Volume 3 | Issue 1 | November 2011

Dehradun Law Review

A Journal of
Law College Dehradun
Uttarakhand

Volume 3 Issue 1 November 2011
ISSN 2231-1157

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EDITORIAL

It gives us immense pleasure that on the occasion of Law Day 2010, we are coming up with the second issue of Dehradun Law Review. 26th November is celebrated as Law Day every year and the journal on this occasion is an endeavour to make the day meaningful for the students and faculty members of Law College Dehradun. It is to our satisfaction, that the journal is gradually taking its desired shape as was visualized at the time of its launching. Combination of wall Journal, web Journal and book Journal remains a unique feature of the journal. The abstracts of the articles are placed on the wall of the college whereas the complete journal is available on the web site of the college and it is placed in the library in book form. 'Know Your Legal Luminaries' is a special feature of this journal, wherein, every issue will contain biographical notes on two eminent personalities who are regarded pioneers among thinkers, philosophers and jurists.

Revolutionary changes are taking place in the legal education of the country. These are evidently good signs for the future of the profession. In my stint of nine years in this college, I see a discernible difference in the qualititative aspect of the students taking admission in law. Now a considerable number of students are taking up study of law as their first choice. Active participation of students in the moot court competitions, Para- legal activities and debates has become the order of the day. Institutions imparting legal education need to provide infrastructure and facilities to the students to facilitate these activities. Above all I feel we need to provide them a platform to polish their research and creative aptitude. A law journal of the college with active participation of faculty members as well as students may well serve this end.

Delay in the justice delivery system and pendency of cases has reached an alarmingly critical stage and is on the verge of paralyzing our judicial machinery. Frustration is writ large on the faces of clients in the courts. People of the country are gradually losing faith in the efficiency of the justice delivery system. However it is imperative to note, that speedy disposal of cases and delivery of quality justice top the priority list of the agenda of the Apex Court as well as High Courts of the

country. Keeping this in view, articles on this topic were invited from the students. This issue contains well researched articles from students as well as faculty members. Justice V R Krishana Iyer, a living legend in the legal world and Jeremy Bentham, the founder of Utilitarianism, is regarded as one of the greatest philosophers, jurists, social reformers and activists the world has ever produced. Available information on both these personalities is also reproduced in brief.

We are thankful to all the contributors whose valuable support has greatly contributed to the successful launching of the present issue. We look forward to more productive articles in the forthcoming issues.

God speed!

- Dr. RAJESH BAHUGUNA

EDITOR-IN-CHIEF

Dehradun Law Review

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ARTICLES

KNOW YOUR LEGAL LUMINARIES

DISCLAIMER

The college, editors, publisher and printers do not owe any responsibility for the views expressed by the contributors and for their errors, if any, in the information contained in the Journal.

SPEECH OF HON'BLE MR. JUSTICE A R LAKSHMAN, THEN CHAIRMAN OF LAW COMMISSION OF INDIA, ON THE OCCASION OF INAGURATION OF 'SOHATHM' BY LEGAL ASSISTANCE FORUM

Warren E.Burger, former Chief Justice, US Supreme Court said 20 years back, and I quote:

"The entire legal profession (lawyers, judges, law school teachers) has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers of conflicts."

Perhaps, the worth of these golden words could have never been truer and clearer than it is today in context of the Justice Delivery and redressal systems. In this fast moving and neo-legal world of today, legal reforms and initiatives to tackle the increased load on the judiciary and cry of delayed justice is the immediate need of the hour.

Parallel system of dispute resolution has become a necessity where police, lawyers, judiciary and the litigant deviate from the formal systems and engage with the parallel system. For many a litigant, the engagement with the parallel system is not even a choice as they remain oblivious of the existence of the same. Since, the legitimacy of the Alternative Dispute Resolution (ADR) is premised on parties consenting to the process, the benefits accruing from the parallel system have to be raised considerably high to drive the parties to consent to the ADR processes.

ADR today falls into two broad categories: court-annexed options and community-based dispute resolution mechanisms. Court-annexed ADR includes mediation/conciliation-the classic method where a neutral third party assists disputants in reaching a mutually acceptable solution-as well as variations of early neutral evaluation, a summary jury trial, a mini-trial, and other techniques. Such methods decrease the cost and time of litigation, improving access to justice and reducing court backlog, while, at the same time, preserving important social relationships for disputants.

Community-based ADR is often designed to be independent of a formal court system that may be time consuming, expensive, distant, or otherwise inaccessible to a large section of population. New initiatives sometimes build on traditional models of popular justice that relied on elders, religious leaders, or other community figures to help resolve conflict. India embraced lok adalat village-level people's courts in the 1980s, where trained mediators sought to resolve common problems that in an earlier period may have gone to the panchayat, a council of village elders.

The use of Mediation and Conciliation as means of dispute resolution can be traced back thousands of years. For many centuries, the meditative approach has been the primary way of dispute resolution in countries like China and India, where personal (and collective) responsibility and responsibility to the community are highly valued. Conciliation and mediation refers to a voluntary process whereby the mediator/conciliator, a trained and qualified neutral, facilitates negotiations between disputing parties and assists them in understanding their conflicts at issue and their interests in order to arrive at a mutually acceptable agreement. Mediation/ Conciliation involves discussions among the parties and the mediator/conciliator with an aim to explore sustainable and equitable resolutions by targeting the existent issues involved in the dispute and creating options for a settlement that are acceptable to all parties.

Decentralisation – the Transfer of power, responsibility and resources from central to regional and local governments- is seen as one way to improve governance by bringing decision making closer to the people affected by the decision, thereby enhancing empowerment, access and accountability.

In India, the panchayat justice system in which respected village elder(s) assists in resolving community disputes, has long been an accepted method of conflict resolution. Since, the Vedic times, India has been heralded as a pioneer in the achievement of social goal of speedy and effective justice through informal but culminating dispute resolution systems. Alternative dispute resolution methods are not new to India and have been in existence in some form or the other in the days before the modern justice delivery system was introduced by colonial British rulers. In *Bhadranayaka Upanishad*, Sage *Yajnavalkya* has referred to various types of arbitral bodies, commonly known as *Panchyatdars* and its members as *Panchas*. The dawn

of these arbitral bodies led to the emergence of the celebrated Panchayati Raj system in India, especially in the rural and village locales. This ever-evolving system ran through the veins of dispute resolution mechanisms of the Vedic, Gupta, Mauryan, Mughal, & even the British Raj justice deliverance structures. Proceedings before theses bodies were of an informal nature, free from cumbersome technicalities of domestic laws.

However, after the introduction of the modern justice delivery arrangements, these ancient forms of dispute resolution took a back seat for many decades. The same were granted a *sanjivani* by the Parliament through the enactment of the various litigant-friendly statutes such as Legal Services Authorities Act, 1987, the Arbitration and Conciliation Act, 1996. In 2002, the CPC was amended to make ADR an integral part of the judicial process. In terms of the newly inserted section 89 of CPC, if it appears to the court that there exist elements, which may be acceptable to the parties, the court may formulate the terms of a possible settlement and refer the same for arbitration, conciliation, mediation or judicial settlement.

The justice delivery system, despite an increase in disposals, is under considerable strain due to an increase in the institution of cases with a corresponding increase in the pendency of cases. Presently, Lok Adalats are taking away some of the burden of pending cases but quite clearly that is not enough. Some massive steps have to be taken in this arena to lead towards the eventual success of the present-day dispute resolution systems.

"Traditional" mediation is best suited to conflicts and disputes between people living in the same community, who seek reconciliation based on restoration. Formal justice, on the other hand, is able to provide the legal and procedural certainty in cases involving serious penalties, such as imprisonment; or where the parties are unwilling or unable to reach a compromise. Access to justice by disadvantaged people may require both formal and traditional systems; the way they enrich each other may vary in each context. Formal systems may sometimes need to be "informalized" to become user friendly, while in certain circumstances, traditional systems need to be formally recognized and set under the oversight of the courts to ensure fair and impartial justice.

Our Hon'ble President Dr. APJ Abdul Kalam has also been supportive of amicable settlement of disputes and has advocated the need to encourage mediation as an alternative dispute resolution (ADR) mechanism in the following words:

"(Mediation and conciliation) is definitely a faster method of dispute resolution compared to the conventional court processes. Only thing is that we have to have trained mediators and conciliators, who can see the problem objectively without bias and facilitate affected parties to come to an agreed solution. In my opinion, this system of dispute resolution is definitely a cost effective system for the needy ..... Mediators must possess the qualities of being a role model in the society, impeccable integrity and ability to persuade and create conviction among the parties."

Over a century ago, Abraham Lincoln, then President of the United States of America said; and I quote:

"Discourage litigation; persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser- in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."

In criminal matters, the complainant and the accused can arrive at a settlement, which is recognized by law under Sec. 320 of the Cr.P.C., 1973. Once the parties decide to settle all their grievances the criminal charges against the accused can be compounded with the permission of the court, and in some cases, even without it.

The present project of Legal Assistance Forum, ably titled **SOCIAL HARMONY THROUGH MEDIATION (SOHARTHM)** is a welcome step for the greater awareness of mediation/conciliation as a dispute resolution mechanism, both in civil and criminal cases. It would to a great extent, assist in changing the judicial system from adjudication based model to a justice delivery model in pending cases and in pre-litigation disputes of the common man. I am sure that this project can bring about momentous transformation for the people in our villages and rural areas, though it would require a series of workshops and camps to train the conciliators. The members of Legal Assistance Forum have volunteered to do it, which is very commendable indeed. I wish this project and all the members of the Legal Assistance Forum all the very best for its success and achievements.

Thank you.

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE IN INDIA

Dr. A.K. Pandey*

Introduction

Domestic violence is an extremely complex and vicious form of abuse, committed most often within four walls of the family house and /or within a particular deep rooted power dynamic and socio- economic structure, which do not allow even the recognition or acknowledgment of this abuse. Domestic violence[1] is defined as an act of omission or commission stressing the fact that omission can cause as much heat burn as acts of commission. Thus the section provides protection against any act, conduct, omission, or commission that harms or injures or has the potential to harm or injure, and it will be considered as 'domestic violence'. Again the act of omission or commission may be physical, mental, sexual, emotional or economical (2). Even a single act of commission or omission may constitute domestic violence. Now women do not have to suffer a prolonged period of abuse before taking recourse to the law. The legislation has widened the scope of domestic violence and can be broadly related to human rights. In a way it highlights the notion violence of silence also. The expansive interpretation of violence of violence is a critical breakthrough made by an ACT. In addition to this, the interpretation of the fact that whether the act would come under the ambit of domestic violence .or not has to be arrived attacking into consideration the overall facts and circumstances of the case[3].

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1. Protection of Women against domestic violence Act 2005-Section 3.
2. Whenever one things of violence it is often confined to physical violence which is visible but the Act goes a step further extending its perception on other sort of injuries being suffered by women within home which is mental and hence considered subtle and imper ceptible.
3. Explanation II to section 3 of the Act reads "for the purpose of determining whether any Act, omission, commission or conduct oft he respondent constitutes domestic violence under this section. The overall fact and circumstances of the case shall be taken into consideration."

Domestic Violence is violent victimization of women, within the boundaries of family, usually by men (or his family)[4]. A woman of any age, she be may a girl child, and unmarried, married or elderly women including a widow are such women with whom men have marriage like relationship. Violence can be both physical and psychological. It indicates threats or aggressive behavior towards her not only to her physical being, but towards her self -respect and self- confidence. Domestic Violence against women may be psychological, physical or sexual. Psychological violence is carried out with psychological weapons like insults, humiliating treatment, denial of human existence rather than physical attack. Physical violence includes all types aggressive physical behavior towards the women's body. Sexual violence could include both passive and active violence. It will also include cases of perversity. Victimers of domestic violence may be husband or his family members. Domestic violence could occasionally be seen in other relations also like by parents, brothers or others in parent family[5].

In India, there is unique situation of co -existence of all form of violence specially of elimination of women that is selective female foeticide, female infanticide, bride burning .The incidence of violence of all forms within family has also gone up. Even today various forms of violence against women are prevalent in our society, though many cases remain unreported due to one or other reasons. Women on many occasions are victimized by all sorts of discrimination, deprivations and obstruction in goal achieving and responses. These incidences may occur in the family, offices, industries or even public places. Inflicting and experiencing violence in many subtle forms causing and suffering mental pain in day- to- day life has become ways of our world in interpersonal relationships. The cruelty, the hate that exists in ourselves is expressed in the exploitation of the weak by the powerful and cunning. The worst part of problem is that women today are not feeling safe and secure even in the family. The concept of home, sweet home is no more, so far many women, who suffer violence against themselves by the members of the family whom is no safe place when it comes to aggressive behavior.

4. Sushma Sood, Violence Against Women ,1990 P.268
5. J. Krishnamurthy , Commentaries on Living 3 Series, Edited by Dr. Raja Gopal ,1977,P.166

In last many decades, there has been an alarming increase in the incidence of violence within and outside family .Today, we hear more about wife beating, dowry deaths, and sexual crimes. There are differences between the husband and wife resulting in increasing divorce. Human feelings are gradually evaporating and man resorts even to murder the wife if he does not get the expected dowry or some other reason. The growing dowry system is gradually making the baby girl unwanted. People are resorting to foeticide and sometimes, baby girls are even killed after birth. Women are ignored in house work and outside home. They are suffering innumerable tortures from their in-laws and husbands. The women, right from the moment of stepping into the husband's home tries to forget her own identity and adjust everything according to needs of new place and the people living in it. In spite of it, she is under a constant watch and is often criticized for many things. The society, the religion, her parents and in-laws everyone expects her to become her husband's shadow. The worst thing is that all this come as a rude shock to her after marriage, because the institution of marriage in our society is highly glamourized. Hence for women, 'the union of souls' turning into a nightmare is a truly horrifying and shattering experience. The mental violence may be committed in such a subtle manner that others will never come to know of it[6].

Causes of Domestic Violence

In India, where there is no discrimination on grounds of caste, sex and where each human being has the right to participate in social process to create conditions of equality for the socially suppressed and disadvantaged sections of society, 'the dice is heavily loaded against women.' Female oppression continues from womb to tomb[7]. In particular, discrimination occurs within the family, where norms regarding women's secondary status are reinforced in children from birth. Women are viewed as dependants within the family, hence face severe restrictions. Sometimes the cultural beliefs, patriarchal social norms, superstitions and mind set that combine to produce discrimination patterns[8].

6. Sushma Sood, Violence Against Women ,1990 P.227
7. Indira Nupur Kulsherstra ,Women's Studies in School Education: A new Perspective(1989) P. 8
8. UNICEF report published in Nov 1995. titled The Progress of Indian States in Child Survival Health, Primary Education

Due to modern science and technology female infanticide has been replaced by female foeticide. Another reason for the dangerous phenomenon of female foeticide is the extreme low valuation of female life and the low status accorded to women in India. The reduction of birth rates in most of the Indian states has also contributed to intensification of son preference in the existing patriarchal society. Because of traditional gender bias, the cases of female infanticide occur and the girl child is denied equal opportunities in terms of food, clothing and education. Fear of sexual abuse of girl child also leads to female infanticide. Lack of religious education and degradation of moral standards also leads to such crime. Hence social and economic factors have been overemphasized in dynamics of child abuse.

Violence against married women is also a manifestation of gender discrimination. The specificity of violence in women involves as analysis of gender and its centrality to the family which has gender inequalities in day -to -day life. Domestic violence, battering, dowry, rape, suicide are the manifestations of gender inequalities within the family system. There are indications that any social structure which treats women as fundamentally of less value than men is conducive to violence against women. Violence against women in marital situation has more to do with the relationship of the husband and wife in social matrix. The cultural factors relating to marriage, status of women and per structure relationship between men and women in the society are important while describing violence against women in the family context. It may also have its origin in psychological factors like irrational, pathological behavior of abuser and the victim, which subsequently affect the interpersonal relationship of both the parties. The lack of awareness of the right and a general social belief in women's sub-ordinance perpetuates a low self image in women and her inferior status. She is taught that marriage is the ultimate goal she has to achieve. All this conditioning gradually becomes the nature of Indian women[9]. Puberty, alcoholism, unemployment, frustration and poor role of modeling also contribute to violent behavior.

It is also seen that the patriarchal attitude of Indian society which perceives women as an object rather than a subject and gives her a low status in the society. Deep rooted ideas about male superiority enable men to freely exercise unlimited

9. Women's link Jan-Mar. PP- 43-44

power over women's life. Violence is thus a tool that men use constantly to control women as a result of highly internalized patriarchal conditioning which accord men the right to be their wives and thus ostensibly perform the duty of chastising them. The Indian women directly or indirectly encouraged to sacrifice her own needs, feelings or interests constantly for the needs of some other person or community like children, husband, family or community. The social conditioning results in the basic difference between how men and women view themselves and the reason for their violent interactions. In Kuandalabala vs. State of A.P. [10].It was observed that 'Of late there has been an alarming increase in cases relating to harassment, torture, awaited suicides and dowry deaths of young innocent brides. The growing cult of violence and exploitation of young brides continues unabated there is constant erosion of the basic human values of tolerance and the spirit of live and let live. Lack of education and economic dependence of women have encouraged the greedy perpetrators of the crime.

In the Indian society the situation of elderly is thought to be less severe considering the value system, culture and the still sustaining joint family system. However, the fast changing Indian social scenario leading to the degeneration of the joint family system, dislocation of cultural and family bonds and loss of respect for the aged indicate that family can no longer be a secure place for elderly. There are indications that the elderly population still depends on the family for economic and emotional support. The dependant position of elderly is a major cause of abuse. Stress is one of the major factors contributing to the abuse of the elderly. Social isolation and poverty experienced by the care takers are additional factors that increase the possibility of abuse[11].

Legal & Judicial Responses

Portection under Indian Constitution

The constitution of India contains much provision for securing the gender justice. The preamble of the constitution of India promises 'to secure to all its citizens Justice - social, economic and political; equality- of status and opportunity.

10. (1993) 2 SCC 684
11. R.Hugman, Ageing and The Care of Older People in Europe 1994

The Constitution empowers the state to make special provisions for women and children even in violation of the obligation not to discriminate among the citizens. This power has been used to enact special laws for the protection of women, women workers in factories, mines and plantations and to provide maternity leaves to women workers in the organized sectors. The Constitution of India enunciates the general principle of right to equality and prohibits the state from denying to any person equality before law and equal protection of law[12]. Equality of opportunities in public employment and office under the state is guaranteed by Article 16 of Constitution. This Clause has helped to ensure a significant position and its status to Indian women. In a landmark judgment in Vishaka v. State of Rajasthan [13], the Supreme Court has laid down exhaustive guidelines to prevent sexual harassment of working women in place of their work. The court held that it is the duty of employer or other responsible person in work places or other institutions whether public or private to prevent sexual harassment of working women. The court also held that right to life means life with dignity .The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of the mechanism for its enforcement, is the responsibility of the legislation and the executive. The Directive Principles of State Policy embodying the major goals of welfare State also contain certain specific items affecting women while the provision of Article 38 directs the State to bring about a transformation of socio-economic conditions for the common good, another Article directs movement towards the achievement of an egalitarian and just social order, which would affect men and women equality. Article 39 holds out the promise of an equal right to adequate means of livelihood , equal pay for equal work, protection of health and strength of workers- men, women and children- from abuse and entry into avocations unsuited to their age and strength . Just and humane conditions of work and provision of maternity relief are directed by Article 42.

In Yousuf, Abdul Aziz v. State of Bombay[14] the validity of Section 497 Indian Penal Code which punishes only male counter part in the offence of adultery which

12. Article 14 of the Indian Constitution
13. AIR 1997 S.C. 3011
14. AIR 1954 S.C. 321

exempts the women from punishment was challenged as violative of Article 14 and 15(1) of the Constitution. The petitioner contended that even though the women may be equally guilty as abettor only but the man was punished, which violated the right to equality on the ground of sex. The Supreme Court upheld the validity of said provision on the ground that classification was not based on the ground of sex alone. The Court obviously relied upon the mandate of Article 15(3) to uphold this provision.

Protection under Civil law

The Specific recognition of domestic violence is the concept of cruelty as ground for divorce and judicial separations. The meaning of cruelty differs in the various personal laws applicable depending upon the religion of the parties. There is no specific remedy to a spouse, who does not wish to move for a divorce or judicial separation. Further, domestic violence in a not matrimonial situation is not recognized. Civil remedies against domestic violence are to be found in the Specific Relief Act and Civil Procedure Code. The basic principle of general civil law is that an invasion of a right or a threat of such an invasion would entitle a person to a mandatory or prohibitive injunction as a means of preventing the enquiry. Other Civil laws relevant to situations of domestic violence are with respect to maintenance and custody and guardianship of children.

The Hindu Adoption and Maintenance Act provides for maintenance to be provide by a Hindu husband to his wife in case of desertion and cruelty[15]. The Act further lists out the factors to be taken into consideration while determining the amount of maintenance under the Act. In a family where domestic violence occurs, children are the worst sufferers. Children can claim maintenance from their father. In case the children are minor, application can be file by a mother. If women decide to leave her husband due to domestic violence she is very much concerned regarding the welfare of her children as they are worst sufferers of domestic violence. A women will have start legal proceedings for guardianship, if her husband is threatening to deny or has denied access to her children or if she wishes to prevent her husband from having access to them.

15. Hindu Adoption and Maintenance Act ,1956 S. 18

Protection under Criminal law

The incidence of domestic violence against women has been increasing over the years. Women are subjected to violence namely cruelty by husband or his relatives, dowry death, and grievous hurt. The criminal law offers two options that one is of prosecuting abusers for committing offences. If a woman is facing violence at home, she can approach criminal court, the abuser will be arrested. The second is a preventive measure by getting the abuser to executive bond for keeping the peace.

