NULJ
NIRMA UNIVERSITY LAW JOURNAL
Bi-annual refereed Journal

ISSN 2249 – 1430

Volume I • Issue I • July 2011

FORWORD

Nirma University Law Journal provides a new and exciting way of exploring the changing dynamics of law. The journal is designed to cover a broad spectrum of topical issues, which are set within the framework of a changing global scenario; highlighting the catalytic nature of legal frameworks for society. The result is a coherent exposition which offers the reader a clear overview of the broader thematic influences on the law generally whilst also focusing more specifically on current manifestations of legal questions.

Thought leaders of today emphasize the need to embody all disciplines in one spectrum to analyze problems with creative zeal. Education in the real sense is the spirit of enquiry resulting in new knowledge and path breaking insights on mundane ideas and ways of living. The Nirma University Law Journal aims to encourage writings that are inter-disciplinary in nature expounding contemporary issues across disciplines like Sociology, Political Science, Public policy and Economics in the context of Law. It showcases contemporary issues and challenges specific to law; with an inter-disciplinary approach towards knowledge. It is the endeavor of the Institute to become the beacon of legal education by encouraging synthesis of knowledge and best practices cutting across academia and research fraternity.

We thank all the contributors for their ingenuity in expressing new ideas and hope that the journey of legal research is fruitful for the fraternity and students at large.

Prof. (Dr.) Purvi Pokhariyal,
Chief Executive, Nirma University Law Journal
I/c Director, Institute of Law, Nirma University

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LAW IMPACT ASSESSMENT

Prof. (Dr.) N.R. Madhava Menon*

Among the law teaching institutions in Western India, Institute of Law, Nirma University has assumed a prominent place in a relatively short period. The credit goes entirely to a dedicated team of enthusiastic teachers and the liberal support extended by the Board of Governors headed by Chairman, Dr. Karsanbhai Patel. Let me record my appreciation for the good work you are doing for quality education and wish you all success for your noble endeavor.

It is thoughtful on the part of Institute of Law, Nirma University to have convened this Seminar on a topic crying for attention of scholars and researchers for a long time in this country. What impact the laws are making on the lives of the people particularly the marginalized sections for whose welfare the Constitution has provided special provisions? Article 38 of the Indian Constitution mandates the State to secure a social order for the promotion of welfare of the people and in particular, strive to minimize the inequalities in income, eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. Article 39 further stipulates the State to secure adequate means of livelihood for all citizens, equal pay for equal work for both men and women, protection of the

* Former Vice-Chancellor of National Law Universities at Bangalore and Kolkata; Keynote Speech At 'National Seminar on Law Impact Assessment', Nirma University Institute of Law, Ahmedabad 21st January, 2011

strength and health of workers, tender age of children from not being abused, dignity of childhood and youth etc. Though the Constitution does not show preference to any particular model of economic development and left it to the Government to decide, it does direct the State to see that "(a) the ownership and control of the material resources of the community are so distributed as best to sub serve the common good, and (b) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment". This is the socialist philosophy of the Constitution and the social justice agenda set for the Parliament and State Assemblies. Article 37 explicitly states that though the Directives are not directly enforceable through courts, yet they are fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Obviously, the agenda of this Seminar is set by the Constitution itself. What laws have been made in the past six decades by the States and the Centre and with what intentions? Have they been directed to the implementation of the Directive Principles of State Policy? What has been their impact in terms of the Constitutional goals and objectives? Did the State fail in conceiving the policies or structuring the tools or putting the systems of management in place? Was the failure attributable to faulty implementation or inadequate institutions and sanctions? What are the success stories in policy development and implementation and what factors contribute to them? Have the agencies of the Government learnt any lessons from the successes and failures in governance through laws? If economic liberalization turned out to be a success, at least partly, can it suggest the way ahead in other sectors of government including health, education, food, housing, infrastructure etc.? Can the regulatory model of management now being put in place for the telecom, electricity, securities and other sectors can be adapted across the board (excepting defense, external affairs and such other sovereign subjects) for governance with public-private participation? What

are the areas where criminal sanctions are appropriate and inappropriate? How could corruption be controlled, punished or managed according to acceptable standards of due process and rule of law? Like these, over a thousand questions are awaiting for answers from the legal community for which impact assessment is an important first step.

I. WHAT IS IMPACT ASSESSMENT?

According to my understanding, impact assessment is a measurement, both in quantitative and qualitative terms, of the effect of a policy, the extent to which it has achieved its objects, the reasons for its achieving or not achieving those objects and to suggest possible corrections or reforms for better pursuit of the policy. Naturally, the research has to have certain hypothesis, a clear methodology accepted for empirical (evidence-based) studies and an understanding of the legislative history (mischief intended to be avoided or benefit sought to be achieved) and framework on the subject. Conventional legal research based on statutes and precedents (judicial decisions) are inadequate, resources for impact studies. Even the social science research methods need modifications as the fact finding processes of law are far more rigorous (under the Evidence Act) as compared to statistical approximations which the social scientists employ.

Lawyers, law teachers and law researchers are, generally speaking, innocent of social science research methodology. Nor do they use the products of social science research with the respect they deserve. They consider the Indian Evidence Act and the technique of cross examination as the best method of ascertaining the ultimate truth! The result is impact studies are relatively unknown to the legal world. When the Environment Protection Act introduced environment impact assessment with statutory backing, lawyers supported or challenged its products and methodologies according to the interests of the side they were engaged in. When the Supreme Court asked the Government to make judicial impact assessment whenever new

legislations are introduced in Parliament, the Government, not knowing how to do it, appointed a Committee to recommend a methodology therefore. The report submitted by the Committee is under the consideration of the Government and the Court for the last three years and more. For a long time criminal courts in this country has been struggling to find out how sentencing discretion could be utilized to make an impact on the offender. Having failed to find impact studies locally, they have borrowed, rather unsuccessfully, from Western studies on impact of different punishments on different categories of criminals. The point I am seeking to put forward is that there is hardly any actionable literature available in India on law impact assessment because of the reluctance of the legal community to embrace social science research methods and the indifference of the social scientists towards law and legal institutions for their research.

II. BEGINNINGS OF LAW IMPACT ASSESSMENT IN INDIA

Early efforts towards impact assessment arose when reservation and affirmative action measures came to be challenged on various grounds. Evidence was sparse and unreliable. Commissions appointed by the Central and State Governments conducted empirical studies and produced data on the basis of which conclusions were drawn on extent of backwardness, relative eligibility, quantum of reservation and impact of benefits given or denied. The catena of cases on reservation refers to several empirical studies some of which helped to make new law in the matter of equality and compensatory discrimination.

In the next stage, some stray attempts to study impact of welfare legislations enacted for the protection of women and children were made, again not so much by law scholars but by feminists and activists. Many reform initiatives were undertaken on the findings of such study. Unfortunately, the reports produced by the Law Commission during this period did not reveal the scholarship that impact studies provided. Nevertheless, during the

consultation processes that the concerned Government departments had undertaken, inputs were received from several social research impact assessment documents some of which found their way into policy making.

After the enactment of many environment protection laws, the Supreme Court commissioned empowered groups to make impact studies and report to the court in pending litigations. This gave some respectability to law impact research and law researchers started invoking socio-scientific data to demonstrate the efficacy or otherwise of environment-related legislations.

III. The Way Forward in Law Impact Research

The case for impact studies is obvious in a developing society where law is intended to engineer a constitutional revolution through the technology of rule of law and human rights. Given the diversities and inequalities in society, it is not an easy task to direct social change, if due process is to be followed and human rights are to be respected. This requires in-depth study of different policy models and their possible impact on the intended beneficiaries as well as others, so that the equality guarantee is not violated and the justification for differential policy could be demonstrated on the principle of larger public good. In fact, every legislation should be preceded by an impact assessment and should be followed up by another soon after its implementation. It is expensive and time consuming; nevertheless it is scientific, fair and cost-effective in the long run. There is no standardized methodology as yet for impact assessment; nevertheless there are tentative frameworks which can be tested and perfected. After all, what Law is, what Law does. Public perception of what the Law does is what the impact is about. If there are quantifiable parameters to measure such perceptions, they can form the basis of intelligent and acceptable policy making. This can happen when law persons partner with social science researchers to develop methodologies appropriate for impact assessment studies.

I have great pleasure in inaugurating this important national seminar on such a socially significant area of legal education and research. I thank the organizers for having given me the honor to associate myself with the event. Let a new era of socio-legal research begin with this Seminar.

SHAH BANO, NARENDRA MODI AND REALITY CHECKS ABOUT GLOBAL UNDERSTANDINGS OF INDIAN LAW

Werner Menski*

This article highlights the deeply contested nature of various conceptualizations of law and illustrates primarily the usefulness of pluralist methodology in legal analysis today. Highly politicized views infect much recent writing about Indian law, often represented today as examples of abuses of power and deeply deficient statehood. Both Shah Bano and Narendra Modi are used globally as iconic symbols to misrepresent and hide significant Indian legal developments. Many observers refuse to accept that Indian law is simply different from so-called Western, purportedly global prototypes. However, Indian law will continue to develop differently from Western models simply because law is of necessity culture-specific. The personal law system of India, in particular, despite some evidence of gradual harmonization, retains critical elements of structural and functional difference in legal management that global legal scholarship must account for in analyzing Indian laws and searching for 'the right law'. To argue against Indian personal laws today thus comes close to violating basic human rights, as Indians, too, deserve a right to culture.

While many Indian lawyers fail to understand their own legal system, in theory and often in practice, confusions are multiplied when Gujarati NRIs

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as a long-established migrant group with multiple cross-jurisdictional links are embroiled in complicated intercultural cases litigated in English courts. The article advises basically more focused attention on intercultural conflicts of laws as an underdeveloped field within private international law.

I. INTRODUCTION: WHY SHAH BANO AND NARENDRA MODI?

Shah Bano symbolizes for many readers all over the world today a Muslim woman abandoned by a careless Indian state, while Narendra Modi often epitomizes for those same readers all that is wrong with the Hindu-dominated nation of India and, by implication, with Hinduism itself. Together this reinforces the insidious bothering of India which so many scholars endorse, often to feather their own nests or to claim 'progressive' status. Such hostility to everything Indian and Hindu systematically prevents deeper analysis of the remarkable achievements of Indian law over the past sixty years in holding together a composite nation of now well over a billion people, remarkably without generating huge streams of refugees or promoting global terrorism, quite in contrast to neighboring countries. Remarkably, this is not even mentioned by most critics of Indian law.

The deliberately provocative combination of these two symbolic figureheads of Indian law epitomizes remarkably persistent alternative and conflicting readings and perspectives on Indian law, past and present.[1] Much agonizing concerns questions of 'law' and 'religion', a highly sensitive combination in today's world, with both components open to enormously subjective assessments rather than rational analysis that takes account of the almost limitless pluralities of law and life. Analysts of Indian laws also tend to ignore the crucial dimension of 'living law' in favor of text-based and

[1] There appears to be also a global scholarly battle going on now about different US and European perceptions of Indian law, exemplified in an ambitious recent project that rightly emphasizes the need for more research on Indian law, but employs highly questionable methods. See Lubin, Timothy, Donald R. Davis Jr. and Jayanth K. Krishnan (eds.) *Hinduism and Law. An Introduction* at p. 234 (2010).

positivising perspectives.[2] However, if we fail to do a reality check in the 'global Bukowina', huge misunderstandings about Indian laws will arise.

