accomplished social persons.

We all know that the other social institutions are declining. For instance, *Ayodhya* issue and *Godhra* incident has divided Hindus and Muslims on religious lines. The strain in Kashmir where religious fundamentalism is on

⁹ *Id* 60.

¹⁰ *Id* 55.

the rise, is challenging the secular ideology of a modern nation-State¹¹. Communal riot, atrocities on *Harijans*, sexual harassment at work place, reservation riots and communalization of politics have become the ugly features of Indian social order. The poor and the oppressed are frightened, insecure and humiliated. The economic relations are still moulded by capitalist dominations and under the conditions of capitalist economic developments, the State is providing enormous facilities, resources, and opportunities favouring the propertied classes.

A sense of responsibility is indispensable if we have to live and work together. Responsibility, again is a social virtue, a trait of character and there is very little that law can do in inculcating moral virtues. Law can, of course, make people accountable to their outward actions violating the legal rights of others. This is done by creating legal duties and imposing sanctions for violating of rules. In our view inculcating moral virtue of responsibility is the work of other social institutions which help to make people good and law simply inhibit men from being bad. What would happen if family, culture, education, morality and religion fail to perform their work and their hold on individuals is weakened. The inevitable result would be that defiance of law will increase and law would lose its effectiveness.

It must therefore be acknowledged that law operates at a distance far removed from the people whose lives it governs. The other social institutions like family, school, religion and morality are in more intimate touch with men's emotions and thus mould human character. Therefore, unless more intimate social institutions are strengthened to prepare men to be law abiding citizens with a sense of responsibility to societal values, law can never be an effective instrument of social change. Professor Roscoe Pound very well recognised the limits of law as a means of social control when he asserted that "law must function on a background of other less direct but no less important agencies, the home, home training, religion and education. If they have done their work properly and well much that otherwise fall to the law will have been done in advance. Anti-social conduct calling for regulation and ill-adjusted relations with neighbours will have been obviated by bringing up and training and teaching leading to life measured by reason"¹². The decline of many of these social agencies in India is more than apparent. This has resulted in serious lapse in the inculcation of support of moral rules. If law is missing moral support of other agencies of social order, law will be limited in its effectiveness.

11 Parmanand Singh, "*The Problem of Minorities and the Constitution : A Preferatory Note*", MINORITIES AND THE STATE AT THE INDIAN LAW 7 (1991).

12 *Supra* note 8, 25-26.

Conclusion:

The efficacy of the legal action in achieving the goals of social justice is equally affected by the political economy and cultural policies. The politics of “cultural nationalism” nurtured through the vague and controversial conceptions of *Hindutva* is promoting only higher Hinduism detrimental to the interests the *Dalits* and other oppressed classes. The economic policies of liberalization and privatizations being pursued by the Indian State has failed to augment wealth in a manner which would eliminate poverty, generate growth with justice and eliminate social and economic inequalities. How can in such a setting, courts can achieve social justice simply by acknowledging new positive human rights? Spreading of norms and values and creation of elaborate institutional mechanisms for generating humane, equalitarian, and rationalistic social climate and eliminate pre-capitalist feudal or semi-feudal modes of exploitation and oppression is the task of the political executive and social and economic institutions and professional organizations and not of the judges. Unfortunately the political economy emerging in globalised India has resulted in the formation of new social classes of landowning prosperous farmers, traders, moneylenders, and bureaucrats which are controlling social and economic institutions and cultural networks and are promoting the capitalist path of development. The economic policies of liberalization and privatization pursued by successive political regimes have provided enormous resources as well as legal and normative value system favourable to the new social classes¹³. This has resulted in massive unemployment, pauperization, atrocities on women, children and *dalits* and State oppression. The much applauded and publicized judicial activism has completely failed to check the growing frustration among the exploited and oppressed classes¹⁴. Mass production of rights through judicial activism has only resulted in heightened expectations from the judges that they are available to provide relief from all miseries and personal misfortunes¹⁵. But when a stage would come when the gap between what has been promised and what has been performed would become too wide, the outcome will be only confusion, frustration and disenchantment. The courts might then lose persuasive power, draining away the credibility of judicial institution. The disillusioned masses might then turn to other means of achieving their claims, whether it be civil disobedience, protests, demonstration or even violence.

13 See Parmanand Singh, “*Human Rights in India : Some Epistemological Question*” XVII DELHI LAW REVIEW 40-61 (1995).

14 Rajeev Dhavan “*Law As Struggle : Public Interest Law in India*” 36 JOURNAL OF THE INDIAN LAW INSTITUTE 302-38 (1994).

15 Parmanand Singh, “*State, Market and Economic Reforms in (P. Singh (ed.)) LEGAL DIMENSIONS OF MARKET ECONOMY* 23 (1996).

It is beyond the judges to instill in men and women the habits and attitudes, the modes of behaviour, the mutual respect and cooperation, that are indispensable to a decent social life. They can undoubtedly intervene to correct any form of exclusion, discrimination, exploitation and institutional abuses. The judges have performed this task in a commendable way in upholding the ideology of rule of law. They have unmasked the repressive realities of State and law by providing access to justice to the poor and the victimized people. But the law and legal action can achieve something of real value if other social and economic institutions besides law also perform their function in an efficient way in the formation of human character to make men and women acceptable social members.

SOCIAL WELFARE IN HINDU JURISPRUDENCE

*Vijender Kumar**

It has been acknowledged by the eminent western jurist, Mayne, that the Hindu law has the oldest pedigree. The necessary and sufficient conditions for the existence of a legal system were present in India during *Rigveda* period. The dates assigned to *Rigveda* range from 6000 B.C. to 1500 B.C. The concept of State (*Rashtra*) was well developed in the Vedic period and the duties of the King and leaders of the society have been meticulously depicted in the Vedic literature. Not only the law but also the principles of interpretational law (Mimamsa Rules of Interpretation) find expression in the Vedic literature. Rules of war, protection of State, duties of the State and the King have been vividly expressed in the Vedic literature.

Once the concept of State has evolved the development of law and legal theory naturally follow. The Hindu system of law has been so rich in principles, precedents and concepts that even the most advanced legal systems of modern times are unable to surpass it. The eminent Indian jurist K.P.Jayaswal in his *Tagore Law Lectures* makes the position clear beyond doubt. He says:

“The rules show a very developed stage of pleadings. The language of Yajnavalkya which is terse like that of the sutra-writers, makes their appreciation difficult. His procedural law becomes clear only when we make a comparative study of the subject and give value to each of his syllables. Here Apararka excels even the great Vijnaneswara and the acute Mitra-Misra. Yajnavalkya’s law of procedure is far in advance of Kautilya and Sumati. Yet he does not reach the level attained by Narada and Brihaspati, whom the most technical rules of pleadings of modern Europe have not yet surpassed. In our modern courts at present, for instance, it is to be argued that the judge has to be convinced by the authority of English cases that plaintiff’s right cannot be affected by ‘fraud of speech’ in his plaint. But in Narada’s time the matter was placed beyond controversy. One who further abandoning his first case, takes stand on another, on account of shifting his ground, is called one of ‘Hina’ (‘inferior’) pleading”¹.

Vedic literature states that the welfare of the people must be the central concern of the King or the leader of the society whose acts should be directed for the welfare of the people. We find the prevalence of this principle in all the

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1 Jayaswal K.P., “*Manu and Yajnavalkya*”, 1930, pp. 127-128.

law codes of Hindus. All attempts to reform the society are bound to fail if they neglect the individual, the basic unit of society. Therefore, the ancient Indian Philosophers, Jurists or reformers who had fully grasped the preaching of the scriptures, and had worked them out in practical life always stressed that the first step for a co-ordinated harmonious society is that ambiguities and conflicts must be eliminated from the minds of the individual. Hence every reform must start from the individual. The code of Manu, contains the principles which contribute to the solution for so many socio-legal problems of the conflict-ridden modern world, from which moral values are fast disappearing. There is a moral vacuum. The author of the Code is not an ordinary individual possessing worldly knowledge alone. He seems, certainly, to have comprehended the ultimate truth, the truth of the spirit, and it is in the light of this truth that he wants to reshape the actual life of the people.

Mr. Motwani's remarks are noteworthy in this connection:

“Manu belongs to no single nation or race; he belongs to the whole world. His teachings are not addressed to an isolated group, caste or sect, but to humanity. They transcend time and address themselves to the eternal man”².

The main purpose of the Code is to propound a science of social relations. One of the most complex problems of the day is “how to strike a balance between the interest of the individual and the society without infringing the personality of the individual. According to Indian view of life personality has a special significance which does not conflict with collectivism”. Personality means independence of growth. It is not necessarily unlikeness because there cannot be complete unlikeness, since man the world over is the same, especially so far as the aspects of spirit are concerned. “The variations are traceable to distinctions in age, history and temperament”. This variation which is spoken of by the eminent philosopher Dr. Radhakrishnan owes its existence in the *Karmavipaka* theory³. This variation is the root cause of the division of the world into different camps. The Code of Manu, I think, can provide a suitable answer to the modern problems. Not only those problems are not new, but they are perennial. The Code is composed with a view to provide answer to such socio-legal problems. It covers the whole-life span of the individual, who is

2 K.Motwani, “*Manu Dharmasastra*”, 1958, p. 333.

3 *Karmavipaka* means a theory of action according to which every action performed gives rise to its consequences-“*Karmaphal*”. According to Indian metaphysics immortality is at the root of *Karmavipaka* theory (action-consequence theory). The consequences, which subsist in invisible form after the completion of the act follow the soul in the next birth. Law of *Karma* is a characteristic of Indian philosophy and is of universal nature; it is demonstrative of the doctrine of freedom of action for which man cannot shift his responsibility. The Indian philosophy thus makes man sovereign in the sphere of his salvation which is essentially individual in nature. See K.V.R. Aiyanger, “Some Aspects of Hindu View of Life According to Dharmasastra”, 1952, Ch. I, n. 53.

the unit of the society, by providing various disciplines (*Samskaras*) for him, which, if correctly followed, inculcates in him the characteristics or qualities of a really civilized person. The Code prescribes these disciplines (*Samskaras*) right from conception, birth to death until his body is consigned to flames. To one not conversant with Indian metaphysics these *Samskaras* may seem part of the religion. But they are in the nature of disciplines prescribed for an individual at various stages of his life in order to prepare him for the larger role in the life ahead, to face and tackle any problem in the social life.

These *Samskaras* are also in the nature of social norms for imparting social training and regulating the life of an individual so that he may develop his personality in the best possible manner and in order to adjust himself in the society. Sri Aurobindo says:

“The business of the ancient *Rsi* was not only to know God, but to know the world and life and to reduce it by knowledge to a thing well understood and matter with which the reason and will of man could deal on assured lines and on a safe basis of wise method and order. The ripe result of this effort, was the *Sastra*”⁴.

According to Hindu view of life the juridical principles originate and evolve from the very existence of human life, very much nearer to the approach by the jurists of historical school. The view of the givers of the Hindu Codes is.

Universe owes its existence according to Hindu view of life, to desire, *Ekoaham Bahusyami*. This text is the basis of all the concepts, whether juridical or otherwise. No system, social or legal can be built scientifically on universal principles if we ignore the element of desire in constructing that system. Desire is the genus of which the interests or rights are the species. People have desires, interests or rights which they want to satisfy. Not a single act here (below) can ever be done by a man free from desire, for, whatever (man) does, is (the result of) his impulse or desire. Every society has an end in view which it sets before it for achieving. This tendency is very much found in the modern days when directive principles of State Policy find place in the Constitutions. These principles of State Policy are in the form of Dharma or end or moral law which the State shall strive to achieve, and therefore, they may also be called the rules of morality set forth for the State. Manu had well in advance anticipated that the progress of the society is impossible without an ideal for the society. The ideal is relative to time and place. The socio-legal philosophy of Manu, the master of Brahma Vidya, is *Sarva-vidya-pratistha* which must be of the highest order and is ahead of the contemporary socio-legal philosophy.

4 Sri Aurobindo, “*The Foundations of Indian Culture*”, 1959, p. 89.

Those who are ignorant of the Hindu metaphysics can think that the Code of Manu is a specimen of a primitive humanity of the Vedic times. Therefore, Vedic background is essential for the proper understanding and appreciation of the purpose underlying this ancient Code. The rules of the Code of Manu owe their origin to the nature of Man. And, therefore, the Dharma which is promulgated in the Code could not be said to have been based on *apriori*-doctrines alone. Manu distinctly declared that the source of all rules or Dharma lies in the desires of human beings.

It clearly indicates that the law according to Hindu jurists has social dimension and its function in the society is to augment the welfare of the society in full. While the unit of the society is the individual and, therefore, the Hindu law givers have stressed on the development of the individual personality in all its faculties, body, mind and heart because a healthy society can be thought of only when the society consists of healthy individuals. All the natural freedoms or the civil liberties which are given a sacrosanct place in the Constitutional Jurisprudence of the civilized world were not only known to the ancient Hindu law givers but they also high- lighted them. They assigned very important place to civil liberties.

It would be naïve, rather absurd, to expect the 'social welfare' concept in the modern sense of the term to have developed in ancient Hindu jurisprudence. The present day welfare State with its promise of social good is a material State, and the 'social welfare' concept is the by-product of the Industrial revolution, which brought in, factory or labour legislation to curb the liberty and privilege of factory owners to exploit the weak. This legislation was enacted with a view to provide and improve working conditions of workmen, children and women who were employed to work in factories. Thus the Industrial revolution provided the backdrop to the theory of welfare State. It is beyond doubt that the concept of social welfare as presented in the modern formula of welfare State has never been a part of Hindu jurisprudence.

Social welfare element in the ancient Indian jurisprudence is the concern of Dharma therefore, Dharma had from the very beginning a social dimension, in ancient Indian scriptures. Legislator-philosophers who propounded the law codes were seriously concerned with the welfare of the members of the society. The greatest events of the ancient Indian History, as depicted in the Epics-Ramayana, and Mahabharata, are the two wars fought. These wars were fought to uphold the Dharma because if law is violated the whole society and social system would collapse, which will result in untold miseries to the people. Dharma or law has an ultimate aim to remove the miseries of the people and to create conditions so that people may pursue the aims of life which Dharmasastras prescribe for each individual.

About the Indian legal thought, there have been three fundamental misunderstandings or mis-information. They are (1) regarding the Aryans, (2) regarding the Vedas, and (3) regarding the Caste system. Le Figaro in his book "*Rewriting Indian History*" and Dr. S.D. Sharma in his book "*Administration of Justice in Ancient India*" have exposed the fallacies regarding these misunderstandings or mis-information. Not one scholar worth the name can afford to reach the true spirit of Hindu legal theory without freeing oneself from these misunderstandings.

Varnasrama Dharma had for its ideal the social welfare of the entire society which is the distinct feature of Indian culture. The object of the people of Europe is to exterminate all in order to live for themselves. The aim of the Aryans is to rise all up to their own level, nay, even to a higher level than themselves. Thus, the means of European civilization is the sword, but that of the Aryans is the division into different varnas. This system of division into different varnas is the stepping-stone to civilization, making one rise higher and higher in proportion to one's learning and culture. In Europe, it is victory of the strong, and death of the weak. In the land of Bharata, every social rule is for the protection of the weak⁵.

The views of Dr. Radhakrishnan are also interesting and illuminating. He also uses the word caste in the sense of varnasrama, i.e., classification of the society on the basis of work. The institution of caste illustrates the spirit of comprehensive synthesis characteristic of the Hindu mind with its faith in the collaboration of races and the co-operation of cultures. Paradoxically as it may seem, the system of caste is the outcome of tolerance and trust... No other country in the world has had such racial problems as India... Regarding the solution of the problems of racial conflicts the different alternatives which present themselves are those of extermination, sub-ordination, identification or harmonization. The first course has been adopted often in the course of the history of the world... When extermination is impossible, the powerful races of the world adopt the second alternative of subordination. They act on the maxim, spare the slave and smash the rebel.... Caste, on its racial side, is the affirmation of the infinite diversity of human groups.... Caste was the answer of Hinduism to the forces pressing on it from outside. It was the instrument by which Hinduism civilized the different tribes it took in. Any group of people appearing exclusive in any sense is a caste. The Hindu society has differentiated as many types as can be reasonably differentiated.... It stands for the ordered complexity, the harmonized multiplicity, the many in one, which is the clue to the structure of the Universe⁶.