In order to combat the increasing incidence of torture of women by their husbands and relatives, the legislature enacted S. 498A of IPC and S.113A of the Indian Evidence Act. In order to convict a person for a crime under S. 498A of IPC, the prosecution has to prove that the accused committed acts of harassment or cruelty as contemplated by the section and that the harassment or cruelty was the cause of suicide[16]. Many women have been killed by their husbands and relatives out of greed for more dowries. To deal with this problem, the offence of dowry death was included in IPC and legislature has also enacted the Dowry Prohibition Act 1961. As the earlier law was not sufficient to check dowry death, the legislature introduced provisions under S 304 B in IPC. and S 113 .B in Evidence Act. These provisions were introduced so that the person committing inhumane crimes on married women could not skip liability as Evidence of direct nature is not readily available. Dowry deaths occur within the four walls of the house, therefore the concept of deemed dowry death was introduced in 1983. There can be no direct evidence available for the offense of dowry death, therefore the course must rely upon circumstantial evidence and infer from the material available.

Domestic Violence sometimes may drive women to suicide. In such cases, it may be difficult to make the abuser responsible for the death under the provision of dowry death, but one may use the provision that provides punishment for abetment of suicide. If a woman has been harassed and subjected to mental cruelty , and has committed suicide because of this mental cruelty, the person who harassed the woman is liable for commitment of suicide. If a husband re marries during the subsistence of first marriage or if he was already married when he got married , he would be

16. State of Maharastra v. Ashok Chote Lal Shukla(1997) II SCC 26

guilty of bigamy. Whether he is guilty or not depends on the religion that he belongs. Relevant provisions regarding bigamy are content under S. 494 and 495 IPC. If husband is having a sexual relationship with other women, he will be guilty of offence of adultery.

Protection under Domestic Violence Act

Domestic violence is defined as an act of omission or commission or conduct of the respondent shall constitute domestic violence if it harms or injures or has the potential to harm or injure. It may be physical, mental, sexual, emotional or economical[17]. The Act stipulates the appointment of functionaries such as protection officers and service providers to assists the complainant woman in assisting the court and other support services and assisting the court during the course of proceedings and in the enforcement of orders. The protection officers are to be appointed by the State government for each district by notification in official gazette and are required to do all duties entrusted to it under the Act [18]. The appointment of service providers[19] are based on registration. This provides recognition and legal protection to voluntary association such as NGOs and other registered bodies that work on women's right and provide support to women facing violence. The Act for the first time gives recognition to the right to reside[20]. For right to secured housing for matrimonial / shared house hold [21]. Whether or not she has any title or right in the household, there by guarding her against illegal disposition. Apart from this, it creates certain other civil rights i.e. some declarative rights such as right to protection against domestic violence and some substantive rights such as right to maintenance, right to compensation, right to custody of children, right to medical expenses etc. Keeping with objectives of the law and the rights recognized, women is entitled to protection orders [22]. Directing to stop violence , residence orders [23] as to prevent disposition or allow for restoration in case the women has already been thrown out, monetary relief [24] enabling the aggrieved women to meet the expenditure incurred

17. Protection of Women Against domestic violence Act 2005, S.3
18. Id S. 9
19. Id S. 10
20. Id. S. 17
21. Id S (5)

due to the violence and even include maintenance, compensation orders conferring damages for the mental agony suffered and custody orders[25] enabling the aggrieved to have temporary custody of children so as to guard her against any form of harassment over the issue of custody of children .

Though the Act is civil in nature, since it categorically states that criminal procedure code would apply to the proceedings[26]. It empowers the existing Criminal Judicial System to deal with the applications under the Act. It means, the competent court can grant relief and orders as per the Act. The Magistrate has been confirmed with the wide powers. To ensure that cases are disposed off in efficacious manner, he can secure the services welfare experts, protection officers, service providers, police officers for the purpose of assisting in discharging the functions. While disposing the case he can punish not only the respondent for committing a breech of order but also the protection officers for not discharging the duty[27]. The jurisdiction is also conferred on civil court and family court in certain cases. Application for relief may be filed by aggrieved person or a protection officer or any other person on behalf of the aggrieved before the Magistrate on prescribed form[28]. There is no limitation prescribed for filing the application. From the order of the Magistrate an appeal may lie to the Court of Session within 30 days from the date on which the order is served on aggrieved or respondent. The Magistrate shall give opportunity to both parties to be heard about the application and shall also consider the domestic incidence report. Again, it is specifically stated that in order to determine what constitutes domestic violence the court shall consider the facts and circumstances of the case. The onus would be on the respondent to bring material on record to disprove the arguments of the aggrieved. Under the Act the offender can be punished with imprisonment of either description for a term of one year or fine of Rs. 20,000 or both. The offenders may also be charged under S. 498 A of IPC or Dowry Prohibition Act 1961.

22. Id S 18
23. Id S. 19
24. Id S. 20
25. Id S. 21
26. Id S 28
27. Id S. 33
28. Id S 12

In Bhagwan Das v. Kartar Singh[29] the court held that the suicide was due to demand of dowry soon before death, S. 304 B of IPC can attracted whether it is a case of homicide or suicide. In Kailash v. Sate of M.P.[30] wife died under suspicious circumstances . Court held that even if death is not caused by burns or bodily injury if it happens in unusual course and apparently under suspicious circumstances that can be brought under the purview of S. 304 B IPC. Again in Ram Badan Sharma v. State of Bihar[31] there was persistent demand of dowry and because of not fulfilling it, wife was subjected to harassment, humiliation and continuous beating by husband and in-laws. They were convicted under 304 B of IPC.

The matrimonial home is the household a woman shares with her husband, whether it is rented, officially provided, or owned by her husband or his relatives. A woman has the right to remain in the matrimonial home along with her husband as long as she is married. If a woman is being pressurized to leave her matrimonial home, she can ask court for an injunction or restraining order protecting her from being thrown out. Thus, apart from the criminal remedy the existing civil remedy is in the form of injunction. The Act is significant in the context because for the first time the term domestic violence has been widened from the culture specific restriction on dowry deaths and penal provisions to positive civil rights of protection and injunction. The Act has delinked domestic violence from mere dowry related offences. The complexities of two separate issues, domestic violence and women's right over property were sufficiently deciphered in the present legislation. Although the Act reflects the need for civil law it has taken a co coordinated approach[32].

Conclusion

The problem of domestic violence is as old as the institution of family. The worst forms of verbal, physical, psychological and sexual violence are committed in their homes. The denial of food, turning a woman out of house, confining her in house and denying access to minor children constitutes mental torture. The other form of torture is repeated physical violence. To check the domestic violence, the

29. AIR 2007 SC 2045
30. AIR 2007 SC 107
31. (2006) SCC 2855
32. P.K. Dass , The protection of women from Domestic Violence Act and Rules,2007 P. 5

Protection of Women from Domestic Violence Act was passed in 2005 because the criminal law was not enough to deal with complex issues involved in domestic violence .The Act recognizes the need for relief to be granted as a basic minimum to provide women with violence free India from which they can negotiate their future in the position of equality that means he nature of relief is quick, temporary and permanent way out to domestic violence still remains in the realm of personal laws under which a woman would have to decide on whether or not to continue the relationship . Thus, the Act marks the foremost but significant step towards achieving a target of equality.

The Act is criticized on the ground that it strikes at the very root of the family and marriage which has been in time immemorial considered sacrosanct. Another criticism of the Act is that it recognizes no legal relationship by bringing within its ambit; relationship is the nature of marriage. Here it should be noted that such an inclusion has been made to extend protection to women who happen to fall in such relationship, these sorts of relations are often seen now a days. To them there exists no support since all the protective provisions are available for women who are legally married.

There is no doubt that given in hypocritical, patriarchal and insensitive nature of the society, the Act would definitely be instrumental in putting an end to all the degradation meted out to women. Women, who have for decades being silent victims of oppression, will now have a better chance of fighting the injustice without the slightest of hesitation. The role of judiciary as law enforcement instrument, towards protecting women involves the identification of rights in a beneficial manner wherever possible.

FOOD SECURITY AND CLIMATE CHANGE: NEED FOR POLICY INTERVENTION

Amit K. Pant*

Abstract

There are scientific evidences that the climate is changing and the graph is towards the warming of the Earth. Agriculture is directly related with the state of the climate. The temperature, water, rain-fall, precipitation etc. together determine the carrying capacity of a particular area. The Intergovernmental Panel on Climate Change (IPCC, 2007) states that because of the changing climate conditions, increased frequency of heat stress, drought and floods shall negatively affect crop yields and livestock. The climate variability and change also modify the risks of fires, pest and pathogen outbreak, negatively affecting food, fiber and forestry.

On the other hand, the right of food and adequate nutrition is being recognized as a human right in international human rights law regime across the globe. This right finds its roots in the Universal Declaration of Human Rights, 1948. The Supreme Court of India has been issuing orders from time to time asking the governments to identify the needy within their jurisdictions, and to ensure that they receive adequate food. The first Millennium Development Goal states that the UN 'is to eradicate extreme hunger and poverty', and that 'agricultural productivity is likely to play a key role in this if this is to be reached on time'.

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1. See http://en.wikipedia.org/wiki/Food_security
2. See Para 6, General Comment 12, UN's Committee on Economic, Social and Cultural Rights, 1999.
3. See http://www.who.int/trade/glossary/story028/en

As a consequence of the impact of changing climate on agriculture, the food scarcity is further bound to increase. Therefore, in order to ensure the right to adequate food and nutrition, the intervention in existing policies regarding agriculture and food security is necessary. The present paper is a humble attempt in this regard.

Food Security: Meaning

Food security refers to the availability of food and one's access to it. A household is considered food-secure when its occupants do not live in hunger or fear of starvation.[1]

The World Food Summit, 1996 defines food security as existing that when all people at all times have access to sufficient, safe, nutritious food to maintain a healthy and active life. The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.[2]

Food security is built on three pillars:[3]

1. Food availability: sufficient quantities of food available on a consistent basis.
2. Food access: having sufficient resources to obtain appropriate foods for a nutritious diet.
3. Food use: appropriate use based on knowledge of basic nutrition and care, as well as adequate water and sanitation.

Food security is a complex sustainable development issue, linked to health through malnutrition, but also to sustainable economic development, environment, and trade. There is a great deal of debate around food security with some arguing that:[4]

(a) There is enough food in the world to feed everyone adequately; the problem is distribution.
(b) Future food needs can - or cannot - be met by current levels of production.
(c) National food security is paramount - or no longer necessary because of global

4. Ibid.
5. *Ibid.*
6. http://uk.oneworld.net/guides/food_security?gclic=CNPBk TwuKsCFQQb6wodLCn_ca #Right_to_ Food
7. Article 25 (1), Universal Declaration of Human Rights

trade.

(d) Globalization may - or may not - lead to the persistence of food insecurity and poverty in rural communities.

Issues such as whether households get enough food, how it is distributed within the household and whether that food fulfils the nutrition needs of all members of the household show that food security is clearly linked to health.[5]

However, there in no straightforward, universally accepted definition of food security. Most versions stipulate secure access to sufficient and affordable nutritious food. Such conditions for food security can be assessed on any scale, from a single household to the global population. In this least serious degree, food insecurity indicates only the risk of hunger, not necessarily its presence. By contrast, chronic food insecurity denotes a constant condition of hunger. Famine is the most extreme state of food insecurity. It exists where a series of hunger indicators, including mortality, cross critical thresholds set by the UN.[6]

Right to Food - a Human Right

The right to food and nutrition are being recognized as a human right in International Human Rights law. This right finds its roots in the Universal Declaration of Human Rights, 1948. The Universal Declaration of Human Rights reads as "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food...."[7] The International Covenant on Economic, Social and Cultural Rights (which came into force in 1976), says that "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing...."[8.] It also recognizes "the fundamental right of everyone to be free from hunger...."[9]In addition to that the *Convention on the Rights of the Child* (which came into force in 1990), also recognizes th nutrition right of a child. It says that "States Parties recognize the right of the child to the enjoyment of the highest

8. Article 11, International Covenant on Economic, Social and Cultural Rights
9. Ibid.
10. Para. 1, Article 24, Convention on the Rights of the Child, 1990.
11. Para 2 c, *Ibid.*
14. Article 24, Convention on the Rights of the Child, 1990

attainable standard of health...."[10] It further imposes the obligation on the States to take appropriate measures "to combat disease and malnutrition...through the provision of adequate nutritious foods, clean drinking water, and health care."[11] It also says that States Parties shall take appropriate measures "...To ensure that all segments of society, in particular, parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition [and] the advantages of breastfeeding...."[12] It further keep on to say that States Parties shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing, and housing.[13]

In the year of 1996, the World Food Summit held in Rome with the aim of renewing global commitment to the fight against hunger. The Food and Agriculture Organization of the United Nations (FAO) called the summit in response to widespread under-nutrition and growing concern about the capacity of agriculture to meet future food needs. The conference produced two key documents, the Rome Declaration on World Food Security and the World Food Summit Plan of Action. The plan of action of the Summit called upon the UN High Commissioner for Human Rights, in consultation with relevant treaty bodies, and in collaboration with relevant specialized agencies and programmes of the UN system and appropriate intergovernmental mechanisms, to better define the rights related to food in Article 11 of the Covenant and to propose ways to implement and realize these rights....[14] On May 12, 1999 the UN's Committee on Economic, Social and Cultural Rights published a document known as General Comment 12 (Twentieth session, 1999): The Right to Adequate Food. It states that "the right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement"[15] It explains that *adequacy* means that account must be taken of what is appropriate under given circumstances. Food *security* implies food being accessible for both present and future generations. *Sustainability* relates to long-term availability and

15. Para 6, General Comment 12, UN's Committee on Economic, Social and Cultural Rights, 1999.
16. Para 7, *Ibid.*
17. Para 8, *Ibid.*
18. Para 14, *Ibid*
19. Para 15, *Ibid*

accessibility.[16] According to the General Comment, the right to adequate food means "the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights"[17] It imposes the obligations on the States as follows: Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.[18] The right to adequate food, like any other human right, imposes three types or levels of obligations on States Parties: the obligations to *respect*, to *protect* and to *fulfill*. In turn, the obligation to *fulfill* incorporates both an obligation to *facilitate* and an obligation to *provide*. The obligation to *respect* existing access to adequate food requires States Parties not to take any measures that result in preventing such access. The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfill* (*facilitate)* means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfill (provide)* that right directly. This obligation also applies for persons who are victims of natural or other disasters.[19]

In the year of 1999 the World Summit on Food Security was held at Rome. The Summit adopted unanimously a declaration committing all the nations of the world to eradicate hunger at the earliest possible date. It pledged to substantially increase aid to agriculture in developing countries, so that the world's 1 billion hungry can become more self-sufficient. The declaration confirmed the current target for reducing hunger by half by 2015. Countries agreed to work to reverse the decline in domestic and international funding for agriculture and promote new investment in

20. Seehttp://ww.fao.org/fileadmin/templates/wsfs/ Docs/Final_Declaration/WSFS09_Declaration.pdf.
21. See Maneka Ghandhi v. Union of India,

the sector, to improve governance of global food issues in partnership with relevant stakeholders from the public and private sector, and to face the challenges of climate change to food security.[20]

Constitutional Mandate

Article 21 of the Indian Constitution states that "no person shall be deprived of his life or personal liberty except according to procedure established by law." The Supreme Court through judicial interpretations has expanded this right in two ways, firstly, any law affecting personal liberty should be just, fair and reasonable; secondly, the expression 'life' in this Article, has been interpreted to mean a life with human dignity and not mere survival or animal existence.[21] Thus, the Court has incorporated many unarticulated liberties which are supposed to be necessary to live with human dignity.

In the light of this, the State is obliged to provide for all those minimum requirements which must be satisfied in order to enable a person to live with human dignity, such as education, health care, just and humane conditions of work, protection against exploitation etc. Thus, the Right to Food is inherent to a life with dignity, and Article 21 should be read with Articles 39(a) and 47 to understand the nature of the obligations of the State in order to ensure the effective realization of this right. Article 39(a) of the Constitution, enunciated as one of the Directive Principles, fundamental in the governance of the country, requires the State to direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means to livelihood. Article 47 spells out the duty of the State to raise the level of nutrition and the standard of living of its people as a primary responsibility. The citizen's right to be free from hunger enshrined in Article 21 is to be ensured by the fulfillment of the obligations of the State set out in Articles 39(a) and 47. The reading of Article 21 together with Articles 39(a) and 47, places the issue of food security in the correct perspective, thus making the Right to Food a guaranteed Fundamental Right which is enforceable by virtue of the constitutional remedy provided under Article 32 of the Constitution. The requirements of the Constitution preceded, and are consonant with, the obligations of the State under

22.People's Union for Civil Liberties v. Union of India and Others, In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001.

the 1966 International Covenant of the Economic, Social and Cultural Rights to which India is a party. That Covenant, in Article 11, expressly recognises the right of everyone to an adequate standard of living, including adequate food.

Judicial Response:

The apex court has also expressed its concern over the issues of starvation and nutrition. On April 16, 2001, the PUCL submitted a writ petition to the Supreme Court of India asking three major questions:[22]

1. Starvation deaths have become a National Phenomenon while there is a surplus stock of food grains in government godowns. Does the right to life mean that people who are starving and who are too poor to buy food grains free of cost by the State from the surplus stock lying with the State particularly when it is lying unused and rotting?
2. Does not the right to life under Article 21 of the Constitution of India include the right to food?
3. Does not the right to food which has been upheld by the apex Court imply that the State has a duty to provide food especially in situations of drought to people who are drought affected and are not in a position to purchase food?

As a result of the ongoing proceedings, the Supreme Court has been issuing orders calling upon government agencies to identify the needy within their jurisdictions, and to assure that they receive adequate food. On July 23, 2001, the court said that " In our opinion, what is of utmost importance is to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them. In case of famine, there may be shortage of food, but here the situation is that amongst plenty there is scarcity. Plenty of food is available, but distribution of the same amongst the very poor and the destitute is scarce and non-existent leading to mal-nourishment, starvation and other related problems."[23]

The court also reminded the States that "certain schemes of the Central Government are mentioned which are required to be implemented by State

23. *Ibid.*
24. *Ibid.*

Governments: These schemes are: Employment Assurance Scheme which may have been replaced by a Sampurna Gramin Yojana, Mid-day Meal Scheme, Integrated Child Development Scheme, National Benefit Maternity Scheme for BPL pregnant women, National Old Age Pension Scheme for destitute persons of over 65 years, Annapurna Scheme, Antyodaya Anna Yojana, National Family Benefit Scheme and Public Distribution Scheme for BPL & APL families. The Chief Secretaries of all the States & the Union Territories are hereby directed to report to the Cabinet Secretary, with copy to the learned Attorney General, within three weeks from today with regard to the implementation of all or any of these Schemes with or without any modification and if all or any of the Schemes have not been implemented then the reasons for the same."[24]

National Food Security Bill, 2011

The National Advisory Council has proposed the National Food Security Bill, in the month of July, 2011.The long title of the Bill states that this is an Act to ensure public provisioning of food and related measures to enable assured economic and social access to adequate food, for all persons in the country, at all times, in pursuance of their fundamental right to live with dignity. The preamble attached to the Bill intends to recognize and give effect to various provisions of international instruments on the subject including Article 25 of the Universal Declaration of Human Rights (1949); Article 11 of the International Covenant on Economic, Social and Cultural Rights (1966) and General Comment 12 of the Committee on Economic, Social and Cultural Rights; Articles 22, 23, 24, 26, 27.1 and 27.3 of the Convention of the Rights of the Child; Article 12, 13 and 14 of the Convention on the Elimination of All Forms of Discrimination against Women; Articles 5, 25 and 28 of the Convention on the Rights of Persons with Disabilities; Articles 14

25. See Preamble attached to the National Food Security Bill, 2011.
26. Section 4, the Draft National Food Security Bill, 2011.
27. Section 6, *Ibid.*
28. Section 7, *Ibid.*
29. Section 8, *Ibid.*
30. Section 9, *Ibid.*

and 15, Article 21, Article 39 (a), Article 41, Article 42 and Article 47 of the Constitution of India. It also says that the transparency and accountability are the cardinal principles underlying the implementation of the proposed Bill; and the existing administrative machinery for the disposal of grievances needs to be strengthened to secure the ends of justice; and effective redressal of a violation of a person's rights and entitlements is essential to the enjoyment of the rights; And the Supreme Court of India has recognized the right to food and nutrition as integral to the right to life; and further specified variously the corresponding duties of the State; therefore, a set of core entitlements within the universal right to food and nutrition are provided to be enjoyed and progressively expanded until universal access to adequate nutrition is achieved.[25]

The Bill has been divided into eighteen chapters. Chapter III of the Bill deals with food security. It says that every person shall have physical, economic and social access, at all times, either directly or by means of financial purchases, to quantitatively adequate, sufficient and safe food, which ensures as active and healthy life.[26] It also provides for the entitlements of pregnant and nursing women, [27]children at the age group of 0-6 years[28] and mid day meal to children.[29] It also provides that any child below the age of 14 may approach to any agency providing food for getting it. No institution shall deny a freshly cooked nutritious meal to such a child.[30] It imposes a duty on State Governments to identify the children who suffer from malnutrition and treat and prevent the same.

Chapter IV deals with the entitlements of special groups. It provides that the State Government shall provide all destitute persons at least one freshly cooked meal at every day.[31] It also provides entitlements for homeless,[32] migrants[33] all persons affected by the emergency or disaster situations.[34] Chapter V deals with the rights of persons living in starvation.

31. Section 11, *Ibid.*
32. Section 12, *Ibid.*
33. Section 13, *Ibid.*
34. 9 Section 14, *Ibid.*
35. See uk.oneworld.net/guides/food_security#climate_change.

It also provides a mechanism for the implementation of the Act.

Impact of Climate Change:

Climate may be understood as sum total of temperature, humidity, precipitation, winds, radiation, and other meteorological conditions characteristic of a locality or region over an extended period of time and climate change is any long-term significant change in the 'average weather' that a given region experiences. Average weather may include average temperature, precipitation and wind patterns .Accumulation of green house gas in atmosphere is most responsible for causing climate change. The graph of the change is towards the warming of the Earth.