Indian lawyers – and ultimately we all - should actually know that the heroic Shah Bano was not let down by the Indian state.[3] She won her case and then became a catalyst, an immensely useful tool, for the postmodern Indian state to engineer a radical social welfare system that cleverly exonerates the Indian state itself from direct responsibility for whole classes of destitute Indians. This, as far too few people realize, speaks loudly and clearly about the nature of the post-colonial Indian state as a highly sophisticated legal system with an ancient pedigree. The new balance between private and public ordering in relation to post-divorce maintenance for all Indian ex-wives today, and now maybe even former members of a person's household, was achieved by shifting crucial social welfare burdens back to the realm of the family, and thus the interconnected collective primordial sphere, rather than privileging the enlightened autonomous individual as a citizen. India, this confirms, is clearly not America or Europe. India's highly sophisticated strategy of combining more state involvement ('*Verstaatlichung*') in some respects with less state involvement ('*Entstaatlichung*') in others, reflects and in turn reconstructs an ancient Indian skill of legal management that remains severely underrated and badly understood. For, at the core of Indian laws lies the principle of self-controlled ordering, not top-down state-centric regulation. Of course, such *karmic* sophistication flies in the face of secular

[2] The term 'living law' was famously coined by Eugen Ehrlich, a scholar-administrator in the Bukowina, a remote part of the Habsburg Empire, in the early twentieth century. He observed (first in 1913) that local people did not care much about metropolitan law, and constructed their own, not unlike James Henry Nelson found earlier in colonial Tamil country (see relevant details in Lubin et.al., as note 1). See Cotterrell, Roger, *Living Law. Studies in Legal and Social Theory*. (2008) ;Aldershot: Ashgate. Marc Hertogh (ed.) (2008) *Living Law. Reconsidering Eugen Ehrlich*. Oxford: Hart Publishing speaks of 'the global Bukowina' today, confirming that legal pluralism is a fact, whether we like it or not.

[3] Mohammed Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945. A remarkable example of continued misguided mythmaking about this case and its aftermath is provided by Lord Meghnath Desai in a review in *India Today International*, 18 April 2011, 44 to the effect that blame is put on those who 'forced Rajiv Gandhi to override Shah Bano's judicial victory. They are the intolerant Indians of this title'. Such factually wrong interpretations happen, as one finds repeatedly, when economists (and even scholars of literature) discuss legal issues without actually reading cases and examining statutes.

Weberian and other standard assumptions about rationality, with models of development and 'progress' which all rely on more state involvement as a public good *per se*. But is it really so progressive and desirable that we should all become dependent on modern state structures that then fail to deliver their promises in crisis scenarios, just because they have promised too much?

II. INDIAN LEGAL PLURALISM AND CULTURE-SPECIFIC RULE OF LAW

India's fine-tuned re-balancing of competing expectations about social welfare surprises many observers once they understand what is really going on in Indian law today. Part of the story is that Indian family law can these days not be treated as separate or divided from the constitutional sphere; the private becomes the public, the personal sphere links in with global concerns, everything is interconnected, like the four corners of a kite in the sky.[4] The intricate interplay of general law and personal law in Indian law, of legislation and judicial intervention, and of the various forms of law and activism is not sufficiently appreciated by many analysts. Such Indian methods may look messy, but they are undoubtedly an alternative form of standard rule of law models. Moreover, India is not unique in having a personal law system. Instead of appreciating this, it remains another much-misunderstood phenomenon, plainly because far too many people believe that law-making is or remains a matter for Parliaments alone. Why are such myopic visions and reduced perceptions so persistently applied that entire books, on closer scrutiny, collapse like packs of cards because they are flimsily built on elaborate fictions of what 'the law' is said to be? The biggest self-serving fiction of all appears to be that Western laws are uniform, state-centric structures, so that 'rule of law' just means one law for all. Detailed inspection reveals that these are convenient fictions, of course diligently supported by those who wish to rule an amorphous uncritical mass with minimum hassle and maximum power.

[4] *Infra* note. 14

III. CONTESTED CONCEPTS AND MEANINGS OF LAW

Since the global literature about the Shah Bano saga and its aftermath is so deeply misleading, and often bluntly wrong, it does not assist public understanding of this theme, remarkably even in India. Such dodgy misrepresentations also have enormous implications for overseas Indians, as can only be indicated in this brief article. Similarly, the deeply tainted image of Narendra Modi as a leading Hindu politician of 'Shining India' has many dimensions which a superficial gaze is bound to miss and overlook.

Taken together, and applied to an analysis of Gujarati family law cases currently litigated before English courts, which must be covered in another article, this would teach us that we constantly risk being led astray by superficial study and shallow knowledge. Remarkably, even many Indian lawyers seem to know little about the current realities of law for common Indians. Some have tried to teach me that all Indian marriages now have to be registered to be legally valid! Such significant distortions of key perceptions about Indian law are so dramatically persuasive now that much further activism and research is urgently needed to avoid misguiding a whole generation of lawyers.

Where does one start in this mess? Putting these two real and symbolic protagonists together here and linking them ultimately to current struggles over handling Gujarat's family laws, today even on a faraway island that used to be the huge colonial Empire's centre, illustrates the deeply politicized nature and global relevance of Indian legal studies. Law is clearly nowhere a separate field, it is everywhere deeply interdisciplinary. Emphasizing this may provide a useful analytical pointer for this inaugural issue of a Law Journal published in Gujarat. This new Journal, which aims to achieve excellent standards, will need much sustained support from various quarters to maintain its ambitious goals. Efforts to connect theory and practice, politics and governance, law and society, and much else, will confirm that

law remains everywhere a superstructure, in a non-Marxist sense, simply a messy interdisciplinary field of activity. If one studies this properly and not just through a plumbing-like method of fixing holes in a leaking system, huge further questions are bound to arise and gaping holes will continue to exist, indeed new ones will constantly arise. That is simply the nature of scientific enquiry in law, as a major scholar noted in the 1970s:[5]

The piecemeal quality of intentional legal intervention, whether legislative, executive or judicial, is due to its construction as a response to particular circumstances at particular moments. The accretion of many such responses over time makes for a composite, unplanned, total result. Even though, at various times and places, there have been attempts to codify everything once and for all, in the long term all legal 'systems' are built by accretion, not by total systematic planning.

Lawyers and those who wish to comment on law and legal issues ignore such basic facts at their peril. If law constantly generates new contested scenarios, it does not simply solve issues, but forever creates new ones. Of course, let us be honest, this is good for legal business, even for academic business! At the end of the day, however, law should not only be about *paisa* or about what Indians call *nîti*, but also about *nyâya*. Law, then, should ultimately be about justice and finding 'the right law', a key phrase coined a long time ago by an almost forgotten important German legal scholar of the nineteenth century, Rudolf Stammler (1856-1938). Stammler's 'right law' cultivated a theory of 'natural law with a changing content', arguing that the ideal of justice may well be absolute, but law everywhere varied with time, place and circumstance.[6] More recently, a prize-winning and world-famous Indian economist, Amartya Sen, produced a book that is advertised as 'the most

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[5] Sally Falk Moore *Law as Process: An Anthropological Approach* at p. 9 (1978)

[6] See Michael Freeman, *Lloyd's Introduction to Jurisprudence*. (7th ed. 2001). Sweet & Maxwell, Menski, Werner, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* 133-134 (2nd ed. 2006)

important contribution to the subject since John Rawls's *A Theory of Justice*'.[7] Why have lawyers so little to say on this topic? And what do law students need to know about this subject, even if they are often more interested in making money than engaging in philosophy or becoming social scientists?

Competent legal practice today clearly demands more than perfunctory knowledge of statutes and cases, precisely because law is highly dynamic and evidently more than statutes and cases. Law is also about social norms that constantly re-generate from below, based on and in turn creating value pluralisms that no statutory regime can ever completely regulate, as the quote from Professor Moore above indicated. A well-educated lawyer should be ready to admit that we simply do not know what we mean by 'law'. All around the world today, we have no global agreement on what is meant by that key term.[8] So lawyers fight and make money, and nobody really seems to have much interest in clarifying even the most basic concepts. Positivist legal methodology, we know, is highly deficient on its own to help explain and analyze the internally plural phenomenon of law. In India this may have been known for millennia,[9] but colonial brainwashing and current globalizing trends still make far too many people and lawyers forget this. Highly politicized legal training and academic writing these days, without admitting its political agenda, creates reductionist legal knowledge and dimmed awareness. It dangerously short-circuits and impoverishes legal study, creating grave risks for unwary persons faced with sharks. It is quite simply not good enough to teach 'black letter law', according to which law is law because someone in power says so! Nor is it good enough to presume that in patriarchal contexts, women always suffer and men always cruelly exploit their pole positions. Life is rather more complex. So we need legal

[7] See Amartya Sen , *The Idea of Justice*(2010)
[8] S.N. Katz, The *Oxford International Encyclopedia of Legal History*. 17 (Volume 4, 2009)
[9] Werner Menski *Sanskrit Law. Excavating Vedic Legal Pluralism*. SOAS School of Law Research Paper No. 05-2010. Available at http://ssrn.com/abstract=1621384.

methodologies that can pick up those multiple differences and nuances of differentiation. This will help us all to make better decisions, finding solutions which may be only right at a particular point of time and for a specific situation. Law, every law student must appreciate, is forever highly dynamic, it simply cannot be set in stone.

The ancient Indian image of chaos or 'law of the jungle',[10] more accurately envisaged as 'rule of the fish' (*mâtsyanyâya*), and thus 'shark rule', is still a very relevant cultural symbol today for the wide field of dispute settlement, encompassed in another Sanskrit key term, *vyavahâra*. This term of art for lawyers clearly means so much more than formal litigation or 'judicial proceedings', as reductionist positivist interpretation by Indian lawyers and European Sanskritists made us believe far too long.[11] Clearly, the global oceans of law as a ubiquitous phenomenon remain full of sharks.[12] Engaging in formal litigation may be good for lawyers, but not for most clients, who will be fleeced and stripped to the bare bone, possibly experiencing a *piranha* attack. Individuals, sometimes whole communities and even states, may be left without a just outcome. Law, this indicates, becomes often a tool for harassing others, rather than a nice device to achieve justice. As law is everywhere internally plural, it is always its own 'other'. When such basic messages are lost on anyone who endeavours to discuss Indian laws, incomplete analyses are produced.[13]

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[10] Notably, this popular but misleading translation is used by M.J. Akbar in *India Today International*, 30 May 2011, 7. It is misleading because we simply tend to speak of 'lawlessness' and 'jungle law' when we do not understand specific cultural or political inputs in multivalent ordering systems.

[11] Werner Menski, *Indologica Taurinensia* 123-147(2007). Notably, this formalistic misrepresentation of *vyavahāra* is continued throughout some parts of Lubin et al., as note 1, especially in chapter 2.

[12] On the ubiquitous nature of law see Melissaris, Emmanuel (2009) *Ubiquitous Law*. Farnham: Ashgate. The author says nothing new in identifying the plural nature of law and struggles with recognition of individual agency as a major legal component. At the end of the day, law remains concerned about people and their ubiquitous disagreements.

[13] *Supra* note 1

The most recent warning example, see especially chapters 5 and 6, which have excellent parts, but largely overlook the ubiquity of socio-legal dimensions in Indian laws.

IV. THE ROLE OF LAW JOURNALS

A law journal as a public forum for discussion and debate needs to identify such complex tripwires and deliberate silences and lay them open to debate. Critical legal scholarship is needed all over the world and must urgently become more sophisticated. Long laments and grievances about gender and caste discrimination may be fashionable, but cannot replace analysis of how to achieve justice in complex and often adverse scenarios. Remember that someone's terrorist is often someone else's freedom fighter – so what is 'right' in such competitive scenarios? If all law is indeed internally plural, so that law becomes a plurality of pluralities,[14] then all scenarios are potentially adversarial, and not just in a traditional binary mode. Nothing is simply agreed and just implemented without a struggle; everywhere we find *vyavahâra*, processes of finding 'the right law'. These can be invisible, mental processes, informal mechanisms of negotiating obligations, or indeed formally supervised battles between opposing parties; the term itself is a plurality of pluralities. Lawyers need to learn to become sensitive to such 'pop' elements. It will help us all to lead better lives and to identify 'best practice', which will remain situation-specific, but might be a yardstick for other scenarios.