5 Swami Vivekananda, "*Caste, Culture and Socialism*", 1947, p. 19.

6 Dr. Radhakrishnan, "*The Hindu View of Life*", 1968, pp. 67-70, 75.

The emergence of social welfare concept in ancient India lies in the fact that according to Dharmasastra writers, society was the organizational unit in which each member of it occupied a very important place. For instance, a Brahmana is one who has attained perfect intellectuality and spirituality. The concept of social welfare according to Manu and Indian thought includes the overall welfare of the society. It is so comprehensive a term that the welfare does not stop with provision of mere guarantee for food and shelter, but it aims at securing for each person the status of a Brahmana. The Hindu jurisprudence is full of precedents of the supremacy of Brahmana rather than of the Kings. Many Kings were subjected to curses and punishments by Brahmanas. It was not the result of a conflict that the Kshatriya occupied the position of earthly ruler and the Brahmana is confined only to the religious and sacerdotal duties. The Indian scriptures provided for it.

The Brahmana is specifically prohibited to aspire for wealth, power or rights guaranteed by State. He is assigned the position second to the King in secular matters of State. The supremacy is that of the Kshatriya, who is supreme and recognized as the chief executive, the head of the State. *Bhradaranyakopanisada* makes it clear beyond doubt, "The Brahmana, using his intellectual power, recognized the Kshatriya as King, and endowed him with a hallow", *Sreyorupamatyasrijata Ksatram*. The text further says, "there is no one superior to the Kshatriya, that being the reason, the Brahmana honours the enthroned Kshatriya, himself sitting below the King in the *Rajasuya Yajna*". This doctrine of the supremacy of King illustrated that King has been given the power to administer justice over Brahmanas, lest they (Brahmana) should deviate from Dharma. The comment of Samkaracarya on this text makes the matter further clear. He says: "Since Brahmana created the Kshatriya in extremely excellent form, nobody is capable of controlling the Brahmana except the Kshatriya..." therefore, the Brahmana says: King! You are Brahmana⁷.

A clear supremacy of temporal power over the custodians of spiritual power has been the chief mark of ancient Indian jurisprudence. The controversy of temporal vs. spiritual that ravaged the European society was singularly absent because of the wise and tolerant attitude of Brahmana towards the King who was hailed as superior to everything in society, in the interest of law and order. Therefore, there was no room for the "two- sword doctrine"⁸, to emerge in

7 Yasmadbrahmanatisayena srestam ksatram tasmatksatratparam nasti Brahmanajaterapi niyantra... Rtvikpunastam pratyahatvam rajanbrahmasi. Comment on Br. Up. I, 4,11. (Gita Press 4th ed. Pp. 288-289).

8 The doctrine of two swords: In the later mediaeval conception of State, two opposed influences meet: the vigorous Roman Empire of the Caesars, conserved in the Roman German Empire, as the bearer of the older culture through which the authority of the Pope was established, confronts the Catholic Church which had usurped control of all temporal power. The Church found its philosophic support in Augustine's doctrine of the 'Civitas terrena'; while the Aristotelian philosophy favoured a more restricted conception of ecclesiastical rule. It was agreed that temporal and spiritual powers are alike conferred

ancient Indian polity. This discussion of the principles of ancient Hindu jurisprudence is much more advanced in terms of social welfare and secularism because of the negation of the “two- sword doctrine” as the express recognition of secular aspect of ancient Hindu jurisprudence.

by God, but there arose a violent conflict of opinion and doctrine as to whether the temporal sword is conferred upon the ruler directly by God or through the mediacy of the People. The doctrine of ‘Two swords’ typifies the most important political issue of mediaevalism. Upon it Grimm comments, ‘Christ bade his disciples to buy a sword, and when they brought two, he said, ‘it is enough’ who would have thought that the biased interpretation of these simple words should for centuries serve to justify the rural claims of the two greatest of earthly powers’. See F. Berolzheimer, “The World’s Legal Philosophies”, 1968, pp. 101-102.

PRECAUTIONARY PRINCIPLE AS AN EFFECTIVE JUDICIAL TOOL IN THE PREVENTION AND CONTROL OF WATER POLLUTION IN INDIA

*Aruna B Venkat**

Introduction

It is axiomatic that water is one of the most invaluable natural resources, which the nature has bestowed on human kind. By the same token, it is a vital life sustaining nature's gift to mankind, which has unfortunately been most defiled with serious deleterious consequences to human welfare. Man's 'ecological misbehavior',¹ which is more predominant in the area of water management than in other areas of vital human concerns, has been the main cause for the growing shortages of fresh water sources through out the world. It may be noted that in many parts of the world, lack of sufficient fresh water is likely to be one of most crucial issues of the twenty-first century. It is apprehended that future wars among the members of the international community might centre around water disputes more than anything else. The importance of water resource for the survival of humanity has been highlighted by the Indian Central Board for Prevention and Control of Water thus:²

The fresh water that is so essential to our lives is only a small portion of the earth's total water supply; it is only about two per cent of the total. Nearly all of this, however, is locked in the masses of ice caps, glaciers and clouds; and constitute about 1.998 per cent of the total. The remaining small fraction of fresh water has accumulated over centuries in the lakes and underground supplies of the world.... Almost 85 percent of the rain falls directly into sea and never reaches land. The small remainder precipitates on land. It is this water that fills the lakes, wells, underground supplies and keeps the rivers flowing and the latter constitutes only 0.00008 per cent of the total. Humanity is left with only one-spoonful of sweet water for every five liters of total water.

Alas, humanity has not been able to preserve and protect this small percentage of this precious and invaluable basic environment element from the menace of pollution.

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1 Barbara Ward and Rene Dubos, *Only One Earth: The Care and Maintenance of a Small Planet*, p xii (1972).

2 See also, UNEP Asia-Pacific Annual Report, p3 (Bangkok: UNEP, May, 1984). According to this report, about 71 percent of the Earth's Surface is covered with Water and the bulk of it (i.e., around 97 percent) is stored in oceans. Of the remaining 3 percent, which is fresh water, 77 percent is in the shape of frozen polar ice caps and glaciers and is thus unavailable for human use and consumption. Around 22 percent is in the shape of groundwater resources, which is at a depth of more than 800 meters and therefore, cannot be exploited by man. It is only 0.4 percent of fresh water in the shape of lakes, streams and atmosphere is available for human consumption.

India, which is comparatively better off in respect of water resource, is in an unenviable position, facing the worst water pollution problem. India's major watercourses, which, among others, consists of fourteen major, fifty five medium and forty four small rivers, have all become highly polluted, evoking national concern for their protection and preservation. This is evident from the Statement of Objects and Reasons of the Water (Prevention and Control of Pollution) Bill, 1974, which reads:³

The problem of pollution of rivers and streams has assumed considerable importance and urgency in recent years as a result of the growth of industries and the increasing tendency to urbanization. It is, therefore, essential to ensure that the domestic and industrial effluents are not allowed to be discharged into the watercourses without adequate treatment as such discharges would render the water unsuitable as source of drinking water as well as for supporting fish life and for use in irrigation. Pollution of rivers and streams also causes increasing damage to the country's economy.

In order to achieve the above stated objects, the Water Act, 1974 and the Water Cess Act, 1977, have been enacted. These laws, which have been intended to combat the menace of water pollution and to restore the wholesomeness of water, have been in operation for almost three decades. Despite this fact, the problem of water pollution has not been mitigated, on the contrary the problem has aggravated mainly due to the lack luster implementation of the legislative mandates by the concerned administrative agencies constituted thereunder. Expressing serious concern at the general executive apathy in the implementation of environmental legislation, the Supreme Court, in *Indian Council for Enviro-Legal Action v. Union of India*⁴, observed:⁵

There are stated to be over 200 Central and State Statutes, which have at least some concern with environment protection, either directly or indirectly. The plethora of such enactments have, unfortunately, not resulted in preventing environmental degradation, which on the contrary, has increased over the years.... Violation of anti-pollution laws not only adversely affects the existing quality of life but the non-enforcement of the legal provisions often results in ecological imbalance and degradation of the environment, the adverse affect of which will have to be born by the future generations.

It may be appreciated that the entire judicial initiative and effort that has marked the exercise of the writ jurisdiction under Arts 32 and 226 has been not only to strengthen and complement the legislative efforts but also to effect a

3 See, the Statement of Objects and Reasons of the Water (Prevention and Control of Pollution) Bill, 1974.

4 (1996) 5 SCC 281.

5 Id at 293.

viable constitutional balance and harmony between the competing needs of development and the values of environmental protection and preservation. It is a matter of encouragement for the protagonists of environment that the Indian higher judiciary has performed this balancing task admirably by adoption and application of the doctrine of “sustainable development”⁶ which has been implicit in the Indian Constitution Scheme of Parts III and IV of the Indian Constitution, which together go to constitute its conscience.⁷ In other words, the higher judiciary, by its innovative and dynamic approach to the issues of environment and development, has made explicit what has been implicit in the constitutional scheme. This aspect needs a slight elaboration.

It may be appreciated that the India’s fundamental law envisages a perfect harmony and balance between development and environment. While the Constitution enjoins the State to legislatively implement the directive principles of State Policy (Part IV) which means that not only the State should undertake socio-economic developmental programmes and schemes but also encourage the entry of private enterprise into the field of developmental activities, the same document of India’s destiny obligates the State to respect and protect environment.⁸ Again, it may be noted that the Constitution, not only confers on individuals a fundamental right to wholesome environment⁹, but also a duty on them not to defoul environment.¹⁰

It is this constitutional scheme that provides the required harmony and balance between development and environment and it is this harmony that the Indian higher judiciary strived to protect and promote by its innovative judicial strategies. The Courts have shaped and applied different judicial strategies to meet the demands of different judicial remedies sought in the context of different fact-situations that have been brought before them for adjudication and decision. In this context, it may be appreciated that the Courts have asserted their judicial power under Art 32¹¹ and 226¹² of the Constitution to provide not only preventive relief but also remedial relief. This is evident from the Supreme Court’s observation in *MC Mehta v. Union of India*¹³, which is:¹⁴

The Power of the Court is not only injunctive in ambit, that is, preventing the infringement of fundamental right, but it is also remedial in scope and provides relief against a breach of a fundamental right already committed.

6 For its comprehensive import, see, supra, chapter I, the text accompanying fn 111.

7 *Minerva Mills v. Union of India* AIR 1980 SC 1789 at 1807.

8 Article 48 A. See, supra, chapter II, fn 7.

9 Article 21. See, supra, chapter II, fns 52, 54, 56 and 58.

10 Article 51 A (g). See supra, chapter II, fn 8.

11 Article 32. See, supra, chapter II, fn 6.

12 Article 226. See, supra, chapter II, fn 12.

13 AIR 1987 SC 1086.

14 Id at p 1091.

In tune with this judicial assertion of their power and duty to protect the fundamental right to wholesome environment by giving both preventive and remedial relief to those seeking the enforcement of their rights, the Supreme Court and the High Courts have used both “precautionary Principle” and the “Polluter Pays” principle, which are essential aspects of the concept of “Sustainable Development” recognised, adopted and enforced at the international level¹⁵, by asserting that they have become part of the environmental jurisprudence of the country.¹⁶ While the former principle has been used to give preventive relief¹⁷, the latter has been used to accord remedial relief.¹⁸ The Courts have also used public trust doctrine and the doctrine of intergenerational equity to give remedial relief.¹⁹ The Courts have sought to enforce the “Polluter Pays” principle not only by imposing strict and absolute liability on the polluter²⁰ but also for awarding both simple and exemplary damages/compensation for the damage caused to the environment.²¹ In this paper the discussion is mostly confined to the use of “Precautionary Principle” as an effective judicial tool to combat Water Pollution

Precautionary Principle: An Effective Prevention Judicial Tool

(a) A Brief Legislative Format For Water Pollution Control

Before a discussion of the development and judicial application of the “Precautionary Principle” is undertaken, it may not be inappropriate to give a brief picture of legislative format of water Pollution Control.

The Water Act requires every person seeking to establish or take any steps to establish any industry, operation or process or any treatment and disposal system or an extension or addition thereto, which is likely to discharge sewerage or trade effluents into a stream or well or sewer or on land to obtain the previous consent of the State Pollution Control Board which is dependent upon the fulfillment of the conditions specified by the Boards.²² Failure on the part of

15 See Stockholm Declaration, Rio Declaration and GH Brundtland Report of the World Commission on Environment and Development, “*Our Common Future*”, 43 (1987). For a discussion of these see, supra, chapter I of the study.

16 See Justice Kuldip Singh’s observation in *Vellore Citizens Welfare Forum v. Union of India* AIR 1996 SC 2715, at p 2722.

17 See, *APPCB v. MV Nayudu* AIR 1999 SC 812 and *Vijay Nagar Educational Trust v. Karnataka State Pollution Control Board* AIR 2002 Kant 123.

18 See, *MC Mehta v. Union of India* (1987) 1 SCC 395; *Indian Council for Enviro-legal Action v. Union of India* AIR 1996 SC 1446; *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715; *MC Mehta v. Union of India* AIR 2002 SC 1515; *MC Mehta v. Kamal Nath* AIR 2000 SC 1997; and *Re Bhavani River* AIR 2002 SC 2578.

19 *MC Mehta v. Kamal Nath* AIR 2000 SC 1515 and (1997) 1 SCC 388.

20 *MC Mehta v. Union of India* (1987) 1 SCC 395; *Indian Council for Enviro-legal Action v. Union of India* AIR 1996 SC 1446; *Vellore Citizens Welfare Forum v. Union of India* AIR 1996 SC 2715.

21 *MC Mehta v. Union of India* AIR 2002 SC 1515.

22 The Water (Prevention and Control of Pollution) Act, 1974, s 25.

the person concerned to obtain the consent will entitle the State Pollution Control Board to serve notice on the person imposing conditions on establishment, outlet or discharge of effluents.²³

Again, it may be mentioned that under the Environment Protection Act, 1986²⁴, the Central Government passed the Environment Impact Assessment Notification, 1994, requiring environmental clearance of projects.²⁵ The notification makes it mandatory to get environmental clearance from the Ministry of Environment and Forests (MOEF) before undertaking any new project in India or before undertaking expansion or modification of any activity that tends to increase in existing emissions, liquid effluents and solid or semi-solid wastes in industries/ projects specified in Schedule of the notification.²⁶ It may also be noted that the same Ministry issued another similar notification in 1992²⁷ requiring environmental clearance from the Central Government, as the case may be, the State Government concerned in accordance with the procedure specified therein for the expansion or modification of any existing industry or new project listed in Schedule I or Schedule II of the notification²⁸ Clause (2) of the notification declared that notwithstanding anything contained in Schedule II, any project proposed to be located within 10 kilometers of the boundary of reserved forests, or a designated ecologically sensitive area or within 25 kilometers of the boundary of national park or sanctuary will require environmental clearance from the Central Government.²⁹

It may also be noted that in order to protect ecologically sensitive coastal areas of the country, the Union Ministry of Environment and Forests issued the Coastal Zone Regulation (CZR) notification in 1991, declaring coastal areas as coastal regulation zones. The notification, while prohibiting certain activities within the coastal regulation zones, (i.e., zones extending over a strip of land up to 500m from the High Tide Line (HTL) along the entire Indian Coast) sought to regulate certain other permissible activities.³⁰ The original notification has been amended several times by issuance of amending notifications.³¹ These

23 Id s 30.

24 See s 3(1) and (2) (v) read with Rule 5(iii) of the Environment Protection Rules, 1986.

25 SO 60 (E), published in the Gazette of India Extraordinary, Part II, s 3(1) dated 27th January, 1994.

26 Id, Schedule II, clause 2 (1) (a).

27 SO No 85 (E), published in the Gazette of India, Extraordinary Part II, s 3(i), dated 29th January, 1992.

28 Id clause (1).

29 Id clause (2).

30 The Coastal Regulation Zone Notification, 1991 was issued by the Central Government in exercise of its powers under s 3(1) and (2) (v) of the Environment (Protection) Act, 1986 read with Rule 5 (3) (d) of the Environment (Protection) Rules, 1986.

31 See Coastal Regulation Zone Notification (Amendment) 1991, 1994 and 1997; the CRZ Amendment Notification of 21/10/1997; the CRZ Amendment Notification of 20/ 04/ 1998; the CRZ Amendment Notification of 30/09/ 1998; the CRZ Amendment Notification of 29/ 12/ 1998; and the CRZ Amendment Notification of 5/ 2/ 1999, 12/02/1999, 28/ 05/ 1999, 30/06/1999, 13/07/1999, 03/08/1999 and 05/08/ 1999.

regulations, which are popularly known as CRZ Regulations, seek to impose severe restrictions on developmental activities through out the extensive Indian coastline.