Climate change was first perceived as an environmental phenomenon, then as an economic exercise on costs and benefits, but now increasingly as a potential human rights calamity. As the impacts of global warming on crop yields, water cycles, extreme weather events and rising sea levels become better understood, the projections of deaths, malnutrition, disease and displacement acquire greater credibility. All such outcomes infringe social and economic rights.[35]

Agriculture is highly sensitive to climate variability and weather extremes, such as droughts, floods and severe storms. The forces that shape our climate are also critical to farm productivity. Human activity has already changed atmospheric characteristics such as temperature, rainfall, levels of carbon dioxide (CO2) and ground level ozone. The scientific community expects such trends to continue. While food production may benefit from a warmer climate, the increased potential for droughts, floods and heat waves will pose challenges for farmers. Additionally, the enduring changes in climate, water supply and soil moisture could make it less feasible to continue crop production in certain regions.[36] The Intergovernmental Panel on Climate Change (IPCC, 2007) concluded: Recent studies indicate that

36. See www.epa.gov.climatechange/effects/agriculture.htm#climate.
37. IPCC, 2007: Climate Change 2007: Impacts, Adaptation, and Vulnerability: Contribution of Working Group II to the Third Assessment Report of the Intergovernmental Panel on Climate Change [Parry, Martin L., Canziani, Osvaldo F., Palutikof, Jean P., van der Linden, Paul J., and Hanson, Clair E. (eds.)]. Cambridge University Press, Cambridge, United Kingdom, See *Ibid.*
38. *bid.*
39. *Ibid.*

increased frequency of heat stress, droughts and floods negatively affect crop yields and livestock beyond the impacts of mean climate change, creating the possibility for surprises, with impacts that are larger, and occurring earlier, than predicted using changes in mean variables alone. This is especially the case for subsistence sectors at low latitudes. Climate variability and change also modify the risks of fires, pest and pathogen outbreak, negatively affecting food, fiber and forestry.[37]

Several factors are directly connected with climate change and agricultural productivity. These factors include:

1. Average temperature increase: An increase in average temperature can i) lengthen the growing season in regions with a relatively cool spring and fall; ii) adversely affect crops in regions where summer heat already limits production; iii) increase soil evaporation rates, and iv) increase the chances of severe droughts.[38]
2. Change in rainfall amount and patterns: Changes in rainfall can affect soil erosion rates and soil moisture, both of which are important for crop yields. The IPCC predicts that precipitation will increase in high latitudes, and decrease in most subtropical land regions-some by as much as about 20 percent. While regional precipitation will vary the number of extreme precipitation events is predicted to increase.[39]
3. Rising atmospheric concentrations of CO2: Increasing atmospheric CO2 levels, driven by emissions from human activities, can act as a fertilizer and enhance the growth of some crops such as wheat, rice and soyabeans. CO2 can be one of a number of limiting factors that, when increased, can enhance crop growth. Other limiting factors include water and nutrient availability. While it is expected that CO2 fertilization will have a positive impact on some crops, other aspects of climate change (e.g., temperature and precipitation changes) may temper any beneficial CO2 fertilization effect.[40]
4. Pollution levels such as tropospheric ozone: Higher levels of ground level ozone limit the growth of crops. Since ozone levels in the lower atmosphere are shaped by both emissions and temperature, climate change will most likely increase

40. *Ibid.*
41. *Ibid.*
42. *Ibid.*
43. State of Food Insecurity in the World 2003, **See** http://www.fao.org/docrep/006/j0083e00.htm

ozone concentrations. Such changes may offset any beneficial yield effects that result from elevated CO2 levels.[41]

5. Change in climatic variability and extreme events: Changes in the frequency and severity of heat waves, drought, floods and hurricanes, remain a key uncertainty in future climate change. Such changes are anticipated by global climate models, but regional changes and the potential affects on agriculture are more difficult to forecast.[42]

Need for Policy Intervention:

There are various international legal instruments which ensure the right to food. In the home, the National Advisory Council in consonance with the international regimes and verdict of the Hon'ble Supreme Court on starvation case has introduced the National Food Security Bill in this very year. The Bill imposes an obligation on the Governments to provide food to every needy person.

The first UN Millennium Development Goal states that the UN "is to Goals are one of the initiatives aimed at achieving food security in the world. In its eradicate extreme hunger and poverty", and that "agricultural productivity is likely to play a key role in this if it is to be reached on time".

The Food and Agriculture Organization states that "in general the countries that succeeded in reducing hunger were characterized by more rapid economic and specifically more rapid growth in the agriculture sectors. They also exhibited slower population growth, lower levels of HIV and higher ranking in the Human Development Index"[43] As such, according to FAO, addressing agriculture and population growth is vital to achieving food security. Other organizations and people have come to this same conclusion, and advocate improvements in agriculture and population control.[44]

Keeping in view the international and national regimes on food security on the one hand, and possible adverse impacts of climate change on food production in future on the other, intervention in some of the existing policies is felt necessary in order to ensure food security in the country. Food insecurity may further result by extreme weather conditions such as flood, drought, famine or any other disaster. The urgent areas of policy intervention include:

44. http://en.wikipedia.org/wiki/Food_Security.

(a) Population policy

(b) Agriculture policy: that there is a need to generate the data regarding the impact of climate change on food production in each and every climatic zone of the

RESERVATION IN HIGHER EDUCATION:

Validity of Constitution (Ninety–third) Amendment Act, 2005 and the Central Educational Institution (Reservation in Admission) Act, 2006.

Dr. Subhash Chandra Gupta*

Abstract

The Constitution (Ninety-third Amendment) Act, 2005, has inserted clause (5) in Article 15 enabling the state to make special provisions, by law, for the advancement of any socially backward classes of citizens or for the scheduled castes or scheduled tribes, insofar as such special provisions related to their admission in educational institutions, including private educational institutions, whether aided or unaided by the State. Minority educational institutions referred to in clause (1) of Article 30 were, however, excluded from the purview of the newly inserted clause.

But today with the changing scenario, reservation has become a part of politics and not a matter of right to secure social solidarity. Political leaders just in the greed of votes and stability are using this sensitive issue as a weapon. If each and every caste will demand reservation then there will be nothing like a general class and every one will be in a reserved class which in turn will abolish reservation or just join hands together to curb red tapism and corruption existing in the present system and work hard to show your abilities in such a manner that inspite of reservation one may stand in a distinct position because even the reservation is not reaching to the one who really need reservation.

Our Constitution apart from being federal has uniquely taken its ambit principle of equity, prohibition on discrimination of people on the ground of religion, race,

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caste, sex or place of birth. However, soon after the Constitution was carved out an amendment was made. The amendment being the first one was taken to be a compromise in the Constitution. The amendment was in the year 1951 whereby a clause was added to Article 15 saying that the state could make special provision "for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

The time when the said insertion was made, it was made keeping in mind the centuries old practice of humiliating the untouchables and the extreme backward classes. That time the thought was not to create an unusual gap between different sects of the society, which we were proud of. Therefore, the step was more than welcome.

Years later the same insertion came into limelight. Reason was seats for other backward classes in national institutions of India. After long lasting political tussle the Supreme Court was forced to step in. The Apex Court observed that the emphasis on quotas would divide the country on caste basis. Inspite, of the Apex Court's interference nobody has been able to understand the reason why at this point, must any government disrupt the cohesion of a stabilizing society? Therefore, the court has asked the government to explain the basics of its reasoning justifying quotas for OBCs, adding that "these issues would have serious political and social ramifications."

For a democratic Government, it is very important to please its people with rights and by doing away with wrongs. Achievement of social, economic and political justice and equality of status and opportunity is one of the preambulor objectives of our Constitution.

The Constitution of India also provides that in order to achieve the socio-economic equality among all citizens, the state is required to implement various

1. Art.17 says that 'Untouchability is abolished': Performance of Untouchability in any form is an offence punishable under the Law.
2. II Ambedkar's Writings and Speeches 184-87.
3. Arts. 15 (4) & 16 (4) of the Constitution of India. Art. 15 (4) says, 'nothing prevents the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled tribes'. Art. 16 (4) says, 'nothing in this Article shall prevent the State from making any provision of appointment or posts in favour of any backward class of citizens, which in the opinion of the State, is not adequately represented in the services under the State.'

Directive Principles of State Policy. In order to bring about equality in society, the social evil like 'Untouchability' is abolished in the Constitution.[1]

Dr. Ambedkar, the architect of the Indian Constitution has highlighted the then existing injustice and inequalities in our society in his speech delivered in the Constituent Assembly as follows: [2]

> [W]e must begin by acknowledging first that there is complete absence of two things in Indian Society. One of these is 'equality'. On the social plane, we have in India a society based on privilege of graded inequality, which means elevation for some and degradation of others. On the economic plane, we have a society in which there are some with immense wealth as against many who are living in utter poverty ..... In politics, we have equality and in social and economic life, we have inequality. We must remove this contradiction at the earliest possible moment, or else those who suffer from inequality will blow up the structure of the political democracy which this Assembly has so laboriously built up.

The above observation made by Dr. Ambedkar clearly shows that equality should be secured to all persons even in socio-economic life through State's intervention. This can be achieved through the means of reservation of seats in educational institutions and public employment, which has been provided in the Constitution of India.[3] The Constitution has also directed the state to secure adequate means of livelihood to all citizens and to promote with special care the educational and economic interests of the weaker section of the people and in particular, of the scheduled castes and scheduled tribes and they should be protected from social injustice and all forms of exploitations.[4]

The Constitution has provided reservation of seats in educational institutions and in public employment to three categories of people:

4. Arts. 39 and 46 of the Constitution of india.
5. Art. 15 (5), which provides that 'nothing in Article 15 or sub clause (g) of clause (1) of Article 19 would prevent the State from making any special provision for the Advancement of any socially and educationally backward classes of citizens or for the Scheduled Caste or the Scheduled Tribes in so far as such special provisions relate to their admission to the educational institutions, whether aided or unaided by the State Ministry Educational Institutions, referred to in clause (1) of the Article 30 to be excluded.'
6. 'Hereinafter the Act'.

(i) Persons who are socially and educationally backward classes of citizens,

(ii) Scheduled castes, and

(iii) Scheduled tribes.

The Constitution has obligated the State to protect the interests of the above groups through 'affirmative action'. Through this, a percentage of seats are reserved for the OBC, SC and ST in the public sector units, government departments and all public and private educational institutions. The reservation policy is also extended to legislature (both Parliament and legislatures) for the SC/ST's. The framers of the Constitution believed that due to caste system, scheduled castes and scheduled tribes were historically oppressed and denied respect and equal opportunities in Indian society and were thus under-represented in nation building activities.

The Constitution (Ninety-third Amendment) Act, 2005, has inserted clause (5) in article 15[5] enabling the State to make special provisions, by law, for the advancement of any socially backward classes of citizens or for the scheduled castes or scheduled tribes, insofar as such special provisions related to their admission in educational institutions, including private educational institutions, whether aided or unaided by the state. Minority educational institutions referred to in clause (1) of Article 30 were, however, excluded from the purview of the newly inserted clause. The said amendment, which became effective from 30.1.2006, along with the newly enacted Central Educational Institutions (Reservation in Admissions) Act, 2006[6] came to be challenged before the Supreme Court in *Ashoka Kumar Thakur v. Union of India*[7]. Section 3 of the Act provided for 15% reservations for scheduled castes, 7.5 % for scheduled tribes and 27% for other Backward Classes in 'Central Educational Institutions'. The Act, however, did not provide any reservation in any private unaided institution.

The Supreme Court has upheld the 93rd Constitutional Amendment and the Central Educational Institution Act as valid as they facilitate for social justice to the OBC's and SC /ST's. The other question which was raised in the instant case was whether creamy layer is to be excluded from socially and educationally backward classes? The court answered positively and held that creamy layer should be excluded from the purview of reservation. However, this is not applicable to the members of

7. (2008) 6 SCC 1.

scheduled castes and scheduled tribes. The justification given by the court for excluding creamy layer from socially and educationally backward classes is that they are economically advanced or educationally forward. This principle of creamy layer is also applied for the purpose of identifying the socially and educationally backward classes from providing them reservation benefit. The 'creamy layer' principle cannot be applied to SC/ST's as they are separate class by themselves.

The judgment is a resounding of our Constitutional values and is rooted in the history of the struggle for Independence and the major concern of our constitution for the abolition of discrimination based on caste, which characterized our society.

What was at stake was future directions in a country beset with caste prejudice and social stratification. The judgment gives a clear signal that the future lies in inclusive growth, inclusion of SC/ST and backward classes in the halls of higher learning.

What is more important, it rejects a facile notion of 'equality' as requiring equal treatment of those unequally situated. Rather, it is based on a notion of equality that recognizes the vast inequality that exists in Indian society, an equality of status and opportunity in all fields of life.

This interpretation of 'equality' holds great potential for social change in the matter of distribution of national resources, based on need and historical disadvantages, rather than on market forces. It also has important implications for women who have been demanding reservations in Parliament, in State legislatures and will put to rest any argument that any such reservations will result in inequality of results.

Considering the law was unique, in that it actually increases capacity in these institutions, by increasing the number of seats, one wonders, what was behind the objection to the law. The forward classes stood to lose no seats, something that is commonly objected to.

This was a law that created an additional 27 percent seats to be filled in by the backward classes. It actually proposed the building of a new capacity in the institutions to be made available to OBC candidates. Clearly, therefore, the petitioners were demanding that this newly built capacity should also go to the

open general capacity.

Though dressed in Constitutional rhetoric and political cynicism, the bottom line was a fight over national resources and how they should be distributed. It was a battle to defend class and privilege closing the doors to those other excluded, to enter the realm of higher education.

The Supreme Court wisely avoided answering the question whether reservations can be made in private institutions, stating that the question will be decided only as and when a law is made making reservations in private institutions. This means, the issue is left open for an appropriate day.

Besides, a question also arose before the Supreme Court regarding no time limit prescribed for the operation of the Act. The contention of the petitioner was that as there is no time limit prescribed and the affirmative action would continue for an indefinite period that would ultimately result in reverse discrimination rather than protective discrimination. But the court struck down the contention and upheld the Act as constitutionally valid and the court has directed the central government to review the situation of the backward classes after ten years.

In this stunning decision of Supreme Court of India, one recognizes the power of a Constitutional Court. The judgment is a vision statement, a road map for development, a road map for inclusive growth. It is time for us to acknowledge frankly that the so-called benefits of globalization and privatization have not reached the lower level of society, but remained in the privileged hands of a few, for whom the world begins and ends with fashion, Bollywood and cricket.

At a time when prestigious foreign universities are looking to set up shop in India, it is only natural that they need to know where they stand on the reservation issue as it will impact deeply on their finances. Education will become more out of reach than it is already for the backward classes. The Supreme Court judgment corrects an existing imbalance in this regard.

The court has been able to separate the grain from the chaff and look at the reality of the situation. The judgment will change the lives of many formally excluded sections from the halls of higher learning and privilege.

Reservation acted as a boon for our country's development and individual

rights. A member of a scheduled caste who was not earlier even allowed to attend a panchayat can now become a **Sarpanch.**

Although, it was for the purpose of carrying a democratic revolution in the arenas of education and employment, but it has not achieved its targeted change. One of the reason include the idea that the recipients of reservation are drawn from the 'creamy layer' e.g. children of highly educated and well employed parents belonging to the backward and scheduled castes. Another important concept responsible for acting as a wall stopping the effective reach of the reservation policy is the 'Merit Syndrome', which support that reservation policy destroys merit deprived classes. But the problem not ends here, there are many loopholes in the present reservation system, the trend has shifted to reverse discrimination. Some backward class elites have gained political and economic power based on this reservation. However, a majority of backward classes is not living any differently than before. Their subsistence in rural lifestyles does not provide them with any of the benefits. Thus, a distinct economic class system exists within the backward classes. Since economic status is not a test used, undeserving people gain the advantages and the deserving ones are still without a significant change in their situations. Creamy layer must also act as criteria among the schedule castes and scheduled tribes also.

A statement by **Mr. Bainsla(Gujjar Leader)** states that either eliminate the whole reservation system or give **Gujjars** a scheduled tribe status. This agitation is a fight against the whole defective piece of reservation policy in the present scenario.

Some support these agitations on the basis of that even Jaats were given a backward class status in Rajasthan inspite of their better political and economical conditions. The government of our country is still taking effective measures for no riots on the basis of religion but this reservation controversy has led to difference between castes of same religion – can we still call INDIA with 'UNITY IN DIVERSITY'.

Well causing any kind of public nuisance and destroying the public property by harming public peace and morality through unlawful assemblies is not at all legal. But as the constitution guarantees freedom of speech and expression and democracy and public opinion forms an important part to keep a check on government policies, so such demands can be termed to be justified. It is the fault of political leaders who initially in order to fill their vote banks just make fake promises, and afterwards

TECHNOLOGY TRANSFER IN TRIPS AGREEMENT: IMPLICATIONS FOR DEVELOPING COUNTRIES

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I. Introduction

The controversial and divisive debate on transfer of technology, which acquired importance on the international economic agenda with the launching of the unsuccessful negotiations concerning a Draft Code of Conduct in the 1970s, remains a subject of continuing multilateral negotiations. Developing countries have expressed in various international forums their preoccupation about access to foreign technologies as a means of enhancing their technological capabilities and of narrowing the deep North- South gap in development levels. In response, developed countries argued during the Uruguay Round negotiations that strengthening and expanding the protection of intellectual property rights (IPRs) was a key condition to promote increased flows of technology transfer to developing countries. This argument has been repeatedly articulated by TRIPS enthusiasts and the industries that most benefit from the international rules set forth in the TRIPS Agreement. Developing countries, however, have become increasingly skeptical about the existence of a virtuous relationship between IPRs and technology transfer. This skepticism underpins the need to assess the implications to the developing countries of the TRIPS Agreement with reference to provisions of technology transfer. This article briefly explores some aspects of the TRIPS Agreement that are relevant to technology transfer and their implications to the developing countries. Although

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there are many aspects of domestic Intellectual property laws still subject to national discretion that may influence the extent of technology transfer and the power of third parties to gain access to foreign technologies, this article focuses on some international rules contained in the TRIPS Agreement.

II. Meaning of Technology Transfer

There is no consensus on the definition of technology transfer.[2] For the purpose of present study we accept technology transfer to mean *any process by which a party in one country gains access to the technology of another party in a second country and successfully learns how to absorb it into its production function*.[3] Generally, this paper focuses on technology transfer from developed countries to developing or least-developed countries (LDCs), but technology transfer may occur between any two countries in any direction. Thus, technology transfer is a broad term though this Article will consider only a limited part of it.

2 There has been a general consensus that any workable definition of technology transfer must be functional rather than formal; however, the specific definitions have varied. One scholar *Harold Brooks* defined it as "the process by which science and technology are diffused throughout human activity." *Kaynak* labeled it "the transmission of know-how to suit local conditions...." Nevertheless, both authors were careful to point out that the transfer of technology requires a functional component—in order for there to be a true transfer of technology, there must be effective absorption of the transferred technology by the recipient country. Another scholar *Eric W. Hayden* elaborated, "the important factor in defining technology transfer is that the recipient acquires the capability to manufacture itself a product whose quality is comparable to that manufactured by the technology supplier." Thus there is no consensus on the definition of "technology transfer." Although discussed in the United Nations for years, there has not yet been any formal agreement within that body. *See* David M. Haug, "The International Transfer of Technology: Lessons That East Europe Can Learn From The Failed Third World Experience" *5 Harv. J.L. & Tech. 209 (1992).*

WIPO standing committee on the Law of Patents observes that the term "transfer of technology" may be understood in a narrow or broad sense when used in the context of intellectual property. Broadly stated, the transfer of technology is a series of processes for sharing ideas, knowledge, technology and skills with another individual or institution (e.g., a company, a university or a governmental body) and of acquisition by the other of such ideas, knowledge, technologies and skills. In the context of transferring technologies from the public sector and universities to the private sector, the term "transfer of technology" is sometimes used in a narrower sense: as a synonym to "technology commercialization" whereby basic scientific research outcomes from universities and public research institutions are applied to practical, commercial products for the market by private companies. See WIPO, *Standing Committee on the Law of Patents* (December 11 2009) SCP/14/4, *available at:* http://www.wipo.int/edocs/mdocs/scp/en/scp_14/scp_14_4.pdf (visited on 6 October, 2011).

3 Keith E. Maskus, "Encouraging International Technology Transfer" 9 (UNCTAD-ICSD Project on IPRs and Sustainable Development), Issue Paper No. 7, 2004. *available at:* http://www.iprsonline.org/unctadictsd/docs/CS_Maskus.pdf (visited on 12 September 2011).

Due to disparity in technological capacity among countries, technological knowledge generally flows from a higher technological capacity country to a lower technology capacity country in different forms and methods.[4] These include foreign direct investment (FDI), licensing, joint ventures, turn-key packages, purchase of equipment, management contracts, government aid etc.[5]

III. Preamble of TRIPS Agreement

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) reflects the contentious nature of the negotiations and the differences in perspective among the negotiating WTO Members. TRIPS is a new instrument on IPRs in international trade. It is the result of "new area" negotiations in the Uruguay Round.[6]

As far scope of Preamble is concerned, the statements contained in Preamble are not intended to be *operative* provisions in the sense of creating specific rights or obligations. A Preamble is designed to establish a definitive record of the intention or purpose of the parties in entering into the agreement.[7] Article 31 of the Vienna Convention on the Law of Treaties[8] provides that the Preamble forms part of the treaty text and, as such, part of the terms and "context" of the treaty for purposes of interpretation.[9] Article 31 of the Vienna Convention on the Law of Treaties (1969) provides in relevant part:

4. See WIPO, *Standing Committee on the Law of Patents* (December 11 2009) SCP/14/4, *available at:* http://www.wipo.int/edocs/mdocs/scp/en/scp_14/scp_14_4.pdf (visited on 6 October, 2011).
5. *See* David M. Haug, "The International Transfer of Technology: Lessons That East Europe Can Learn From The Failed Third World Experience" 5 *Harv. J.L. & Tech*. 209 (1992).
6. The other principle "new area" of negotiations concerned trade in services, resulting in the General Agreement on Trade in Services, or GATS. While trade-related investment measures (or TRIMS) also covered a "new area", the resulting agreement in that area largely restated existing GATT 1947 rules.
7. UNCTAD-ICTSD Project on IPRs and Sustainable Development, *Resource Book on TRIPS and Development* 2 (Cambridge, New York, 2005).
8. The Convention was adopted on 23 May 1969 and entered into force on 27 January 1980. Text: United Nations, *Treaty Series*, vol. 1155, p.331.
9. Article 31 of the Vienna Convention on the Law of Treaties (1969) provides in relevant part:
"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the *text, including its preamble and annexes*."