A good law journal needs to bring such issues out and must open the reader's eyes to the ubiquitous complexities of law. As a showpiece for a Law College, whether private or public, it should be deeply concerned to promote the wider education of lawyers, those practicing now and practitioners of the next generation, seeking to improve standards of legal education and practice, rather than serving merely as a mouthpiece for its authors. A law journal should certainly not just be a place in which academics can fulfill their obligation to be seen to publish their work. Teaching, research and

[14] On this concept see now Menski, Werner (2010) 'Fuzzy Law and the Boundaries of Secularism' (December 3, 2010) *Potchefstroom Electronic Law Journal*, 13.3 (ISSN 1727-3781). Available at SSRN: http://ssrn.com/abstract=1752910 and Menski, Werner (2010) '*Flying Kites in Pakistan: Turbulences in Theory and Practice*'. Journal of Law and Social Research (Multan, Pakistan), 1(1) 41-57.

publication need to go hand in hand and will then benefit from each other. I was pleased to see this explicitly recognized in a recent article by an outspoken young Indian scholar.[15] Only when we learn to think more deeply and scrutinize everything in front of us can we become better lawyers, in theory as well as in practice. This is a huge challenge, as law is everywhere misused and deeply politicized. It is unsurprising that recent scholarship advises lawyers to develop more elaborate techniques to understand their field of activity. This may include treating law as performance, or as a symbolic field; 'legal semiotics' is now becoming a new fashion.[16] Lawyers must learn to 'think out of the box' and to analyze contextually.

V. PLAYING WITH SYMBOLS: LEGAL ICONS, TRUTH AND JUSTICE

Mythmaking by politicians and scholars is of course a familiar phenomenon, but what is 'the truth'? Like 'justice', as Amartya Sen recently reminded us, following Jacques Derrida and other global scholars, this is an elusive concept. Have Indians forgotten so quickly that Ambedkar, Nehru and Gandhi never agreed on how to use law as a tool of governance and development? Are Indian lawyers not aware that the Constitution of 1950 itself, with all its many amendments, was and is an intricate compromise of competing expectations, a working document for plurality-conscious negotiation rather than a top-down Napoleonic Code? Do Indians not know the difference between asking for the moon and being shown a mirror image that in another myth Mother Yashoda so cleverly employed to please and guide a demanding child?[17]

When ancient Indians warned about 'shark rule' and chaos, or the 'rule of the fish' (*mâtsyanyâya*), they saw much selfishness and violence around them, probably just as we see today. Nothing has changed, then, it seems; the world

[15] Lovely Dasgupta, *Reforming Indian Legal Education: Linking Research and Teaching", Journal of Legal Education,* 59(3) 432-449 (2010).S

[16] *Supra* note n.1

[17] See Menski, Werner *Asking for the Moon: Legal Uniformity in India from a Kerala Perspective*. 2006(2) *Kerala Law Times*, Journal Section, 52-78.

has not really become a much better place. After all, as Indians know, we continue to live presently in *kaliyuga*, maybe forever. Developments will go up and down, as before. They do not evolve lineally from a backward point A to a progressive point B, as Sir Henry Maine a long time ago perceived.[18] Even in late *kaliyuga*, we may have become postmodern, but are we any wiser or less cruel to each other? Indications are that the opposite is happening. We are stressed and often hear of increasing levels of violence and aggression. What sense do readers make, for example, of reports that newly-wed brides in India who use mobile phones now risk divorce in a society that struggles with problems of loyalty between *mere log - tumhare log*?[19] While one should not presume that loyalty is only problematic in patriarchal India, such issues are probably bound to be redefined in South Asian laws as 'dowry-problems'. Yet more twists and turns of messed-up iconic gendered analysis, increasingly fashionable in Indian scholarship today but bound to misguide young lawyers further.[20]

Concerning 'truth' and 'justice', do academic observers even want to know 'the truth', or do they prefer to construct their own? One central truth is clearly that composite India has well over a billion citizens of many different kinds. Whether the long-established and highly sophisticated personal law system (including a secular option) is able to handle this messy pluralism remains contested. In a crisis, rather than instructing lawyers, Indians may turn to divine entities with more or less formalized petitions to sort out their problems.[21] By contrast, many scholarly observers have problems with religion and its relation to India's personal law system: Is personal law really just based on religion? Rina Verma Williams claims: 'It is certainly the case

[18] Henry Sumner Maine, *Ancient Law*. London: John Murray (1861).

[19] See Arvind Chhabra, *Dial M for Break Up*, India Today International, 30 May 2011, at 33.

[20] On the misguided nature of allegedly dowry-related violence and murders, see Wyatt, Robin and Nazia Masood (2010) *Broken Mirrors. The 'Dowry Problem' in India*. New Delhi: Sage. For a critique of fashionable middle class contortions of Indian family law, see Menski, Werner (2010) "'Slumdog Law, Colonial Tummy Aches and the Redefinition of Family Law in India", *South Asia Research*, 30.1 (February): 67-80.

[21] Some remarkable examples are given in Lubin et al., as note 1, 213-214. Gods as removers of obstacles are of course familiar to South Asians, wherever they may be in the world today.

that religious personal laws have been an ongoing dilemma for the Indian state, for political parties, and for political leaders from Independence on'.[22] Problems may be a fact, but what solutions have been found? Why are scholars so remarkably reticent in discussing the considerable progress made in recent decades? One reason for such silences appears to be that major developments have not gone in the direction that most scholars wanted to see. But Indian law remains a culture-specific glocalised amalgam, not a carbon copy of some foreign blueprint. Assessments whether this contributes to justice or not will evidently differ vastly. Some lawyers, unaware of this highly politicized discourse, contribute their own obfuscations, frequently by making wishful claims about the effectiveness of legal reforms.

Legal pluralism is today widely perceived by modernists as a devious tool to undermine gender justice and human rights. But legal pluralism can also generate and strengthen justice, for it empowers people to navigate and opt for the most suitable solution. Formal pluralism is reinforced and structurally endorsed when central laws and state laws co-exist so visibly all over India. Positive law itself, then, is also a plurality of pluralities. Gujarat, for example, has long had its own law (shared with Maharashtra) on marriage registration. Few lawyers outside these states seem to know this, causing problems for litigants in practice. In applications before foreign High Commissions and Embassies in Delhi involving persons from Gujarat, no senior legal adviser had ever heard of the relevant Gujarati laws. But do Gujarati lawyers themselves understand these laws and their application?[23] Some experienced lawyers have pompously tried to teach this uninformed foreigner that all marriages have to be registered! It gets positively criminal and troublesome when such vacuous claims are made in foreign courts,

[22] See Lubin et al, as note 1, 118.

[23] This is the *Bombay Registration of Marriages Act*, 1953, superseded by the *Gujarat Registration of Marriages Act*, 2006, which has already created its own myths when people assume that registration under this Act is compulsory. Section 13 of that Act clearly tells a completely different story.

banking on the ignorance of foreign lawyers about Indian laws.

VI. GLOBAL MYTHMAKING ABOUT INDIAN LAWS AND REALITY CHECKS

One is forced to highlight such problems about lawyers' knowledge because various alternative versions of 'truth' are being traded globally. They challenge not only the letter of the law, but create their own myths and risk becoming 'the law'. As noted, in the mental image of many people, Shah Bano as an old divorced Muslim woman has become the classic victim of Islamic law *and* of Indian state lawlessness. Narendra Modi as a male Hindu politician may be a hero for some, but is more prominently still the classic villain of another story about Indian law, again involving Muslim issues, which have now acquired hugely prominent global significance. Here again, oddly, Muslims are the victims, and Hindu politicians become hate figures for secular fundamentalists and human rights activists. In often one-sided discussions (creating doubts if that term is even appropriate), not a word is mentioned about Muslim attempts to destabilize India.[24] Reality indicates that Indians have suffered meticulously planned terrorist attacks by Muslims. While India claims to have experienced its own 9/11, globalised human rights debates systematically sidestep such evidence.

Of course one cannot overlook or belittle atrocities against Muslims in Gujarat, or elsewhere in India. Everywhere, however, complex reductionism of legal knowledge raises its head in assessments of Indian law and governance, especially in comparative contexts. A defining moment of my own thinking came when Ratna Kapoor, a highly respected and brilliantly articulate human rights activist, in a London conference a few years ago, claimed without tolerating dissent that Pakistan had abolished polygamy in 1961 and in the same breath blamed India for being guilty of letting down all

[24] See, for example, the article by Smita Narula in Lubin et al, 234-251, which discusses Godhra, Narendra Modi's role and 'the ease with which Hindu nationalist rhetoric has been deployed to incite popular fear and garner electoral support' (at 250). *Supra* note 1

its women by tolerating male indulgence. If that is our level of scholarship and knowledge, where are hope for rational analysis and the search for 'truth'? I find it unsurprising, thus, that present debates about the ongoing Velusamy case are so confused.[25] The key issue here is not just patriarchy, as is vigorously claimed, in an odd replay of the evidently misused, world-famous idiosyncratic *Sarla Mudgal* case of 1995,[26] but the attempted re-drawing of boundaries in India today between marriage and cohabitation and their financial consequences. While the rights of 'lovers', of whatever duration, to post-relationship maintenance are presently creating massive debates, some modernists apparently strive to ignore the rights of traditional wives. Are these wilful concoctions or evidence of lacking depth of analysis?

VII. REALITY CHECK ON THE SHAH BANO AFTERMATH

Fortunately, when analyzing both symbolic figures, there is not only despair but also an alternative image of hope and heroism. A brief reality check is possible here. Shah Bano, after all, fought valiantly for her rights as a divorced Muslim wife and a victim of polygamy. Having irretrievably lost her husband to a younger woman, she won her case for post-divorce maintenance in the Supreme Court,[27] propelling a whole deluge of hugely important developments in Indian social welfare law that most Indian law students are never told about. Much of the global literature on Shah Bano has become highly elaborate fiction. Her name has become a symbol, like the dirty word 'caste', for what is allegedly wrong with Indian law and the postcolonial Indian state. What actually happened in the case and its

[24] See *D. Velusamy v. D. Patchaiammal,* decided by Mr. Justice Katju in the Indian Supreme Court on 21 October 2010. In another instance of well-meaning but myopic activism, this case is now seen as simplistic proof that Indian patriarchy tolerates polygamy, when the real issue is the competition between married wives and lovers of their husbands over post-relationship maintenance payments.

[26] *Sarla Mudgal v. Union of India*, AIR 1995 SC 1531. What commentators have simply failed to notice is the highly personalized involvement of the Judge who made that particular decision at the time it was promulgated.

[27] See Mohammed Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945.

aftermath is simply ignored by such mythmaking, mainly because it went against preconceived notions and does not fit into the constructed picture.

A quick reality check confirms that Shah Bano may well have been a victim of her own courage, but her significant victory in 1985 is even larger in retrospect when we re-examine this in 2011.[28] Indian divorced women have significant rights today which are now making increasing numbers of Indian men decide not even to get married. Has anyone thought about wider implications of such developments? Oddly, Indian women, even if they live in the UK now, may benefit indirectly. The Indian legal regime of post-divorce maintenance is definitely much more generous to divorced wives than the supposedly modern 'clean break' principle applied to brief failed marital relationships under English law would ever dare to contemplate. The underlying reasons are not difficult to cross-check: The presumed desirability of 'clean break' arose in the socio-political environment of a modern state, more precisely the then prosperous British welfare state. It sought to put autonomous individuals at the centre of its policy concerns. In emergencies, the welfare state would step in to pick up any bills for alleviating vagrancy. Today, quite clearly, such optimistic assumptions about the state's capacity for direct social welfare management are lying shattered.