In a few cases, the higher courts have been approached, seeking enforcement of these notifications/regulations on the ground that laxity and failure on the part of administrative authorities who are meant to implement them with the seriousness they deserve has resulted in the degradation of the environment affecting their right to healthy environment in the Country. In these cases the Courts have given preventive relief by invoking the application of the “Precautionary Principle”.

(b) *Development of ‘Precautionary Principle’*

It may be appreciated that the “Precautionary Principle” has now not only become part of the rules of customary international law but also become part of the Indian environmental jurisprudence.³² The development of the evolution of this principle from Stockholm Conference in 1972 to Rio Conference in 1992 has been marked by the replacement of the “assimilative capacity” principle by this principle which has been prompted by the idea that the “Precautionary Principle” is more a viable tool for the prevention of environmental harm in certain uncertain situations. While the “assimilative capacity” principle, as envisaged in Principle 6³³ of the Stockholm Declaration, is founded on the assumption that the environment has the capacity, to some extent, to assimilate substances so as to render them harmless, the “Precautionary Principle”, as embodied in Principle 15³⁴ of the Rio Declaration, is based on the premise “that it is better to err on the side of caution and prevent environmental harm than to run the risk of irreversible harm”.³⁵

32 See, supra fn 19.

33 Stockholm Declaration 1972, Principle 6 reads: “The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems”.

As the text of this principle indicates that the “assimilative principle” as embodied in the Declaration is primarily concerned with the halting of discharge of toxic substances or release of heat beyond the carrying capacity of the environment.

34 Rio Declaration, 1992, Principle 15 states: “ In order to protect the environment, precautionary approach shall be widely applied by States according to their capacities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.”

35 See, P Leelakrishnan and NS Chandrasekharan, *Environmental Expertise and Judicial Review: Need for Strategy Shift and Law Reform*, 41 JILL, p 357, 362 (1999). The learned authors opine: “Precautionary approach was not an uncommon doctrine in the pre-Rio era of international environmental law. Lack of scientific certainty on the consequences of depletion of ozone layer and on the green house effects did not obstruct international conventions and protocols to propose prohibitory and regulatory measures. In the maintenance of the marine environment, the principle is conspicuously entrenched. Prevention of pollution from land based sources, prohibition of dumping into the sea, moratorium on commercial

(c) *Judicial Enunciation and Application of “Precautionary Principle”*

Since *Vellore Citizens Welfare Forum v. Union of India*³⁶, is the first case in which the Supreme Court not only explained the linkage between development and environment by infusing into the Indian environmental jurisprudence the concept of sustainable development but also enunciated the “Precautionary Principle” as its essential feature, it will be appropriate to begin with this case.

In this case, a petition was filed by the Vellore Citizens Welfare Forum seeking a direction to the tanneries³⁷ and other industries which caused pollution by enormous discharge of untreated effluent in the state of Tamil Nadu. It was alleged that the tanneries were discharging untreated effluent into agricultural fields, roadsides, waterways and other areas. The Palar River, into which the untreated effluent was discharged, was highly polluted, making its water highly unpotable. The petitioner stated that an independent survey conducted by Peree Members’, a non-governmental organization, covering 13 villages of Dindigal and Peddalar Chatram, revealed that 350 wells out of total of 4678 used for drinking and irrigation purposes had been polluted and that women and children had to walk miles to get drinking water. Justice Kuldeep Singh, who delivered the judgment of the Court, after examining various reports, affidavits of the parties and the relevant provisions of the Water Act and Environmental Protection Act, 1986, expressed his anguish and disappointment with Central Government’s performance in respect of the discharge of its statutory duties.³⁸ His Lordship issued directions for setting up an authority under s 3(3) of the Environment Protection Act, 1986 to deal with polluting industries in the State of Tamil Nadu³⁹ and directed the Madras High Court to constitute a ‘Green Bench’ to deal with this case and other environmental matters.⁴⁰

whaling and opposition to the use of drift nets that threaten sustainable fisheries are ideas generating the significance of the precautionary principle.”

36 AIR 1996 SC 2715.

37 According to the affidavit filed by Member Secretary, Tamil Nadu Pollution Control Board there were 584 tanneries in North Arcot District. There were 900 of them in five districts of Tamil Nadu.

38 See, supra, fn 39 at 2724. His Lordship expressed his disappointment thus: (at 2724) “It is thus obvious that the Environment Act contains useful provisions for controlling pollution. The main purpose of the Act is to create an authority or authorities under s 3(3)38 of the Act with adequate powers to control pollution and protect environment. It is a pity that till date no authority has been constituted by the Central Government. The work which is required to be done by an authority in terms of s 3(3) read with the other provisions of the Act is being done by this Court and other Courts in the country. It is high time that the Central Government realizes its responsibility and statutory duty to protect the degrading environment in the country. If the conditions in the five districts of Tamil Nadu, where Tanneries are operating, are permitted to continue then in the near future all rivers/canals shall be polluted, underground waters contaminated, agricultural lands turned barren and the residents of the area exposed to serious diseases. It is, therefore, necessary for this Court to direct the Central Government to take immediate action under the provisions of the Environment Act.”

39 Ibid.

40 Id at p 2727.

His Lordship recognised the vital importance of leather industry to the country's development. Rejecting the traditional idea that development and ecology were opposed to each other, His Lordship stated that the only answer to the conflict between environment and development was the concept of "Sustainable Development" which was accepted and adopted as a viable concept in the Stockholm Declaration of 1972.⁴¹ His Lordship held⁴²:

"Sustainable Development" has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems. "Sustainable Development" as defined by the Brundtland Report means "Development that meets the need of the present without compromising the ability of the future generations to meet their own needs". We have no hesitation in holding that "Sustainable Development" as a balancing concept between ecology and development has been accepted as a part of the Customary International law though its salient features have yet to be finalized by the International Law Jurists. Some of the salient features of "Sustainable Development", as culled out from Brundtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of National Resources, Environmental Protection, the Precautionary Principle, the Polluter Pays Principle, Obligation to assist and co-operate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that "The Precautionary Principle" and "The Polluter Pays" principle are essential features of "Sustainable Development".

Explaining the import of "precautionary principle", the learned judge observed⁴³:

The "Precautionary Principle" in the context of municipal law means:

- (i) Environmental measures- by the State Government and the statutory authorities – must anticipate, prevent and attack the causes of environmental degradation.
- (ii) Where there are threats of serious irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
- (iii) The "Onus of Proof" is on the actor or the developer / industrialist to show that his action is environmentally benign.

Dealing with the import of "the Polluter Pays" principle, his Lordship referred with approval, to the view taken in *Indian Council for Enviro-Legal*

41 Id at 2720.

42 Id at pp 2720-21.

43 Ibid.

Action v Union of India,⁴⁴ and declared that the Principle meant that “absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of ‘Sustainable Development’ and as such polluter is liable to pay the cost of the individual sufferers as well as the cost of reversing the damaged ecology”.⁴⁵

According to Justice Kuldip Singh, these two principles had become part of Indian municipal law by virtue of their being part of the customary international law.⁴⁶ After examining the scope of Arts 21, 47, 48A and 51A (g) of the Constitution and the Water and Air Acts, he expressed the view that “[i]n view of the above constitutional and statutory provisions we have no hesitation in holding that the precautionary principle and polluter pays principle are part of the environmental law of the country”.⁴⁷

His Lordship, taking into consideration all the aspects of environmental law, issued comprehensive directions to meet the demands of the situation.⁴⁸

44 See *Supra*, f n 39 at 2724.

45 AIR 1996 SC 1069.

46 In India it is an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law. See *Jolly George Varghese v. Bank of Cochin* AIR 1980 SC 470; *ADM Jabalpur v. Shivakant Shukla* AIR 1976 SC 1207; *Gramophone Company of India Ltd v. Birandra Bahadur Pande* AIR 1984 SC 667. The recent judicial trend has been to give due regard not only to the rules of international customary law but also to the international conventional law. (Vide *Vishaka v. State of Rajasthan* AIR 1997 SC 3011; *People's Union for Civil Liberties v. Union of India* AIR 1999 SC 1203 and *Apparel Export Promotion Council v. AK Chopra* AIR 1999 SC 625.

47 See *Supra*, fn 39 at pp 2721-22.

48 *Id* at pp 2726-27. The following directions have been issued:

- (a) The Central Government shall constitute an authority under s 3 (3) of the Environment (Protection) Act, 1986 and shall confer on the said authority all the powers necessary to deal with the situation created by the tanneries and other polluting industries in the State of Tamil Nadu. The authority shall be headed by a retired judge of the High Court and it may have other members — preferably with expertise in the field of pollution control and environment protection — to be appointed by the Central Government. The Central Government shall confer on the said authority the powers to issue directions under s 5 of the Environment Act and for taking measures with respect to the matters referred to in Clauses (v), (vi), (vii), (viii), (ix), (x) and (xii) of subsection (2) of s 3. The Central Government shall constitute the authority before September 30, 1996. Such authority known as Loss of Ecology (Prevention and Payment of Compensation) Authority for State of Tamil Nadu has since been constituted.
- (b) The authority so constituted by the Central Government shall implement the “precautionary principle” and the “polluter pays” principle. The authority shall, with the help of expert opinion and after giving opportunity to the concerned polluters assess the loss to the ecology/ environment in the affected areas and shall also identify the individuals/families who have suffered because of the pollution and shall assess the compensation to be paid to the said individuals/families. The authority shall further determine the compensation to be recovered from the polluters as cost of reversing the damaged environment. The authority shall lay down just and fair procedure for completing the exercise.
- (c) The authority shall compute the compensation under two heads namely, for reversing the ecology and for payment to individuals. A statement showing the total amount to be recovered, the names

In *MC Mehta v. Union of India*,⁴⁹ the Supreme Court followed the ratio laid down in *Vellore Citizens Welfare Forum*⁵⁰ case regarding the concept of

of the polluters from whom the amount is to be recovered, the amount to be recovered from each polluter, the persons to whom the compensation is to be paid and the amount payable to each of them shall be forwarded to the Collector/District Magistrates of the area concerned. The Collector/District Magistrate shall recover the amount from the polluters, if necessary, as arrears of land revenue. He shall disburse the compensation awarded by the authority to the affected persons/families.

- (d) The authority shall direct the closure of the industry owned/managed by a polluter in case he evades or refused to pay the compensation awarded against him. This shall be in addition to the recovery from him as arrears of land revenue.
- (e) An industry may have set up the necessary pollution control device at present but it shall be liable to pay for the past pollution generated by the said industry which has resulted in the environmental degradation and suffering to the residents of the area.
- (f) We impose pollution fine of Rupees 10,000/- each on all the tanneries in the districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai MGR. The fine shall be paid before October 31, 1996 in the office of the Collector/District Magistrate concerned. We direct the Collectors/District Magistrates of these districts to recover the fines from the tanneries. The money shall be deposited, along with the compensation amount recovered from the polluters, under a separate head called "Environment Protection Fund" and shall be utilised for compensating the affected persons as identified by the authorities and also for restoring the damaged environment. The pollution fine is liable to be recovered as arrears of land revenue. The tanneries which fail to deposit the amount by October 31, 1996 shall be closed forthwith and shall also be liable under the Contempt of Courts Act.
- (g) The authority in consultation with expert bodies like NEERI, Central Board, Board shall frame scheme/schemes for reversing the damage caused to the ecology and environment by pollution in the State of Tamil Nadu. The State Government under the supervision of the Central Government shall execute the scheme/schemes so framed. The expenditure shall be met from the "Environment Protection Fund" and from other sources provided by the State Government and the Central Government.
- (h) We suspend the closure orders in respect of all the tanneries in the five districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai MGR. We direct all the tanneries in the above five districts to set up CETPs or Individual Pollution Control Devices on or before November 30, 1996. Those connected with CETPs shall have to install in addition the primary devices in the tanneries. All the tanneries in the above five districts shall obtain the consent of the Board to function and operate with effect from December 15, 1996. The tanneries that are refused consent or who fail to obtain the consent of the Board by December 15, 1996 shall be closed forthwith.
- (i) We direct the Superintendent of Police and the Collector/ District Magistrate/Deputy Commissioner of the district concerned to close all those tanneries with immediate effect who fail to obtain the consent from the Board by the said date. Such tanneries shall not be reopened unless the authority permits them to do so. It would be open to the authority to close such tanneries permanently or to direct their relocation.
- (j) The Government order No. 213 dated March 30, 1989 shall be enforced forthwith. No new industry listed in Annexure-I to the Notification shall be permitted to be set up within the prohibited area. The authority shall review the cases of all the industries, which are already operating in the prohibited area, and it would be open to authority to direct the relocation of any of such industries.
- (k) The standards stipulated by the Board regarding total dissolved solids (TDS) and approved by the NEERI shall be operative. All the tanneries and other industries in the State of Tamil Nadu shall comply with the said standards. The quality of ambient waters has to be maintained through the standards stipulated by the Board.

49 (1997) 3 SCC 715.

50 See *Supra*, fn 39.

‘Sustainable Development’. In this case, in order to prevent environmental degradation around Badkhal and Surajkund lakes in the State of Haryana which are popular tourist resorts almost next door to the capital city of Delhi and in order to protect them from environmental degradation the Supreme Court ordered that no construction of any type should be permitted now onwards within 1 km radius of Budkhal and Surajkund lakes.⁵¹ This order was in modification of earlier order prohibiting any construction activity within 5 kms radius of these two lakes. The present order was based upon two expert reports prepared by the Central Pollution Control Board and the National Environmental Engineering Research Institute (NEERI) where in it was opined that large scale construction in the vicinity of these tourist resorts might disturb the rain water drain which in turn might badly affect the water level as well as the water quality of these water bodies. Such construction might also cause disturbance to the aquifers, which are the source of ground water, besides causing disturbance to hydrology of the area.⁵²

In this case the Court referred with approval to the “Precautionary Principle” which makes it mandatory for the State Government to anticipate, prevent and attack the causes of environmental degradation and which has become not only part of the Indian Municipal Law but also part of Indian Environmental Law. According to the Court this was so because of Arts 21, 47, 48A and 51A(g) of the Indian Constitution which give a clear mandate to the state to protect and improve the environment and to safe guard the forests and wildlife of the country.⁵³

It may also be noted that in an earlier case of *MC Mehta v. Union of India*⁵⁴ the Supreme Court gave among other things, directions to stop mining operations within the radius of 5 kms from the tourist resorts of Badkhal lake and Surajkund in the State of Haryana.

In *S Jagannath v. Union of India*⁵⁵ which is known as *the Shrimp Culture Case*, a petition under Art 32 of the Constitution was filed by the petitioner

51 See Supra, fn 53 at pp 720-21.

52 Id at 718.

53 Id at 720.

54 (1996) 8 SCC 462.

55 (1997) 2 SCC 87. The Supreme Court passed several interim orders and issued several notices to different authorities since the writ petition was filed in 1994. Thus, the Court passed orders on 3/10/1994, 27/03/1995, 09/05/1995, 04/08/1995 and 24/08/1995 before it finally heard the petition on 17/10/1995. It may be noted that in *S Jagannath v. Union of India* 1995 (3) SCALE 126, the Supreme Court issued, in May 1995, an interim injunction in the *Shrimp Culture* case, prohibiting the setting up of new Shrimp farms or the conversion of agricultural lands for aquaculture purposes in the coastal stretches of Andhra Pradesh, Tamil Nadu and Pondicherry. Again, in *S Jagannath v. Union of India* 1995 (5) SCALE 66, this interim injunction was extended to all coastal states in August, 1995 till the final disposal of the case. Similarly, in *Indian Council for Enviro-Legal Action v. Union of India*, 1995

who was the Chairman, Gram Swaraj Movement, a voluntary organization working for the weaker sections of the society. He sought the enforcement of the Coastal Zone Regulation Notification, 1991 by stopping of the intensive and semi-intensive types of prawn farming in the ecologically fragile coastal areas and by prohibiting the use of waste lands / wet lands for prawn farming. The petitioner also sought court's direction for the constitution of National Coastal Management Authority to safeguard the marine and Coastal areas.