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given As noted earlier, the Preamble of TRIPS may be used as a source for interpretation of the operative provisions of the agreement.[10] Since the Preamble is not directed to establishing specific rights or obligations, it is difficult to predict the circumstances in which its provisions may be relied upon. Many or most TRIPS Articles leave some room for interpretation, and in this sense the Preamble may be relevant in many interpretative contexts for developing countries.[11]

The potential importance of the Preamble to TRIPS is demonstrated by reference to the decision of the WTO Appellate Body (AB) in the Shrimp-Turtles case.[12] In this case, reference in the WTO Agreement to the objective of "sustainable development" fundamentally influenced the approach of the AB to interpretation of the GATT 1994.[13] Because there is a wide variety of dispute that may arise under TRIPS, it is not practicable to predict the circumstances in which the Preamble may be employed as an interpretative source. What the Shrimp-Turtles case makes evident is that the potential role of the Preamble should not be discounted.[14] The Preamble of TRIPS should be read in conjunction with the Preamble of the WTO Agreement that sets out the objectives to reduce barriers and discrimination in trade in order to promote economic development and improve standards of living, with attention to sustainable development, and with special attention to the needs of developing countries.[15]

IV. Objectives and Principles of TRIPS Agreement

Article 7(Objectives) of TRIPS provides:

"The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of

10. See supra note 7.
11. Id at 10.
12. WTO, United States*: Import Prohibition on Certain Shrimp and Shrimp Products- Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R 1998-4.
13. See supra note 7 at 12.
14. Ibid.
15. Ibid.

technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

The first three objectives-technological innovation, transfer and dissemination of technology, and the production and use of technological knowledge focus mainly on technological development.[16] IPRs have been designed to benefit society by providing incentives to introduce new inventions and creations. In introducing IPR protection, countries should frame the applicable rules so as to promote technological innovation and the transfer and dissemination of technology "in a manner conducive to social and economic welfare".[17] The concept of "mutual advantage of producers and users of technological knowledge" is of particular importance in this context, since developing countries are largely *users* of technologies produced abroad.[18] A number of developing countries have indicated that the implementation of Article 7 should be examined in the Council for TRIPS in the context of determining whether TRIPS is fulfilling the objective of contributing to the dissemination and transfer of technology.[19]

Article 8.1(Principles) provides:

"Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement."

Article 8.1 provides the interpretative or normative principle of the TRIPS. The provision, together with Article 7, confirms the broad and unfettered discretion

16. Peter K. Yu, "A Tale of Two Development Agendas" 35 *Ohio N.U. L. Rev.* 465 (2009).
17. "Transfer" generally refers to the *transmission* of technology in a bilateral context (e.g. a licensing agreement), while "dissemination" rather alludes to the *diffusion* of innovation. IPRs normally reduce the diffusion of innovations as the title-holder charges prices above marginal costs in order to take advantage from the exclusive rights, he enjoys.
18. Interestingly, although TRIPS covers trademarks and copyrights, it only refers in Article 7 to "technological" knowledge.
19. While reference to reaffirming commitments under Article 66.2 was made in the Doha Declaration, this reference relates to encouraging actions by enterprises and institutions in favour of least developed Members.

that Members have to pursue public policy objectives.[20] Article 8.1 broadly recognizes Members' rights in formulating or amending their laws and regulations. It does not only refer to laws and regulations on IPRs but to measures adopted in other fields, for instance, those that restrict the manufacture or commercialization of IPR-protected goods. Issues concerning the application of Article 8.1 may, hence, arise in two contexts, one fully within the IPR realm, and another one outside it, but with implications on the protection of IPRs.[21]

Article 8.1 is important to third world because it provides justifications for special exceptions that promote the public interest in sectors of vital importance to socio-economic and technological development.[22] Whether a particular act is "*in the public interest*" is probably not subject to any objective test. Each member state should be able to decide what constitutes these sectors based on their needs, goals, and interests.[23] Permissible actions may include measures excluding foreign direct investment in certain sectors, and the regulation of royalty rates and other conditions in licensing agreements.[24]

With the rapid development experienced by economies such as India, Brazil, China and South Africa, the question what constitutes "sectors of vital importance" may assume new complexities. These economies have the distinctive characteristics of having wide internal divergences in their socio-economic conditions and technological capabilities. It is therefore difficult to determine what constitutes the relevant sectors in these countries.[25]

Although Article 8.1 can no doubt be interpreted broadly to promote the development goals of third world, the provision contains two major constraints, both of which were added at the request of developed countries in the last stages of the negotiation. The use of the term "necessary," as opposed to the language "it considers necessary" would seem to indicate that the imposition of these measures

20. The fact that Article 8 only states a 'principle' rather than a specific rule mirrors the intention of the treaty-makers not to rule on the matter itself in any detailed form, but to leave Members broad discretion as regards its implementation.
21. See supra note 16.
22. Ibid.
23 . Ibid.
24. Ibid.
25. bid.

are not within the absolute discretion of the invoking Member, but are instead subject to potential WTO review in regard to their validity.[26] Even worse, the provision requires the measures to be "*consistent with the provisions of this Agreement*." This second constraint greatly erodes the pro-development aspect of Article 8.1.[27]

Fortunately for third world, whether one fails the TRIPS-consistency requirement will depend on the overall interpretation of the TRIPS. When Articles 7 and 8 are read together, a careful and effective interpretation of Article 7 may help remove the potential inconsistency with the TRIPS. Also of great importance is a skillful use of the Preamble, which arguably can be viewed as a condensed expression of the underlying principles of the TRIPS. Consistency with the TRIPS should be assessed in the light of Article 7 and of the Preamble that is, taking the balance of rights and obligations and the social and economic welfare into account.[28] Certain measures for technological development may be inconsistent with some of the specific standards laid down in the TRIPS; it is their overall consistency with the agreement that should be taken into account.[29]

Article 8.2 (Principles) provides:

"Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."

This Article to a large extent reflects the view advanced by the Indian delegation,

26. Ibid.
27. Ibid.
28. Ibid.
29. Ibid.
30. Exploitation of Intellectual Property Rights (IPRs) could give rise to anticompetitive behaviour, whether by individual firms or by concerted practices or agreement among firms. In safeguarding the efficient functioning of the market, competition policy seeks to deal with situations where the promotion of competitiveness is undermined by other factors. There are, in this context, three types of conflicts that may arise between the pursuit of competitiveness and IPRs. First, intellectual property may be used contrary to the objectives and conditions of its protection, a situation called misuse. Second, market power resulting from intellectual property may be used to extend the protection beyond its purpose, such as to enhance, extend or abuse monopoly power. Third, agreements on the use or the exploitation of intellectual property may be concluded in restraint of trade or adversely affecting the transfer or the dissemination of technology or other knowledge, a situation called restrictive contracts or concerted practice. In order to prevent or control such conflicts and to distinguish pernicious practices from competition-enhancing ones, many countries have enacted anti-trust regulations or other competition

among others, during the Uruguay Round negotiations that one of the main objectives of TRIPS should be to provide mechanisms to restrain competitive abuses brought about by reliance on IPR protection.[30]

Practices which adversely affect the international transfer of technology, must be understood broadly as well. *First*, practices adversely affecting international technology transfer must be distinguished from practices which restrain trade. This is so because they are named separately in Article 8.2,[31] and because Article 7 of the Agreement singles out transfer of technology as one of the objectives of the Agreement. Thus practices which are not anti-competitive, but which do have an adverse effect on technology transfer, may be subject to specific national regulation.[32] The consistency requirement[33] already provides the necessary safeguards against truly counter-productive regulation of technology transfer. *Second*, compared to Article 40,[34] which is ambiguously formulated in this respect, Article 8.2 clearly covers not only contractual practices affecting international transfer of technology,

legislation to respond to anti-competitive behaviour. The approaches taken depend on the particular conditions of national markets, national legal traditions, and on public interest considerations. Competition rules are not designed to curb the functioning of the intellectual property system, but rather to safeguard its proper functioning.

31. It is true that Article 40.1 uses cumulative "and" rather than alternative "or" language, but Article 40.1 is a provision with a narrow meaning, and, most likely, needs corrective reading.

32. Conversely, there are many possibly anti-competitive practices which do not affect technology transfer, e.g., restrictive licences concerning copyrights or trademarks.

33. It must be understood as a negative limitation preventing an application of national competition rules that outlaw generally accepted methods of exploiting intellectual property that TRIPS recognizes through requiring the protection of IPRs. It is therefore the systematic development of national competition law as a general curtailment of intellectual property protection (as required by TRIPS) that the consistency requirement is intended to prevent. It is difficult to specify in the abstract what might amount to inconsistencies with this requirement. As a general proposition, it may be said that anti-trust rules which would tend to *systematically* invalidate the constitutive elements of intellectual property protection by exclusive rights, as distinguished from subjecting licensing obligations in *particular* circumstances to rules regulating anti-competitivepractice, would be inconsistent with TRIPS.

34. *Article 40.1* - Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology. *Article 40.2* - Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

but also unilateral practices.[35] *Third*, in accordance with the Agreement's rationale of improving international trade relations, Article 8.2 covers all practices affecting international transfer of technology, both inbound and outbound.[36]

During the Doha negotiations, Articles 7 and 8 were singled out for their special importance. Paragraph 19 of the Ministerial Declaration stated explicitly that the work of the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS and shall take fully into account the development dimension.[37] Although the legal effect of this document remains unclear, the document may lead a panel to take a longer look at to how these provisions should be interpreted in the context of the Agreement as a whole, especially with respect to the need for balance.[38]

Articles 7 and 8 become even more important in light of the many ambiguities built into the TRIPS. These provisions provide policymakers, WTO panels, and the Appellate Body with objective clues as to how ambiguous words in the TRIPS are to be interpreted. The context provided by Articles 7 and 8 may also be of particular importance to correctly interpret the extent of several obligations and exceptions under the TRIPS.[39] These ambiguities are constructive because they can be strategically interpreted and deployed to provide third world with additional room to implement their obligations under the TRIPS.[40] If strategically used, they will allow these countries to actively push for interpretations that meet their needs, interests, and goals.[41]

Using Articles 7 and 8 as help to interpret the object and purpose is only a starting point. There are inherent difficulties in that as the Articles seek to capture competing objectives and purposes, and they represent a compromise between the disparate views of those entering the agreement. What amounts to "promotion of

35. Such as abusive refusals to license or to pre-disclose information on innovations affecting related industries (spare parts, complementary equipment or services etc.)
36. See supra note 7 at 550.
37. *Available at:* http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm (visited on 23 September 2011)
38. See supra note 16.
39. Ibid.
40. Ibid.
41. Ibid.

technological innovation and to the transfer and dissemination of technology" is, by its nature, open to some debate and the viewpoint of any WTO member is likely to relate to its economic position.[42] As a result, it is important for third world to interpret the provisions in a way that would highlight the social aspect, development dimension, and public policy goals of the TRIPS. Article 7 could be invoked to limit an obligation to protect or enforce a given intellectual property right where no promotion of intellectual innovation and transfer or dissemination of technology can be proven. To help restore the balance of the international intellectual property system, the TRIPS therefore needs to be interpreted through a pro-development lens, with an emphasis on the objectives and principles set forth in Articles 7 and 8 of the TRIPS and the flexibilities expressly recognized in those provisions.[43] If such interpretations are to be developed, then it is also essential to develop model laws, policies, and best practices that are development friendly and that take account of the needs, interests, and goals of third world. Because these models can serve as good starting points for international negotiations, they are particularly useful as a response to the growing use of "TRIPS-plus" bilateral and regional trade agreements.[44]

Although the provisions may not provide a legal basis for challenging intellectual property laws and policies in developed countries in the WTO dispute settlement process, both provisions can be used to strengthen other operative provisions that promote social and economic welfare or that help preserve the balance of the intellectual property system.[45] For example, Articles 66.2[46] and 67[47] of the TRIPS,

42. Ibid.
43. Ibid.
44. Ibid.
45. Ibid.
46. Article 66.2 of the TRIPS Agreement states that "Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base".
47. Article 67 of the TRIPS Agreement states that "In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel".

require developed countries to provide technology transfer and technical cooperation. Doha Ministerial Decision of 2001, which covers implementation-related issues and concerns, reaffirmed the mandatory nature of the provision.[48] The decision further required the TRIPS Council to "put in place a mechanism for ensuring the monitoring and full implementation of the obligations in question."[49] With fortifications from Articles 7 and 8, Articles 66.2 and 67 are likely to become even more robust and effective.[50]

In addition, Articles 7 and 8 may feature prominently in the review processes established by the TRIPS Council, WTO bodies, and other international organizations. For example, numbers of developing countries have already indicated that the implementation of Article 7 should be examined in the Council for TRIPS in the context of determining whether TRIPS is fulfilling the objective of contributing to the dissemination and transfer of technology.[51]

Articles 7 and 8 can serve as a useful bridge that connects the TRIPS regime with those other regimes that may be implicated by the protection and enforcement of intellectual property rights. The language of Article 7 has recently been incorporated into a recommendation adopted as part of the WIPO Development Agenda.[52] Articles 7 and 8 of the TRIPS, therefore, are important for maintaining the balance in not just the TRIPS regime, but also in the global innovation system.[53]

48. Paragraph 11.2 stated that "Reaffirming that the provisions of Article 66.2 of the TRIPS Agreement are mandatory, it is agreed that the TRIPS Council shall put in place a mechanism for ensuring the monitoring and full implementation of the obligations in question. To this end, developed-country Members shall submit prior to the end of 2002 detailed reports on the functioning in practice of the incentives provided to their enterprises for the transfer of technology in pursuance of their commitments under Article 66.2. These submissions shall be subject to a review in the TRIPS Council and information shall be updated by Members annually".
49. Ibid.
50. See supra note 16.
51. Ibid.
52. As Recommendation 45 states specifically: To approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations", in accordance with Article 7 of the TRIPS Agreement.
53. See supra note 16.

While it remains important to strengthen safeguards in the international intellectual property system, it is equally important to develop support in other international instruments that can be used to enhance the impact of Articles 7 and 8 within the TRIPS. With the support of these additional standards, Articles 7 and 8 may more effectively persuade the WTO panels and the Appellate Body to recognize and give effect to developmental priorities. In fact, it may be useful in the context of dispute settlement to cross-reference developmental objectives and principles of the appropriate agreements. After all, the Preamble of the TRIPS states the drafters' intention to recognize the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives. [54]

V. Technology Transfer to Least-Developed Countries

Article 66.2 of TRIPS provides:

"Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base."

There are several noteworthy aspects of this Article. *First*, it requires only developed countries to provide incentives, and only to the LDCs. No obligations or rights are created for the developing and transition countries. *Second*, that it is a positive obligation as indicated by use of the word "shall" and this fact was clarified by the Doha Declaration. Thus, developed nations must find means to define and provide such incentives. *Third*, while the incentives involved must promote and encourage technology transfer, the language does not say that they must actually achieve increases in Technology Transfer. Indeed, governments cannot coerce private firms to take up these incentives. Firms are presumably more likely to engage in Technology Transfer where they can profit from it.[55]

The precise scope and nature of the duty is not defined in any detail. Thus, there would appear to be considerable discretion on the part of the developed country

54. Ibid.
55. See supra note 3 at 30.

Member as to how to discharge this duty.[56] However, it is clear that the duty exists and must be discharged. This reading is consistent with the general objectives of TRIPS, as laid out in Articles 7 and 8, where the protection of IPRs is seen as having to contribute to the promotion of technological innovation and the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to the balance of rights and obligations. Moreover, the Doha Ministerial Declaration expressly reaffirmed the mandatory nature of the provisions under Article 66.2.[57]

An interesting interpretive question is whether Article 66.2 may be complied with on the basis of programs (as maintained by several development aid agencies) mainly aimed at providing technical assistance that substantially involves the transfer of readily accessible, generally mature technologies already available from the public domain. The object of the TRIPS is the protection of IPRs. It does not deal with public-domain technologies. Hence, the only logical interpretation seems to be that the obligation under Article 66.2 will be satisfied if developed countries adopt incentives that encourage the transfer of technologies subject to IPRs, and not merely unprotected technologies. Nevertheless, LDCs may benefit from transfers of non-proprietary technologies, such as knowledge provided by consultants, machinery manufacturers and other suppliers. In fact, in an early industrialization phase licensing of technology may play a secondary role as a technology source, compared to suppliers of equipment and materials and clients.[58] Finally, the obligation to encourage technology transfer includes proprietary technology and not only technology in the public domain. The latter is more easily accessible, whereas the transfer of the former is in the exclusive discretion of the holder of the respective right.[59]

In order to ensure that developed countries meet their obligations under Article 66.2 sufficiently, and that LDCs receive the proper benefits in exchange for adopting

56. However, that some precision has been added to this provision through the decision by the Council for TRIPS concerning the implementation of Article 66.2 of the TRIPS Agreement.
57. See supra note 7 at 730.
58. Keith E. Maskus and Jerome H. Reichman (eds.), *International Public Goods and Transfer of Technology Under A Globalized Intellectual Property Regime* 252 (Cambridge, New York, 2005).
59. See supra note 7 at 730,731.

the minimum level of IPRs required by TRIPS, some minimum standard and method of evaluation should be enacted. Indeed, because LDCs are required under TRIPS to adopt a somewhat specific minimum level of IPRs, developed countries should be held to an equally specific standard for meeting their Technology Transfer obligations under the agreement.[60]

Leading authorities on technology transfer have identified increasing human capital and the technological base in LDCs as one of the most effective methods to ensure that the IP protections required by TRIPS result in an increased inward flow of technology transfer to LDCs. The reports submitted by developed countries to the TRIPS Council reflect that some of this type of investment is indeed occurring.[61] Detailed review of reports reveal that implementation of Article 66.2 has improved slightly in the past decade.[62] Moreover, few new initiatives have been taken but virtually all are continuing from prior policy decisions. There are virtually no programs aimed specifically at the LDCs, rather their benefits are available to all developing countries or even developed countries.[63] Thus, some developed countries have taken some steps though implementation of Article 66.2 could be improved.[64] Steps should be taken to implement Article 66.2 because it is mandatory in nature and one of the key elements in the trade-off between rights and obligations under TRIPS.[65]

A substantive minimum standard would help generate improvement simply by informing LDCs of what they should expect from developed countries, and allowing them to hold developed countries accountable for meeting that standard. If experts on technology transfer devise the standard, it would lead to increased efficiency in

60. Andrew MichaelsHYPERLINK "http://international.westlaw.com/Find/Default.wl?DB=PROFILER%2DWLD&DocName=0302375101&FindType=h&AP=&mlac=FY&spa=intbanhin-000&rs=WLIN10.01&ifm=NotSet&fn=_top&sv=Split&mt=GlobalNews&utid=1&vr=2.0&pbc=761981BC", "International Technology transfer and TRIPs Article 66.2: Can Global Administrative Law Help Least Developed Countries Get What They Bargained For?", 41 *Geo. J. Int'l L.* 223 (2009).
61. All reports are *available at:* http://docsonline.wto.org (visited on 26 September 2011).
62. Suerie Moon, *Does TRIPS Art. 66.2 Encourage Technology Transfer to LDCs? An analysis of Country Submissions to the TRIPS Council (1999-2007)* (UNCTAD-ICTSD Project on IPRs and Sustainable Development, Policy Brief No. 2, Dec. 2008).
63. See supra note 3 at 35.
64. See supra note 62.
65. TRIPS Council, *Minutes of Meeting: Held in the Centre William Rappard on 28 October 2008* (Feb. 6, 2009) 162-164, IP/C/M/58.

the efforts of developed countries, by focusing their efforts on the most effective ways of enhancing Technology Transfer to LDCs.[66]

TRIPS is a classic example of a regime in need of administration.[67] WIPO would actually be a better forum for the administration of TRIPS because of its expertise in IP, as opposed to the TRIPS Council's focus on trade expertise.[68] However, since technology transfer involves many trade issues besides IPRs, the ideal situation may be for the Council to administer Article 66.2 based upon its expertise in trade matters, and invite WIPO to bring its IP expertise to bear on the decision-making process.[69]

The proposals and statements leading to the WIPO development agenda seem to recognize the need for stronger technology transfer requirements in the world IP regime. The representative of India recognized that "for developing countries to benefit from providing IP protection to western rights holders there has to be some obligation on the part of developed countries to transfer and disseminate technologies to developing countries."[70] Argentina and Brazil deemed it important that "clear provisions on transfer of technology be included in the treaties currently under negotiation in WIPO."[71] WIPO,

66. See supra note 60.
67. Rochelle Cooper Dreyfuss, "Fostering Dynamic Innovation, Development and Trade: Intellectual Property as a Case Study in Global Administrative Law" IILJ Working Paper 4 (Global Administrative Law Series) 19-26(2008)
68. Ibid.
69. See supra note 60.
70. WIPO, *Proposal for Establishing a Development Agenda for WIPO-India* (Oct. 1, 2004). *Available at:*www.cptech.org/ip/wipo/india10012004.html *(visited on 8 October 2011).*
71. WIPO, *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO* (August 27, 2004) WO/GA/31/11. on issue of the development dimension and the transfer of technology mentioned in Annex,page3 submitted that: "The transfer of technology has been identified as an objective that intellectual property protection should be supportive of and not run counter to, as stated in Articles 7 and 8 of the TRIPS Agreement. Yet, many of the developing countries and LDCs that have taken up higher IP obligations in recent years simply lack the necessary infrastructure and institutional capacity to absorb such technology.
Even in developing countries that may have a degree of absorptive technological capacity, higher standards of intellectual property protection have failed to foster the transfer of technology through foreign direct investment and licensing. In effect, corrective measures are needed to address the inability of existing IP agreements and treaties to promote a real transfer of technology to developing countries and LDCs.
In this regard, a new subsidiary body within WIPO could be established to look at what measures within the IP system could be undertaken to ensure an effective transfer of technology to developing countries, similarly to what has already been done in other fora such as the WTO and the UNCTAD. Among these

Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO (August 27, 2004) WO/GA/31/11. on issue of the development dimension and the transfer of technology mentioned in Annex,page3 submitted that: "The transfer of technology has been identified as an objective that intellectual property protection should be supportive of and not run counter to, as stated in Articles 7 and 8 of the TRIPS Agreement. Yet, many of the developing countries and LDCs that have taken up higher IP obligations in recent years simply lack the necessary infrastructure and institutional capacity to absorb such technology.