In contrast, the postcolonial Indian state never felt rich enough to promise all Indian ex-wives direct welfare assistance. The burden, cleverly re-designed by Indira Gandhi in a situation of scarcity (*garibi* was the word used), fell under the redefined definition of 'wife' in section 125 of the Indian *Criminal Procedure Code* of 1973. The rest is known: A gender-sensitive reworking of the legal rights of all divorced Indian wives was engineered by a state seeking to avoid having to foot the bill. Even after divorce, a wife in

[28] I seem to be alone in discussing this. See Menski, Werner (2008) 'The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda'. *German Law Journal*, 9.3 (1 March) 211-250. [http://www.germanlawjournal.com/article.php. and Menski, Werner (2009) "Indian Secular Pluralism and its Relevance for Europe". In Ralph Grillo, Roger Ballard, Alessandro Ferrari, André Hoekema, Marcel Maussen and Prakash Shah (eds.) *Legal Practice and Cultural Diversity*. Aldershot: Ashgate, 31-48.

Indian law thus remains a 'wife' for the purposes of social welfare provisions to be made by the ex-husband.

In Indian law, the internally plural and dynamic nature of law is confirmed by extremely skilful navigation of the boundaries between personal laws and general laws. Where Muslim personal law contains shortcomings, disputes may be dragged into the general law sphere, bound to cause political problems. The Shah Bano case of 1985 did not even make a totally new legal point. The broader issue had been decided in *Bai Tahira* through the principle that any divorcing husband should make adequate arrangements for his former wife 'to keep body and soul together'.[29] The Shah Bano case was brought to challenge that, but backfired badly when the Supreme Court confirmed the ex-husband's liability for the ex-wife's welfare beyond the *iddat* period. For good measure, through *neo-ijtihad*, it was also held there was no contradiction between the Qur'an and the *Criminal Procedure Code*. The rest is history, but like all history, its interpretation remains contested. What cannot be denied, though, is that the *Danial Latifi* case in late September 2001, and thus not haphazardly, endorsed a legitimate place for Muslim personal law in the Indian legal system while confirming the *Shah Bano* case as good law.[30] The Supreme Court, by giving Indian Muslims unique rights and duties, created serious imbalances between different categories of Indian ex-husbands. These were remedied only two days later, when nobody would dare to riot.[31] Claims that Indian Muslim women, or any Indian women, have been let down by the Indian state with regard to post-divorce maintenance thus hide gaping holes in scholarly fictions about *Shah Bano*. A careful reality check shows a totally different picture.[32]

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[29] *Bai Tahira* v. *Ali Hussain Chothia*, AIR 1979 SC 362.

[30] *Danial Latifi* v. *Union of India*, AIR 2001 SC 3958 and 2001(7) SCC 740.

[31] Specifically, the Code of Criminal Procedure (Amendment) Act of 2001 lifted the 500 Rupees limit for maintenance payments, now potentially for all Indians.

[32] See Werner Menski *Maintenance for Divorced Muslim Wives*, Kerala Law Times, Journal Section, 1994(1), at 45-52

VIII. REALITY CHECK ON THE LEGAL ICON OF NARENDRA MODI

Some readers may think I am just some naïve *dhoriya*, perhaps even surreptitiously seeking to endear myself to *hindutvawalas*. I admit to having more than just professional associations with India, even to Gujarat, as I am a son-in-law in Baroda and now, by miraculous osmosis, a 'Person of Indian Origin'. While that does not make a person wiser, speaking as a long-term Indian law specialist, I am simply trying to convey here why certain symbolic law-related figures are playing such powerful roles in distorting the global image of Indian law. I remain agnostic about what Narendra Modi did or did not do. All we know for sure is that these riots happened in early 2002 and that many Muslims and Hindus were killed. The rest seems again largely a matter of politics, often played by outsiders with nothing to lose. Riots do not just happen. Remarkably, the recent judicial verdict on the Godhra train incident of 27 February 2002, pronounced by a special court on 22 February 2011, caused no riots, serving as 'an indication of how far Gujarat has moved on since the 2002 riots'.[33]

In Baroda a few days after the riots, I was amazed how soon Hindus and Muslims were again doing business together. Hindus wanted to eat meat, which they get from Muslim butchers. People needed transport and other basic facilities. Gradually cross-communal interaction was revitalized, certainly not completely, given what happened, but there is no mileage in claims that Gujarat is today a collection of ghettos. Rather, many people seem to have learnt since 2002 to navigate pluralist co-existence more skillfully, while outsiders continue to pursue their own communal politics. The riots clearly had multiple meanings; affixing them as dirt to the image of a leading politician was never going to be a convincing strategy. India is too polycentric for such politics.

[33] See Mahurkar, Uday (2011), "Justice Restored", *India Today International*, 7 March 2011, 37.

Similar to *Shah Bano*'s iconic victim status in terms of undercutting axiomatic ideological expectations, Narendra Modi's tainted image has meanwhile turned more into that of a hero of development and good governance. As Chief Minister of a state with a long-established, large and internally diverse Muslim population, he may have learnt to manage diversity more skillfully than earlier. Evidence of outcome-focused leadership (*nîti*) now includes convincing statistics that show Gujarati Muslims doing better than their co-religionists in other Indian states.[34] This may be due to geographical indicators, but cannot simply be explained away by saying that Gujaratis of whatever religion are genetically primed as successful businesspeople. There must be more to turning gory communal murder stories into increasingly strong reports of sustained growth under the leadership of a politician who is proud to be a Hindu.

IX. CONCLUSIONS

Today, then, Hindu hate figures and Muslim victims may still energize whole academic conferences focused on symbols of Indian lawlessness. Like Shah Bano, even between 2002 and 2011, Narendra Modi's symbolic position and influence in composite India has been changing. Revised visions based on legal reality checks rather than scholarly fiction can strengthen forms of higher public interest that few academic observers seem to appreciate. The context is truly global. Plurality-conscious scholars of comparative religions have shown that Hindus in today's world, long dominated by Judaeo-Christian and Muslim concepts as part of the global 'other', continue to face deep post-Enlightenment biases as the misguided pagan 'other'.[35] This has serious consequences that rationality-focused scholarship in any field surrounding law fails to admit. The image of Indian laws is systematically blackened when any occasion is sought and eagerly pursued to use damaging

[34] See *India Today International*, 11 April 2011, 32.
[35] S.N. Balagangadhara, *The Heathen in His Blindness...."Asia, the West, and the Dynamic of Religion*. (2005)

symbolic icons to score political points, often in blatant ignorance of legal facts and realities.

There is limited space here to discuss the wider implications. Recently, several wasteful cases before English courts involved Gujarati couples fighting over marriages, divorces and ancillary relief matters. Many other cases involve Gujaratis battling with the blatantly discriminatory English legal system when it comes to immigration-related matters. Such cases are not normally leading to published case reports.[36] So, similar battles are fought again and again. Everybody engages in feeding frenzy, including evidently corrupt specialist advisors on Indian law. It seems that particularly Gujarat's lawyers, since so many Gujaratis now live abroad, urgently need to know more about the complex issues that such litigation raises. While such cases will have to be the subject of future articles, I conclude here that shallow politics and iconic misuse of legal symbols can be curtailed by best practice in law teaching, including the ability, using a familiar Gujarati cultural image, to fly kites. Skilful handling of the completing claims and expectations of different perspectives on law and life that litigants may and do bring to the legal arena should be part of the standard toolkit offered to law students anywhere in the global world today - they need it every day.[37] If lawyers are not sufficiently skilful navigators, they may make some money, but will not be able to serve a good public purpose.

In an Indian state where for many people going to court constitutes a form of violence, and where *ahimsa* still has much value, despite what happened in

[36] If a case does get reported, the image is hostile, as in *Gandhi v. Patel*, [2002] 1 FLR 603, where a Hindu marriage (in a restaurant in the UK) was held to be 'no marriage at all'. See Menski, Werner, *Dodgy Asians or Dodgy Laws? The Story of H, Immigration, Asylum and Nationality Law*, p. 284-294 (2007).

[37] In essence, the kite flying symbolism and methodology involves the management of four competing types of law: (1) natural law, which can be religious or secular concepts, values and ethics; (2) socio-cultural and economic norms originating in social contexts; (3) state-driven rule systems, which may be taken and adapted by the state from other normative orders; and (4) various concepts of human rights and international norms. It is important to remain aware that all four corners of this kite-like structure contain in themselves significant pluralities, hence law is actually a plurality of pluralities.

2002, plurality-focused legal education will undoubtedly benefit from deeper insights into how various types of law interact in real life. In Gujarat, with its hugely important global links, there are powerful arguments for not neglecting the cultivation of private international law expertise. Recommending legal pluralism as a necessary analytical tool here, rather than dismissing it as some dirty concept, is thus not merely a matter of methodology and theory. It directly impacts on good practice and contains important global lessons for good governance, deeply relevant today specifically for Middle Eastern countries after the 'Arab Spring', which make a big mistake if they only look towards the West for suitable models of legal management.

LAW IMPACT ASSESSMENT: NEED, SCOPE & METHODOLOGY

G S Bajpai*

Impact analysis is a "jurisprudence of consequences." The judicial decisions are made, besides the expressed provisions, on the basis of the larger consequences and effects they intend to effectuate. The judicial decision with regard to conflicting values is to anticipate the possible social and behavioral consequences of the alternative course of action. The decisions whether protecting the due process of law in a matter or allowing crime control compulsions of the police dealing with terrorists attack in a region falls in the frame this discussion.

The discussion on 'Assessment of Law Impact is largely derived from the tradition of empirical legal research. It took really long for legal research scholarship to grow empirical in true sense. Professor Schuck's observation that the two main forms of legal scholarship -theoretical and doctrinal—account for "almost the entire corpus of legal scholarship" remains largely accurate, particularly if one views legal scholarship in its entirety. The arrival of empirical legal research was predicted as far back as the early twentieth century when Oliver Wendell Holmes opined about the future influence of the "man of statistics" on the law. Heiss opined that history proved Holmes's prediction correct, empirical legal scholarship's

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journey was long and tortuous; its path littered with the carcasses of earlier failed starts. By the turn of twentieth century, the legal scholarship especially in Harvardian model focused on innovating with legal methodology. "Langdellian case law" model is the best example. Subsequently, the legal realism movement provided the first significant and visible forum for the intersection between applied social science and legal scholarship. The empiricism in the American world evolved from the fact that there was consistent support and encouragement to the studies in law with a cross fertilization with social and behavioral sciences that brought a methodological precision in the contemporary legal scholarship.

The law as an instrumentality to regulate social affairs or to resolve human conflicts is now the part of everyday life of citizenry. Law is an objective and purposeful tool to bring some change in the desired direction. Intrinsic to this is the legislative intent behind the law which is the cardinal feature of any law. In accordance with its mandate, objectives and scope, the law also raises the public expectations. Therefore, the law serves two ends: one that is mandated as per the objectives and other in terms of fulfilling the public aspirations associated with the concerned law. This position also finds a basis in the oft-quoted epigram of Sir Holmes- "*The life of law has not been logic; it has been experience*. The later part of this statement i.e. 'experience' is now a dominant theme in all progressive societies looking at law to resolve issues. This takes us to the consequences of judicial decisions leading us to contemplate that *'.. A judicial decision must be judged by the results it achieves, not by the niceties of its internal structure'*. Pound (1908) also stated that *"..It must be valued by the extent to which it meets its ends, not by the beauty of its logical process and its strictness with which its rules proceeds from the dogmas it takes for its foundations"*

This is the approach leading the judiciary to be impact sensitive as the immediate gains strictly according to law are not apprenticed in this process and impact oriented approach is considered. This approach is within the

domain of " experimental jurisprudence" – a science of law based on rigorous application of scientific methods and devoted to the study of law of the phenomenon of law making , the effect of law upon society and the efficiency of laws in accomplishing the purposes for which they came into existence ((Beutel, 1958)

I. THE NEED FOR LAW IMPACT ASSESSMENT

The need to have law impact assessment is product of official and social requirement. The official need arises to know if the law is delivering the purpose for which it was implemented and the kind of effects it is having with regard to the concerned stakeholders. The social objectives require having the impact assessment to know if the law has brought the desired changes in the social issues it wanted to intervene or regulate. The study of manifested changes brought by the law in society is an obvious requirement in this regard.