Justice Kuldip Singh who delivered opinion of the Supreme Court, highlight the fact that the new trend of more intensified shrimp farming in certain parts of the country without much control of feeds, seeds and other inputs and water management practices- has brought to the fore a serious threat to the environment and ecology.⁵⁶

His Lordship, after referring to the Reports of Alagaraswami⁵⁷, NEERI⁵⁸, the Suresh Committee⁵⁹, the United Nation's study⁶⁰, and to the Stockholm

(2) SCALE 120, taking note of the widespread breaches of the law, the Court imposed a general interim ban on all activities of development within 500m of the High Tide Line (HTL). However, after four months, the Supreme Court lifted the ban and required strict enforcement of the CRZ Regulations. The Court ordered that all "the activities that have been declared as prohibited within the Coastal Regulation Zone shall not be undertaken by any of the respondent – States. The regulation of permissible activities shall also be meticulously followed."

See also *Indian Council for Enviro-Legal Action v. Union of India* AIR 1995 SC 2252 at 2253. It may also be noted that in *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCALE 579, the Supreme Court declared an amendment of 1994 which sought to amend the Coastal Zone Regulation Notification issued in 1991 by reducing the width of the NDZ for rivers, creeks and backwaters from 100m to 50m invalid. The Court also declared the discretionary power conferred, by the amending notification, on the Central Government to permit constructions, at its discretion, within the 200 meters NDZ invalid. The Court observed: (at p 590) "The Central Government, has, thus, retained absolute power of relaxation of the entire 6,000kms long coast line and this in effect, may lead to the causing of serious ecological damage as the said provision gives unbridled power and does not contain any guidelines as to how and when the power is to be exercised. The said power is capable of abuse.... We, accordingly, hold that the newly added proviso in Annexure III in paragraph 7 in sub-paragraph (1) (item i) which gives the Central Government arbitrary, uncanalized and unguided power, the exercise of which may result in serious ecological degradation and may make the NDZ ineffective is ultra vires and is hereby quashed. No suitable reason has been given which can persuade us to hold that the enactment of such a proviso was necessary, in the larger public interest, and the exercise of power under the said proviso will not result in large-scale ecological degradation and violation of Art 21 of the citizens living in those areas."

56 Id at pp 104-106.

57 Dr K Algarswami's Report was in fact a research paper titled "*The Current Status of Aquaculture in India*", which he presented at a workshop organized by FAO of the UNO. This was part of a Report published in April 1995 on Regional Study and Workshop on the Environmental Assessment and Management of Aquaculture Development. The Court made use of this Report.

58 The Court directed NEERI to visit Coastal areas of Andhra Pradesh and Tamil Nadu and submit a report. See, Id at p 93.

59 This was a report prepared by an expert group headed by Justice H Suresh, a retired judge of the Bombay High Court, titled "*Expert Committee Report on Impact of Shrimp Farms Along the Coast of Tamil Nadu and Pondicherry*". See, Id p 126.

60 This is a report prepared and published by the United Nations Research Institute for Social Development

Conference and Stockholm Declaration, the Brundtland Report,⁶¹ the relevant Constitutional⁶² and statutory⁶³ provisions and the case law⁶⁴ in which the importance of the import of the concept of “sustainable development” along with its core features of “Precautionary Principle” and “Polluter Pays” principle, as viable judicial strategies to give both preventive and remedial relief, has been explained, declared.⁶⁵

We are of the view that before any shrimp industry or shrimp pond is permitted to be installed in the ecology fragile coastal area it must pass through a strict environmental test. There has to be a high-powered “Authority” under the Act to scrutinize each and every case from the environmental point of view. There must be an environmental impact assessment before permission is granted to install commercial shrimp farms. The conceptual framework of the assessment must be broadbased primarily concerning environmental degradation linked with shrimp farming. The assessment must also include the social impact on different population strata in the area. The quality of the assessment must be analytically based on superior technology. It must take into consideration the inter-generational equity and the compensation for those who are affected and prejudiced.

Finally, His Lordship, while deprecating that “the authorities responsible for the implementation of various statutory provisions are wholly remiss in the performance of their duties under the said provisions”,⁶⁶ issued several directions.⁶⁷

in collaboration with the World Wide Fund for Nature International, which had conducted the study. The Report was titled “*Some Ecological and Social Implications of Commercial Shrimp Farming in Asia, 1995*”. See, Id p 137.

61 Id at pp 144-145.

62 The Learned Judge referred to Arts 21, 47, 48 (A) and 51 A (g) of the Constitution. Id at p 145.

63 Sections 2, 7, 8, 15 of the Environment (Protection) Act, 1986; Rule 5 of the Environment (Protection) Rules, 1986; The Statement of objects and Reasons and Ss 2 and 25 of the Water (Prevention and Control of Pollution) Act, 1974; the Fisheries Act, 1897; the Wild Life Protection Act, 1972; the Forest Conservation Act, 1980 and the Air (prevention and Control of Pollution) Act, 1981.

64 *Vellore Citizens Welfare Forum v. Union of India* (1996) 5 SCC 647 and *Indian Council for Enviro – Legal Action v. Union of India* (1996) 3 SCC 212.

65 Id at p 147.

66 Id at p 143.

67 Id at p 147 to 150. The regulations are:

1. The Central Government shall constitute an authority under section 5(3) of the environment (Protection) Act, 1986 and shall confer on the said authority all the powers necessary to protect the ecologically fragile coastal areas, sea shore, water front and other coastal areas and specially to deal with the situation created by the shrimp culture industry in the coastal states/Union Territories. The authority shall be headed by a retired Judge of a High Court. Other members preferably with expertise in the field of aquaculture. Pollution control and environment protection shall be appointed by the Central Government. The Central Government shall confer on the said authority the powers to issue directions under section 6 of the Act and for taking measures with respect to the matters referred to in clauses (v), (vi), (viii), (ix), (x) and (xii) or sub-section (2) of Section 3. The Central Government shall constitute the authority before January 15, 1997.

The New Innovative Contours of Precautionary Principle.

In *AP Pollution Control Board v. MV Nayudu*⁶⁸, which is one of the landmark decisions of the Supreme Court in the area of environmental

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2. The authority so constituted by the Central Government shall implement “the Precautionary Principle” and “the Polluter Pays” principles.
 3. The shrimp culture industry/the shrimp ponds are covered by the prohibition contained in para 2(1) of the CRZ Notification. No shrimp culture pond can be constructed or set up within the coastal regulation zone as defined in the CRZ notification. This shall be applicable to all seas, bays, estuaries, creeks, rivers and backwaters. This direction shall not apply to traditional and improved traditional types of technologies as defined in Alagaraswami report, which are practiced in the coastal low lying areas.
 4. All aquaculture industries/shrimp culture industries/shrimp culture ponds operating/set up in the coastal regulation zone as defined under the CRZ Notification shall be demolished and removed from the said area before March 31, 1997. We direct the Superintendent of Police/Deputy Commissioner of Police and the District Magistrate/Collector of the area to enforce this direction and close/demolish all aquaculture industries/shrimp culture industries/shrimp culture ponds on or before March, 31, 1997. A compliance report in this respect shall be filed in this Court by these authorities before April 15, 1997.
 5. The farmers who are operating traditional and improved traditional systems of aquaculture may adopt improved technology for increased production, productivity and return with prior approval of the “authority” constituted by this order.
 6. The agricultural lands, salt pan lands, mangroves, wetlands, forest lands, land for village common purpose and the land meant for public purposes shall not be used/converted for construction of shrimp culture ponds.
 7. No aquaculture industry/shrimp culture industry/shrimp culture ponds shall be constructed/set up within 1000 meter of Chilk Lake, Pulicat Lake (including Bird Sanctuaries namely Uadarapattu and Nelapattu)
 8. Aquaculture industry/shrimp culture industry/shrimp culture ponds already operating and functioning in the said area of 1000 meter shall be closed and demolished before March 31, 1997. We direct the Superintendent of Police/Deputy Commissioner of Police and the District Magistrate/Collector of the area to enforce this direction and demolish aquaculture industries/shrimp culture industries, shrimp culture ponds on or before March 31, 1997. A compliance report in this respect shall be filed in this Court by these authorities before April 15, 1997.
 9. Aquaculture industry/shrimp culture industry/shrimp culture ponds other than traditional and improved traditional may be set up/constructed outside the coastal regulation zone as defined by the CRZ notification and outside 1000 meter of Chilk and Pulicat Lake with the prior approval of the “authority” as constituted by this Court. Such industries which are already operating in the said areas shall obtain authorisation from the “Authority” before April 30, 1997 failing which the industry concerned shall stop functioning with effect from the said date. We further direct that any aquaculture activity including intensive and semi-intensive which has the effect of causing salinity of soil, or the drinking water or wells and/or by the use of chemical feeds increases shrimp or prawn production with consequent increase in sedimentation which, on putrefaction is a potential health hazard, apart from causing siltation turbidity of water course and estuaries with detrimental implication of local fauna and flora shall not be allowed by the aforesaid authority.
 10. Aquaculture industry/shrimp culture industry/shrimp culture pond which have been functioning/operating within the coastal regulation zone as defined by the CRZ Notification and within 1000 meter from Chilk and Pulicat Lakes shall be liable to compensate the affected persons on the basis of the “polluter pays” principle.
 11. The authority shall, with the help of expert opinion and after giving opportunity to the concerned polluters assess the loss to the ecology/environment of the affected areas and shall compensate all individuals/families who have suffered because of the pollution and shall assess the compensation to be paid to the said individuals/families. The authority shall further determine the compensation to be recovered from the polluters as cost of reversing the damaged environment. The authority shall lay down just and fair procedure for completing the exercise.

jurisprudence in the country, the Supreme Court had the opportunity to further clarify the import of the “Precautionary Principle” beyond what was expounded in *Vellore Citizens Welfare Forum’s* case⁶⁹. This is evident from the following observation:⁷⁰

The *Vellore* Judgment has referred to these principles briefly but, in our view, it is necessary to explain their meaning in more details, so that Courts and tribunals or environmental authorities can properly apply the said principles in matters which came before them.

In this case, the Surana Oils and Derivatives (India) Ltd (SODL), which sought to establish a factory to manufacture castor oil derivatives sought consent of the Andhra Pradesh Pollution Control Board by an application to that effect. Unfortunately for the respondent company, the consent was refused by the Board on the ground that the factory was located at a place which was very close to Himayat sagar lake which supplied water to Hyderabad. The refusal was questioned before the Appellate Authority established under s 28 of the Water Act, 1974.

The Appellate Authority, reviewing the decision of the Board, directed the latter to grant consent. This direction was challenged in a PIL before the

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12. The authority shall compute the compensation under two heads namely for reversing the ecology and for payment to individuals. A statement showing the total amount to be recovered, the names of the polluters from whom the amount is to be recovered, the amount recovered from each polluter, the persons to whom the compensation is to be paid and the amount payable to each of them shall be forwarded to the Collector/District Magistrate of the area concerned. The Collector/District Magistrate shall recover, the amount from the polluters, if necessary, as arrears of land revenue. He shall disburse the compensation awarded by the authority to the affected persons/families.
 13. We further direct that any violation or non-compliance of the directions of this Court shall attract the provisions of the Contempt of Courts Act, in addition.
 14. The compensation amount recovered from the polluters shall be deposited under a separate head called “Environment Protection Fund” and shall be utilized for compensating the affected persons as, identified by the authority and also for restoring the damaged environment.
 15. The authority, in consultation with expert bodies like NEERI, Central Pollution Control Board, respective State Pollution Control Boards shall frame scheme/schemes for reversing the damage caused to the ecology and environment by pollution in the coastal States/Union Territories. The scheme/schemes so framed shall be executed by the respective State Governments/Union Territory Governments under the supervision of the Central government. The expenditure shall be met from the “Environment Protection Fund” and from other sources provided by the respective State Governments/Union Territory Governments and the Central Government.
 16. The workmen employed in the shrimp culture industries which are to be closed in terms of this order, shall be deemed to have been retrenched with effect from April 30, 1997 provided they have been in continuous service (as defined in Section 258 of the Industrial disputes Act, 1947) for not less than one year in the industry concerned before the said date. They shall be paid compensation. The compensation shall be paid to the workmen before May 31, 1997. The gratuity amount payable to the workmen shall be paid in addition.

68 AIR 1999 SC 812.

69 AIR 1996 SC 2715.

70 See, supra, fn 73 at p 820.

AP High Court, which declined to interfere with the decision of the Appellate Authority. Against the decision of the High Court a Special leave appeal was preferred to the Supreme Court under Art 136⁷¹ of the Constitution.

Justice Jagannatha Rao, who spoke for the Court, infused new insights into the import, significance and role of the concept of “Precautionary Principle” in the context of the issue of assessment of the adverse impact of new industrial or other projects on environment. Being conscious of the fact that the Courts and other environmental authorities have been facing considerable difficulty in adjudicating upon correctness of the technological and scientific opinions presented to the courts as evidence in favour of or against the new developmental projects in the context of the issue of their adverse environmental effects,⁷² his Lordship projected the importance of the “Precautionary Principle” as a viable judicial tool for the protection of environment. The principle as articulated is based on the premise that it “is better to err on the side of caution and prevent environmental harm which may indeed become irreversible”.⁷³ After tracing its development from Stockholm Conference in 1972 to Rio-Conference 1992, his Lordship articulated its import thus:⁷⁴

It is to be noticed that while the inadequacies of science have led to the ‘precautionary principle’, the said ‘precautionary principle’ in its turn, has led to the special principle of burden of proof in environmental cases where burden as to the absence of injurious effect of the actions proposed is placed on those who want to change the status quo.... This is often termed as a reversal of burden of proof, because otherwise in environmental cases, those opposing the change would be compelled to shoulder the evidentiary burden, a procedure which is not fair. Therefore, it is necessary that the party attempting to preserve the status quo by maintaining a less-polluted State should not carry the burden of proof and the party who wants to alter it, must bear this burden.... The precautionary principle suggests that where there is an identifiable risk of serious or irreversible harm, including, for example, extinction of species, widespread toxic pollution in major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment.

71 Article 136 (1) of the Indian Constitution reads: “(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.”

72 See, *supra*, fn 48 at p 818.

73 *Id* at pp 820-21.

74 *Id* at 821.

More importantly, the “Precautionary Principle” as enunciated by the judicial innovation, has been used as a judicial tool to reform the rules of evidence in order to expound the new concept ‘burden of proof’ in environmental matters. Articulating this new insight of the “Precautionary Principle”, the learned Judge observed:⁷⁵

The principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. It is based on scientific uncertainty. Environmental protection should not only aim at protecting health, property and economic interest but also protect the environment for its own sake. Precautionary duties must not only be triggered by the suspicion of concrete danger but also by (justified) concern or risk potential.

It may be appreciated that the core aspect of the “special principle of burden of proof”, as enunciated in *Nayudu*’s case lies in its insistence that it is on the developer / industrialist who seeks to alter the environmental status quo to prove that his action is environmentally benign. To quote, again, the learned Judge:⁷⁶

It is also explained that if the environmental risks being run by regulatory inaction are in some way “uncertain but non-negligible”, then regulatory action is justified. This will lead to the question as to what is the ‘non-negligible risk’. In such a situation, the burden of proof is to be placed on those attempting to alter the status quo. They are to discharge this burden by showing the absence of a “reasonable ecological or medical concern”. That is the required standard of proof. The result would be that if insufficient evidence is presented by them to alleviate concern about the level of uncertainty, then the presumption should operate in favour of environmental protection. ... The required standard now is that the risk of harm to the environment or to human health is to be decided in public interest, according to a ‘reasonable persons’ test.