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This obligation already exists in the form of TRIPS Article 66.2, and WIPO could increase its clarity and enforceability by working with the TRIPS Council to establish a substantive minimum standard for Technology Transfer incentives.[72]

A formal partnership between WIPO and the Council for TRIPS has already been established through the WTO.[73] This partnership is reaffirmed by the development agenda, which requests that WIPO "intensify its cooperation on IP-related issues with UN agencies...especially WTO."[74] WIPO recently established a Committee on Development and Intellectual Property (CDIP) to work towards

measures, we note with particular interest the idea of establishing an international regime that would promote access by the developing countries to the results of publicly funded research in the developed countries. Such a regime could take the form of a Treaty on Access to Knowledge and Technology. It is also important that clear provisions on transfer of technology be included in the treaties currently under negotiation in WIPO."

72. See supra note 60.

73. Agreement between the World Intellectual Property Organization and the World Trade Organization (December 22, 1995) *available at:* http://www.wipo.int/treaties/en/agreement/trtdocs_wo030.html (visited on 27 September 2011).

74. Recommendation 40 mention "*To request WIPO to intensify its cooperation on IP related issues with United Nations agencies, according to Member States' orientation, in particular UNCTAD, UNEP, WHO, UNIDO, UNESCO and other relevant international organizations, especially the WTO in order to strengthen the coordination for maximum efficiency in undertaking development programs*."

implementing the development agenda.[75] By collaborating with the TRIPS Council on technology transfer issues, CDIP could both work towards its goal of implementing the development agenda and help the TRIPS Council work towards a better implementation of Article 66.2. Thus, collaboration between WIPO and the TRIPS Council on implementation of Article 66.2 would likely be both practical and beneficial.[76]

VI. Technical Cooperation to Developing Countries

Article 67 of TRIPS provides:

"*In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel*."

Considering the lack of experience and expertise in intellectual property issues prevailing in many developing and least-developed country Members, the need for technical cooperation for those countries is obvious. It is of crucial importance in this respect that policy makers of developing countries are fully aware of the inherent flexibilities under TRIPS Agreement that may be used during the negotiations of bilateral and multilateral technical cooperation for the realisation of development goals.

75. The WIPO General Assembly, in its session held in September October 2007, decided to adopt the recommendations for action on the 45 agreed proposals, and to immediately implement the 19 proposals identified by the Chair of the PCDA, in consultation with Member States and the Secretariat. The General Assembly also decided to establish a Committee on Development and Intellectual Property (CDIP) to: **(a)** develop a work-program for implementation of the adopted recommendations; **(b)** monitor, assess, discuss and report on the implementation of all recommendations adopted, and for that purpose it shall coordinate with relevant WIPO bodies; and **(c)** discuss intellectual property and development related issues as agreed by the Committee, as well as those decided by the General Assembly. It was also decided that the Committee would report and may make recommendations annually to the General Assembly.

76. See supra note 60.

The TRIPS Agreement itself provides no definition of technical cooperation activities. However, some guidance on what IP-related technical cooperation might involve was provided by the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council) on 26 April 1996, when it summarised the information on technical cooperation activities presented by WTO members. The TRIPS Council categorised technical cooperation as: general cooperation in the development of human resources; assisting in the preparation of laws and regulations on the protection and enforcement of IPRs as well as on the prevention of their abuse; support regarding the establishment or reinforcement of the relevant domestic offices and agencies; and other types of cooperation, specifically the promotion of public awareness of intellectual property and the exploitation of intellectual property rights.[77]

The Secretariat of the World Trade Organisation (WTO) provides a limited amount of technical cooperation, mainly to explain the rights and obligations under the TRIPS Agreement to developing country member states or observers and to provide information of the progress of ongoing negotiations in the TRIPS Council on IP-related issues. Under the WTO-WIPO cooperation agreement, much of the WTO's role in the explanation of the TRIPS Agreement is delegated to World Intellectual Property Organization (WIPO).[78]

However, WIPO is a multilateral organization with an explicit mandate to promote intellectual property protection.[79] Since about ninety per cent of WIPO's funding comes not from member governments but from the private sector in the form of fees paid by patent applicants made under the Patent Cooperation Treaty (PCT), it has been characterized as a firm advocate of stronger intellectual property protection in developing countries.[80] In the recent past WIPO's technical Cooperation activities have come in for criticism for a variety of reasons. The

77. Keith E. Maskus, "Using the International Trading System to Foster Technology Transfer for Economic Development", *Mich. St. L. Rev* 219 (2005).
78. Tom Pengelly, "Technical Assistance for the Formulation and Implementation of Intellectual Property Policy in Developing Countries and Transition Economies" 14 (ICTSD Programme on IPRs and Sustainable Development), Issue Paper No. 11, 2005.
79. Duncan Matthews, "TRIPS Flexibilities and Access to Medicines in Developing Countries: The Problem with Technical Assistance and Free Trade Agreements" 27(11) *EIPR* 420 (2005).
80. Ibid

organization's activities which include courses, seminars and legislative services, have been criticized, in particular, because they are geared to facilitate the implementation of TRIPS Agreement meaning that the emphasis of the programmes is on performance of the obligations in the Agreements by the developing countries and least-developed countries. It is argued that this cooperation is unlikely to help developing countries tailor their intellectual property laws to meet their technological and other development objectives and to employ TRIPS flexibilities.[81]

At a bilateral level, most developed country initiatives undertaken by way of providing technical cooperation fall within the remit of fulfilling obligations under Article 67 of TRIPS Agreement. However, there are in-built limits to Article 67 that have important consequences for the quantity and quality of technical cooperation provided. By requiring developing countries to request cooperation from developed country members, and by requiring the providers and recipients of technical cooperation to mutually agreed terms and conditions, there is a risk that Article 67 perpetuates a dependency culture. By making explicit reference to the fact that technical cooperation under Article 67 "shall include" the provision of cooperation associated with the protection and enforcement of intellectual property rights, Article 67 fails to place an explicit obligation on developed countries to assist developing countries in utilising TRIPS flexibilities such as those in relation to Objectives and Principles, compulsory licences, anti-competitive contractual licences and technology transfer. As a result, developed countries have largely limited their technical cooperation activities to protection and enforcement activities.[82]

In pursuance of Article 67 of the TRIPS Agreement India has signed bilateral Agreements with developed countries and multilateral institutions in the recent past. It includes Australia, Germany, Switzerland, Japan, UK, USA, Canada, European Patent Office and WIPO.[83] The areas of cooperation include, *inter alia*, capacity building, public education and awareness, information exchange and experience share, consultation, joint studies on specific issues, human resource development,

81. Sisule F. Musungu, "2nd Bellagio Series on Development and Intellectual Property", ICTSD UNCTAD Dialogue 6 (Sept. 2003).
82. See supra note 79.
83. http://dipp.nic.in/index_mou_ipr.htm (Accessed 11 Sept. 2011).

training and management of officials, automation etc. Moreover, provisions of all the Agreements overlap with each other and fail to include technical cooperation in key sector specific areas where India actually needs cooperation to use flexibilities inherent in the TRIPS Agreement to pursue its technological and other development objectives.

On the basis of the analysis of submissions made by the United States, Japan and the European Communities to the TRIPS Council in relation to Article 67 reveals that bilateral technical cooperation tends to emphasize intellectual property protection and enforcement objectives that are priority areas for foreign right holders operating in developing countries.[84] The presence of strong private sector involvement in close coordination with government agencies of developed countries indicates that advice being provided to developing countries is closely linked to private business interests. So, there are attendant risks of the institutional orientations of the providers as well as other factors such as political considerations.[85] This carries with it the risk that technical cooperation activities do not present developing countries with all available options when implementing the TRIPS Agreement.[86]

Meanwhile, Foreign Trade Agreements (FTAs) between developed and developing countries pose new challenges. Even though they consolidate important market access opportunities in developed countries, experts and civil society groups have expressed concern that the TRIPS- plus provisions in these agreements raise many implementation challenges in terms of policy coherence and ultimately reduce opportunities to use the flexibilities built into the TRIPS Agreement. FTAs have even limited, to a certain extent, some of the flexibilities inbuilt in the TRIPS Agreement.[87]

VII. Conclusion

The TRIPS Agreement was essentially conceived as a means of strengthening the control by rights holders over intellectual creations and technologies, and not

84. See supra note 81.
85. Ibid.
86. See supra note 77.
87. Roffe Pedro, Vivas David & Vea Gina, "Maintaining Policy Space for Develoment: A Case Study on IP Technical Assistance in FTAs" 3 (ICTSD Programme on IPRs and Sustainable Development), Issue Paper No. 19, 2007.

with the objective of increasing the transfer and use of technology globally. The technology transfer was not, in fact, a concern of TRIPS proponents and the possible effects of the new protectionist standards on such transfer were never seriously considered during the negotiations or thereafter. However, the TRIPS Agreement includes a number of flexibilities to facilitate technological development and transfer of technology. To safeguard these flexibilities, Preamble and Articles 7 and 8 play important roles in the interpretation and implementation of the Agreement. Articles 7 and 8 become even more important in light of the many ambiguities built into the TRIPS. These ambiguities are constructive because they can be strategically interpreted and deployed to provide third world to actively push for interpretations that meet their needs, interests, and goals.

The evidence arising from the review of annual reports of country members to the TRIPS Council does not give a satisfactory picture of compliance of Article 66.2. There is no definitional clarity regarding the terms "technology transfer" and "developed country". Therefore, many developed countries have never submitted a report. There is also irregularity in submission of annual reports to the TRIPS Council. In addition, a majority of the programmes and policies reported do not specifically target LDCs of WTO. Furthermore, a significant number of programmes for LDCs do not actually target technology transfer. In order to improve the situation WTO members should agree to expand Article 66.2 of TRIPS to include all developing countries, or at least those without a significant domestic science and technology base. It should also agree on a definition of technology transfer. A list of country and sector specific programmes of technology transfer should be adopted by TRIPS council to all developing and LDCs.

Technical cooperation under TRIPS Agreement offered by multilateral institutions and developed countries is not appropriate to the needs of the developing countries but rather tilted in favour of the interest of intellectual property holders. Current trends of technical cooperation fail to take into account both the development needs of developing member countries and the flexibilities under TRIPS Agreement. This assessment of technical cooperation requirements of a developing country should be based on case-by-case basis. A list of country and

sector specific programmes of technical cooperation should be adopted by TRIPS council to provide guidelines for developed and multilateral institutions. Building capacity for regulation of IPRs, particularly in relation to matters of special public interest such as with compulsory licensing, controlling anti-competitive practice by rights holders and technology transfer should be given higher priority in technical cooperation programmes for developing countries in the future.The existence of such policies should be recognised as a necessary part of developing a coherent approach to the implementation of international intellectual property related commitment.

PLEA BARGAINING – YET TO BE ADAPTED IN INDIAN CRIMINAL JUSTICE SYSTEM

Dr. Rajesh Bahuguna*

Abstract

There is a century old Baconian example of a sheep which ran for shelter to a bush to save itself from rain and hail and found itself deprived of its fleece when it came out. This is the condition of a litigant, not only in India but in almost all the countries of the world. Pathetic condition of judicial system in India which includes pending cases, shortage of judges, inadequate fund, inadequate infrastructure, the reality of today's overcrowded and expensive system of court and delay in justice made everyone to think of an alternative to resolve disputes. With these and for some other reasons alternative dispute resolution system is gradually and slowly stepping into the shoes of adversarial system of dispute resolution. As far as criminal matters are concerned, plea bargaining being a major ADR technique to resolve criminal matters, is rapidly occupying the field.

I. The Concept

Basically, the plea bargaining consists of an agreement (formal or informal) between the defendant and the prosecutor. The prosecutor typically agrees to a reduced prison sentence in return for the defendant's waiver of his constitutional right against self-incrimination and his right to trial. The dictionary meaning of Plea Bargaining is "[t] he process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case, subject to approval of the court. It usually involves the defendant's pleading guilty to a lesser offence or to only one or some of the counts of multi-count indictment in return for a lighter

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sentence than that possible for the graver charge."[1]

According to Justice A. K. Sikri, "There is no perfect or simple definition of Plea Bargaining. Simply put, a plea bargain is a contractual agreement between the prosecution and the defendant concerning the disposition of a case of a criminal charge. However, unlike most contractual agreements, it is not enforceable until a judge approves it."[2] Under this technique, the criminal cases are resolved through a "plea bargain", usually well before the case reaches trial. In a plea bargain, the defendant agrees to plead guilty, usually to a lesser charge than one for which the defendant could stand trial, in exchange for a more lenient sentence, and/or so that certain related charges are dismissed. For both the government and the defendant, the decision to enter into (or not enter into) a plea bargain may be based on the seriousness of the alleged crime, the strength of the evidence in the case, and the prospects of a guilty verdict at trial. Plea bargains are generally encouraged by the court system, and have become something of a necessity due to overburdened criminal court calendars and overcrowded jails in the country like United State of America.

According to Justice M.Y. Eqbal, in plea bargaining also we have to follow the Manu's dictum i.e. to inflict just punishment on those who act unjustly by means of bargain between the parties. It is sum and substance of the philosophy of punishment in cases to be resolved through plea- bargaining.[3]

As a whole the guilty plea or no contest plea is the quid pro quo for the concession and there is no other reason. A plea bargain (also plea agreement, plea deal or copping a plea) is an agreement in a criminal case in which a prosecutor and a defendant arrange to settle the case against the defendant. The defendant agrees to plead guilty or no contest and in some cases to also provide testimony against another person in exchange for some agreement from the prosecutor as to the punishment. A plea bargain can also include the prosecutor agreeing to charge a lesser crime or reducing the charges or dismissing some of the charges against the defendant. In most cases, a plea bargain is used to reduce the number of cases and their aggregate impact on the criminal justice system as the number of cases which can be actually tried by a court

1. Black's Law Dictionary.
2. Justice A.K. Sikri 'Plea Bargaining' Nyaya Deep, Volume VII Issue 3 .July (2006).
3. 'Concept of Plea Bargaining' by Justice M.Y. Eqbal, Nyaya Deep, Volume IX Issue 1 .January, 2008.

system is a fraction of the number of cases filed. Plea Bargaining can be of three types:-

Charge Bargaining

It is a common and widely known form of plea. It involves a negotiation of the specific charges or crimes that the defendant will face at trial. Usually, in return for a plea of guilty to a lesser charge, a prosecutor will dismiss the higher or other charge(s). For example, subject to the approval court, .in return for dismissing charges for first-degree murder, a prosecutor may accept a guilty plea for Manslaughter

Sentence Bargaining

It involves the agreement to a plea of guilty in return for a lighter sentence. It saves the prosecution the necessity of going through trial and proving its case. It provides the defendant with an opportunity for a lighter sentence. For example, it may be used to reduced period of the sentence or amount of the fine associated with the crime being charged with. Again it is with the approval of the court.

Fact Bargaining

This is the least used form of plea bargaining. It involves the agreement to a plea of guilty and in return the Prosecutor agrees not to reveal any aggravating factual circumstances to the court because that would lead to a mandatory minimum sentence or to a more severe sentence under sentencing guidelines.

II. Application of Plea Bargaining

To illustrate how a "plea bargain" might be reached in a criminal case: suppose Mr. Ajay Pratap Singh is arrested and charged with two charges of aggravated assault/ battery, based on his alleged use of a baseball bat in a street fight. A "plea bargain" might be reached in his case in one of three ways:

- The prosecuting attorney handling the case approaches Mr. Ajay Pratap Singh and his attorney, and offers to allow him to plead guilty to a less serious charge, such as simple assault/battery or even disorderly conduct; or
- Mr. Ajay Pratap Singh agrees to plead guilty to one charge of aggravated assault/ battery, in exchange for dismissal of the second charge; or
- The government's evidence against Mr. Ajay Pratap Singh is so strong, and the

injuries suffered by the assault victim so serious, that Mr. Ajay Pratap Singh agrees to plead guilty to the original charge of aggravated assault/battery, in exchange for a less severe sentence than he would likely to receive if a jury found him guilty at trial.

III. Origin

The roots of plea bargaining may be seen long back in United State of America. It was a prosecutorial tool used only episodically before the 19th century. In America, Fisher says, "it can be traced almost to the very emergence of public prosecution although not exclusive to the U.S., developed earlier and more broadly here than most places." But because judges, not prosecutors, controlled most sentencing, plea bargaining was limited to those rare cases in which prosecutors could unilaterally dictate a defendant's sentence. ''Not until the crush of civil litigation brought on by the explosion of personal-injury cases in the industrial era did judges begin to appreciate the workload relief plea bargaining promised." In other words, plea bargaining is arguably another outgrowth of late-19th-century industrialization.[4] Plea Bargaining is today a very common practice in so many developed countries especially in the United State of America. Most of the criminal cases in America are settled through plea bargaining. The Federal Rules of Criminal Procedure recognize and codify the concept of plea bargaining or plea agreements.[5] The Supreme Court of United State has also approved this practice.[6] During 19th Century even in America this was not so popular and practiced in the rarest cases. But with the rapid growth in the population as well as increase in the court trials the courts became overcrowded and by the end of twentieth century's it became almost impossible for the trial in every criminal case. This made vast majority of criminal cases resolved with guilty pleas. Presently, since plea bargaining is expressly authorized in statutes and approved by the courts in America, it is conducted in almost every criminal case and roughly

4. Dirk Olin, 'Plea Bargain' The New York Times Magazine, September 29, 2002.
5. Rule 11(e) of the Federal Rules of Criminal Procedure (U.S.A.)- Under this rule, a prosecutor and defendant may enter into an agreement whereby the defendant pleads guilty and the prosecutor offer either to move for dismissal of charge or charges. Recommends to the court a particular sentence or agree not to oppose the defendant's request for a particular sentence, or agree that a specific sentence is the appropriate disposition of the case.
6. Santobello v. New York 404 U.S. 257 (1971).

ninety percent of the cases are converted into plea agreements, except in the Federal offences providing mandatory sentences and subject to United State Sentencing Guide Lines(USSG). According to Justice M.Y. Eqbal, in fact Plea Bargaining has over the years emerged as a prominent system of American Criminal Justice System. It has been immensely successful in USA and with the passage of time plea bargaining has become the norm rather than exception.[7] Non acceptance of this concept and even ban on the application of plea agreements may also be witness in so many countries of the world. According to Justice A.K. Sikri, "statutes codifying many federal Offences expressly prohibit the application of plea agreements."[8] Plea bargaining was introduced in Pakistan in 1999.[9] Under this, the accused accepts his guilt and offer to return the proceeds of corruption as determined by the investigators. If the plea is accepted by the court, the accused stands convicted, but will not be sentenced. However, the accused will be disqualified from taking part in election, holding public office, obtaining any bank loan and is dismissed from service if he is a government official. It is also used in England, Wales and Australia but to the limited extent of allowing the accused to plead guilty to some charges in return, for which the prosecutor will drop the remaining charges. But there is no bargaining over penalty and penalty is to be decided by the court. Irrespective of the facts that plea bargain has been criticized by the jurists as violation of fundamental rights such as right to trial, self- incrimination, double jeopardy and so on; gradually and slowly it is being adopted by the legislatures of series of countries including India.[10]

7. Concept of Plea Bargaining' by Justice M.Y. Eqbal, Nyaya Deep, Volume IX Issue 1 .January, 2008.
8. Justice A.K. Sikri 'Plea Bargaining' Nyaya Deep, Volume VII Issue 3 .July, 2006. –Federal Criminal Practice is governed by title 18 of the U.S. CODE, Part II (Criminal Procedure). Chapter 221of part II addresses arraignments, pleas, and trial. The U.S. Attorney's Manual (USAM) contains several provisions addressing plea agreements. For example, Chapter 9-16-300 (Plea Agreements) states that plea agreements should "honestly reflect the totality and seriousness of the defendant's conduct," and any departure must be consistent with sentencing guideline provisions. The Justice Department's official policy is to stipulate only to those facts that accurately represent the defendant's conduct. Plea agreements require the approval of the assistant attorney general if counts are being dismissed, if defendant companies are being promised no further prosecution, or if particular sentences are being recommended."
9. National Accountability Ordinance, 1999.
10. Criminal Law (Amendment) Act, 2005

IV. Plea Bargaining in India

The concept of Plea Bargaining was alien to the Indian judicial system till 5th July, 2006 that is the date from which Criminal Law (Amendment) Act, 2005 came into operation. Prior to this it was considered to be against the public policy even by the Supreme Court of India.[11] At the same time Law Commission of India had been advocating the introduction of the provisions as to plea bargaining in the criminal justice system for a long time.[12]It suggested to introduce plea bargaining as is in vogue in many states of US and considered the question of introduction of concept of concessional treatment for those who chose to plead guilty by way of plea bargaining. As a result, Criminal Law (Amendment) Act, 2005 passed by the Indian Parliament incorporated into Code of Criminal Procedure, 1973 as Chapter XXI-A and Concept of Plea Bargaining was thereby introduced to Indian criminal justice process.