Another motivation to assess the impact of law stems from the need to bring changes and amendments to suit the requirements. This is one of the most widely felt needs. Some provisions of laws tend to become obsolete or they need to be altered bringing parity with fresh social or other situations. The fast changing socio-economic situations impel many changes in the laws. There comes the need to scientifically view the provisions requiring review and amendments in a particular law.

The need to carry out impact analysis may also come from the introduction of new laws or judicial pronouncements wherein the guidelines are suggested by the apex court to be observed by the state governments. The implementation of a new law or the following of certain guidelines obviously carry considerable financial implications. It is therefore necessary and feasible at times to conduct the impact analysis of these developments in terms of financial burden that the state exchequer may have to bear to implement a judicial decision.

II. JUDICIAL IMPACT ASSESSMENT IN INDIA

The exercise of judicial impact measurement does not have a long history in India. The Supreme Court of India in *Salem Advocates Bar Association v. Union of India* directed the Central Government to examine the matter of judicial impact as it is done in the U.S. In compliance to this direction a Task Force with Justice Jagannadha Rao as Chairman was appointed to mainly study the impact on judiciary resources needed when a new legislation is introduced or some amendment in the existing legislation is brought in. Produced in two volumes, the Reports of Task Force (2008), which were the result of research undertaken by selected institutions on behalf of it, suggested many methodologies to measure the financial impact on account of a fresh law being introduced. The key methodology in these Reports focused on the demand of litigation, resultant increase in the workload on a court and financial estimation involving judicial manpower and infrastructure.

As stated, the studies measuring the impact of law in India are very few and far between. The Lawyers Collective conducted two Monitoring & Evaluation studies in case of Domestic Violence Act, 2005. The focus in these studies was to assess the infrastructure and manpower availability and capability in enforcing the law and the role of officials in facilitating the access to justice on the part of women. The methodology applied included the use of interview schedules and thereby generating the data in this area. These studies focused more on implementation analysis rather than assessing the impact of law. One of these studies would give an idea to the researchers as to how the objectives could be framed in this kind of study. Another significant study was carried out by the Transparency International titled 'The impact of law enforcement interventions on corruption'.

III. IMPACT OF SUPREME COURT DECISIONS

The Supreme Court (SC) of India has been a catalyst in developing a new jurisprudence and to give a dynamic dimension to the seemingly obsolete laws and provisions. Invariably, the activism in the juridical circles is the product of the apex court.

Assessing the impact of SC decision therefore becomes quite relevant. Baxi (1983) finds this impact to be of minimal, long term and optimum. It is therefore necessary, according to Baxi, to identify what could be the range of meanings associated with the notion of impact and what should be its range for the purpose of empirical analysis. In addition to this, the 'impact constituencies' and the processes through which impact occurs is also a step in this direction.

The decisions of SC intend to cause or uncause certain things with regard to an issue. And this is called the mandate of the decision. Impact of this can be seen in terms of compliance and no-compliance. Several intervening factors come into play which has a crucial bearing on its realization and this could be measured and assessed through implementation and impact analysis.

Of empirical interest could be what Baxi (1983) calls 'impact constituencies' where the SC decisions want the effect to be seen. It could be a human group, executive, government, institution or legislature etc.

TYPES OF IMPACT:

With regard to a judicial decision, the impact may manifest in several ways: one, where the decision wants the compliance of specific nature; second is the idea of effecting impact as a kind of hierarchical control envisaged by the apex court in general. The third type of impact is of political nature where the government agencies come under obligation to act as per the mandate of decision. Fourth type of impact is of social nature which relates to regulation of behavior, allocation of costs and benefits of specific activities and occurrence of associated but indirect changes.

Impact may not be immediate in all cases. A judicial decision might have no visible short term impact but in the long terms it may have crucial results. For instances, there are number of seminal judicial decisions which continue to have profound and sustained impact on subsequent matters. The decisions like *Motiram , Maneka, Keshvanand , and Sunil Batra* are old and classical and lately *Vishakha, Best bakery, D K Basu*, and recently *Selvi* are a few examples to prove the point.

The impact is direct in case of stakeholders and targeted beneficiaries. Considering the direct impact as the only outcome would be fallacious. In its legislative intent, a law envisages to be offering a standard of behavior to be adhered by the citizens. The impact in this shape is declarative and forms part of the objectives of legislation. In case of judicial decision, the direct impact manifests even at more micro level as the affected parties are the persons to be impacted.

It would be too limiting to view the impact of law only in terms of direct impact. Admittedly, a law intends to reach and addresses to a large number of relevant issues. Many a things fall in its 'circle of influence' and several unintended and intended effects not only surfaces but they anticipated as well. To illustrate this point further, a mention of what could be termed as 'diffusion effect' would be imperative here. Diffusion effect is about ripple effect that brings associated consequences that may not be declarative in the scheme of a law but they do impact significantly. The compliance, for instance, is effected by the very existence of law by defining the behavior conforming to law.

IV. JUDICIAL DECISION-MAKING RESEARCH

Law impact research does not always fit into straight jacket mode. Apart from the law itself, the impact of law is crucially dependent on the manner in which the law is applied and interpreted by the judge. Two distinct, though related, models have dominated judicial decision-making research literature for much of the past two decades: behavioralism and attitudinalism. Between

these two, attitudinal models have received more empirical support and have come to dominant in the literature. The legal, public choice, and institutionalism theories to judicial decision making are other models relevant in this regard.

V. JUSTICE IMPACT TEST

Law impact is also seen in terms of justice delivered through laws. Hence, justice is the end product and result of legal process. Attempt to measure the justice impact is a recent development. The Ministry of Justice in the UK has recently (2010) embarked upon measuring the justice on account of any change in the policy impacting the justice system. The Ministry constructed a 'Justice Impact test' The Ministry finds that these impacts need to be considered, anticipated and planned for at an early stage, to make best use of public funds. Otherwise the justice system will become strained and service provision jeopardized. The Justice Impact Test is a tool to help policy-makers find the best way of achieving their policy aim. This aims at:

- identifying areas in which impacts need to be determined
- suggesting methods for assessing and quantifying the impacts
- Identifying ways to avoid or minimize any negative impacts.

The test looks at the impact of policy right across the justice system – civil and criminal, and covers: legal aid, courts and tribunals, prisons and probation services, prosecuting bodies, the judiciary.

Cited below is an example as to how a policy change in legal aid sector can cause impact on criminal justice system.

The following table includes general examples of the more common policy changes that impact on the legal aid scheme. This is not an exhaustive list, but it does provide helpful examples.

Proposal	**Potential impact**
Creation of new offences	Could lead to additional applications for legal aid.
Changing the procedures/ provision of welfare benefits	People receiving some types of rules on welfarebenefits automatically qualify for criminal and civil legal aid. Therefore, increasing the population eligible for a particular benefit could also increase the number of people eligible for legal aid.
Changing the penalties and mode of trial for existing offences	Trial on indictment in the Crown Court generally costs more than summary trial in the magistrates' courts. Therefore, changing the maximum penalty for an existing offence could increase trial costs paid for from the legal aid budget.
Proposal to increase legal disputes	Any proposal that could increase the likelihood of legal disputes, especially between individuals and public bodies, could increase the claims on the legal aid budget.

VI. JUSTICE IMPACT TEST – A FEW ILLUSTRATIONS

Some illustrations can be given where policy changes would impact the justice system. Any proposal of creating new offences, reclassification of offences or bringing new penalties will impact the justice system. Following would be vital to consider:

- whether the penalty is necessary and proportionate to the harm being caused
- whether the behavior being targeted is already covered by criminal law

- who will be responsible for investigating and prosecuting any offence
- implications for the legal aid scheme
- how the courts will be affected
- new court procedures that might be required
- rights of appeal
- whether the proposals will require changes to primary and/or secondary legislation
- whether they increase demand for prison places
- enforcement costs for financial penalties

LITIGATION IMPACT

'Litigation impact' means any change in the number of cases being heard in the courts as a result of legal challenges to the making of decisions by public bodies, or in the exercise of their functions.

The major source, for example, of litigation could be increased engagement of people with human rights. Piling of incessant litigation may also result due to legal complexities, public spirited issue and liberal laws and procedure. An example is that of section 498 IPC which has triggered huge litigation on account of its anticipated results by the complainants.

VII. METHODS AND MEASUREMENT

While the impact assessment of laws and judicial decisions appear to be relevant, there are hardly any studies conducted in this area. Legal studies even otherwise suffer from methodological applications and in case of impact assessment the penury becomes quite apparent. Infact, in legal studies in India so called 'doctrinal method' has been profusely used and[1] 'abused'.

[1] Doctrinal method is equally systematic research method but it has been conveniently used without following its structural protocols.

Empirical traditions in legal research could also not develop owing to scores of factors. The dearth of methodological precision in Indian legal research is now an acknowledged fact. This limitation of Indian legal research is manifestly clear in both individual and official studies[2]. The most disquieting aspect of Indian legal research scene is that the laws have hardly been subjected to any substantial impact analysis. Perhaps India is the only country where the laws are not subjected to impact analysis. In case of other departments of government, there is a mechanism of reviewing policies and programme and the Planning Commission also conducts some monitoring and evaluation exercises but in the area of law this is not done though there is ministry and department both at the Centre and state level.

The measurement of impact involves complicated methodological issues. The object of legal impact analysis is to examine and explain how a particular law works within a particular social setting. The central idea in impact assessment is to see the law in action. As against its doctrinal structure, the law becomes more complex when it is put into action. This happens because the implementation of law faces an interface with conflicting social, cultural and political factors. The interplay of these factors some time defies or alters the doctrinal objective of the law. Baxi cautions the narrow deductions in interpreting the law and remarks that '*All India Report consciousness* of the law is far too blinkered in its perception of the law as a social process'.

The issue of measuring the effect of a law on the behavior and attitude of people living within the jurisdiction of a law is also relevant while considering the relevance of legal impact analysis.

VIII. RESEARCH DESIGN

Impact assessment of any law or judicial decision can strictly be carried out in empirical manner. It is therefore desirable to consider the best suited research design. The choice of research design is guided by the nature, scope

[2] One does not find any significant empirical research in the reports published by the Law Commissions.

and coverage of subject matter involved in the impact analysis. While no perfect model of research design can be suggested for want of these reasons, a broad categorization of research design is presented here.

The most accepted impact study framework consists of two kinds of research models:

1. *Ex-post* facto or retrospective design where the performance of a law on the basis of measurable indicators is examined from past to present and changes in the desired direction, for which the law was implemented, can be studied. This model may also explore the factors and variable that might have been instrumental in bringing the said changes in the situation. To illustrate this point, lets us consider whether a strict traffic law that has been implemented recently has affected the motor vehicle discipline on the road. Number of people fined in month could be an indicator but to be comparable the factors like increase in the number of motor vehicles and users will have to be kept in view.
2. The other type is Prospective design where the research is followed forward in time and this allows the research to be conducted over a period of time

IX. ASSUMPTIONS

The impact assessment may not be perfect in absolute term. However, depending on the methodological precision and tools applied, the imperfections could be minimized. In all applied management or social science researches, the research precede with some assumptions. In case of the study of impact also, some assumptions must be considered

1. Impact may not be studies in pure 'cause-effect' relationship model.
2. Impact is a relative term observable in the specific context and setting.

3. It is generic expression and could be seen in terms of outcomes.
4. Impact is measurable through observable indicators.
5. Impact is crucially contingent upon the intervening factors.
6. Impact is not one dimensional rather it is multifaceted and varying.
7. Impact is dynamic process.
8. Impact assessment may not be generalized as it is true to its context.