The ratio, dealing with the scope of judicial review of administrative environmental decisions, laid down in *Nayudu* case is also significant in the sense that it breaks a new ground in effecting departure from the past judicial practice⁷⁷ which was based on the limited concept of judicial review of

75 Ibid.

76 Ibid.

77 In *Sachidanad Pande v. State of West Bengal* AIR 1987 SC 1109 (Calcutta Taj Hotel Case), the Supreme Court observed: (at p 1115) “The least that the court may do is to examine whether appropriate considerations are borne in mind and irrelevancies excluded. In appropriate cases the court may go further but how much further must depend on the circumstances of the case. The court may always give necessary directions. However, the court will not attempt to nicely balance relevant considerations.

administrative decisions based upon the ‘Wednesbury’ rule.⁷⁸ The Court being alive to the fact that these bodies, as their composition indicates, are bereft of the required expertise to adjudicate matters involving science and technology issues, disapproved steadfast adherence to such a detached “Wednesbury” review.⁷⁹ The Court, while referring the scientific and technical aspects of the dispute in question for investigation and decision of the National Appellate Authority established under the National Environmental Authority Act, 1997 which combines in its self both legal and scientific and technological expertise, suggested suitable amendments to all the relevant environmental laws to effect structural changes to environmental courts, authorities and tribunals to ensure that these bodies should consist of judicial and technical personnel well versed in environmental laws and matters.⁸⁰ To quote the relevant passage:⁸¹

Different statutes in our country relating to environment provide appeals to appellate authorities. But most of them still fall short of a combination of judicial and scientific needs. ...Good Governance is an accepted principle of international and domestic law. It comprises of the rule of law, effective State institutions, transparency and accountability in public affairs, respect for human rights and the meaningful participation of citizens – (including scientists) – In the political processes of their countries and in decisions affecting their lives. It includes the need for the State to take the necessary ‘legislative, administrative and other actions’ to implement the duty of prevention of environmental harm...Of paramount importance, in the establishment of environmental Courts, Authorities and Tribunals is the need for the providing adequate judicial and scientific inputs rather than leave complicated disputes regarding environmental pollution to officers drawn only from the Executive...There is an urgent need to make appropriate amendments so as to ensure that at all times, the appellate authorities or tribunals consist of judicial and also Technical personnel well versed in environmental laws. Such defects in the constitution of these bodies can certainly undermine the very purpose of those legislations.

When the question involved the nice balancing of relevant considerations, the court may feel justified in resigning itself to acceptance of the decision of the concerned authorities.” See also *Dahanu Taluka Environmental Protection Group v. Bombay Suburban Electricity Supply Company Ltd.* 1991 (2) SCC 539 at p 541; *Tehri Bandh Virodhi Sangarsh Samiti v. State of Uttar Pradesh* 1992 Suppl (i) SCC 44 and *Shivrao Shantaram Wagle v. Union of India* AIR 1988 SC 952.

78 Wednesbury rule was laid down in *Associated Picture Houses v. Wednesbury Corporation* (1948) 1 KB 223.

79 Wednesbury rule looks at bad faith, dishonesty, unreasonableness, and reliance on extraneous circumstances, failure to consider relevant matters and disregard of public policy as grounds of judicial review of administrative decision.

80 See, supra, fn 73, at p 822.

81 Id pp 821-22.

In *M/s Vijay Nagar Educational Trust v. KSPC Board, Bangalore*,⁸² the Karnataka High Court gave a new dimension to the “Precautionary Principle”. In that case the petitioner filed a writ petition under Art 226 of the Indian Constitution, questioning the correctness of the order dated 9 June 2000 of the Karnataka Pollution Control Board and of the appellate authority, which dismissed the petitioner’s appeal. The petitioner, by an application on 27 November 1999, sought permission/ clearance and consent of the PCB to establish a medical college and hospital. On 9 February 2000, by a communication the Board officials sought petitioner’s cooperation for its site inspection, which was responded to positively by a letter on 26 February 2000. Thereafter there was no response from the Board until 9 June 2000 when the Board passed an order refusing permission to establish the proposed medical college along with the hospital. Meanwhile, since the petitioner did not hear anything from the Board, it obtained the sanction from the Bangalore Metropolitan Regional Development Authority (BMRDA) and started construction of the buildings for the medical college and the hospital and spent about 5 cores of rupees without waiting for the consent of the Board. One Mr Bhat filed writ petition against the proposed project on environmental considerations. In response to the writ petition, the High Court of Karnataka, stayed further construction which was questioned in vain before the Appellate Authority and the High Court and the Supreme Court under Art 136 of the Constitution. Against the order of the PCB, the petition preferred an appeal to the Appellate authority which initially did not consider the appeal on the ground that the writ petition filed by Mr. Bhat was pending before the High Court. The High Court disposed of the petition and directed the Appellate authority to consider all aspects involved in the appeal. The Appellate authority after considering the matter dismissed the appeal. It is against this appeal that the present writ petition was filed.

The Board (PCB), acting under s 25(4) (b)⁸³ of the Water Act, 1974, refused permission/ consent/ clearance, inter-alia,⁸⁴ on the ground that the site of the proposed project was located on the Banks of Kumudavathi River which joined the TG Halli Reservoir which was the major source of drinking water to the Bangalore city and that, therefore, the site was located in a sensitive area and that the direct and indirect discharges from the activities of the hospital

82 AIR 2002 Kant 123.

83 Section 25 (4) (b) of the Water Act, 1974 states: “The State Board may – refuse such consent for reasons to be recorded in writing.”

84 The other reason was that the petitioner started construction of the medical college and hospital without obtaining clear permission of the Board as required by the provisions of Water (Prevention and Control of Pollution) Act, 1974.

and the public attending the hospital were likely to join the river and were likely to affect the water quality of the reservoir which would prove health hazard.⁸⁵

The High Court held that the reason advanced by the Board was legally untenable and allowed the appeal, quashing the orders passed by the PCB and the Appellate authority. The Court also declared:⁸⁶

It is, however, open to the Board to make a detailed study of all the potential pollutants and direct the petitioner as provided under s 25(5) of the Water (Prevention and Control of Pollution) Act, 1974 and the rules made thereunder to take all precautionary measures to offset any danger that may be caused by establishment of the college and hospital.

As regards the first part of the reason advanced by the PCB for its refusal to grant consent, the Court declared it legally untenable on the ground that since there was no publication of any notification declaring the area in question as a sensitive area either by the State Government or Central Government, the PCB could not arrogate to itself that power.⁸⁷

As to the second part of the above reason advanced by the PCB, the High Court held that the petitioner was neither “called upon nor was he provided the opportunity to dispel any reasonable concern that the Board may have about the potential danger that the industry would have caused”.⁸⁸

In the context of the fact situation that obtained in this case the High Court held that since the medical college and the hospital had not commenced operations, the issue in question could be “determined only with reference to the ‘Precautionary Principle’ which ... has now emerged as the law governing matters of environment and finds expression in Art 47,48A and 51A(g) of our Constitution. This concept has now come to be recognized as part of our domestic law. The new concept places the burden of proof on the developer to show that establishment of an industry would not expose the environment to serious or irreversible damage”.⁸⁹

The court held that since the “Precautionary Principle” shifts the burden of proof to the developer to prove that his proposed industry does not pose serious or irreversible damage to environment, he must be given an “opportunity to discharge the burden and present evidence to alleviate the concern against

85 See, *supra*, fn 87, at p 131.

86 See, *supra*, fn 87 at p 134.

87 *Id* at p 132.

88 *Ibid*.

89 *Id* at p 130.

the level of uncertainty”⁹⁰. The Court held that such an opportunity was not given to the petitioner in this case⁹¹.

Making a distinction between the fact situation that obtained in this case and the one that obtained in *Nayudu’s* case, the Court held:⁹²

When it can be reasonably said that the establishment of the hospital does pose an ‘uncertain’ risk TO environment, it cannot be said, applying the same yardstick of ‘reasonableness’, that the potential risk is ‘negligible’ or ‘non-negligible’. In the case of *A.P. Pollution Control Board*, the Apex Court has every reason to believe that the potential danger to the environment was ‘non-negligible’. In the present case it cannot be said even with a modicum of certainty that the risk involved is ‘non-negligible’.

After referring to the decisions of the Supreme Court in *Nayudu’s* and *Lakshmi Sagar*⁹³, the High Court held:⁹⁴

What emerges from all these pronouncements of the Apex Court is that there should be some ‘non-negligible’ potential danger to the environment if the permission sought could be refused. Where it is not possible to draw a reasonable inference from the records of such ‘non-negligible’ danger to environment, I am of the considered view that the principle of ‘sustainable development’ would come to play. Hospital being an institution that is essential to improve the quality of human life, its establishment subject to ensuring the carrying capacity of the supporting ecosystems, I feel, is the right answer to the question in issue...and it is not possible to ascertain any potential non-negligible danger to environment which would call for adopting the ‘precautionary principle’.

Conclusion

In spite of the fact that the Water Act, which is a law ‘par excellence’⁹⁵, has been in operation for almost three decades, the condition of water pollution

90 Ibid.

91 Ibid.

92 Id at 132.

93 *M/s DLF Universal Ltd v. Prof A Lakshmi Sagar* AIR 1998 SC 3369. In this case the Supreme Court upheld the State’s permission to convert the land situated near Arkavati River and Thippagondanahalli Reservoir for non-agricultural purposes (i.e., for construction of a residential colony). Rejecting the objection on the ground of possibility of pollution of waters, rivers and the water reservoir, the Court held: (at para 16) “We are unable to hold that on the basis of material on record the State Government could not reasonably take the view that the proposed scheme would not affect the availability of water for supply to the city of Bangalore and would not result in pollution of water of river Arkavati and Thippagondanahalli Water Reservoir.”

94 See, supra, fn 87 at 132.

95 See, SN Jain, *Legal Control of Water Pollution in India*, in SL Agarwal, (ed), *Legal Control of Environmental Pollution*, p 21.

in the country has not improved. On the contrary, it has worsened. The responsibility for this sorry state of affairs rests, primarily, with the administrative agencies responsible for the Act's implementation, which have failed to discharge their responsibilities. The Supreme Court, while expressing its anguish at this callous indifference on the part of the authorities, has observed that but for their "remiss in the performance of their duties", the higher judiciary would not have taken up the mantle of playing the over-reacting judicial role for the protection of environment.⁹⁶ The Supreme Court has not only been aware of the fact that the day-to-day enforcement of the environmental laws is not its function but is also conscious of the fact that it is ill-equipped for that purpose.⁹⁷ It may be appreciated that in spite of this awareness and consciousness, the Supreme Court has undertaken day-to-day enforcement of environmental laws by issuing various interim orders and directions of different kinds which in normal circumstances would not have been given without being branded as usurper of the executive and legislative functions. These orders and directions have been issued primarily to safeguard the fundamental rights of the people.⁹⁸

The callous indifference on the part of the administrative authorities, entrusted with the job of implementation of environmental laws, has been highlighted, by the Karnataka High Court in *M/s Vijay Nagar Educational Trust v. K.S.P.C. Board, Bangalore*⁹⁹, where the Karnataka PCB did not care to respond to the respondent's application for grant of consent for more than six months while the maximum statutory period for such response is four months.¹⁰⁰

In *Vellore Citizens Forum*¹⁰¹ case, Justice Kuldip Singh innovatively expounded, adopted and applied the "Precautionary Principle" and the "Polluter Pays" principle which are the core features of the concept of "Sustainable Development" for giving both preventive and remedial reliefs to the victims of environmental degradation by passing appropriate directions.¹⁰²

The *Jagannath* and *Indian Council for Enviro-Legal Action* cases project the judicial concern for the strict enforcement of the CRZ Regulations, which is reflected in the issuance of several orders and directions to protect the

96 See, supra, fn 39 at p 2724.

97 *Indian Council for Enviro – Legal Action v. Union of India* (1996) 5 SCC 281 at 293-94.

98 Ibid.

99 AIR 2002 Kant 123.

100 Section 25 (7) of the Water Act, 1974 states: "The consent referred to in sub section (1) shall, unless given or refused earlier, be deemed to have been given unconditionally on the expiry of a period of four months of the making of an application in this behalf complete in all respects to the State Boards."

101 Supra, n. 39.

102 Supra, n. 36.

ecologically fragile coastal areas of the country. The Supreme Court showed its concern and disapproval of not only the Central Government's amending regulation, reducing the width of the zone from 100m to 50m by declaring it illegal but also the regulation conferring discretionary power on the Central Government to relax the operation of the regulations at any place throughout coast line. Interestingly, as evident from the *Indian Council for Enviro-Legal Action* case, the Central Government which is meant strictly to enforce the CRZ Regulations has shown callous remiss in discharge of its duties which evoked prompt remedial judicial response. Again, it may be submitted that it is the responsibility of the Central and State Governments to take their functions more seriously, which they have not done. This has resulted in further ecological degradation of coastal areas.¹⁰³

The *Nayudu's* case, which is a landmark case with regard to the exposition of the scope and application of the "Precautionary Principle", illustrates different dimensions of this principle in its operation for the protection of environment. In this case, it may be noted that the application of this principle has resulted in the ultimate rejection of the clearance to the proposed project of the respondent company¹⁰⁴. It may also be appreciated that in the resolution of the conflict between the competing claims of development and environment, the "Precautionary Principle" when applied as a judicial tool, takes the side of environment and operates against the undue claims of development. The *Nayudu's* case projects the need for the appointment of judicial and technical personnel well versed in environmental matters on the environmental courts, authorities and tribunals which is necessary to have an effective and meaningful application of the "Precautionary Principle". It is gratifying to note that the Supreme Court in *Nayudu's* case suggested suitable amendments to the relevant environmental laws. While welcoming this suggestion, it is submitted that "there is equally urgent need for amendment of provisions relating to the structure and constitution of pollution control boards if they are to act as an important environmental protection agencies in the State".¹⁰⁵

The *M/s Vijaynagar Educational Trust* case presents a new dimension of "Precautionary Principle". The Karnataka High Court, in this case sought to

103 In this case Justice Saghir Ahmed also made a similar observation, which is: (at p 2002) "The sine qua non for punishment of imprisonment and fine is a fair trial in a competent court. The punishment of imprisonment or fine can be imposed only after the person is found guilty.... In view of the above, it is difficult for us to hold that the pollution fine can be imposed upon M/S Span Motels without there being any finding that M/S Span Motels was guilty of the offence under the Act and are therefore liable to be punished with imprisonment or with fine."

104 It appears that the Supreme Court has rejected the respondent's claim and approved the rejection of clearance to the project.

105 *Supra*, n. 28, at p. 366.

draw the attention of the PCB to the need to expedite its decision on the application by a developer / industrialist to the PCB for grant of consent under s 25¹⁰⁶ of the Water Act, 1974. The Court also held that whenever the state PCB considers the consent application under the above statutory provision the board is duty bound to afford the applicant an opportunity to discharge the burden of proof which is implicit in the operation of the “Precautionary Principle”¹⁰⁷. This case is significant in the sense that it lays down the proposition that the PCB cannot refuse to grant consent without providing any occasion for the “Precautionary Principle” to operate.

106 *Supra*, n. 88.

107 *Supra*, n. 87, at p. 131. While deprecating the attitude of the PCB, the High Court observed: at 131 “The Board which is charged with the solemn duty of protecting the environment has done precious little in discharge of its duty and has displayed an indolent attitude in examining the request of the petitioner for grant of consent. It appears to have woken up from its bureaucratic slumber only after the filing of the Public Interest Litigation.”

PERFORMANCE APPRAISAL OF THE CONSUMER DISPUTES REDRESSAL MECHANISM: SOME OBSERVATIONS ON THE WORKING OF THE DISTRICT FORUMS IN THE STATE OF PUNJAB

*Gurjeet Singh**

INTRODUCTION

The Consumer Protection Act,¹ 1986 was enacted with the sole aim of promoting and protecting consumers' interests and to bring justice to their door-steps. Its enactment has ushered in a new era of consumer protection in the country. The 1986 Act is a benevolent and beneficent piece of legislation and a milestone in the Indian history of law making. Prior to its enactment, a large number of laws were already there on the statute book that directly or indirectly protected consumers' interests.² However, seeking justice under those laws was a cumbersome, dilatory, and a cobwebish procedure that kept majority of consumers away from the process of litigation. As a result thereof, the age old doctrine of Caveat Emptor (let the buyer beware) held sway in the market place, thereby relegating consumers' interests and concerns to the background. The market place, all through, had been a sellers' place.

There is no denying the fact that since independence, a large number of laws were passed by the Indian Parliament with the sole aim to protect the consumers against their exploitation by unscrupulous traders and unethical businessmen. Prominent among these law were: The Prevention of Food Adulteration Act, 1954; the Monopolies and Restrictive Trade Practices Act, 1969; the Hire Purchase Act, 1972; The Standard of Weights and Measures Act, 1976; the Drugs and Magic Remedies (Objectionable) Advertisements Act, 1976; and the Prevention of Black Marketing Act, 1980.³ However, notwithstanding the availability of all these pieces of legislation, the situation had indeed been dismal and an average consumer had always been exploited in the market place. Illiteracy, ignorance, unequal bargaining power, insufficient product information, denial of after-sale service, and lack of awareness and assertiveness on the part of consumers about their rights and above all cumbersome laws and complicated legal procedure cumulatively led to their never-ending exploitation at the hands of unscrupulous traders, unethical

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1 Act No. 68 of 1986.