The Act provides that the plea bargaining is applicable only in respect of the offences for which punishment of imprisonment is up to a period of seven years, offence does not affect the socio-economic condition of the country or has not been committed against a woman or child below the age of 14 years.[13] It lays down procedure to enable an accused to file an application for plea bargaining in the court where the trial is pending. On receipt of such application court must examine the accused in camera so as to ascertain whether the application has been filed voluntarily.[14] The Court then issues a notice to public prosecutors and the complainant, advancing them to workout, a mutually satisfactory disposition of the case.[15] Where the satisfactory disposition of the case is worked out the court shall prepare a report to that effect and the report shall be signed by the all participated in the meeting. If no satisfactory disposition of the case could be worked out, the court shall start the proceeding from the stage application was given for plea

11. State of U P v. Chandrika AIR 2000, SC, 164. Also refer Kripal Sing v. State of Haryana 2000(1) Crimes 53 (SC), "Neither Trial Court nor High Court has jurisdiction to bypass the minimum sentence prescribed by law on the premise that a plea bargain was adopted by the accused."
12. Law Commission of India, 142nd, 154th and 177th Reports on criminal law pertaining to Code of Criminal Procedure, 1973.
13. Section- 265-A of Code of Criminal Procedure, 1973.
14. Section- 265-B Ibid.
15. Section- 265-C Ibid.

bargaining.[16] In case the settlement is reached, the court can award compensation on the basis of settlement to the victim and then hear the parties on the issue of punishment. While disposing of the case so settled the court may release the accuse on probation, if minimum sentence is provided for the offence committed, the accused may be sentenced to half of such minimum punishment, otherwise, the accused may be sentenced to one- fourth of the punishment provided or extendable for such offence[17] The accused may also avail the benefit of setting off the period of detention undergone by the accused against the sentence of imprisonment in plea-bargained settlement.[18]The judgment delivered by the Court shall be final and no appeal shall lie in any court against such judgment except special leave petition under article136 or writ petition under article 226 and 227 of the constitution. Finally, the statements or facts stated by the accused in the application for plea bargaining shall not be used for any other purpose except for the purpose of this chapter.[19]

V. Pros and cons of Plea Bargaining

As far as Indian criminal justice system is concerned, it has very less experience in the application of plea bargaining. At the same time, it is deeply rooted in the United State of America. Over the years, it has emerged as a prominent feature of American criminal justice system so much that it has now become the norm rather than exception. The experience of USA shows that it has been helpful in the disposal of the accumulated cases and expedites delivery of criminal justice. In that country, many criminal cases are resolved out of court by having both sides come to an agreement. This process is known as negotiating a plea or plea bargaining. In most jurisdictions it resolves most of the criminal cases filed. Plea bargaining is prevalent for practical reasons.

- Defendants can avoid the time and cost of defending themselves at trial, the risk of harsher punishment, and the publicity a trial could involve.

16. Section-265-D Ibid
17. Section-265 E Ibid.
18. Section-265 I & 428 Ibid.
19. Section-265-K.

- The prosecution saves the time and expense of a lengthy trial. For prosecutors, a lightened caseload is equally attractive. More importantly, plea bargaining assures a conviction, even it is for lesser charge or crime. No matter how strong the evidence may be, no case is foregone conclusion. Prosecutor often wage long and expensive trials but lose.
- Both sides are spared the uncertainty of going to trial.
- The court system is saved the burden of conducting a trial on every crime charged.
- For judges, the key incentive for accepting the plea bargain is to alleviate the need to schedule and hold a trial on an already overcrowded docket.

Surprisingly, this researcher has come across writing of series of scholars from USA, criticizing plea bargaining bitterly. According to Timothy Lynch, "Impartial juries, one would think that the administration of criminal justice in America would be marked by adversarial trials — and yet, the opposite is true. Fewer than 10 percent of the criminal cases brought by the federal government each year are actually tried before juries with all of the accompanying procedural safeguards noted above. More than 90 percent of the criminal cases in America are never tried, much less proven, to juries. The overwhelming majorities of individuals who are accused of crime forgo their constitutional rights and plead guilty."[20] Plea bargaining has come to dominate the administration of justice in America. According to one legal scholar, "Every two seconds during a typical workday, a criminal case is disposed of in an American courtroom by way of a guilty plea or nolo contendere plea." Even though plea bargaining pervades the justice system, he argues that the practice should be abolished because it is unconstitutional. Legal scholars in America think that Plea bargaining

20. Timothy Lynch, Director of the Cato Institute's Project on Criminal Justice, 'The Case Against Plea Bargaining' published in REGULATION FALL 2003.- The rarity of jury trials is not the result of criminals who come into court to relieve a guilty conscience or save taxpayers the costs of a trial. The truth is that government officials have deliberately engineered the system to assure that the jury trial system established by the Constitution is seldom used and plea bargaining is the primary technique used by the government to bypass the institutional safeguards in trials. He concludes, 'as so many other areas of constitutional law, the Court must stop tinkering around the edges of the issue and return to first principles. It is true that plea bargaining speeds caseload disposition, but it does so in an unconstitutional manner. The Framers of the Constitution were aware of less time-consuming trial procedures when they wrote the Bill of Rights, but chose not to adopt them. The Framers believed the Bill of Rights, and the freedom it secured, was well worth any costs that resulted. If that vision is to endure, the Supreme Court must come to its defense.

unquestionably alleviates the workload of judges, prosecutors, and defense lawyers. But is it proper for a government that is constitutionally required to respect the right to trial by jury to use its charging and sentencing powers to pressure an individual to waive that right? As in America government officials deliberately use their power to pressure people who have been accused of crime, and who are presumed innocent, to confess their guilt and waive their right to a formal trial. We know this to be true because prosecutors freely admit that this is what they do. Any person who is accused of violating the criminal law can lose his liberty and perhaps even his life depending on the offence and prescribed penalty, the Framers of the Constitution took pains to put explicit limits on the awesome powers of government. The Bill of Rights explicitly guarantees several safeguards to the accused, including the right to be informed of the charges, the right not to be compelled to incriminate oneself, the right to a speedy and public trial, the right to an impartial jury trial in the state and district where the offense allegedly took place, the right to cross-examine the state's witnesses, the right to call witnesses on one's own behalf, and the right to the assistance of counsel. Justice Hugo Black once noted that, in America, the defendant "has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process, the defendant has a fundamental right to remain silent, in effect challenging the State at every point to 'Prove it!' By limiting the powers of the police and prosecutors, the Bill of Rights safeguards freedom.

No doubt the plea bargaining has bitterly been criticized in America stating it to be unconstitutional. But reality is that more than ninety percent of criminal convictions come from negotiated pleas and less than ten percent criminal cases go for trial. American Constitution provides, "The trial of all crimes, except in case of impeachment, shall be tried by the jury."[21] On the other hand, the judiciary has never determined that engaging in a plea bargaining process to avoid trial subvert the Constitution. In a leading case, the question before the Hon'ble Court was about the validity of plea bargaining process where in that case was a statute that imposed the death penalty only after a jury trial. Accordingly to avoid the death penalty, defendants were waiving trials and pleading guilty to lesser charges. Justice

21. Article III, Section 2[3] of U.S. Constitution.

Potter Stewart, writing for the majority, noted that problem with the statute was not that it coerced guilty pleas but that it needlessly encouraged them.[22] Even U.S. Supreme Court defended plea bargaining pointing out that the process actually benefited both side of the adversary system. The court noted that its earlier opinion in Jackson merely required that guilty pleas be intelligent and voluntary.[23] Even Supreme Court justifying the constitutionality of plea bargaining further stated that, "It [plea bargaining] is an essential component of administration of justice and as long as it is properly administered, is to be encouraged."[24] Going through the pros and cons and also criticism of plea bargaining by the American legal scholar one may think twice on the justification of adopting it into India. The answer is difference in Indian Criminal Justice process and United States in initiation of plea bargaining as in United States discretion to offer a plea bargaining vests with the prosecution agencies. Thus placing a great deal of responsibility and giving enormous power to the prosecution agencies. On the other hand in India, it is accused who can only initiate the plea bargaining. The fundamental difference between these two systems is that Indian Act allows for no negotiation between the accused and the state or the prosecutor or with the court itself. Besides these Act in India lays down so many duties over the court so as to ensure that the process is not misused. The differing provision in India may be taken as precautionary measures so as to run the wheel of justice smoothly.

As far as Indian criminal judicial system is concerned, the concept of plea bargaining is yet to be adapted. In our country, courts, and judges are placed very high and considered a place of dignity and foundation of justice. Under these circumstances, any concept incorporating bargaining is very difficult to be accepted by the people at large because it is likely to convert courts into markets. A section of lawyers, judges and scholars have always been against the introduction of this concept in India even before the enforcement of the Code of Criminal Procedure (Amendment) Act, 2005. Judiciary in India has adopted very strict approach towards the concept. It did not approve the procedure of plea bargaining with the open

22. United State v. Jackson,390 U.S. 570 (1968).
23. Brady v. United State, 397 U.S. 742 (1970).
24. Santobello v. New York, 404 U.S. (1971).

heart. The Supreme Court of India stated that such a procedure would be clearly unreasonable, unfair and unjust and opposed to public policy and would be violation of new activist dimension of Article 21 of the Constitution. Therefore, conviction of an accused as a result of plea bargaining must be held to be unconstitutional and illegal.[25] In **State of U.P. v. Chandrika**[26]the Supreme Court held that it is now a settled law that the concept of plea bargaining is not recognized and is against public policy under Indian criminal justice system. This method of short circuiting the hearing and deciding the criminal appeals or cases involving serious offences requires no encouragement. On the basis of plea bargaining, the court may not dispose of the criminal cases. The court has to decide it on merits. If accused confesses his guilt, appropriate sentence is required to be imposed. Mere acceptance or admission of the guilt must not be a ground for reduction of sentence. In ***Madanlal Ram Chandra Daga v. State of Maharashtra***[27] the Supreme Court observed: "In our opinion, it is very wrong for a court to enter into a bargain of this character. Offences should be tried and punished according to the guilt of the accused. If the court thinks that leniency can be shown on the facts of the case it may impose a lighter sentence. But the court should never be party to a bargain by which money is recovered for the complainant through their agency." In ***Meghraj Loya v. State of Maharashtra***, [28]the Supreme Court expressed that these arrangements please everyone except distant victim, the silent society. It is idle to speculate on the virtue of negotiated settlements of criminal cases, as obtains in the US but in our jurisdiction, especially in the area of dangerous economic crimes and food offences this practice intrudes on society's interests by opposing society's decisions expressed through predetermined legislative fixation of minimum sentences and by subtly subverting the mandate of the law. The court subscribes the view that "State" can never compromise. It must "enforce the law". Also in **Ganeshmal Jashraj v. Government of Gujarat**[29]the Supreme Court observed that in the case of admission of guilt by the accused the evaluation of the evidence by the Court is

25. Kasambhai Abdulrehmanbbhai v. State of Gujarat AIR 1980 SC 854
26. AIR 2000 SC 164
27. AIR 1968 SC 1267
28. AIR 1976 SC 1929
29. AIR 1980 SC 264

likely to become a little superficial and perfunctory and the court may be disposed to refer to the evidence not critically with a view to assessing its credibility but mechanically as a matter of formality in support of the admission of guilt.

In spite of above unanimous and strict mandate of Indian judiciary, we have plea bargaining in our country because of heavy burden of cases to be discharged and demand for speedier justice. It is this temptation, which has persuaded the legislature to incorporate this concept into Indian legal system.

VI. Conclusion

Today we are standing at a juncture where we have legislative provisions in the form of Chapter XXI-A of Code of Criminal Procedure, 1973 in one hand and on the other hand three champions that is Indian judiciary, a section of lawyers and Indian mindset. Objections have been raised from a section of lawyers stating that with the implementation of plea bargaining the deterrent effect of the law will leave way for the elite class of the society. The rich may get away very easily by paying any amount of compensation and serving a minimum sentence. There have been a strong mandate of Indian judiciary against the concept of plea bargaining as is evident from all the cases discussed above of course decided prior to 5th July, 2006 that is the date from which Criminal Law (Amendment) Act, 2005 came into force. Not only this but mind set of the Indians where Judges are considered at the top of the hierarchy of the justice delivery system and are kept at the place which is next to God. So any concept like plea bargaining where amount of sentence is reduced or compensation is paid and that too with the approval of court is very difficult to be accepted. In fact, these are the core reasons which made the task of adaptation very difficult for plea bargaining in India.

The aim of criminal justice is not only deterrent but is combination of prevention, expiation, retribution and of course reformation. Taking all these into consideration and also the exceptions of Chapter XXI-A of Code of Criminal Procedure, 1973, introducing plea bargaining i.e. application only in respect of the offences for which punishment of imprisonment is up to a period of seven years, offence does not affect the socio-economic condition of the country or has not been committed against a woman or child below the age of 14 years, one can appreciate

with open heart the provisions of plea bargaining in India. More over this concessional treatment to the offenders who on their own volition plead guilty has been introduced on the strong recommendations of Law Commission of India and Justice Malimath Committee Report. The Law Commission of India said, "We have examined the cases decided in USA as well as by the Indian Supreme Court and the 142nd Report (1991). We are of the view that plea bargaining can be made an essential component of administration of criminal justice provided it is properly administered. For that purpose, certain guidelines and procedure has to have to be incorporated in the Code of Criminal Procedure."[30]

Finally the concept of plea bargaining is not new to India. It is a technique of ADR and has been in practice since vedic period. It has been present in our country in the form of 'PANCH-NIRNAYA', which means decision of elder men of the locality in which parties to dispute reside or by the members of Panchayat whereas the origin of the present form of plea bargaining may be traced in USA. The requirement is to open the wrapper of potato chips and show to the Indians that the chips in beautiful pack before you are made of the same potatoes which you have been cultivating in your fields since time immemorial. So keeping into our mind, the peculiar social fabric and economic condition of our country if we implement the provisions of plea bargaining with letter and spirit, we will be able to maintain balance between efficiency and speed on the one hand and justice and dignity of court on the other hand. No doubt every technique has it pros and cons but seeing the success of plea bargaining in USA where more than ninety percent cases are being settle through this technique, we may conclude that all the limitation of plea bargaining may be overcome by proper education , awareness and will of all those making use of this technique.

30. Law Commission of India, 154th Reports on criminal law pertaining to Code of Criminal Procedure, 1973 (1996).

WOMEN'S HUMAN RIGHTS-A DISCUSSION AGAINST SEXUAL HARASSMENT, GENDER BIAS AND VIOLENCE

Dr. Puneet Pathak*

In recent years sexual and gender based violence on women has gained greater public acknowledgement in many countries of the world but denial of its scope and seriousness remains widespread. Violence affects the lives of millions of women worldwide, in all socio-economic and educational classes. It cuts across cultural and religious barriers, impeding the right of women to participate fully in society. Violence against women takes a dismaying variety of forms, from domestic abuse and rape to child marriages and female foeticide. All are violations of fundamental human rights. The slogan "Women rights are human rights" has become a central claim of the global women's movement, feminist theists have argued for an explicit inclusion of women and gender in human rights tenets, and United Nation forums have become central sites of an energetic new global feminist 'public', providing unprecedented avenues for feminist initiatives and action. In the Vienna Declaration and Programme of Action[1] adopted in Vienna Conference 1993[2], the human rights of women were declared to be part of human rights. It said "The human rights of women and of the girl child are inalienable, integral and indivisible part of the universal human rights. The full and equal participation of women in political, civil, economic and cultural life at national, regional and international level and eradication of all forms of discrimination on ground of sex are priority objectives of the international community."[3]

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1. UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.
2. World Conference on Human Rights, 14-25 June 1993, Vienna, Austria.
3. Vienna Declaration and Programme of Action, part I, para.18.

Definition and Magnitude of the Problem:

Violence against women is a manifestation of historically unequal power relations between men and women. Violence is part of historical process and is not natural or born of biological determinism. The system of male dominance has historical roots and its functions and manifestations have changed over time. The oppression of women is, therefore, a question of politics requiring an analysis of the institutions of state and the society, the conditioning and socialization of individuals, and the nature of economic and social exploitation. The use of force against women is only one aspect of this phenomenon, which relies on intimidation and fear to subordinate women.

The United Nations has offered the first official definition of violence against women. The UN has specifically articulated that violence against women does not limit to acts of physical, sexual and psychological violence in the family and community. It includes spousal battering, sexual abuse of female children, dowry-related violence, rape including marital rape, and traditional practices harmful to women, such as female genital mutilation at work and in school, trafficking in women, forced prostitution, and violence perpetrated or condoned by the state, such as rape during war. The definition of WHO also encompasses all types of physical abuse, as well as suicide and other self abusive acts.[4] Violence against women, as defined in the 1993 Declaration on the Elimination of Violence against Women refers to 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'. Such violence persists worldwide, occurring in every region, country and culture and cuts across income, class, race and ethnicity. It impedes development and prevents women and girls from enjoying their human rights and fundamental freedoms.[5]

Forms of Violence against Women:

Women are not only subject to sexual violence but also gender based violence against women. It is expedient to understand the meaning of gender and sex. Sex is

4 WHO, Fact sheet N°239, November 2009
5 A/RES/48/104, 20 December 1993.

a physiogical or biological characteristic of a person, which indicate whether the person is a women or a man. It is natural, constant, non-hierarchical and cannot be easily changed. Gender refers to the socio-cultural definition of men and women, the way societies distinguish them and assign them social roles. It is created by society, hierarchical and difficult to change but not impossible. There are four forms of violence against women which are as follows:

(a) **Physical Abuse:** Physical Abuse such as punching, kicking are usually used to control another person. Physical abuse is more commonly used on women.

(b) **Psychological and Emotional Abuse:** Criticism, threats and other ways of mistreatment and undermining self worth of another person usually result in making that person more dependent and frightened by the abuser.

(c) **Sexual Abuse:** Physical force or non-physical coercion to compel women to have sex against their will is known as sexual abuse. Forms of sexual abuse include forced penetration-rape, sexual assault, forced sexual contact etc.

(d) **Abuse through Controlling Behaviour:** In a patriarchal society, social norms legitimatize more power among men. Violence, which arises as a result of the unequal power relationships and discrimination, falls under this category, e. g. not allowing women to work outside home, restricting financial control etc.

The causes of violence against women are closely linked to the question of female sexuality. It is for this reason that violence against women often finds its sexual expression. The control over female sexual behavior is an important aspect of many law codes. The main purpose of it to ensure chastity and this desire to ensure chastity may take different forms. Female genital mutilation is perhaps the most extreme manifestation. This type of violence curtails female sexual expression so that women will remain chaste and faithful to their husband. The protection against sexual violence often entail restrictions being placed on women whether in the form of dress codes or the freedom of movement.

The prevalence of ideologies which justify the subordinate position of women is another cause of violence against women. Certain customary practices and some aspects of tradition are often the cause of violence directed against women. Besides female mutilation, a whole host of practices violate female dignity. Male preference, early marriage, dowry death, female infanticide and malnutrition are among the

many practices which violate human rights of women. Elements of the international and national media may also be blamed for causing attitude which give rise to violence purported against women. The media sometimes reproduce negative stereotypes of women which may give rise to violence against women. Pornography is both a symptom and cause of the violence against women. Pornography is itself violates female dignity but in addition, it often promotes attitudes and practices which result into violence against women.

Global Initiatives:

The protection of the rights of women has been the concern of world community since the end of world war but there was already a tradition of internationalism among women activists before the UN initiatives on human rights.[6] The preamble and various provisions of UN Charter[7] provide protection and promotion of fundamental human rights on the bases of the principle of equal rights of man and women. Gender based violence is a form of discrimination which seriously inhibit women's ability to enjoy rights and freedoms on the basis of equality with men.[8] Therefore efforts have been made at the International level to prohibit violence against women and sex discrimination, which was first, incorporated in the U.N. Charter of 1945 and later reiterated in the UDHR[9], ICCPR[10] and ICESCR[11]

6 The first International Women's Congress that convened in Paris in 1877, national sections for international women's organizations such as the International Council of Women (founded in 1888), the International Alliance of Women (founded in 1904), and the Women's International League for Peace and Freedom (founded in 1915) were formed in more than fifty countries all around the world.

7 The **Preamble** of the UN Charter reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women; **Article 1** provides one of the purposes of UN is to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; **Article 8** provides that the United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs; **Article 55** with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

8 Laura Reanda,"Human Rights and Women's Rights: The United Nations Approach", Vol. 3, No. 2, May, 1981, Human Rights Quarterly. Page -31 at 11.

9 *Universal Declaration of Human Rights*, GAOR, 3rd Sess. A/810 (1948), [GA Res. 217A (III), 10 Dec.1948.

10 *International Covenant on Civil and Political Rights*, GAOR, 21st Sess., Suppl. No. 16 (A/6316), at 52-58 [GA Res. 2200A (XXI), 19 December 1966.

11 *International Covenant on Economic, Social and Cultural Rights*, GAOR, 21st Sess, Suppl. No. (A/6316), at 49-50 [GA Res. 2200A (XXI), 19 December 1966.

guarantees equal protection of the law to both sexes.[12] Women-specific international instruments have resulted from the realisation that the real equality for women cannot be achieved only by prohibiting discrimination or by using gender-neutral language in formulating regulations, but special conventions were required to make which were mandatory for states to comply with certain women-related legal standards and to adopt special legal and political measures. Until the mid-1960s, the spotlight was on civil and political rights.[13]

Based on the realization that discrimination against women has complex and specific causes, the United Nations General Assembly passed the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in 1979[14] as part of the UN Decade for Women (1976–1985). The Convention is directed at all forms of women-specific discrimination which it calls on states to abolish.For the promotion of women in various fields and to eliminate discrimination against women two organs have been established under UN system. *First,* the Commission on the Status of Women, charged with the formulation of international policy framework to ensure the advancement of women. In 1987 the Commission identified violence against women with in the family and society and in 1991, it recommended the development of international instruments on violence against women and various other majors for the advancement of women. *Second,* the Committee on the Elimination of Discrimination against Women(CEDAW) which is a treaty body established to monitor the 1979 Convention on the Elimination of all forms of discrimination against women The Convention laid the foundation and universal standard for women's equal enjoyment without discrimination of civil, political, economic, social, and cultural rights. The CEDAW provides that women be given rights equal to those of men. The Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against

12 Article 2, 3, 23,26 of International Covenant on Civil and Political Rights and Article 7,10 of International Covenant on Economic, Social and Cultural Rights, are relate to gender equality.