Impact is quantifiable is central assumption that guide the researcher to do the exercise of research. Impact is about measuring the presumed relationship that the law and its effect may have. The principles governing the 'law of effect' are well settled in bevaioural science. Law may not be a behavioral science in strict sense but the legal research involving the study of interplay of certain factors would require appreciating this relationship.

X. LAW OF EFFECT AND EFFECT OF LAW

The law of effect basically states that "responses that produce a satisfying effect in a particular situation become more likely to occur again in that situation, and responses that produce a discomforting effect become less likely to occur again in that situation.

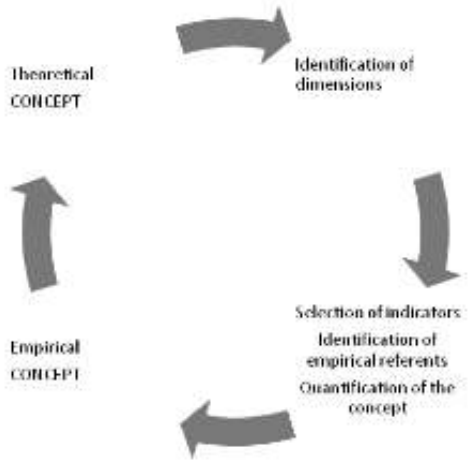
R. J. Herrnstein (1970) proposed a quantitative relationship between response rate (B) and reinforcement rate (Rf): $B = k\,Rf / (Rf_o + Rf)$

where k and Rf_o are constants. Herrnstein proposed that this formula, which he derived from the matching law he had observed in studies of concurrent schedules of reinforcement, should be regarded as a quantification of the law of effect. While the qualitative law of effect may be a tautology, this quantitative version is not.

XI. OPERATIONALIZATION AND QUANTIFICATION

While assessing the effect or impact of law many idea and concept need to be operationalised or quantified. For instance, quantification in terms of translating the ideas into measurable indicators would be necessary to study the social impact of a law. Operationalisation is the process of converting concepts into their empirical referents, or of quantifying concepts for the purpose of measuring their values, such as occurrence, strength and frequency. The basic questions that need to be addressed during the process of operationalisation are:

- What is the concept to be studied?
- What are the dimensions that need to be addressed?
- What are the most appropriate indicators that describe each dimension fully?



XII. TOOLS

To be scientific and objective, impact study must follow the application of certain tools and techniques which would generate the desired data for assessing the impact of law. A brief statement about this facet is undertaken in this section.

XIII. MONITORING & EVALUATION (M & E) FRAMEWORK

The law impact assessment of any kind would broadly require two established techniques: monitoring and evaluation.

Monitoring: The *routine* tracking of the key elements of programme/project performance, usually inputs and outputs, through record-keeping, regular reporting and surveillance systems as well as health facility observation and client surveys.

Evaluation: Is the *episodic* assessment of the change in targeted results that can be attributed to the programme or project/project intervention. Evaluation attempts to ***link*** a particular output or outcome directly to an intervention after a period of time has passed

Causal relationship: At times it is necessary for us to see the impact of law on a situation in its immediate context. The law serves as cause and consequence is seen as effect. The example of this could be whether strict penalty provision discourages ticketless traveling in local trains. The research design for this kind of research is that of experimental model.

Time series analysis: This technique is suitable in the cases where trends are to be studied over a period of time. When the trends are studied in relationship of concerned law or policy, this toll would be useful.

Satisfaction survey: conducting satisfaction survey on the sampled population is a popular way to assess impact of a law. This technique is already acceptable in foreign countries. It gives a geographical representation to the entire population and huge amount of data is generated from these provide the experiences of respondents with regard to the efficacy of a law.

Input-output ratio analysis: This is also known as const benefit analysis. This is a management technique applied mostly in cases where the law is assessed in terms of expenditures being incurred on various aspects of its

implementation and the output being generated f from it. This gives opportunity to rationalize the expenditures on the enforcement of the law.

Performance based indicators analysis: In methodological terms, the impact of law is ascertained in quantitative terms. It is therefore necessary for a researcher to identify the relevant indicators of performance of a law that can be subjected to analysis and research.

What is an indicator? Indicators are measurable variables which are used to measure certain aspects of a complex variable (Example: Social class is measured by means of occupation, housing conditions, transport media, educational level and other indicators). Indicators are a measure that can be used to help describe a situation that exists and to measure changes or trends over a period of time. *Indicators should be: SMART*

Specific

Measurable

Achievable

Relevant and,

Time-bound

XIV. VALIDITY & RELIABILITY

To be objective, a study has to be reliable and valid. This is quintessential requirement of any scientifically conducted research. Joppe (2000) defines reliability as: the extent to which results are consistent over time and an accurate representation of the total population under study is referred to as reliability and if the results of a study can be reproduced under a similar methodology, then the research instrument is considered to be reliable.

Joppe (2000) provides the following explanation of what validity is in quantitative research:

Validity determines whether the research truly measures that which it was intended to measure or how truthful the research results are. In other words, does the research instrument allow you to hit "the bull's eye" of your research object? Researchers generally determine validity by asking a series of questions, and will often look for the answers in the research of others.

XV. WAY FORWARD

While the need to conduct law impact analysis at official and individual level is well accepted, the immediate requirement is to develop expertise in this area. The law academicians need to encourage this research and also try to acquire competence in this area by organizing and undergoing short term courses in legal research methodology. Next, the ministry and law department at state and central level including the Law Commission should not only develop, promote and implement the exercise of law impact analysis, they should also find neutral research agencies and expert and start conducting the impact analysis of laws. It would not be too far fetched to state that tomorrow we may have the 'impact score' of a law.

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THE UNCONVENTIONAL DIMENSIONS OF THE BASIC STRUCTURE DOCTRINE: AN INSIGHT

Sayan Mukherjee*

The aim of this paper is to bring in to focus the expanded perimeters of the Basic Structure doctrine, the most significant Judicial Construct to protect the essence of Constitutionalism in our country. The doctrine was formulated to prevent unrestrained exercise of the power to amend bestowed upon the Parliament by the Constitution. However, through a detailed study of the nature of the doctrine, and also going through the various judicial pronouncements we come to the conclusion that Basic Structure doctrine is not merely applicable for testing the vires of the Constitutional amendments but can also be extrapolated to other arenas.

The paper is divided into three chapters and an epilogue. In the first chapter, an initial introduction to the doctrine and its origins and some critical and essential aspects of the doctrine has been discussed. The second chapter deals with the applicability of the Basic Structure doctrine in the process of law-making. The third chapter deals with the applicability of the doctrine by the court to compel an amendment. These are the areas where the Basic Structure doctrine is yet to find an usage but there are ample scope by which these aspects can be brought under the umbrella of the Basic Structure. This are unconventional dimensions of the doctrine and is a field yet untilled but bears huge significance in establishing

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Constitutionalism in the country in its truest sense.

I. INTRODUCTION: SOME CRITICAL ASPECTS OF THE BASIC STRUCTURE DOCTRINE

This paper seeks to explore the various dimensions of the Basic Structure doctrine enunciated by the Supreme Court in the *Keshavananda Bharati v. State of Kerala*[1]. Initially the doctrine was applicable only for the purpose of amendment to the Constitution. But now, with changing times the horizons of the doctrine has expanded and the doctrine is finding application beyond such limited scopes. As per the doctrine, any Constitutional Amendment that violates 'Basic Structure'[2] of the Constitution is a nullity.[3] According to the Court, an isolated reading of article 368 attributing to it its natural meaning would be incorrect, in spite of the fact that the article imposes no express restrictions on the amending powers.[4] Thus the Court rejecting a literal interpretation of Article 368 read certain implied limitations on the amending power of the Parliament into it. To quote Justice Shelat and Justice Grover,

"*The meaning of the words 'amendment of this Constitution' as used in Article 368 must be such which accords with the true intention of the Constitution makers as ascertainable from the historical background, the preamble, the entire scheme of the Constitution, its structure and framework and the intrinsic evidence in various articles including Article 368. It is neither possible to give a narrow meaning nor can such a wide*

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[1] (1973) 4 SCC 225

[2] It may be noted that even though certain features have been listed as being part of the Basic Structure, no clear and precise definition of what provisions or features of the Constitution constitute the Basic Structure of the Constitution has been provided either in *Keshavananda*'s case or in any subsequent cases. The matter has been left to judicial discretion.

[3] *Supra* n. 1 at p. 292

[4] Reference may be made to the judgment of Chief justice Sikri, at p. 316, who approvingly quoted the English case of *Bidie v. General Accident & Fire Life Insurance Corporation,* (1948) 2 All ER 995, wherein it was held that, "*The first thing one has to, I venture to think, in construing words in a section of an act of Parliament is not to take the words, so to speak, and to attribute to them what is sometimes called their natural or ordinary meaning*."

meaning be given which can enable the amending body to change substantially or entirely the structure and identity of the Constitution."[5]

The Court supplemented with a number of explanations along with Constitutional provisions and instances, where implied limitations have been upheld[6]. The Indian Constitutional history in fact does point towards having implied restrictions on the amending powers. As for example, Articles 54 and 55[7] require a special procedure for amendment, while Article 52[8] and Article 53[9] which are very basic and more integral, may be amended by the simple procedure of amendment. In terms used by Chief justice Sikri, *"One of the inferences that can be drawn is that the Constitution makers never contemplated, or imagined that Article 52 will be altered and there shall not be a President of India."*[10] Besides, the bare text of the Article 368 mentioned only 'amendment'. The apex Court held that where the term should have been used in its widest amplitude, the terms required to have been used were 'amend, alter or repeal'. The use of word amendment alone in Article 368 point towards implied limitations.[11]

This view of the Supreme Court has often been contradicted by the other Judges on a number of grounds. J. Dwivedi opined that within the folds of

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[5] *Supra* note 1 at p. 435

[6] *Ibid.* Per Shelat and Grover, JJ., *"Rule is established beyond cavil that in construing the Constitution of the United States, what is implied is as much a part of the instrument as what is expressed."*

[7] Both dealing with the election of the President.

[8] Article 52 reads: "The President of India.- *There shall be a President of India*"

[9] Article 53 reads; "Executive Power of the Union.- *(1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution.*
(2) Without Prejudice to the generality of the foregoing provision, the Supreme Command of the Defense Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.
(3) Nothing in this Article shall- (a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or any other authority; or
(b) prevent Parliament from conferring by law functions on authorities other than the President."