2 For a list of all these statutory enactments, see: Gurjeet Singh and Simmie G. Singh (1989): "*Consumer Protection: The Socio-Legal Aspects.*" in Indian Socio-Legal Journal, Vol. 15, Nos. 1-2, pp. 77-86.

3 For a detailed study of the enactment of various laws relating to consumer protection in the post-independence era, see: Gurjeet Singh (1994): "*The Problem of Consumer Protection in India: A Historical Perspective.*" In: Consumer Protection Reporter, Vol. 3, Pars 11-12 (November-December), pp. 704-19.

businessmen, and irresponsible service providers. Thus the consumers needed protection.⁴

All this continued till 1985 when the United Nations General Assembly laid down certain guidelines for consumer protection and desired the member states to abide by those guidelines. One of these guidelines enjoined upon the member states to enact full-fledged independent laws for the protection of consumers interest.⁵ Broadly speaking, it was in line with these guidelines that the Indian Parliament enacted the Consumer Protection Act, 1986 with the sole aim of promoting and protecting consumers' interests. Voluntary consumer organisations and various other social groups also lobbied heavily with the government for the enactment of a consumer-friendly legislation. However, the year 1986 can be called as the 'Year of Consumers' as, besides the enactment of the Consumer Protection Act, 1986, a number of other laws were also suitably amended with the sole aim of liberalising the locus standi and thereby allowing consumer organisations to litigate on behalf of the exploited consumers and take justice to their doorsteps.⁶

The Consumer Protection Act was passed in December 1986 and came to be known as a Code of Consumer Rights⁷ However, strictly speaking its effective implementation started in the year 1990 when the Consumer Disputes Redressal Agencies envisaged under the Act were by and large established throughout the country. It may be appropriate to mention here that it was due to the repeated intervention by the Supreme Court of India that these redressal agencies were ultimately established. Many states established these agencies when they were likely to face the contempt proceedings in the Supreme Court.⁸ This sadly shows the apathy on the part of the governments in welfare state to implement even a benevolent piece of legislation on their own.

Once these agencies were well in place, they started dispensing justice by way of entertaining and disposing of complaints against the supply of defective goods as well as against rendering of deficient services, inter alia, by airlines, banks, housing boards and corporations, insurance companies, medical

4 For further details, see: Gurjeet Singh (1994): "*The Concept of 'Consumer' and the Rationale of Consumer Protection in the Contemporary World.*" in Consumer Protection and Trade Practices Journal, Vol. 2, No. 2 (February), pp. 29-38.

5 For further details about the UN Guidelines on Consumer Protection, see: Gurjeet Singh (1994): *Significance of International Coordination in the Arena of Consumer Protection: A Case Study of the United Nations Guidelines and the International Organisation of Consumer Unions.* in Consumer Protection Reporter, Vol. 2, Part 7 (August), pp. 562-68.

6 Prominent among these were: The Drugs and Magic Remedies (Amendment) Act, 1986; The Prevention of Food Adulteration (Amendment) Act, 1986; the Standard of Weights and Measures (Amendment) Act, 1986; and the Monopolies and Restrictive Trade Practices (Amendment) Act, 1986.

7 For details, see: Gurjeet Singh (1993): "*Consumer Rights Under the Consumer Protection Act, 1986: A Critique.*" in The Indian Journal of Legal Studies, Vol. 13, pp. 132-38.

8 See: *Common Cause v. Union of India*, (1992) 1 SC 707.

profession, posts and telegraphs, railways, roadways, and telecommunications. As it normally happens, a number of terms defined in the Consumer Protection Act, 1986 had different and divergent interpretations.⁹ As a result thereof, at the initial stages, many of these services claimed complete immunity from their governance by the 1986 Act by way of advancing the arguments that each of them had their own regulatory law and in-house control mechanism. However, the 1986 Act being the one that is “in addition to and not in derogation of any other law for the time being in force”, Consumer Disputes Redressal Agencies brought all these services within the ambit and amplitude of the 1986 Act except for educational services, housing, legal and the medical profession in the first instance. However, a large number of cases particularly filed against the housing boards and corporations as well as against the medical profession before the different Consumer Disputes Redressal Agencies and the claiming of immunity by these two types of services from their governance by the 1986 Act, coupled with the equally strong arguments advanced by the consumer protagonists and their organisations for their inclusion and by the medical profession against their exclusion created a lot of controversy and led to heated debates on the issue.¹⁰

However, in a short span of time, even these two services were also brought within the ambit of this Act, thanks to the radical decision-making by the Supreme Court of India and pronouncement of some path-breaking judgements against housing services¹¹ as well as against the medical profession.¹² Notwithstanding the fact that the controversy relating to educational services¹³ and the legal profession¹⁴ is yet to be fully settled, there

9 For further details, see: Gurjeet Singh (1993): “*The Concept of Commercial Purpose Under the Consumer Protection Act, 1986.*” in Consumer Protection Reporter, Vol. 2, No. 10 (October), pp. 290-300. Gurjeet Singh (1994): “*The Concept of ‘Contract of Personal Service’ Under the Consumer Protection Act, 1986.*” In: Consumer Protection and Trade Practices Journal, Vol. 2, No. 3 (March), pp. 51-56.

10 For further details, see: Gurjeet Singh (1995): “*The Consumer Protection Act, 1986 and the Medical Profession in India: Conflicts and Controversies.*” in Journal of the Indian Law Institute, Vol. 37, No. 3 (July-September), pp. 324-63 and Gurjeet Singh (1997): “*Consumer Forums as Enforcers of Patients Rights - Applicability of the Consumer Protection Act, 1986 to the Medical Profession in India: Some New Developments.*” in Global Health Law Souvenir, New Delhi: Indian Law Institute, pp. 141-52.

11 See, for example: *Lucknow Development Authority v. M.K. Gupta*, 1993 CTJ 929 (SC).

12 See, for example: *Indian Medical Association v. V.P. Shantha*, 1995 CTJ 969 (SC).

13 For further details, see: Gurjeet Singh (1993): “*Increasing Ambit and Amplitude of the Consumer Protection Act, 1986: A Case Study of its Applicability to Educational Services.*” in Consumer Protection and Trade Practices Journal, Vol. 1, No. 9 (September), pp. 166-87. Also see: Gurjeet Singh (1995): “*Applicability of the Consumer Protection Act, 1986 to Educational Services: Need for a Final Word from the Supreme Court of India.*” in Consumer Protection and Trade Practices Journal, Vol. 3, No. 4 (April), pp. 57-60.

14 For further details, see: Gurjeet Singh (1997): “*The Consumer Protection Act, 1986 and the Legal Profession in India: Some New Developments.*” In: Consumer Protection and Trade Practices Journal, Vol. 5, No. 8 (August), pp. 129-36.

has not been any looking back for the redressal agencies and each decision pronounced by the National Consumer Disputes Redressal Commission as well as by some of the High Courts and above all by the Supreme Court of India has led to the crystallisation as well as to the consolidation of law on the subject thereby giving boost to the emerging consumer protection jurisprudence in the country.¹⁵

CONSUMER DISPUTES REDRESSAL MECHANISM UNDER THE CONSUMER PROTECTION ACT, 1986

The Consumer Protection Act, 1986 envisages a three-tier redressal mechanism for the redressal of consumers' grievances. At the lowest level, the institution of District Consumer Disputes Forum has been envisaged. At the state level, the institution of the State Consumer Disputes Redressal Commission has been envisaged and at the apex level, the institution of the National Consumer Disputes Redressal Commission has been envisaged. The State High Courts have not been given any locus standi to entertain complaints from consumers or appeals against the decision-making by any of the three redressal forums. The State High Courts can entertain cases only under their writ jurisdiction and the Supreme Court of India is to be the final appellate authority under the Consumer Protection Act, 1986.

Due to space constraints, it is not possible to discuss in detail the statutory provisions relating to powers, functions, and jurisdiction of each of the District Forum,¹⁶ State Commission,¹⁷ and the National Commission.¹⁸ In the following paragraphs, I would, however, like to discuss about the functioning of the institution of the District Consumer Disputes Redressal Forums especially in the State of Punjab. Even if it may sound little autobiographical, I would like to mention here that the observations made in the present paper are primarily based on the research conducted by the author with the help of some of his research scholars on the actual working of the Consumer Disputes Redressal Forums in the State of Punjab.

15 For further details, see: Gurjeet Singh (2000): "*Consumer Protection Law.*" in S.K. Verma and Kusam (eds.): *An Evaluation of the Role and Decision-Making of the Supreme Court of India: Its Grasp and Reach*, New Delhi: The Indian Law Institute and Oxford University Press, pp. 495-539.

16 For further details, see: Gurjeet Singh (1995): "*Consumer Disputes Redressal Mechanism Under the Consumer Protection Act, 1986: Critical Analysis and Observations on the District Forum.*" in *Consumer Protection and Trade Practices Journal*, Vol. 3, No. 7 (July), pp. 93-108.

17 For further details, see: Gurjeet Singh (1995): "*Consumer Disputes Redressal Mechanism Under the Consumer Protection Act, 1986: Critical Analysis and Observations on the State Commission.*" in *Consumer Protection and Trade Practices Journal*, Vol. 3, No. 8 (August), pp. 120-28.

18 For further details, see: Gurjeet Singh (1996): "*Consumer Disputes Redressal Mechanism Under the Consumer Protection Act, 1986: Critical Analysis and Observations on the National Commission.*" in *Consumer Protection and Trade Practices Journal*, Vol. 3, No. 1 (January), pp. 11-16.

WORKING OF THE DISTRICT CONSUMER DISPUTES REDRESSAL FORUMS IN THE STATE OF PUNJAB

As the information collected and gathered for the Research Project is yet at the stage of analysis, a part of this can be shared with the readers of this paper. However, I would not like to name as to which District Forum the information pertains to, but would only like to make a few general observations.

In the first place, it may be pointed out at the outset that unfortunately, the State of Punjab was also one of those erring states that did not establish the District Forums in the entire State by self-initiative. As mentioned above, it was only on the basis of the Supreme Court Decision in the case of *Common Cause v. Union of India* that the various erring states were given directions to establish the District Forums by a cut off date given by the Supreme Court failing which the contempt proceedings were to be initiated against those states. Thus even though some of the District Forums had been established in the State, but they were almost non-functional and everything got into its place after the radical and strong-worded judgement pronounced by the Supreme Court of India. Further, even if these forums were established, appointments could not be made in time and if made, they were controversial and the functioning of some of the District Forums could be started quite late.

Secondly, as regards the appointments to these Forums, whereas the appointments of the Hon'ble Presidents were concerned, these were more or less fair. There was no option either because only people with judicial background were to be appointed. Yes, of course, at most District Forums, Additional Sessions Judges were appointed. It is quite late that even retired District and Sessions Judges are now being appointed. However, as regards the appointment of other two Hon'ble Members is concerned, most of the times, these have been controversial. For instance, prior to the enactment of the Consumer Protection (Amendment) Act, 1993, the word 'Lady Social Worker' was used and no qualification, whatsoever, was laid down for the appointment of lady member to the District Forum. Therefore, majority of the appointments came in for criticism due to the fact that these were political appointments where nothing else was considered except the candidate's close proximity to the ruling political party. However, after the 1993 Amendment, situation has changed a bit. However, may be due to lack of availability of competent people or their unwillingness for this job has led to certain appointments those cannot be said to have been done on the merit basis.

Thirdly, as regards the relationship between the Hon'ble President and the other two members, in some of the Forums, some notes of discord have been noticed. The main reason behind this is that the Hon'ble President being

a person from the judicial background have been allegedly demonstrating their superiority, though in a very discrete manner. This fact is normally not acceptable to the non-judicial members especially when their appointment warrants them to be at par with the judicial officer and their role is equal in the decision-making in consumer complaints.

Fourthly, at some District Forums, there have been notes of discord between the Members of the Consumer Forum and the lawyers. The reason is obvious. The senior lawyers or advocates visit Consumer Forums as a last resort. They are busy in the Sessions Court as well as in other courts. And the work of the Consumer Forum suffers due to the non-availability of the advocate of one of the parties. Here even the role of the Bar Associations has not been very supportive.

Fifthly, the working in the District Consumer Forums sometimes starts quite late in the morning. Whereas the court work should normally start at sharp 10.A.M., it was observed that in some of the District Forums, the Presiding Officers do not sit up until 11.30 or even upto 12 noon and they rise from the court at 3. P.M. on the pretence of dictating judgements or reading complaints and files.

Another thing that came to our notice was until the Hon'ble President himself sits in the Consumer Forum, the judicial work does not normally start. It may be due to lack of understanding of law and legal provisions and / or lack of confidence that the other two members are just not ready to listen to the arguments of the advocates. So much so that even they are not ready to give adjournments to the parties or to their advocates. And if the Hon'ble President of the District Forum is on leave, the work of the Forum comes to a complete stand still.

About the infrastructure, the less said the better. There is shortage of staff, stationary, furniture and other day to day requirements. In some of the District Forums, it is a precedent that the complainant has not only to bring his own stationary, that is, envelop and stamps, but also has to pay a nominal fee to the Process Server and even have to accompany him to get the notice served to the opposite parties.

Further, in some of the cases, the Consumer Forums face the problems with regard to the enforcement of their orders. Many a times, police is not cooperating and many a times, the respondents have given wrong, false and fabricated addresses and it is difficult even to convey the order passed by the District Forum. Well these problems are not exclusively applicable to the Consumer Forums in the State of Punjab. These have been experienced in

almost all the districts.¹⁹

There were a couple of other day to day problems that we observed during our survey of the District Forums in the State of Punjab but due to space and time constraints, it is not possible to mention all those. These can be discussed later.

CONCLUSION

In conclusion, I would like to state that despite all these shortcomings mentioned above, Consumer Disputes Redressal Forums are certainly dispensing justice in the State of Punjab. Though it is possible to compare the functioning of one District Forum with the other, but it is not possible to compare the performance of District Forums in one state with those of the other. And that is why it is not possible to comment as to whether they are or are not functioning effectively and efficiently. There is no denying the fact that the defective appointments, intentional non-cooperation by the lawyers and infra-structural problems are some of the problems that afflict their decision-making as well as their day to day functioning, but with little farsightedness things can be improved. The ultimate responsibility lies with the consumers. They have not only to assertive about their rights, but must also be conversant with their duties also. During the survey, we found that many a times consumers file complaints and after two to three hearings, they do not follow up. This is indeed a negative attitude and an unhealthy trend that needs to be reversed.

In my personal opinion, the functioning of any institution, whether judicial or quasi-judicial, depends not solely on the administrators, that is, it is not only the Hon'ble President or the Members of the District Forum who are to run the Forum smoothly. Besides them, its functioning is also affected by the role and responsibilities performed by the clerical staff and their attitude towards the lawyers and the litigants. Lawyers appearing before the District Forums are also expected to play a very very important role. As a matter of fact, Consumer Forums are the reminiscent of the Family Courts where lawyers have a minimum role to play. However, since lawyers appear frequently in Consumer Forums, a lot is expected from them. The greatest thing that is expected from the lawyers is they should rarely ask for an adjournment, for seeking of repeated adjournments totally defeats the sole purpose of the enactment of the Consumer Protection Act that aims at providing quick justice to the consumers. Next comes the role of the litigant consumers. If we as consumers are aware of our rights that have been recognised in the Consumer

19 For further details, see: Gurjeet Singh (1993): "Enforcement of the Orders of the Consumer Disputes Redressal Agencies and Imposition of Penalties Under the Consumer Protection Act, 1986." in Consumer Protection and Trade Practices Journal, Vol. 1, No. 10 (October), pp. 194-201.

Protection Act, 1986 and are ready to assert them in the market place, we will not perhaps feel the need to approach the Consumer Forums because ever since the enactment of the Consumer Protection Act, 1986, business community has become well aware that in case they are not going to regulate themselves, the consumer are going to drag them to the Consumer Forums.²⁰ Consumers have to realise that the Consumer Forums have been established for protecting their interests and to provide redressal to their grievances. Therefore, once they approach the Consumer Forums, they have to pursue their remedy till end. If they do not pursue their complaint till end, the entire purpose of litigation gets defeated. Lastly, media should also play it part. If a District Forum is quick in disposal of complaints filed before it, its role must be reflected and highlighted positively in the media columns. That would encourage other litigant to approach that forum for the redressal of their genuine grievances and it will also encourage the other Consumer Forums to emulate the example highlighted in the media columns. Consumer Protection is a 'Collaborative Endeavour' wherein every player has to play its part. Proving access to justice is one thing; seeking justice is another. Both have to move in juxtaposition in the pursuit of establishment of a 'Consumer Friendly Society'.