13 Convention on the Political Rights of Women (1952); Convention on the Nationality of Married Women (1957);Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962). These conventions have lost virtually all meaning in practice today.

14 The convention came into force in 1981. It has ratified by 179 states by 2005.

Women entered in to force on 22 December 2000[15], which entitles individual women and groups of women to petition CEDAW with respect to the violation of convention. It also allows committee of its own motion to inquire in to grave or systematic violation including all forms of violence against women.[16]

Various world conferences on women concluded under the auspices of UN made an important role for the protection and to promote awareness of women's human rights.[17] In addition to the world conferences on women, there have been several other UN global forums since 1990 that produced separate sections devoted to women in their final documents.[18] The world Plan of Action adopted by the First World Conference on Women in Mexico in 1975 drew attention to the need for the family to ensure dignity, equality and security of each of its members. The 1980 Conference, which marked the middle of the UN decade for women, adopted a resolution on "battered women and violation in the family." At the Nairobi World Conference in 1985 the issue of violence against women truly emerged as a serious international concern. The Vienna Conference of Human Rights in 1993[19] was one of the main turning points in women's rights for the first time, recognized the gender-based violence against women, as a human rights concern. What is particularly noteworthy in the Vienna paper is that the discussion on the protection of women against violence also makes explicit reference to the private sphere, including marriage and family. Until then, states had not felt responsible for taking action against violence in the private domain. The Vienna Declaration and Programme of Action[20] specifically condemned gender based violence and all forms of sexual harassment and exploitation.

Following the Vienna Conference, the UN General Assembly passed the UN

15 Optional Protocol to the Convention on the Elimination of Discrimination against Women, G.A. Res. 54/4, Annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), entered into force on Dec. 22, 2000.

16 Article 2 of Optional Protocol to the Convention on the Elimination of Discrimination against Women 2000.

17 Four world conferences took place between 1975 and 1995: in Mexico City in 1975, Copenhagen in 1980, Nairobi in 1985, and Beijing in 1995.

18 The Conference on Environment and Development (1992, Rio de Janeiro), the World Conference on Human Rights (1993, Vienna), the International Conference on Population and Development (1994, Cairo), and the World Summit on Social Development (1995, Copenhagen).

19 World Conference on Human Rights, Vienna, 14-25 June 1993.

20 A/CONF.157/23 12 July 1993

Declaration on the Elimination of Violence against Women in December 1993.[21] Although the Declaration is not binding under international law, it recognises violence against women – even in the private sphere – as a violation of human rights and calls upon the state to take relevant measures. It serves as a reference point for human rights entities, other UN organizations, as well as NGOs in their efforts to combat violence against women. The definition of violence in the Declaration encompasses actual or threatened physical, sexual and psychological violence in the family and society as well as violence perpetrated or condoned by the state. This includes, *inter alia*, sexual abuse, rape and violence in marriage, female genital mutilation, trafficking in women, enforced prostitution and sexual harassment at the workplace. The Commission on Human Rights[22] in1994 created the first gender specific human rights mechanism and appointed a special rapporteur on violence against women[23]. Her mandate was to seek and receive information on violence against women and recommend measures to eliminate violence.

The subsequent UN Conference especially the Fourth World Conference on Women 1995 was held in Beijing. The outcome document of the Conference was the Beijing Platform for Action[24], which has 12 strategic areas of critical concern, including violence against women, human rights of women, violation of the rights of women in armed conflict, particularly murder, systematic rape, sexual slavery and forced pregnancy, forced abortion, female infanticide and pre-natal sex selection. It was concluded that issues critical to the future well being of the women of the world in terms of resources development, protection of environment, establishment of peace, improvements of health and education depend on the adjustment of the status of women. For this it suggested a multi pronged, integrated approach. As a contribution to the implementation of the Action Platform, UNIFEM established

21 A/RES/48/104,85th plenary meeting, 20 December 1993.

22 Human Rights Commission was replaced by Human Rights Council by UNGA Res. A/RES/60/ 251, 15 March 2006.

23 The United Nations Commission on Human Rights in resolution 1994/45, adopted on 4 March 1994, decided to appoint a Special Rapporteur on violence against women, including its causes and consequences. The mandate was extended by the Commission on Human Rights in 2003, at its 59th session in resolution 2003/45 . **Ms. Rashida Manjoo** (South Africa), since August 2009, **Dr. Yakin Ertürk** (Turkey), August 2003 - July 2009, **Ms. Radhika Coomaraswamy** (Sri Lanka), 1994 - July 2003.

24 Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

a fund in 1996 to finance projects integrating innovative strategies to counter violence against women[25].

In 2000, within the scope of the follow-up process to Beijing, a special session of the UN General Assembly was held to appraise the implementation of the Action Platform.[26] The Beijing+5 recognizes the fact that gender based violence against women is now viewed as a matter of serious concern by the international community, with many forms being regarded as serious violation of international legal standards.

The outcome document of the Beijing +5 Conference, for the first time, mentions female genital mutilation, so-called honour killings, forced marriage and marital rape as examples of violence against women and of human rights violation. Trafficking in women, women and armed conflicts and the effects of HIV/AIDS infection on women have been identified as important new areas for action. The States have committed themselves to abolishing all laws that discriminate against women by 2005 and to eliminate the differences between boys and girls with regard to school attendance. Adult illiteracy will be halved by 2015, and there will be universal access to healthcare.[27] In its 2005 session, the Commission on the Status of Women will review the implementation status of the Beijing Action Platform and the Beijing +5 document.[28] To this end, it has sent out government questionnaires. Women's networks have supported the dissemination of the Platform and strategies for its implementation right up to the local level. Other specialized agencies of UN also acknowledged violence against women in its policy directives.[29]Therefore the global framework of Universal Human Rights has provided legitimacy to all those

25. In its resolution 50/166 of 22 December 1995, the General Assembly gave the United Nations Development Fund for Women (UNIFEM) the mandate to strengthen its activities to eliminate violence against women in order to accelerate the implementation of the recommendations set out in the Beijing Declaration and Platform for Action.
26. General Assembly Official Records Twenty-third special session Supplement No. 3 (A/S-23/10/Rev.1); 23th session (5 to9 June 2000) of UNGA met to agree future action and initiatives to implement the Beijing Declaration and Platform of Action. Which entitles as: "Women 2000: Gender Equality, Development and Peace for the 21th Century."
27. Sonja Wölte, The International Human Rights of Women (Eschborn: Deutsche Gesellschaft für Technische Zusammenarbeit ,2003) p. 17.
28. Ten-year Review and Appraisal of the implementation of the Beijing Declaration and Platform for Action and the outcome of the twenty-third special session of the General Assembly held during the forty-ninth session of the CSW, from 28 February to 11 March 2005.

working towards equal rights for women and has given them tools by specifying the nature, meaning, content and implications of Human Rights of Women.

National Concern:

Every woman deserves a right to live with human dignity and respect. However, for women in India though the rights are constitutionally sanctioned and ideally spoken about, in reality missing. Even after 60 years of democracy, Indian women are still treated as unequal member of the human community. Men exercise greater authority over women. Despite the various provisions in our constitution[30] and numerous statutory laws,[31] women are being discriminated in all wakes of life in India. However, the Government often was unable to enforce constitutional mandate and statutory laws especially in rural areas in which traditions were deeply rooted. The data available clearly shows that in India sexual and gender based violence against women is serious issue.[32]

29 The UNHCR has developed legal and policy directions to ensure recognition of violence against women as the bases for claims of refugee status while determining the refugee status of women.ILO and WHO addressed specific forms of violence against women with in their specific mandate. UNICEF has drawn increasingly attention to the rights of girl child and issue a report on Domestic violence against women and girls in 2000.UNIFEM administers the trust fund in respect of action to eliminate violence against women providing financial support for projects to eradicate gender based violence. The Statute of International Criminal Court adopted in Rome in June 1998 recognizes gender based crime and make provision for the application of gender based justice. The tribunal for Sierra Leone also addresses gender based crime and provide for gender-sensitive justice. Women's rights have also been enshrined in the United Nations protocol to prevent trafficking in persons (December 2002).

30 Constitutional provisions of Gender Equality: Article 14,Equality before Law; Article 15 (I),State may not discriminate against any citizen only on grounds of religion, race, caste or sex; Article 16 :Equality of opportunity in employment; Article 39(a) Equal right to livelihood; Article 39(d) :equal pay for equal work; Article 42 :State to ensure just and humane conditions of work and maternity relief; Article 51 (A)(e) :duty of citizens to renounce practices derogatory to the dignity of women; Article 243 D (3) :Reservation of 33% seats in every Panchayat for women; Article 343 (T) : Reservation of 33% seats for women in each Municipality.

31 Important Legislation Affecting Women: Hindu Marriage Act,1955; The Special marriage Act,1954; Hindu Succession Act, 1956 amended 1993; Hindu Adoption and Maintenance Act 1956; The Child Marriage Restraint (Amendment) Act,1956; The Medical Termination of Pregnancy Act,1971; The Dowry Prohibition Act, 1961; The Immoral Traffic (Prevention) Act, 1986; Indecent Representation of Women (Prohibition) Act,1986; The Commission of Sati (Prevention) Act,1987; Prenatal Diagnostic Technologies Act, 1994;Important legislation affecting Economic Activity of women: The Factories Act,1948; Mines Act,1952; Plantation Labour Act,1951; The employees State Insurance Act,1948; The Maternity Benefits Act,1961; The Factories (Amendment) Act,1976 ; The Equal Remuneration Act,1976; The Contract Labour (Regulation and Abolition) Act, 1976.

Sexual violence apart from being a dehumanizing act is also an unlawful intrusion of the sanctity of a female. It is not merely a physical assault, but is destruction of the whole personality of the victim. Rape is a serious crime in the Indian penal law. About such crime it has aptly described by the apex court as deathless shame and the gravest crime against women dignity.[33] The Indian judiciary has shown a mixed trend over the years, while the period immediately after independence up to the seventies witnessed a conservative and narrow minded judicial system, the late eighties and nineties have seen the emergence of judicial activism which reached its heights in Mathura rape case.[34] Nevertheless instances of injustice being heaped on the victim have continued to persist.[35] In the matter of rape only 10 percent of rape cases were adjudicated fully by the court of law in India. The situation becomes more vulnerable when the Police facilitate the accused person or involve in the commission of crime.[36]

Prostitution in India is common, with an estimated more than 2.3 million prostitutes in the country, some 575,000 of who were children. Many indigenous tribal women were forced into sexual exploitation. Prostitutes began to demand legal rights, licenses especially in Mumbai, New Delhi, and Calcutta. The Government of India signed the South Asian Association for Regional Cooperation (SAARC) Convention on Prevention and Combating Trafficking in Women and Children for Prostitution.[37] Societal violence against women was a serious problem in India. In communal violence more than 850 people have been killed in communal

32 Information available on the website: http://ncrb.nic.in/CII2010,/home.htm. According to National Crime Record Bureau (NCRB) in its report Crime in India 2010, there are 22172 rape cases reported (conviction rate 26.6%), 9961 cases reported relating to sexual harassment of women (conviction rate 52%), 29795 cases relating to Kidnapping and Abduction of women and girls (conviction rate 28.%), 40613 cases relating to Molestation (conviction rate 29.7%), 94041 cases relating to cruelty by husband and relatives (conviction rate 19.1%) in the year 2010.

33 Bodhisattwa Gautam v. Subhra Chakraborty, AIR 1996 SC 992; Chairman Railway Board v. Chandrima Das, AIR 2000 SC 988.

34 Saakshi v Union of India AIR 2004 SC 3599 (Mathura rape case); Pratap Mishra v State of Orissa AIR 1997 SC 1307; Raju v State of Karnataka AIR 1994 SC 222.

35 Dr. Dipa Dube, Rape Law in India, (New Delhi: Lexis Nexis Butterworths India, 2008) p.05.

36 India:Country Reports on Human Rights Practices (2002), Information available on the website: http://www.state.gov/g/drl/rls/hrrpt/2002/18311.htm.

37 The South Asian Association for Regional Cooperation (SAARC) adopted on 5 January 2002 the

violence in the state of Gujarat. A report revealed that Muslim women had been subjected to "unimaginable, inhuman, barbaric" sexual violence during the violence.[38] NHRC and NCW[39] had also taken note of this violence.

In dowry disputes, harassment to women sometimes ended in the woman's death, which family members often tried to portray as a suicide or accident. In 2010 there were 8391 cases of dowry death reported in India. Despite the statute on Domestic violence,[40] it is still common and a serious problem in India. In a survey conducted by the National Family Health Survey 56 percent of the women said that domestic violence was justified. Such type of sentiments, combined with ineffective prosecution, made progress against domestic violence difficult. In 2010 according to NCRB statistics, there were 9961 cases of sexual harassment. The court has taken a serious note on issue of sexual harassment of working women and declared sexual harassment of working women at her place of work as amounting to violation of rights of gender equality and the right to life and liberty.[41] The apex court has accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.[42]

Conclusion:

It is rather disturbing and unfortunate that in most of the developing nations

Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.

38 Human Rights Watch WE HAVE NO ORDERS TO SAVE YOU"State Participation and Complicity in Communal Violence in Gujarat Human Rights Watch Report, Vol. 14, No. 3 (C) April 2002.

39 In 1992 the government setup NCW a statutory body40 with a specific mandate to study and monitor all matter relating to the constitutional and legal safeguards provided for women. The NCW could take *suo moto* notice of the matter relating to deprivation of women's rights, non implementation of laws in order to provide protection to women, National Human Rights Commission of India is an autonomous statutory body established on 12th October, 1993 under teh provisions of The Protection of Human Rights Act, 1993.

40 The Protection of Women From Domestic Violence Act, 2005(Act. NO. 43 OF 2005)

41 Vishaka v. State of Rajasthan AIR 1997 SC 3011; Apparel Export Promotion Council v. A. K. Chopra, AIR 1999 SC 625.

42 LIC of India v. Consumer Education and Research Centre AIR 1995 SC 1811; Anjali v. State of West Bangal, AIR 1952 Cal. 825; Lakshmindra Swamiar v. Commissioner, H. R. E., AIR 1952 Mad. 613; Pannalal Bansilal Patil v. State of Andhra Pradesh AIR 1996 SC 1023; Air India Cabin Crew Assn v.Yeshaswinee Merchant AIR 2004 SC 187;Yusuf Abdul Aziz v. State of Maharashtra AIR 1954 SC 321;Vijay Lakshmi v. Punjab University AIR 2003 SC 3331; Rajesh Kumar Gupta v. State of UP AIR 2005 SC 2540; A.Ritu Mahajan v. Indian Oil Corporation (2009) 3 SCC 506;D. S. Grewal v. Vimmi Joshi(2009) 2 SCC 210;Government of Andhra Pradesh v. P. B.Vijay Kumar AIR 1995 SC 1648;M. C. Sharma v. Punjab University, Chandigarh AIR 1997 P&H 87.

across the world women does not enjoy the basic human rights. This is all due to gender inequality, direct and indirect discrimination, and violence against women in private or public life. To create women friendly environment there is a need to adopt a fundamental change in the thinking of the male dominating society. They are not a commodity and not in any way inferior to men. Education may be an effective tool to achieve equal socio –economic status in the society. Gender sensitive programme for judicial and law enforcement officials and other public officials is helpful to protect and promote human rights of women. All the personal laws need to be brought within the scope of Uniform Civil Code to prevent any discrimination based on religion. Tradition, customs and such religious practices which cause discrimination and violence against women must be banned by the states. Formation of women's groups to minimize isolation of women and increase their power individually and collectively may be helpful for women empowerment. Mass media can play an important role to promote gender equality and to promote human rights of women. The time has come to make world more women friendly, protect the human rights of women and to raise our voices against the discrimination of women because the welfare of the world, the development of any country, and the cause of peace requires the maximum participation of women on equal terms with men in all fields.

DOCTRINE OF PROPORTIONALITY: EXPANDING DIMENSIONS OF JUDICIAL REVIEW IN INDIAN CONTEXT

Dr. Poonam Rawat*

Abstract

The doctrine of proportionality is emerging as another new ground of judicial review of administrative action. It is very well entrenched in the continental system of administrative law. It is claimed that this doctrine is capable to control arbitrariness in the administrative action effectively. Whether it replaces the outdated Wednesbury principle to determine the rationality aspect of the reasonableness is an important debate in the juristic circle. The principle of judicial review that court cannot go into the merit of the decision and the doctrine of proportionality that allows the reviewing court to probe some aspect of the merits of the case is the matter of reconciliation. Although the courts are still grappling with the fundamentals of this concept but the analysis of the case laws has to bring out this dilemma of the court to correctly appreciate and apply this novel principle of law. Being an important juristic principle and ground of judicial review of administrative action the research on doctrine of proportionality is of great academic as well as legal interest.

Introduction

With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts.

If an action taken by any authority is contrary to law, improper, unreasonable

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or irrational, a court of law can interfere with such action by exercising power of judicial review. One of such modes of exercising power is the doctrine of proportionality.

The application of the doctrine of proportionality in administrative law is a debatable issue and has not been fully and finally settled. Proportionality covers sound common ground with reasonableness. It is a course of action which could have been reasonably followed and should not be excessive. Proportionality can be described as a principle where the court is "concerned with the way in which the administration has ordered his priorities; the very essence of decision-making consists, surely, in the attribution of relative importance to the factors in the case. This is precisely what proportionality is about."[1]

The doctrine of proportionality used in fundamental rights context involves a balancing and the necessity test. The "balancing test" means scrutiny of excessive onerous penalties or infringements of rights or interest and a manifest imbalance of relevant consideration. The "necessity test" means that the infringement of fundamental rights in question must be by the least restrictive alternative.[2]

The principle of proportionality is very well entrenched in the continental droits administratif.[3] For example, the Federal German Constitutional Court has defined the proportionality principle as follows:[4]

"The intervention must be suitable and necessary for the achievement of its objectives. It may not impose excessive burdens on the individual concerned, and must consequently be reasonable in its effect on him".

There are three elements in this formulation:-

(i) State measures concerned must be suitable for the purpose of facilitating or achieving the pursued objectives.

(ii) The suitable measures must also be necessary, in the sense that the authority concerned has no other mechanism at its disposal. Thus, it is not the method used which has to be necessary, but "the excessive restriction of freedom involved in the choice of method".

1. Quoted in U.O.I. v. G. Ganayutham (1997) 7 SCC 463, 473.
2. De Smith, Woold and Jowell; Judicial Review of Administrative Action, (1995) 601-605.
3. Schwarze, European Administration Law, 677-866.
4. Ibid, at 687.

(iii) The measure concerned may not be disproportionate to the restrictions which it involves. The principle of proportionality has been characterised as "the most important general legal principle in the common market law".

The court of justice of the European Communities has laid down the principle of proportionality as follows:[5]

"In order to determine whether a provision of community law is consonant with the principle of proportionality it is necessary to establish, in the first place whether the means it employs to achieve its aim correspond to the importance of the aim and, in the second place, whether they are necessary for its achievements".

DEVELOPMENTS IN INDIAN LAW

i) Introduction

In India Fundamental Rights form a part of the Indian Constitution, therefore, courts have always used the doctrine of proportionality in judging the reasonableness of a restriction on the exercise of fundamental rights. Thus while exercising the power of judicial review court performs the primary role in *Brind's*[6] sense of evaluating if a particular competing public interest justifies the particular restriction under the law. This situation arises when the court is deciding on the constitutionality of a law imposing unreasonable restriction on the exercise of fundamental rights.

The principle of proportionality originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European Countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the principle while judging the validity of administrative action. But even long before that the Indian Supreme Court has applied the principle of proportionality to legislative action since 1950.

5. Denkavit France v. Fonds D' Orientation, (1987) 3 C.L.R. 202. Also, Buitoni SAV Fonds D'Orientation Et. De Regularisation Des Marches Agricoles (1979) 2 C.N.L.R. 665.
6. R v. Secretary of State for the Home Department ex. p Brind(1991) 1 AC 696

This principle applied when the administrative action is attacked as discretionary under Article 14 of the constitution. However where administrative action is questioned as 'arbitrary' under Article 14 then the Wednesbury's [7] principle applied.

So far as Article 14 is concerned the courts in India examined whether the classification was based on the intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. It mean that the courts were examining the validity of the difference and the adequacy of the difference. This is again the principle of proportionality.

In India, in the case not involving fundamental freedoms, the role of our courts/ tribunals in administrative law is purely secondary and while applying Wednesbury and CCSU[8] principles to test the validity of executive action or of administrative action taken in exercise of statutory powers, the courts can only go into the matter as a secondary reviewing court to find out if the executive or the administrator in their primary roles have arrived at a reasonable decision on the material before them in the light of Wednesbury and CCSU tests. The choice of the option available is for the authority. The courts/tribunals cannot substitute the view as to what is reasonable.

ii) Application of Proportionality

Here are some cases on the point:

In *Hind Construction Co. v. Workman*[9] conforming the order of the tribunal, the Supreme Court observed that the absence could have been treated as leave without pay. The workman might have been warned and fined. Brief facts are: some workers remained absent from duty treating a particular day as holiday. They were dismissed from service. The Industrial Tribunal set aside the action. Court further said, "it is impossible to think that any reasonable employer would have imposed the extreme punishment of dismissal on its entire permanent staff in this matter".