[10] *Supra* note 1 at p. 315

[11] See Articles 372 and 320(5) of the Constitution.

democracy, the elected representatives must bear the Supreme power. To quote his own words,

"I conceive that it is not for us to make ultimate value choices for the people. The Constitution has not set up a government of the Judges in this country. It has confided the duty of determining paramount norms to Parliament alone. Courts are permitted to make limited value choices within the parameters of the Constitutional value choices. The Court cannot gauge the urgency of an amendment and the danger to the State for the want of it, because all evidence cannot come before it. Parliament on the other hand, is aware of all factors, social, economic, political, financial, national and international pressing for an amendment and is therefore in a better position to decide upon the wisdom and expediency of it."[12]

But one must not forget that in India, it is the Constitution and not any Constitutional body that is supreme. The Court being the custodian of the Constitution, must defend the values propagated by it from the over-ambitiousness of the legislature.[13] Therefore it is under an obligation to invalidate even Constitutional amendments if they violate the Constitutional philosophy.[14] Again, in spite of the fact that the Parliament consists of democratically elected representatives of the people, it is still a majoritarian institution. Thus, if the Parliament is vested with absolute power to amend the Constitution, such amendment may not reflect the will of the nation and can hence be violative of the very basis of the Constitution. For instance, if the legislature in order to appease the vast Hindu majority abrogates

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[12] *Supra* note 1 at p. 946

[13] *Supra* note 1 at p. 451; Per Shelat and Grover, JJ., *"...Under our Constitution none of the three great departments of the State is supreme and it is only the Constitution that is supreme and which provides for a government of laws and not of men..when the Judiciary places a limitation on the amending powers, says Mr. Palkhivala, only as a matter of true construction, the consequence is not that the Judiciary is supreme but that the Constitution is supreme."*

[14] *Supra* note 1 at p. 481; Per Hegde and Mukherjee, JJ. akin to the term *"The Personality of the Constitution"* used.

minority rights by means of Constitutional amendments that would certainly be contrary to our Constitutional philosophy.[15]

Another pertinent objection was that unless power to amend is there, the present Basic Structure, though competent for use now, may become redundant in future and can bind the future generations with stubborn rigidity which they are unwilling to accept.[16] Thus it perplexes us as we ponder upon whether Basic Structure itself is a constant or is it merely reflective of certain basic needs of the time? As J. Beg answers this,

"*My learned Brother Justice Dwivedi has, very aptly, compared the mode of progress visualized by the Constitution as the movement of a Chakra. Such a movement naturally involve that a part of the nation which may have been at the top at one time may move towards the bottom and then come back to the top again.*"[17]

Thus, today what seems sacrosanct as the Basic Structure and may subsequently be excluded from the status by turning of the Constitutional

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[15] *Supra* note 1 at p. 481; Per Hegde and Mukherjee, JJ., who raised the same issue, *"That apart, our Constitution was framed on the basis of consensus and not on the basis of majority votes. It provides for the protection of the minorities. If the majority opinion is taken as the guiding factor then the guarantees given to the minorities may become valueless."*

[16] *Supra* note 1 at p. 908 and 909; Per Beg, J. citing ancient Indian text Stated that, "*(1) Anve krita yugay dharmaah tretaayam duaaparey parey anye kali yugey nreenam yuga roopaanusaaratah*

-Parashara

-Manu

(2) anya krita yugey dharma treetaayaama dvapaarey parey anye kali yugey nreenaam yuga roopanusaratah

-Parashara

-Manu

English translation of the sense of the above passages runs as follows: *'The fundamental laws (imposing fundamental duties or conferring fundamental rights) differ from age to age; they are different from the age known as krita from those in the dvaapara age; the fundamental laws of the kali age are different from all previous ages; the laws of each age conform to the distinctive character of that age(yuga roopaa nusaara tah).'*

In other words even our ancient jurists recognized the principle that one generation has no right to tie down the future generations to its own views or laws even on fundamentals.

The fundamentals may be different not merely as between one society and another but also between one Generation and another of the same society or nation."

[17] *Supra* note 1 at p. 909

wheel. Hence, if the Constitutional Basic Structure is construed as the 'Philosophy of the Constitution' then this entire question of future generation being bound down would not arise[18].

A third contention was raised by Justice A. N. Ray, who emphasized upon the phraseology of the Article 368. According to him, the phrase used in the Article is *'the Constitution shall stand amended'* by virtue of which the amendment has become part of the Constitution and hence outside the jurisdiction of the Court. This contention was not adequately and expressly contradicted by the Court, the judgment makes it clear that an amendment contrary to the Basic Structure is *ultra vires* the Constituent power and any such amendment stands null and void.

From this understanding of the Basic Structure we shall now move towards the other avenues and fields Parliament and also under specific circumstances in allowing the Court to compel amendments to the Constitution.

II. THE BASIC STRUCTURE: APPLICABILITY IN LAW-MAKING

The aim of this chapter is to show that the law-making power of the Parliament under Article 245 is subject to the limitations posed forward by the Basic Structure doctrine. The main line of argument to prove such a hypothetical Statement would be the argument used by Mr. Shanti Bhushan in *Indira Gandhi v. Raj Narain*[19]. Now whether the Law-making power of the Parliament is subject to such limitations have perplexed the Indian jurists since a long time.[20] The power of legislation has been made subject to the

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[18] *Supra* note 14

[19] 1975 (Supp) SCC 1. In this case, the specific issue being dealt with in this section was addressed by the Court, with the final holding that the law making power is not subject to the basic structure.

[20] Reference can be made to the cases of *Indira Nehru Gandhi v. Raj Narain*, 1975 (Supp) SCC 1; *Ismail Faruqui v. Union of India*, (1994) 6 SCC 360; *V. C. Shukla v. Delhi Administration*, (1980) 2 SCC 665*; Minerva Mills v. Union of India*, (1986) 4 SCC 222; *G. C. Kanungo v. State of Orissa*, (1995) 5 SCC 96.

'provisions of the Constitution'[21], but can an implied limitation also be attributed to the same?

The first question to be answered in this respect is that whether it is possible for a law to violate the basic structure without running contrary to the Constitution. Here, the case of *Indira Gandhi v. Raj Narain* provides a fine example. An explanation was added to Section 77 of the Representation of the People's Act, 1951, by virtue of which expenditure incurred by the political party in connection with the election of a candidate would not be deemed to be expenditure incurred or authorized by the candidate or his election agent. This gives political parties to spend enormous amount on elections without any limitations. This though not forbidden by any express provision of the Constitution, is surely contrary to 'democracy'[22] and is thus in contradiction with the Basic Structure.[23] This is a perfect illustration how a law can contravene the Basic Structure without being in opposition to any express provision of the Constitution. Another example can be a law contrary to 'Separation of Powers' which is nowhere expressly provided in the Constitution. Are these laws constitutionally valid or invalid?

The apex Court in *Indira Gandhi*'s case answers in negative[24]. Chief justice Ray[25], J. Mathew and Justice Chandrachud held that the law-making power of the Parliament was not subject to Basic Structure. As Stated by J. Mathews,

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[21] Article 245 of the Constitution of India.

[22] In such circumstance, the Government established would not reflect the true will of the people, but would become the sole repository of the moneyed class, and this is against democratic principles.

[23] It may be noted that 'democracy' has been considered as a basic structure of the Constitution in various cases, including *Indira Gandhi v. Raj Narain* cited in *Supra* note 19

[24] However it may be noted that to some extent the position has been changed in the cases of *V. C. Shukla v. Delhi Administration* and *G. C. Kanungo v. State of Orissa,* cited in supra note 20

[25] It may be noted that though Chief Justice Ray was unable to fully appreciate the ratio of *Keshavananda*'s case, and Stated " *the theory of implied limitations on the power of amendment of the Constitution has been rejected by seven judges in* Keshavananda Bharati*'s case*."

"*I think the inhibition to destroy or damage the basic structure by an amendment of the Constitution flows from the limitation of the power of amendment under Article 368 read into it by the majority in Bharati's case because of their assumption that there are certain fundamental features in the Constitution which its makers intended to remain there in perpetuity. But I do not find any such inhibitions so far as the power of Parliament or State Legislatures to pass laws is concerned.*"[26]

But according to Mr. Shanti Bhushan it was *paradoxical that the higher power should be subject to a limitation which will not operate on the lower power*. The contention was negated by J. Chandrachud who Stated that certain limitations do operate upon the higher power because it is a higher power. A Constitutional amendment has to be passed by a special majority and certain amendments have to be ratified by the legislatures of not less than one-half of the States as provided by Article 368(2). An ordinary legislation can be passed by a simple majority.[27]

It is most humbly submitted in this context that the Counter argument provided by Justice Chandrachud is flawed. The honorable Justice has omitted to consider the fact that the sphere of operation of the two powers or the effects of the two powers are not the same and hence the analogy hardly holds water. While the power to amend the Constitution is meant to bring about a change in the Constitution, ordinary legislative power is meant to function within the contours of the Constitution. This in itself accords to it a status lower than that of the amending power. Thus Mr. Shanti Bhushan's contention in this context seems more valid.[28]

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[26] *Supra* note 19 at p. 138

[27] *Supra* note 19 at p. 262

[28] *Supra* note 1 at p. 236; Per Beg, J.(who seems to have appreciated this point), "*I mention this here in answer to one of the question set out much earlier: Does the 'Basic Structure' of the Constitution test only validity of a Constitutional amendment or also ordinary laws? I think it does both because ordinary law making itself cannot go beyond the range of constituent powers*."

The second argument posed forward by the apex Court to restrict the scope of the Basic Structure doctrine was that it is a vague and indefinable concept. It was Stated that: "*The concept of a Basic Structure as brooding omnipresence in the sky apart from specific provisions of the Constitution constituting it, is too vague and indefinite to provide a yardstick to determine the validity of an ordinary law.*"[29]

This argument is unacceptable in the light of the *Keshavananda Bharati*'s case. If the concept is not too vague and undefined for the constituent power of the Parliament to be limited by it, the same should also be applicable to the law making power of the Parliament. Chief Justice Sikri aptly quoted Lord Reid[30] in *Keshavananda Bharati*'s case: "*I would regard these as tainted by perennial fallacy that because something cannot be cut and dried or nicely weighed or measured, therefore it does not exist.*"[31] But in the *Indira Gandhi*'s case, the same vagueness was used to negate its operation on the law-making power of the Parliament.

Another argument on behalf of the Court was that this would be an encroachment upon the doctrine of separation of powers. To second this, Chief Justice Ray Stated:

"*The legislative entries are the fields of legislation. The pith and substance doctrine has been applied to find out legislative competency, and eliminate encroachment on legislative entries. If the theory of Basic Structure or Basic Feature be applied to legislative measures it will denude the parliament and the State Legislatures of the power of legislation or deprive them of laying down legislative policies. This will be encroachment on the separation of powers.*" [32]

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[29] *Supra* note 19 at p. 141; Per Mathews, Further reference made by C. J. Ray (at p. 61), "*the theory of basic structure or Basic Features is an exercise in imponderables. Basic Structures or Basic Features are indefinable. The legislative entries are the fields of legislation.*"

[30] *Ridge v. Baldwin,* (1964) A. C. 40 at p. 64

[31] *Supra* note 1 at p. 366

[32] *Supra* note 19 at p. 61; Chief Justice Ray went on to further substantiate this stating that, "*the Judiciary, said the Federalist, is beyond the weakest of the three departments of power*". Also see generally, the judgment of J. Ray and J. Dwivedi in *Keshavananda Bharati*'s case.

This contention is untenable in law. It is the duty of the Courts to see that the Legislature does not transgress the powers under its legislative authority.[33] The Judiciary in such circumstances cannot wash its hands of and evade responsibility. In *Supreme Court Advocates on Record Association v. Union of India*[34]*:*

"The Constitution gives unelected judges a power called judicial review under which they may nullify unconstitutional acts of the Executive and of elected representatives of the people assembled in the Parliament and State Legislatures. This conclusion does not suppose that the Judiciary is superior to the legislature. It only supposes that the power of the people embodied in the Constitution is superior to both."[35]

It is indeed difficult to understand how judicial review of legislative enactments in the backdrop of Basic Structure violates the separation of powers and results in overstepping of the judicial authority, where the same is not the case when an enactment is reviewed in the light of Constitutional provisions or when amendments are reviewed in the perspective of the Basic Structure. Perhaps it is the vagueness of the Basic Structure which is the reason behind such a stand. But that has already been refuted earlier in this paper and cannot be allowed to encroach upon the applicability of the doctrine. In the words of Mr. R. Sudarshan:

"*The Court missed another valuable opportunity to enunciate the point that the idea of impersonate rule is inherent in the idea of State…The Court ought to have grasped and elucidated upon the idea of State as a holistic concept. Had it done so it would have become apparent that it is illogical to limit the application of the Basic Structure doctrine only to cases involving*

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[33] The line of argument finds support in the judgment of J. Beg who States that, "*Courts, however, have to test the legality of laws, whether purporting to be original or Constitutional, by the norms laid down by the Constitution.*"

[34] (1998) 4 SCC 409

[35] A. Lakshmikanth, *Basic Structure and Constitutional Amendments: Limitations and Justiciability*, p. 266.(2002)

review of Constitutional amendments. Ordinary laws as well as executive orders that do not violate any particular provisions of the Constitution could nonetheless, have the consequence of undermining an organic unit among the basic principles and norms in the Constitution."[36]

This opinion seems correct. There is no reason to assume that the power to contravene the Basic Structure, while excluded from the constituent power has been introduced through a side-door that is through the law-making power. For example, if prior to the 42nd Amendment Act, the Parliament in exercise of its Constituent powers attempted to insert the word 'Hindu' in the preamble in the place where 'secular' stands now, such a step would not be allowed as secularism was nevertheless a part of the Basic Structure.[37] However, if it was a mere law that was passed declaring India to be a Hindu State, with no repercussions on the rights of the people, this would not be liable to be struck down on any grounds. It fails all tests of logic and seems to be an absurdity.