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20 Gurjeet Singh (1996): "*The Consumer Protection Act, 1986 and Self-Regulation of Business.*" in *Consumer Protection Reporter*, Vol. 3, Parts 11-12 (November-December), pp. 374-88.

CONSUMER JURISPRUDENCE

*Mahesh Koolwal**

The contemporary world under the aegis of liberalisation, free-market and open trade has led to limitless industrial development turning the whole world into a global village-market. This has contributed to manifold linkages in the political, ideological, economic, social, health and industrial spheres whereby no nation, no community and no individual can remain an island by himself. The goals of Development for all, Wealth for all, Health for all, clean Environment for all and Consumer Justice for all - which were rather an Eldorado seem to become a near possibility in the twenty - first century. This has been possible on account a number external and internal ideological, political, social and economic factors necessary for human survival as well as mastery of man over Nature culminating in revolutionary progress in scientific and technological fields opening new vistas, opportunities and challenges to man in all spheres. However such extraordinary developments have also caused some imponderable problems for mankind as how to survive against the mighty new hazards unleashed by liberalisation and new free market economy. As unbridled development has led to environmental pollution the free market system has led to manifold un-ethical and unfair trade practices resulting in the exploitation of the entire segment of consumers both in the developed and the developing world. The consumers are continually subjected to manipulated and non-manipulated unfair trade practices such as monopoly situation, cut-throat competition, sub-standard quality, misrepresentation etc. to garner benefits by extortious, illegal and immoral means detrimental to public interest in general and the consumer interest in particular. Consequently the notion of Consumer Sovereignty is merely a populist slogan having no or little bearing in the market place and the business world which is propelled by laissez faire overtones like demand-supply, profits, sub-standard quality, high price wherein the buyer is generally at the receiving end.

Some such consumer hazards adversely affect human health, safety, quality, purity, standard of consumer goods. The absence of fair price, weak bargaining, lack of business ethic etc. the consumers for whom goods are produced become a usual casualty in the hub-bub of the market place. The lure of profits and incomes induces enterprises in collusive practices and behave in a way which is contrary to overall interests of the consumers. Consequently a spate of consumer laws have been passed especially in the latter half of the twentieth century for consumer protection against adulteration of foods, drugs cosmetics for information in

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regard to quality of consumer products, product safety, price warranty of goods and so forth fixing accountability and strict liability on the seller-cum-manufacturer rather than the buyer which has paved the way in the emergency of a new jurisprudence concerning consumer interests, claims and needs.

Nature and Meaning of Consumerism

With the rising revolution in human expectations, hopes and desires towards consumerism has led to state regulation and protection of consumer interests in harmony with opposing interests and goals of industry and manufacturers. It has accordingly resulted in a plethora¹ of consumer laws regulations, practices, judicial principles, formal and informal norms for orderly regulation, protection and control of the respective interest of the parties in the over all interest of consumer justice of the consumer community. Consumer jurisprudence, therefore, is that body of law concerning market-place whereby varying interests of the predominant groups of sellers and consumers are reconciled, adjusted and balanced on the matrix of business morality and well-being of the consumers by protecting them against abuses, impurities and misrepresentation of consumer goods. It is a study of such legal principles, precepts and judicial decisions which regulate control and protect the interests of the consumers in the effective realisation and administration of consumer justice. It inheres a bundle of duties and obligations of the business world, which is obligatory for it to observe and follow in the interest of consumer goals without shifting its legitimate business goals and profits. Such obligations of the sellers-cum-manufacturers are generally in the form of do's and dont's, which they ought to observe in the interest of consumer justice e.g. prevention of the food... adulteration, drug abuse, smoking law etc. Consumer jurisprudence has also become a variant of human rights jurisprudence encompassing some basic rights of man like right to live and life, right to health, right to information and other due-processual rights in this new age of liberalisation and laissez-faire conducive to generation of more entrepreneurial freedom of trade and business within the framework of business ethic concerning consumer justice. Of course consumer jurisprudence is not merely a modern development as its traces can be found in ancient India, China, Rome, Greece, Egypt etc. In India the Ayurveda and its texts like Charka Samhita and later on Kautilya's Arthashastra contain manifold references, evidences and documentation on the entire gamut of unfair and unjust trade practices, abuse of health and purity related rules, control and prevention of injurious drugs and alcoholic beverages

1 'Our four decades of legislation, the Government has spawned law after all, 30 in all promising fair play to consumer. But the Indian market knows but "few curbs only". Times of India, June 1, 1987 (Jaipur, ed.).

etc. which can be said to be the consumer code of the ancient Indians.

The Consumer Protection Act, 1986-New Horizons

The Consumer Protection Act, 1986 had its birth-pangs from the days of Kennedy's Consumer Message 1962 and other metamorphic changes in the consumer world and free-market economy both within and outside India. Accordingly consumer awareness, consumer literacy has received quantum jumps in India during the last decade of this century. This has been possible due to vast expanse in Indian markets as well as consumerism as a result of adoption of liberalisation, decontrols and freeing of Indian economy from the cobwebs of socialist controls and socialist ownership of industry. It is not only a constitutional obligation but a new tryst of the government² to vast array of consuming public assuring and guaranteeing basic consumer rights which were non-existent prior to 1986 shall inform all consumer institutions-administrative, business and judicial. It is interesting to understand that all human beings are consumers whether they are young or old, rich or poor literate or illiterate require legal protection against consumer hazards. Consequently the Act envisages³ the need of disseminating consumer awareness and education in furtherance of the protection of consumer rights through the instrumentality of consumer protection councils constituted at the district, state and central levels. These are namely, (a) the right to be protected against products which are hazardous to life and property; (b) the right to be informed of the quality, quantity, purity, price etc. so as to protect the consumer from unfair trade practices... and access to goods at competitive price; (c) the right to be heard and grievances and complaints redressed as a matter of right at the appropriate forums to save the consumer from exploitation by unscrupulous sellers or producers; and (d) the right to consumer education to sensitise the consumers on all problems and issues concerning consumerism. In short both from the point of view of its coverage, applicability, voluntary democratic and participatory mechanism with a hierarchy of consumer justice delivery forums the Act creates in-built linkage with the victims of consumer wrongs. It embodies the principle of natural justice-the right to hear or an opportunity to both sides of being heard-(audi alteram partem) and provides effective, inexpensive and speedy disputes redressal mechanism commensurate to right to life and a healthy living free from the dangers of modern consumeristic hazards. In this way the Consumers protection Act has given a new Copernican turn of Indian consumer jurisprudence giving enough scope to judiciary to spin consumer jurisprudence

2 The Act is applicable to government, cooperative society or any other sector and all services like transport, railways, telephones communication etc.

3 Sections 5, 6 and 7.

around constitutional values of equality, liberty and right to life. Inevitably judiciary being a part of this national consumer ethos has responded⁴ to the need of consumer justice which in turn has generated consumer awareness. On a complaint filed before the Supreme Court that implementation of the Consumer Protection Act being sluggish as the machinery for redress of the grievances at the base level is the District Forums had not been set up in the country the Court issued directions for the establishment of independent District forums for securing the implementation of the Act. In this context Justice Ahmadi, as then he was, observed.

‘Considerable time, almost over sixteen years, have now elapsed since the provisions of the Act were brought into force and we should have excepted the regular forum in position in every district by now. It is conceivable that the consumer protection movement is gaining ground in other countries because of strong consumer bodies having succeeded in organising the consumers; such powerful bodies are far and few in this country and they are unable to exert sufficient pressure on the powers that be as compared to the pressure brought by vested interests because the consumers in this country are not organised as one would like them to be.’

Position of Consumerism

(A) Position in England:

In its true meaning and content consumerism is a reaction and revolt against the vagaries of commercialism and industrialism which exploited the consuming community contrary to elementary principles of business morality and ethic and endangering the life, health safety and well-being of the common people who were basically their product-buyers. This is because there was absence of government regulation and intervention between sellers and consumers to protect the latter from the deterring consequences of adulterated or unsafe goods, drugs and foods. Even Adam Smith, the high priest of capitalistic free market economy had eulogised ‘consumer sovereignty’ as an important factor which determined the quality and nature of economic activity yet manufacturers had been taking consumer for granted and produced commodities some of which were not safe or of good standard quality etc. As Adam Smith remarked ‘Consumption is the sale end and purpose of all production, and the interest of the producer ought to be attended to only as far as it is necessary for promoting that of the consumer’. As such in free market economy theoretically consumer sovereignty should have been the principal

4 *Common Cause, A Registered Society v. Union of India*, AIR 1993 SC 1403.

parameter of production which was merely a means to satisfy consumer choice. However in reality consumer did not remain the primary end wherein profit acquired as a priority end of production. In traditional common law too consumer ceased to be a king as the principle of Caveat Emptor ruled and governed the consumer philosophy, this rule stipulated 'Let the Buyer be aware' for he ought not be ignorant of what they are when he buys the goods or thing from the seller. The purchaser-consumer was left with no remedy in the free market economy. In England it is the House of Lords which in post-World War I gave an impetus to the emergence of consumer jurisprudence. Lord Atkin's landmark decision in *Donoghue v. Stevenson*⁵ is a water shed in the growth and development of consumer jurisprudence. Lord Atkin observed :

'I do not think so HC of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.'

His Lordship reiterated the proposition of English law that '... a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that absence of reasonable care in the preparation of putting up of the products will result in an injury to the consumer's life and property, owes a duty to the consumer to take that reasonable care.' The Donoghue rule of 'Love thy neighbour' herein the consumer swayed the consumer jurisprudence for over three decades in England and other common law countries. Consequently the onus as to defects, deficiencies of the products goods shifted from the buyer to seller under the rule of Caveat Venditor (Let the Seller be aware). The consumerism received a quantum thrust in England in pursuant to entry of England in the European Economic Community and the numerous directive which England implemented in this regard. In 1961 the Parliament enacted the Consumer Protection Act, 1961. But the major step forward in regard to consumer protection heralded on the recommendation of the Molony Committee which led to a series of amendments in the said Act in 1971, 1976 and 1978 including a White Paper in 1984 which led to the passing of the said law in a consolidated form - the Consumer Protection Act, 1987. Subsequent thereto another significant measure enacted is the Food Safety Act, 1990 relates to consumer food safety, labeling, advertising in order to prohibit and prevent food adulteration.

5 (1932) AC 562.

(B) Position in USA :

USA traditionally is a land of free-market economy where during the age of golden *laissez faire* capitalism sustained by social Darwinism 'the survival of the fittest principle' business and industry had its own way until federal government had to intervene due to business abuses of the market. The Big Business Houses and Corporations who were called by some 'robber barons' were neither responsible neither towards society nor to government and the general public remained at their mercy for the cost and quality of consumer goods. This paved the way for anti-monopoly legislation⁶ and regulatory agencies⁷ to eliminate unfair business practices. In retrospect when the Civil War 1861-63 was over industries instead of producing war materials began to profligate market-places with consumer goods of mass consumption and started taking consumers on their terms or silence their protest against high prices, poor quality, unsafe and unhealthy products etc. Since consumer remained an exploited lot despite his fictional 'consumer sovereignty' it is during 1870 to 1930 covering World War I and the Great Depression a number of governmental agencies-came into existence for consumer protection. The New Deal era witnessed the emergence of Consumer Union which became a catalytic agent in the dissemination of consumer information to ignorant consumers about the unsafe, unhealthy consumer goods like spurious drugs, medicines, cosmetics, soaps, meat, dairy products machines, automobiles etc. It is Ralph Nader who greatly aroused American public opinion for consumer protection despite stiff opposition of giant corporations. The waves of popular indignation, identity of interest between unorganised and organised consumer groups led to special governmental protection for consumers protection against adulteration, misrepresentation of foods, drugs, cosmetics, labeling of consumer goods, product safety etc. between 1962 to 1975.

(C) Position in India:

In India consumer protection is not wholly a modern phenomena. However it was during the British rule that India became a sellers market with less production, high prices and inferior quality flooding the consumer market plagued by hoarding, black marketeering and profiteering. Yet the consumers remained neglected left at the mercy of sellers. The colonial rulers after the

6 The Sherman Anti – Trust Act, 1890, the Clayton Act, 1914, The Federal Trade Commission Act, 1914, the Interstate Commerce Act, 1887.

7 Federal Trade Commission, the Interstate Commerce Commission, the National Bureau of Standards, the Marketing Agencies of the Department of Agriculture, the Securities Exchange Commission, Civil Aeronautic Board.

passing of the Indian Penal Code⁸ 1860 did enact some measures⁹ on consumer protection but these laws were seldom enforced. Likewise after Independence during 1947-1986 the consumerism did not make much strides¹⁰ largely due to lack of consumer awareness, absence of legislative and administrative will and a weak consumer movement. The general principles underlying Caveat Emptor; *Rylands v. Fletcher* and *Donoghue v. Stevenson* borrowed from England were pro-sellers which seldom enforced the claims of the consumers. The Constitution of India too indirectly and in remote fashion appear to include consumer justice in its Preamble and the Directive Principles¹¹ of State Policy. There was a lack of drive and initiative in the protection of helpless consumers. The government viewed problems poverty, unemployment under-development and illiteracy more challenging and urgent than consumer protection. The traditional cultural lag and the Gandhian psyche of simple living too acted as a negative factor in consumer awareness. In short the pre-1986 legislation protected the consumer at the ring level only. However it is after 1986 the government took a positive and bold step to confer basic consumer rights through the consumer protection law by providing simple, speedy and inexpensive redressal mechanism including the right to compensation for any loss or injury sustained on account of defect or deficiency in the product.

Judiciary and Consumerism

Much before the passing of the Consumer Protection Act 1986 in India the judiciary has been expounding new principles on consumer rights¹² to prevent the menace of food and drug adulteration etc. which are a threat to health of the consumers causing diseases, premature deaths, pecuniary losses and social adverse effects on the entire society. In early 1970s and especially during the internal emergency of 1975 the judiciary innovated new techniques, doctrines and principles to strengthen the basic fabric of consumer philosophy echoing the identical principles underlying the Consumer Message of President John F. Kennedy to meet the challenges of health hazards and exploitation like food and drug adulteration¹³ etc. The judiciary adopted a stiff attitude towards such anti-social acts and justified the use of extreme weapon of detaining a trade under the Maintenance of Internal Security Act, 1971 to deter like-minded persons from continuing food adulteration activities. Extreme action of detention

8 Indian Penal Code 1860 – section 267 preventing fraudulent use of false instruments for weighing, section 269-271 relating to adulteration of food, drugs etc.

9 The Dangerous Drugs Act, 1930; the Sale of Goods Act, 1930; the Drugs Cosmetics Act, 1940.

10 The Drugs Control Act, 1950.

11 Articles 39 and 47

12 *United India Insurance Co Ltd v. M/s Rising Entrepreneurs* AIR 1996 J & K 8

13 *Jagdish Prasad v. State of Bihar*, AIR 1974 SC 911.

was justified against such anti-social elements who engage themselves in the racket in 'a big way that throws out of gear even the tempo of life' However it is Palghat Municipality¹⁴ that Justice Narayan Pillai expounded the theory of social engineering for establishing a correlation between the duties of the businessman and the rights of the consumer who is always the victim in consumer offences. He gave a new slant to consumer jurisprudence commensurate with rule of law when he observed¹⁵:

'There are several rights such as right to safety, right to be heard the right to know, right to choose and the right to fair agreement involved in consumerism.... The most important right in consumerism is the right to safety and in our country it was recognised in the Prevention of Food Adulteration Act...'

The Supreme Court gradually invented new legal devices, doctrines and principles for the protection of the rights of the consumers. To fasten culpability the judiciary adopted the doctrine the judiciary adopted the doctrine of strict liability in matters pertaining to consumer wrongs and the dilution of the to meet such challenges affecting public health and life.

14 *Palghat Municipality v. S.R & O Mills* (1975) GLJ 479 (Ker).

15 *Ibid* 492.