In *Ranjit Thakur*[10] case, The Apex Court had applied the doctrine of proportionality while quashing the punishment of dismissal from service and

7. 7(1948)1 KB 223
8. Council of Civil Services v. Minister of Civil Services, 1985 AC 374
9. AIR 1965 SC 917
10. Ranjit Thakur v. U.O.I. (1987) SC 611, 620.

sentence of imprisonment awarded by the court martial under the Army Act. The brief facts of the case are: an army officer did not obey the lawful command of his superior officer by not eating food offered to him. Court martial proceedings were initiated and sentence of rigorous imprisonment of one year was imposed. He was also dismissed from service, with added disqualification that he would be unfit for future employment. The said order was challenged inter alia on the ground that the punishment was grossly disproportionate. Upholding the contention, following CCSU[11] case the court observed:-

"The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court martial. But the sentence has to suit the offence and the offender. It should not be indicative or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as a part of the concept of judicial review, would ensure that even as an aspect which is, otherwise, within the exclusive province of the court martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review".

Same was re-siterated by the Supreme Court in the case of B.C.Chaturvedi that the punishment is so strikingly disproportionate as to call for and justify interference. It cannot be allowed to remain uncorrected in judicial review. Consequently the order and sentence imposed by the court martial on the appellant was quashed by the court.[12] The point is that all powers have legal limits. Judicial Review generally speaking, is not directed against a decision, but is directed against the "decision making process".

In *State of Orissa v. Vidya Bhushan Mahapatra*,[13] while dealing with a disciplinary matter of a government servant, the Apex court held that if the High Court is satisfied that some but not all the findings of the Tribunal were unassailable, then it had no jurisdiction to direct the disciplinary authority to review the penalty. "If the

11. Council of Civil Service v. Minister of Civil Services, 1985, AC 374.
12. B.C. Chaturvedi v. Union of India, 1995 (6) SCC 749.
13. AIR 1963 SC 770: 1963 Supp. (1) SCR 648.

order may be supported on any finding as to substantial misdemeanour for which the punishment can be lawfully imposed, it is not for the court to consider whether that ground alone would have weighed with the authority in dismissing a public servant."

In *Union of India v. Parma Nanda,*[14] the Supreme Court took a very narrow view. In that case, an employee was charge sheeted along with two other employees for preferring false pay bills and bogus identity card. In inquiry all of them were found guilty. A minor punishment was imposed on two employees, but the petitioner was dismissed from service, since he was 'master-mind' behind the plan. His application before the Central Administrative Tribunal was partly allowed and the penalty was reduced in the line of two other employees. Union of India approached the Supreme Court. The appeal was heard by a Division Bench of three judges. Allowing the appeal, setting aside the judgement of the tribunal and considering the decision in *Bidyabhushan Mahapatra*[15] and other cases[16] court had made wider observation and stated; "If the penalty can lawfully be imposed and is imposed on the proved misconduct, the tribunal has no power to substitute its own discretion for that of the authority. The adequacy of penalty unless it is mala fide is certainly not a matter of the Tribunal to concern itself with. The Tribunal also cannot interfere with the penalty if the conclusion of the inquiry officer or the competent authority is based on evidence even if some of it is found to be irrelevant or extraneous to the matter".

It is submitted that the observation made by the Supreme Court did not lay down the correct law in as much as the doctrine of proportionality in awarding punishment has been recognized by the Indian courts since long. It is no doubt true that in the facts and circumstances of the case, the punishment awarded could not be said to be excessively high or grossly disproportionate to the charges leveled and proved against him.

If the punishment imposed is excessively harsh or disproportionate, a High Court or the Supreme Court in exercise of the powers under Articles 32, 226, 136

14. AIR (1989) 2 SCC 177: AIR 1989 SC 1185.
15. State of Orissa v. Bidyabhushan Mahapatra, (1963) SC 779; 1963, Supp.(1) SCR 648.
16. Dhirajlal V.CIT, AIR 1955 SC 271; State of Maharashtra v. B.K. Takkamore, AIR 1967 SC 1353; (1967) 2 SCR 583; Zora Singh v. J.M. Tandon (1971) 3 SCC 834; AIR 1971 SC 1537.

and 227 of the Constitution of Indian can interfere with it. If the Central Administrative Tribunal could be said to be 'substitute' of a High Court, the tribunal undoubtedly possessed power to interfere with the order of punishment.

Sardar Singh v. Union of India,[17] in this case a jawan serving in an Indian Army was granted leave and while going his home town, he purchased eleven bottles of rum from army canteen though he was entitled to carry only four bottles. In court martial proceedings, he was sentenced to undergo rigorous imprisonment for three months and was also dismissed from service. His petition under Article 226 of the Constitution was devised by the High Court. The petitioner then approached the Supreme Court. The Supreme Court observed that the main submission and perhaps the only submission if we may say so, in this appeal is that the sentence awarded to the appellant is wholly disproportionate to the offence committed by him. Court considered the case of *Ranjit Thakur*[18] in the matter of awarding punishment under the Army Act. Applying these principles to this case the court observed that there is an element of arbitrariness in awarding these severe punishments to the appellant.

Jayachandra Reddy J. further said that we are satisfied that an interference is called for and the matter has to be remanded on the question of awarding any of the lesser punishment. Accordingly we set aside the punishment of three months rigorous imprisonment and dismissal from service and remand the matter to the court martial which shall award any of the lesser punishments having due regard to the nature and circumstances of the case and in the light of the above observation made by us....

In *Union of India v. G. Ganahyutham*[19], The respondent was working as Supdt. Central Excise while in service on 14/11/77 charged with a memo of 8 charges. Inquiry officers found him guilty of charges (except 4 & 8 partly). UPSC was consulted and held that charges 4 & 6 not proved but concurred with Inquiry Officer's Report. Respondent retired in 1978. A penalty of withholding 50% pension and 50% of gratuity was awarded in 1984. A writ petition was filed in High court of Madras, later on transferred to CAT which held that the punishment awarded was

17. (1991) 3 SCC 213.
18. AIR 1987 SC 2387.
19. AIR 1997 SC 3387.

too severe that lapses were procedural. The withholding of the pension of 50% had to be restricted for a period of 10 years instead of permanent basis. Secondly, pension does not include gratuity as defined in Rule 3(1)(o). So withholding of gratuity is not allowed. The Union of India filed an appeal. During pendency respondent died his Legal Representative have been brought on record. Supreme Court overruled Tribunal and held that pension include gratuity as defined in R 3(1) (o).

The *Wednesbury case*[20] was discussed, the CCSU Case[21] was analysed as to future adoption of proportionality. *Ranjit Thakur*,[22] as first decision on proportionality was also discussed which treated proportionality as part of judicial review in administrative law. It was followed in *Naik Sardar Singh* case.[23]

De Smith, Woolf and Jowell[24] point out that proportionality used in human right context involves a balancing test and the necessity test. The balancing test means scrutiny of excessive onerous penalties or infringement of rights or interest and manifest imbalance of relevant consideration. The necessity test means that infringement of Human Rights in question must be by the least restrictive alternative.

R. v. Home Secretary exp. Brind[25] was referred in *Tata Cellular v. Union of India*[26] and *State of Andhra Pradesh v. McDowell & Co*.,[27] Supreme Court held that it is debatable whether proportionality is applicable in Indian law. Thus it struck a different note from that of *Ranjit Thakur*[28] case.

Supreme Court observed that McDowell, however makes it clear that so far as the validity of a statute concerned, the same can be judged by applying the principle of proportionality for finding out whether the restrictions imposed by the statute are permissible and within the boundary prescribed by our Constitution. So a statute can be struck down. The principle of proportionality is applied in Australia & Canada to test the validity of statute.

20. (1948) IKB 223
21. (1985) AC 374.
22. Ranjit Thakur AIR 1987, SC 2387.
23. Sardar Singh v. Union of India (1991) 3 SCC 213.
24. Judicial Review of Administration Action 5th Ed. (1995) pp. 101-105.
25. (1991) IAC 696.
26. AIR 1994, SC 3344.
27. AIR 1996 SC 1679.
28. Ranjit Thakur v. Union of India, (1987) 4 SCC 611.

iii) Distinction between Primary and Secondary Roles

Human Rights Courts at Strasbourg exercises primary role in enforcing European Human Right Conventions. But in the absence of incorporation of the convention in English Law (now incorporated by 2002 Human Right Act), the English Court would be left with Wednesbury & CCSU tests. There the courts role would only be a secondary one while the primary role would remain with administrator. It meant that in secondary role the English courts would only consider whether the administrator act reasonably to his primary decision on the material before him.

Margin of appreciation and judicial restraint applied in *Manohar Lal v. State of Punjab*[29] cited while testing the validity of legislative measures in the context of Article 19(2) to (6). Position summarized by the Supreme Court: To judge the validity of any administrative order or statutory discretion; normally the Wednesbury Test is to be applied. The possibility of other tests including proportionality being brought into English Administrative Law in future is not ruled out. These are the CCSU principles.

As *Bugdaycay, Brind, Smith* as long as convention is not incorporated into English Law, the English Courts exercised secondary judgement. If however, convention is incorporated in England makes available the principle of proportionality, then the English Courts will render primary judgement.

The position in our country in administrative law where no fundamental freedoms as aforesaid are involved, the courts/tribunals will only play a secondary role while the primary judgement as to reasonableness will remain with the executive or administrative authority. The secondary judgement of the court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock.

Whether in the case of administrative or executive action affecting fundamental freedom, the courts in our country will apply the principle of proportionality and assume a primary role is left open to be decided in an appropriate case where such action is alleged to offend fundamental freedom. It will be necessity to decide whether the courts will have a primary role only if the freedom under Articles 19, 21 etc. involved and not for Article 14.

29. AIR (1961) SC 418.

In *Ranjit Thakur* this court interfered only after coming to the conclusion that the punishment was in outrageous defiance of logic and was shocking. It was also described as perverse and irrational. In other words Wednesbury and CCSU tests were satisfied.

B.C. Chaturvedi v. U.O.I.[30] followed and so the Court would not intervene unless punishment is wholly disproportionate. In the case of *Om Kumar v. Union of India*,[31] the proceedings arising out of an order of Supreme Court dated 4-5-2000 proposing to reopen the quantum of punishments imposed in departmental inquiries on certain officers of the Delhi Development Authority who were connected with the land of the DDA allotted to M/S Skipper Construction Co. It was proposed to consider impositions of higher degree of punishments in view of the role of these officers in the said matter. After directions were given by this court that disciplinary action be taken and punishments were awarded to the officers in accordance with well known principles of law.

In this case court observed that so far as Article 14 is concerned, the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. It means courts were examining the validity of the differences and the adequacy of the differences. This is nothing but the principle of proportionality.

In the Indian context the existence of a charter of fundamental freedom from 1950 distinguishes our law and has placed our courts in a more advantageous position than in England so far as judging the validity of legislative as well as administrative action.

Under Article 19(2) to (6) restriction on fundamental freedom can be imposed only by legislation. In cases where such legislation is made and restriction are reasonable yet, if the concerned statute permitted the administrative authorities to exercise power or discretion while imposing restrictions in individual situation, question frequently arises whether a wrong choice is made by the Administrator for imposing restriction or whether the Administrator has not properly balanced the fundamental right and the need for the restriction or whether he has imposed the least of the restrictions or the reasonable quantum of restriction etc. In such case

30. AIR 1995, SC 4374.

court observed that such action has to be tested on the principle of proportionality.

Administrative action in India affecting fundamental freedoms has always been tested on the anvil of proportionality in the last fifty years even though it has not been expressly stated the principle of proportionality. Some of the cases are as under:

(i) R.M. Seshadri v. Distt. Magistrate Tanjore.[32]

(ii) Union of India v. Mohan Picture Association.[33]

(iii) S. Rangarajan v. P. Jagjivan Ram.[34]

(iv) Malak Singh v. State of P & H.[35]

(v) Bishambhar Dayal Chandramohan v. State of U.P.[36]

In all the above case the proportionality of administrative action affecting the freedoms under Article 19(1) or Article 21 has been tested by the courts as a primary reviewing authority and not on the basis of Wednesbury principles. It may be that the courts did not call this proportionality but it really was.

In India where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the constitutional courts as primary reviewing courts to consider correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. Here the courts deal with the merits of the balancing action of the Administrator and is, in essence, applying proportionality and is a primary reviewing authority.

But where an administrative action is challenged as arbitrary under Article 14 on the basis of *Royappa*[37] (punishment in disciplinary cases are challenged), the question will be whether the administrative order is 'rational' or 'reasonable' and the test then is the Wednesbury test. The court would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevance factors into consideration or whether his

31. AIR 2000 SC 3684.
32. AIR (1954) SC 747.
33. (1999) 6 SCC 150.
34. (1989) 2 SCC 574
35. (1981) 1 SCC 420; AIR 1981 SC 760.
36. AIR (1982) SC 33.
37. E.P. Royappa v. State of Tamilnadu (1974) 4 SCC 3: AIR 1974 SC 555.

view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary.

Thus, when administrative action is attracted as discriminatory under Article 14, the principle of primary review is for the courts by applying proportionality. However, where administrative action is questioned as 'arbitrary' under Article 14, the principle of secondary review based on Wednesbury principle applies.

The court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the Administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, and in such extreme or rare cases can be court substitute its own view as to the quantum of punishments.

iv) An Appraisal of the Recent Judicial Trends in Proportionality in Punishment Cases

Before *Ranjit Thakur*[38] in 1987, the Supreme Court had been applying the principle of proportionality mostly in punishment cases as a general proposition not in the technical modern sense. For the first time, the apex court made a passing reference to the doctrine of proportionality without delineating its nature, definition or scope in the *Ranjit Thakur* case which was also a punishment case. Again in *Ganayutham* case in 1997, the question whether the courts dealing with executive or administrative action or discretion exercised under statutory powers where fundamental rights are involved could apply the principle of proportionality and take up primary role was left open for future. Again the court did not go into detailed analysis of the concept. However, in 2000 in *Om Kumar v. Union of India*[39] the Apex Court gave some explanation of the doctrine of proportionality and analysed some of the English decisions, especially, *Brind's* case. The position in England has undergone substantially since *Brind's* case. The Human Rights Act, 1998 has come into force and the courts are compelled to apply proportionality in Human Right and European Community law context. Now it is being suggested by

38. AIR 1987 SC 2387.
39. AIR (2000) SC 3689.

eminent jurists and judges to adopt a uniform test of proportionality even in domestic law also in lieu of Wednesbury or CCSU principles.

Therefore, in *Om Kumar*, the Supreme Court reconsidered the whole situation and laid down some principles for future application. The court held that so far fundamental right, except Article 14, are concerned the principle of proportionality is applicable and in fact, the courts have been applying it since 1950 after the commencement of the Constitution. So far Article 14 is concerned it is divided into parts. In cases of discrimination i.e. cases of classification, proportionality will apply. However, if the administrative action is challenged as arbitrary and ordinary cases of abuse of power under the statutory authority proportionality will not apply as such, the reasonableness of the action in such cases will be determined by Wednesbury or CCSU principles unless the administrative action shocks the conscience of the court or tribunal as in the case of *Ranjit Thakur*. When proportionality is applied, the court exercises primary role i.e. puts itself in the same position as the authority itself. But when Wednesbury principle is applied, the role of the court is secondary and judicial review would apply under those conditions without going into the merits of the case. The Supreme Court applied the above principle of *Omkumar* in *C.M.D. United Commercial Bank v. P.C. Kakkar*[40] again in disciplinary punishments. The petitioner was dismissed from the Bank services after the charges were established against him. The High Court set aside the punishment to be excessive and reduced it to a loss of 75 per cent of salary. Action was challenged as arbitrary under Article 14 of the Constitution. The apex court held, 'unless the punishment imposed by the Disciplinary Authority or the Appellate Authority shocks the conscience of the court or tribunal, there is scope for interference. When the court feels that the punishment is 'shockingly disproportionate it must record reasons for coming to such a conclusion. Mere expression that the punishment is shockingly disproportionate would not meet the requirement of law. The Supreme Court set aside the decision of the High and sent the matter back for fresh consideration only on the question of the punishment aspect.

40. AIR 2003, SC 1571.

However, in *Dev Singh v. Panjab Tourism Development Corp.*[41] is one case where the Supreme Court did interfere with the punishment of dismissal imposed on the appellant. The court found the punishment 'too harsh' 'totally disproportionate to the misconduct alleged and which certainly shocks our judicial conscience'.

Again applying the principle of proportionately to a case[42] where the authority in exercise of its statutory powers resumed the property and also forfeited the deposit amount without establishing dishonest intention or motive on the part of allottee, the court held that such a drastic measure was unwarranted on the ground of proportionality. Thus the court firmly laid down that the exercise of statutory power of discretion by the administrative authority affecting fundamental rights should be in consonance with the doctrine of proportionality.

In *Canara Bank v. V.K. Awasthy,*[43] the Apex Court had the opportunity of explaining the scope and ambit of the power of judicial review of administrative action relating to the ground of proportionality. Instead of breaking the new ground and analyzing the concept thoroughly, the Apex Court simply restated the position as laid down in *Om Kumar* case above. In fact in this process, the court created more confusion rather than clarification when it said that where departmental proceedings reveal several acts of misconduct and charges clearly establish failure in discharge of duties with utmost integrity, honesty, devotion and diligence, the scope of judicial review on the ground of proportionality is highly limited to situation of illegality and irrationality. It may be remembered what is said in the beginning of this topic that in applying proportionality it is assumed that the grounds of illegality are not there, since if those grounds are there, the decision will be set aside without going into proportionality. The principle of proportionality replaces the second sense of Wednesbury or irrationality ground only. And even when misconduct and charges are clearly established there is scope for proportionality in seeing whether the punishment imposed is suitable and also necessary in view of the gravity of misconduct or charges established. It is regrettable that the Apex Court is still groping in the darkness so far as the scope of proportionality is concerned.

41. AIR 2003 SC 3712.
42 . Teri Oat Estate (P) Ltd. v. U.T. Chandigarh, (2004) 2 SCC 130.
43. (2005) 6 SCC 321

The Apex Court has produced another controversial decision in *Food Corp. of India v. Bhanu Lodh*,[44] where the court observed that while determining the constitutionality of delegated legislation, no strait- jacket approach is desirable and the intensity of review in public law depend on the subject matter in each individual case. The court emphasized that there is difference in approach between the traditional grounds of review of delegated legislation and proportionality approach. It is important that in cases involving serious violation of public interest proportionality approach may produce better results. As a comment on the above observation, first of all proportionality is applied primarily to determine unreasonableness or irrationality of the exercise of discretionary power in purely executive or administrative decision. It is not suitable for delegated legislation. That is how it is understood in the European law. Secondly, FCI being an autonomous statutory body the government under the Act could issue only 'Policy instructions' of general nature and not routine instructions in its day to day acts. Cancellation of irregular appointment by such order is not authorized by the Act. Illegal acts should have been checked not by administrative order but by other remedies. The apex court justifies the government action on the basis of serious violation of public interest on the ground of proportionality. This is quite unwarranted and out of scope of the proportionality to say the least.

v) Application of Proportionality to Other Cases than Punishments

The principle of proportionality is inherent in cases of punishments. This is also the basis of awarding punishments in the criminal law. For the first time, in *Union of India v. Rajesh*,[45] the Supreme Court applied the principle of proportionality to an area other than that of punishments. In this case 134 posts of constables were to be filled up for which written test and viva voce were held. As a result of allegations of favoritism and nepotism in conducting the physical efficiency test, the entire selection list was cancelled. This was challenged in the High Court through a writ petition. Allowing the writ, the High Court found that there were only 31 specific cases of irregularities. On appeal the Supreme Court upheld the High Court.

44. (2005) 3 SCC 618.
45. (2003) 7, SCC 285.

Applying the principle of proportionality the Apex Court observed that the "competent authority completely misdirected itself in taking such an extreme and unreasonable decision of canceling the entire selections wholly unwarranted and unnecessary even on the factual situation found too, and totally in excess of the nature and gravity of what was at stake, thereby virtually rendering such decision to be irrational.

It would not have been possible for the court on Wednesbury principle to set aside the authority's decision to cancel the entire selection, because the decision could not be characterized as 'so absurd that no sensible person could ever dream that it lay within the powers of the authority". But the court held it to be arbitrary and not reasonable, thus adopting a lower threshold of unreasonableness than the Wednesbury or the CCSU test.

Conclusion

In conclusion it may be said that though the Rajesh Case is a single instance of this type of non-punishment case, the courts in India are mostly concerned with the punishment aspect only. To say that the courts have been applying the principle of proportionality since 1950 is nothing but exaggeration and manipulation of the true nature and scope of proportionality in the modern concept. The essential ingredients of the principle have not been properly appreciated by the courts. The principle requires first of all balancing of the priorities by the authority. In fundamental and human rights the priorities are already determined by their status. In such cases merits review becomes inevitable if the court should hold that the balance tips so heavily one way that only one decision is possible. The Court of Appeal explained this clearly in the case of a Nigerian woman who had lived for ten years in England as an illegal immigrant and had raised a family, but whom, with her children, the Home Secretary decided to deport.[46] The balance had then to be struck between the right to respect for family life (Article 8) and the need for effect immigration control. Allowing the mother's appeal, the court held 'there really is only room for one view as to how the balance between these competing interests should be struck although the Immigration Appeal Tribunal had held the contrary view. The court put strong emphasis on the harm to the children which would be

caused by separation from their father, a British citizen, but apparently little on the need for effective immigration control Simon Brown J. said that, the balance struck by the Secretary of State was simply wrong and outside the range of permissible responses. He further said that if our view differs from the tribunal's, then we are bound to say so and allow the appeal, substituting our decision. That is how the proportionality is to be applied in rights cases.

It is heartening that the courts are making references to the Doctrine of Proportionality and such cases are growing in number in the reports. However it is regrettable that this principle is not properly appreciated and applied in letter and spirit. The critical appraisal of the recent decisions bring out this sad state of the principle. It is hoped that in future the concept would be analysed and applied properly in the right context. This principle has great utility in the judicial review of administrative action and should be applied properly. We have a long way to go in this regard.