CASE COMMENT: THE “*STURDZA TEST*” AND ITS IMPLICATIONS ON ARCHITECTURAL WORKS

V. K. Unni*

Introduction

The new embassy building of the UAE in Washington has been the subject matter of a copyright dispute between 2 architects. The ruling in *STURDZA ELENA v. UNITED ARAB EMIRATES*¹, by the United States Court of Appeals for the District Of Columbia Circuit, clearly analyses and clarifies many of the provisions of the U.S Copyright Act. Obviously this decision will have much significance in other jurisdictions also and the courts in such jurisdictions are very much likely to follow the test developed in this landmark case. Needless to state, this judgement will guide many courts throughout the globe to evaluate infringements regarding architectural works. It is interesting to note that in the US, courts have begun to accept the standards laid down by *Sturdza* in subsequent copyright infringement cases², the latest such affirmation being in May 2003.

To be simple the core of the case involves a dispute between two architects Elena Sturdza and Angelos Demetriou. Sturdza alleges that, Demetriou, has stolen her design for the United Arab Emirates’ new embassy. More than merely suing Demetriou and the UAE for copyright infringement, Sturdza also alleges that the UAE has committed breach of contract, and has also conspired to commit sex discrimination in violation of 42 U.S.C. § 1985. Further more, Demetriou has been charged with several torts: conspiracy to commit fraud, tortuous interference with contract, and intentional infliction of emotional distress.

The trial court³ held that the impugned design was not substantially similar” to Sturdza’s, and thereby granted summary judgment for Demetriou and the UAE on the copyright infringement claim. The district court also dismissed her breach of contract claim, concluding that District of Columbia law bars such claims by architects who have no D.C. architecture license; her tort claims, finding them pre-empted by the federal Copyright Act; and her

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1 *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 62 U.S.P.Q. 2d 1071 (DCC 2002). Judgement dated the 8th of March 2002

2 *Louis M. Kohus v. Mariol; James F. Mariol; JVM Innovation & Design*, 2003 FED App. 0150P (6th Cir.) decided on 20th May 2003, this case involved infringement of copyright regarding drawings of a latch that would lock the upper rails in place for use. This latch (“the 11-KMI86 latch”) was different from others in the sense that it had two flippers, or hinges, instead of one, and this gave it a two-step function that could make it safer than comparable latches. Full text of the decision is available at <http://pacer.ca6.uscourts.gov/opinions.pdf/03a0150p-06.pdf> visited on 23/1/2004

3 United States District Court for the District of Columbia

section 1985 claim, emphasizing that foreign governments are not “persons” within the meaning of the statute. Sturdza in the United States Court of Appeals has challenged the said decision of the trial court in appeal for the District Of Columbia Circuit. This decision rendered by Court of Appeals in the U.S is also significant to jurisdictions outside that country because it addresses some pertinent questions regarding copyright infringement especially with regard to architectural designs.

Brief facts

In 1993, the United Arab Emirates organised a competition for the architectural design of a new embassy and chancery building that it was planning to construct in Washington, D.C. They also provided a “Program Manual” which specified the requirements for various aspects of the design to the participants. As per the manual UAE’s intention was to build a “modern sophisticated multi-use facility expressing the richness and variety of traditional Arab motifs”. Both Sturdza and Demetriou⁴ submitted their respective designs that were judged by a very eminent jury comprising of architects and civil engineers. Ultimately UAE informed Sturdza that her design was selected.

After that Sturdza and the UAE started negotiations to finalize a contract. Atleast eight contract proposals were exchanged during the next two years. In late 1994, Sturdza was asked to make some minor amendments to the design and provide multiple, bound copies for UAE officials. Sturdza readily complied with both demands. After that UAE asked Sturdza to perform certain “geotechnical” engineering services needed to commence construction. For complying with this demand she even hired an engineer and assisted him in addressing various technical issues. In early 1996, the UAE sent Sturdza a final draft of the contract incorporating all the changes mandated by the Ambassador of UAE. Sturdza immediately informed the UAE authorities that she consented to these changes. But since then UAE has ceased communicating with her and has neither signed the contract nor replied to her repeated endeavours to establish contact.

In late 1997, Sturdza realized that UAE had presented an embassy design to the National Capital Planning Commission. To her astonishment she discovered that the design so submitted belonged to Demetriou and more interestingly it differed from his 1993 competition entry. She also noted that the said design of Demetriou has copied and appropriated many of the design features that had been the distinctive features of her design. There after UAE finalized the contract with Demetriou to use his revised design and began building its embassy.

4 Through his firm Demetriou & Associates

Sturdza sued UAE and Demetriou in the United States District Court for the District of Columbia. The district court granted summary judgment against Sturdza on her copyright infringement, breach of contract, and quantum merit claims and dismissed under Federal Rule of Civil Procedure 12(b)(6) her conspiracy to commit fraud, tortious interference with contract, intentional infliction of emotional distress, and section 1985 claims. This order of the District Court has been challenged in appeal before the United States Court of Appeals for the District Of Columbia Circuit.

The US Law on Copyright Infringement

The U.S. Copyright Act of 1976, as amended, protects “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device.”⁵ The Constitutional Provision on Copyright states that “*The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries*”⁶

The law here recognizes three specific opportunities for holding a party liable for copyright infringement they are direct, contributory, and vicarious liability⁷. Direct infringement shall take place when one party makes a copy of the copyrighted work, i.e., make use of one of the copyright owner’s exclusive rights without permission⁸. A simple example of direct infringement will be making unauthorized copies of a video CD for business purposes. More often than not the courts have very little difficulty in finding out direct infringement. It envisages strict liability: neither knowledge nor intent is required to find a party liable under this doctrine⁹.

Although the statute is silent on the concept of secondary liability, courts have accepted two types of secondary liability for copyright infringement – contributory and vicarious liability. According to the US Supreme Court¹⁰ the lack of specific reference to secondary liability within the Copyright Act does not preclude the imposition of liability on third parties.

5 See § 102 US Copyright Act

6 United States Constitution, Article I, Section 8

7 Unni V.K., *Internet Service Provider’s Liability for Copyright Infringement - How to Clear the Misty Indian Perspective*, 8 RICH. J.L. & TECH. 13 (Fall 2001) Full text at <http://law.richmond.edu/jolt/v8i2/article1.html> visited on 23/1/2004

8 See 17 U.S.C. § 106 (enumerating the exclusive rights of copyright owners); 17 U.S.C. § 501 (infringement occurs when alleged infringer violates at least one exclusive rights granted to copyright holders).

9 See 3-13 NIMMER ON COPYRIGHT § 13.08 (2000) (good-faith mistakes and ignorance do not constitute a defence to a finding of direct infringement, though they might affect damages).

10 See *Sony Corp. v. Universal City Studios Inc.*, 464 U.S. 417, 435 (1984).

To establish contributory liability, two conditions must be satisfied: the said party causes or contributes to the infringing activity¹¹ and (ii) the said party should know about the infringing conduct of the primary wrongdoer¹². For e.g. The act of distribution by individual A of unauthorized copies made by individual B would come under purview of contributory liability¹³.

Establishing vicarious liability consists of a two-pronged test:

- (1) Whether the defendant had the right and ability to supervise the misappropriation of the copyrighted work And
- (2) Whether the defendant had a direct financial interest in the exploitation of the copyrighted material¹⁴. Vicarious liability for copyright infringement extends beyond employer/employee relationship, and is much wider than those in torts. Moreover, whereas contributory infringement requires defendants to be aware of the infringement, here there is no such requirement¹⁵.

To understand the scope of direct liability is really easy but it is not that easy to distinguish between vicarious and contributory liability. The distinction is of significant practical importance due to the difference in the level of knowledge about the infringing activity required by each category. Whereas contributory liability requires some degree of awareness of primary infringement, vicarious liability is imposed regardless of the third party's state of mind concerning the primary infringement.

The Analysis

Coming to the present case, although many allegations were levelled against UAE and Demetriou, for the purpose of brevity this write-up would

11 See *Gershwin Publ'g Group v. Columbia Artists Management Inc.*, 443 F.2d 1159, 1162 (2d. Cir. 1971) (defining the contributing party as "one who... induces, causes or materially contributes to the infringing conduct of another"). See also *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693, 706 (2d Cir. 1998) (contributory liability exists if the defendant engages in "personal conduct that encourages or assists the infringement.")

12 Several decisions have determined that it is sufficient, for establishing contributory liability, that the third party should have known about the infringing conduct. See *Cable/Home Communication Corp. Network Prods. Inc.*, 902 F.2d 829, 845 & 846 n.29 (11 th Cir. 1990) (requiring that the secondary infringer "know or have reason to know" of the infringement); *Religious Tech Center v. Netcom On-Line Communication*, 907 F. Supp. 1361, 1373-4 (N.D. Cal. 1995) (framing issue as "whether Netcom knew or should have known" of infringing activities.)

13 *Prather v. Camerarts Publishing Co.*, 176 U.S.P.Q. 68 (N.D. Ill. 1972) (distribution).

14 See *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963) ("When the right and ability to supervise combine with an obvious and direct financial interest in the exploitation of copyrighted materials – even in the absence of actual knowledge that the copyright monopoly is being impaired – the purposes of copyright law be given effect by the imposition of liability upon the beneficiary of that exploitation.")

15 See 3-12 NIMMER ON COPYRIGHT § 12.04 (2000) (noting that lack of knowledge that the primary actor is actually engaged in infringing conduct is not a defence under the doctrine of vicarious infringement.)

only focus on the aspect of copyright infringement, which came before the appeal court. In any copyright claim, the plaintiff has to prove the ownership of a valid copyright and that the defendant copied original or “protectable” aspects of the copyrighted work. This cardinal principle was also reiterated in the landmark case of *Feist*¹⁶. To succeed in such a case the plaintiff has to show that the defendant actually copied the plaintiff’s work and apart from that he has to prove that the defendant’s work is “substantially similar” to protectable elements of the plaintiff’s work. These two conditions are paramount in proving any allegation of copyright violation. While considering the aspect of substantial similarity the crux of the issue is to find out whether actual copying is legally actionable. Interestingly UAE and Demetriou never disputed Sturdza’s ownership of a valid copyright and Demetriou’s actual copying of Sturdza’s design. Their only argument is that Sturdza cannot prove substantial similarity.

Not all “copying” is actionable, however: it is a constitutional requirement that a plaintiff bringing an infringement claim must prove “copying of constituent elements of the work *that are original*.”¹⁷ Throughout the globe *originality* remains the main ingredient of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author. “Original here only means that the work was independently created by the author and not merely copied from other works and it has the minimum degree of creativity.

The Court noted that the question of substantial similarity involves two steps. The first involves the identification of the “protectable elements” of the artist’s work. This is in consonance with the well-known principle that “No author may copyright facts or ideas”. The copyright is limited to those aspects of the work-termed ‘expression’-that display the stamp of the author’s originality.”¹⁸ It further observed that copyright protection does not extend to what are known as “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic, or elements that are “dictated by external factors such as particular business practices. This observation was made by relying on the decisions in *Computer Mgmt. Assistance Co. v. Robert F. DeCastro, Inc*¹⁹ and *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*²⁰

After removing the unprotectable elements, the next stage is to find out whether the allegedly infringing work is “substantially similar” to protectable

16 *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 348, 361 (1991)

17 *Ibid.* at 340, 361

18 *Ibid.* at 350

19 220 F.3d 396, 401 (5th Cir. 2000)

20 672 F.2d 607, 616 (7th Cir. 1982)

elements of the artist's work. "Substantial similarity" is found to exist where "the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value"²¹. More importantly substantial similarity must be determined by giving due importance to their "overall look and feel". This should be done in addition to the comparison of the two works' individual elements in isolation²².

Coming to the present case the Court of Appeals noted that the District Court rightly filtered out from Sturdza's design "domes, wind-towers, parapets, arches, and Islamic patterns" as they were unprotectable ideas. The Court observed that if an opposite view were taken it would only result in a denying the basic architectural elements to architects and would clearly make a mockery of the idea/expression distinction, which provides ample incentives for authors to produce original work while safeguarding society's interest in the free flow of ideas.

The Court of Appeals makes it crystal-clear that "Islamic" patterns are not protectable and classifies them as incidents, characters or settings that are as a practical matter indispensable, or at least standard, in the treatment of a given topic²³. The Court of Appeals while concurring with the District Court's view that Demetriou's design differs from Sturdza's also makes it clear that the District Court had overlooked several important aspects in which Demetriou's design expresses particular architectural concepts in a manner which is quite similar to Sturdza's. The Court finds certain important similarities in the "overall look and feel" of the two designs.

Examining the two designs, the Court of Appeals is convinced that, to a great extent Demetriou's design resembles Sturdza's. The size, shape, and placement of Demetriou's wind-towers, parapets, and pointed domes, when observed from the front portion, give his building an outline almost identical to Sturdza's. It also became very clear that both the buildings have in them a pyramid-like clustering of pointed arches around the front entrances, prominent horizontal bands and vertical columns demarcating the windows, slightly protruding midsections, diamond grids, and similar latticework patterning inside the arches. With the aim of giving an Islamic effect to the embassy building Demetriou expresses and combines his wind-towers, arches, dome, parapet, and decorative patterning in ways quite identical to Sturdza's expression and combination of these elements. These are all relevant facts to be considered, the Court added²⁴.

21 Case of Country Kids, 77 F.3d at 1288

22 See Sturdza supra fn 1

23 Ibid.

24 Ibid.

The Court of Appeals also commented a few words regarding the two expert declarations adduced by Sturdza during the trial stage. The first expert declaration was from a professor of Islamic art and architecture and another from a practising architect. Although the trial court had disregarded the declarations as irrelevant, the Court of Appeals emphasized that the use of expert testimony in copyright cases is a matter that is getting widespread judicial consideration. Earlier, expert evidence was allowed only to assist the juries to determine whether alleged infringer used the copyrighted work in making his own, i.e. actual copying²⁵. But this trend is currently witnessing a sea change as the courts have begun to permit expert testimony to find out substantial similarity in cases involving computer programs²⁶. This is mainly because of the fact that such evidence is inevitable because of the “complexity and unfamiliarity of computer programs to a vast majority of population. But the Court of Appeals found that no court has considered the question of accepting expert evidence to show substantial similarity of architectural works, and the Court for the time being declines to permit expert evidence in the arena of architectural works to show substantial similarity.

Decision

As such the Appeal is allowed. The grant of summary judgment for Demetriou and the UAE on Sturdza’s copyright claim is reversed and the case is remanded for trial. The Court of Appeals also reversed the dismissal of Counts Five, Six, and Seven (the tort claims) as to Demetriou. The question whether Sturdza’s contract and quantum merit claims are barred by the D.C. Law has been certified to the D.C. Court of Appeals. However the decision of the District Court to dismiss of Sturdza’s section 1985 claim is affirmed by the Court of Appeals²⁷.

Conclusion

Sturdza clearly demonstrates an important aspect of how courts are going to approach alleged copying of “buildings”. The court in *Sturdza* also noted that when determining whether a building is a copy of another protected building, the analysis should include the comparison between the overall “look and feel of the two buildings apart from the routine comparison of individual elements such as doors, windows or decorative elements.

This judgement will go a long way in framing certain guidelines for protecting architectural works. Obviously this decision can be of immense help to countries in other jurisdictions also when they have to deal with such cases.

25 Case of *Whelan Assocs. v. Jaslow Dental Lab. Inc.*, 797 F.2d 1222, 1232 (3d Cir. 1986)

26 Case of *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 713-14 (2d Cir. 1992)

27 See *Sturdza* supra fn 1

The “*overall look and feel test*” which the appeals court had adopted taken will help a long way in promoting and protecting creativity with respect to such architectural works at the same time the court took adequate care to ensure that common elements like “domes, wind-towers, parapets, arches, Islamic patterns” are all unprotectable concepts which forms part of the public domain. This balanced approach of the court is very helpful in protecting original creative works and will help a lot to mould the emerging jurisprudence with regard to copyright infringement of architectural works.

FORM IV

Statement of ownership and other particulars about the *NALSAR Law Review*

Place of Publication	3-4-761, Barkatpura, Hyderabad - 500 027
Language	English
Periodicity	Half Yearly
Printer's Name, Nationality and Address	Prof. (Dr.) Ranbir Singh, Indian Vice-Chancellor NALSAR University of Law 3-4-761, Barkatpura, Hyderabad - 500 027
Publisher's Name, Nationality and Address	Prof. (Dr.) Ranbir Singh, Indian Vice-Chancellor NALSAR University of Law 3-4-761, Barkatpura, Hyderabad - 500 027
Editor's Name, Nationality and Address	Prof. (Dr.) Ranbir Singh, Indian Vice-Chancellor NALSAR University of Law 3-4-761, Barkatpura, Hyderabad - 500 027
Owner's Name	NALSAR University of Law, Hyderabad

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