However, this issue in the Indira Gandhi's case can now be said to have been overruled by *S. R. Bommai* v. *Union of India*.[38] J. Ahmadi held that the Constitutional philosophy is axiomatic with the provisions of the Constitution and aptly remarked:

"the Central Government would not be justified in exercising power under Article 356(1) unless it is shown that the ideology of the political party in power in State is inconsistent with the Constitutional philosophy and, therefore, it is not possible for that party to run the affairs of the State in

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[36] *Sudarshan*, R., *Stateness and Democracy in India's Constitution, India's Living Constitution,* (2002), p. 160

[37] Reference may be made to *S. R. Bommai v. Union of India*, (1994) 3 SCC 1 at p.77 wherein J. Ahmadi had clearly Stated: "*Notwithstanding the fact that the words* 'Socialist' *and* 'Secular' *were added in the preamble of the Constitution in 1976 by the 42nd Amendment Act, the concept of Secularism was very much embedded in our Constitutional philosophy… I am therefore in agreement with the views expressed by my learned colleagues Sawant, Ramaswamy and Reddy, JJ., that secularism is a Basic Feature of our Constitution."*

[38] (1994) 3 SCC 1

accordance with the provisions of the Constitution. It is axiomatic that no State government can function on a program which is destructive of the Constitutional philosophy as such functioning can never be accordance with the provisions of the Constitution."[39] Though this case dealt with the applicability of the Basic Structure doctrine with respect to executive actions and not legislative actions, it may now be said that the scope is extended to legislative enactments as well.[40]

III. THE BASIC STRUCTURE AND COMPULSION TO AMEND

Another very important aspect of the Basic Structure doctrine is its scope of applicability in compelling an amendment to the Constitution. In the light of the mandate under Article 368, which expressly confers such power exclusively to the Parliament[41], it is not possible for the Court to initiate such an amendment. However, if an amendment to the Constitution contravenes the Basic Structure, yet it is still in pursuance with the Constitutional pursuance or in other words, there is conflict within the Basic Structure, can in such a situation, the Court can initiate a minor amendment to the Constitution in order to rescue the Constitution from such a crisis?

An illustration would help to understand the matter under discussion. Let's assume that Article 37 was missing from the Constitution and Article 32 contains a clause (5) that empowered the Court to enforce the Part IV if the State has resources for the same. Obviously, the Judiciary is not the appropriate body to determine the ability of the State to enforce the DPSPs. With a view to addressing this fallacy, an amendment is initiated by virtue of which 32(5) is to be repealed and Article 37 is to be added. In such a situation the Court has the following options: it can completely strike down

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[39] *Ibid*

[40] *Ismail Faruqui*'s case and *G. C. Kanungo's* case cited in *Supra* n. 20

[41] *Supra* note 1 at p. 508; Per Hegde & Mukherjee, JJ.: *"This exclusive conferment of amending power on the Parliament is one of the Basic Features of the Constitution…"*

the amendment[42], which has to be in good purpose[43] or with some suitable interpretation of the Constitution, it could be allowed to make a minor change and permit the amendment to stand. The change may be for example, that the Article 37 must constitute a body or an authority for implementing the Directive Principles.

The first argument to prove this contention would be the oath taken by the judges of the Supreme Court and the High Courts. By that oath these judges are supposed to *bear true faith and allegiance to the Constitution of India as by law established* and further to *uphold the Constitution and the laws*[44]. Bearing true faith and allegiance must also include upholding the philosophy of the Constitution[45], or the Basic Structure. *Salus Populi est Suprema Lex,* the good of the mass of the citizens of our country is a supreme law embedded in our Constitution[46].

If the Court upholds the amendment by the Parliament in this case, then that will go contrary to the judge's oath to uphold the Basic structure of the Constitution. The enforcement of the Directive Principles being a part of the Basic Structure, any amendment to infringe upon such power should be struck down. The Court in such a case must compel such an amendment to uphold the Constitution.

As discussed earlier, another option open to the Court is to strike the amendment on the ground of violating the Basic Structure.[47] But again that would be contrary to the judge's oath. The judge according to the maxim *'Salus Populi est Suprema Lex',* is supposed to act for the good of the

[42] For restricting the power of the Judiciary to enforce the Directive Principles, which is a part of the Basic Structure.

[43] That is to mitigate the problems arising out of the Court, with its lack of expertise, attempting to assess the capacity of the State in fulfilling the mandate of the Directive Principles.

[44] The oaths have been provided in the third schedule of the Constitution.

[45] It may be noted that the Basic structure of the Constitution has been referred by Justice Hegde and Justice Mukherjee in *Keshavananda*'s case as 'personality of the Constitution'.

[46] *Supra* note 1 at p. 901; Per Beg, J.: *"In light of this the same could be said to be a part of our Constitutional Basic Structure."*

[47] That is due to the bar it puts upon the enforceability of the DPSPs.

citizens.[48] Thus it is indeed a dilemmatic situation for the judge.So, the solution can be reached if the Court is permitted to compel to bring some modification in the amendment, in order to balance the scale of justice. The immense power that is granted under Article 142 can be invoked and such power to compel such modification in the amendment can be included.

But this is, to a great extent against the doctrine of Separation of power. According to Professor Cox:

"If one arm of the Government cannot or will not solve an insistent problem, the pressure falls upon another. Constitutional adjudication must recognize that the peculiar nature of the Court's business gives it a governmental function that cannot be perfectly discharged without the simple inquiry which decision will be best for the country? Much of the activism of the warren Court, not only in reapportionment but also in criminal law and race relations, was the consequence of the neglect of other agencies of the Government."[49]

Hence we can infer that the doctrine of Separation of Power is not as sacrosanct as that it cannot be contravened if there is a real Constitutional crisis. Such intrusion of one organ into the other is not to establish superiority of one over the other but to establish the Constitution in its true sense. If we study the case of *Kihota Hollohon v. Zachillu*[50], we will find that the main question was regarding the validity of bar on judicial review put by virtue of Paragraph six and Paragraph seven of the Tenth Schedule[51], which deals with anti-defection law. Judicial Review being part of the Basic Structure, any bar upon it would be void, furthermore the procedure under Article 368(2) not having been followed, the powers of the Supreme Court and the High Court could not be restricted. But the Court also had to

[48] This too, is a part of the Constitutional Basic Structure.
[49] *Supra* note 35 at p. 268
[50] AIR 1993 SC 412
[51] Paragraph 6 made the decision of the Speaker regarding the disqualification final; Paragraph 7 barred the jurisdiction of the Courts with respect to the matter of disqualification.

consider the issue of Separation of Power[52], which required that the judicial intervention in such matters remain bare minimum. The Court after balancing the two struck down para seven and reinterpreted para six in order to reach a limited power of the review of the Speaker's decision. It was held that the finality clause in para six was not an absolute bar on judicial review of the Speaker's decision; it merely limited the review of the same to grounds like violations of Constitutional mandates, *mala fides*, non compliance with natural justice etc.[53] Though the Court did not make any express modification in there, the effect of such an interpretation was not different as it what it would have been, had the the Court compelled a modification.

IV. EPILOGUE

"Constitutional Powers are often unlimited in form but limited in practice."[54]. A power cannot be exercised just because it exists. Similarly, just because a power is not exercised does not imply its non-existence. This is very well applicable to the subject-matter of this paper. The powers dealt therein are indeed utilized only sparingly owing to their extreme and volatile nature.

The aim of this paper was to bring to focus the expanded perimeters of the Basic Structure the doctrine. Hence some arguments may have toed the following principle of Schopenhauer: "*we do not want a thing because we have sound reasons for it; we find a reason for it because we want it.*"[55] Hence these arguments must be analyzed and considered in their context and relevance in today's times.

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[52] This too, have been part of the Basic structure; see the judgment of C. J. Sikri in the *Keshavananda Bharati*'s case.
[53] *Supra* note 35 at p. 451
[54] *Dhawan,* R. *Privilege Unlimited*, The Hindu, November 14, 2003
[55] *Supra* note 1 at p. 947; Per J. Dwivedi.

NUCLEAR DAMAGE AND CIVIL LIABILITY: A CRITIQUE IN THE LIGHT OF COMPENSATORY JURISPRUDENCE

Mr. Balasaheb Pandhare

The liability for nuclear damage was recently came in to focus due to the Tsunami attack in the Japan and its impact on the nuclear power plants of the Fukushima. On other hand the increasing protest against the nuclear power plant of India which was going to be installed in Jaitapur in the State of Maharashtra. The protestors are worried about the consequences of the nuclear radiation and its harmful effects on the nature and living creature, therefore it is crying need to strengthen the compensatory jurisprudence for the future generations in case of any upcoming nuclear disasters. Indian government now wants to pass a special law to provide foreign companies s with liability protection in case of nuclear accidents. Hence the civil liability for nuclear damage Bill 2010 was introduced in the Indian parliament in the year 2010. Even prior to the preparation of present bill there are certain other legislations and judicial decisions which had taken care of the nuclear damage and liability for the compensation. This article analyses the shortcoming of the bill as well as the previous mistakes committed by the government while dealing with remedial setup to the victims of the nuclear disasters.

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I. INTRODUCTION

The liability for nuclear damage was recently came in to focus due to the earthquake in the Japan and its impact on the nuclear power plants installed in the Fukushima as well as the increasing opposition to the major nuclear power plant of India which going to be installed in to Jaitapur of the Maharashtra. The protestors are worried about the consequences of the nuclear radiation and its harmful effects on the nature and living creature therefore in the light of this it is desirable to discuss the remedial setup formed by the Indian Government for the future generations in case of any upcoming nuclear disasters,

A much debated civil nuclear deal of the Indian government with the US was came in to effect in the year 2008 by this deal the US Congress have imposed its stringent conditions on the Indian government by not giving any role to play to the India by applying its Nuclear Cooperation Approval and Non-Proliferation Enhancement Act.

Indian government now wants to pass a special law to provide foreign companies s with liability protection in case of nuclear accidents. In this context it is important to remember that the promises on which the deal was sold to the country have been belied, one by one. For example, Prime Minister Manmohan Singh had exulted in 2008 that the deal "marks the end ... of the technology-denial regime against India." Yet, just last month, his Defense Minister conveyed to U.S. Defense Secretary Robert Gates India's "concerns regarding denial of export licenses for various defense-related requirements of the armed forces" and other "anomalous" technology restrictions.

II. HISTORICAL PERSPECTIVE - BHOPAL GAS DISASTER

On the midnight of 2nd December 1984, there was a leak of the highly noxious gas (Methyl Iso-Cyanide) from the plant of Union Carbide India Limited,

which resulted in a large number of causalities. The gas also resulted in deformities and many kinds of diseases. On 8th April, 1985 Union of India filed a complaint before the U.S. District Court, Southern District of New York. Justice Keenan passed an order on 12th May, 1986 allowing the application of UCC on forum non convenience but the UCC was held to be amenable to jurisdiction of the Indian courts. It was only on 17th December, 1987, that the District Judge of Bhopal ordered an interim relief amounting to Rs. 350 crores. The Madhya Pradesh High Court on 4th April, 1988 delivered its judgment and passed an order modifying the order of the District Judge, and thereby granting an interim relief of Rs. 250 crores.

The UCC appealed before the Supreme Court against this interim order. A Constitution Bench of the Supreme Court, on 14th February 1989, held that due to "the enormity of human suffering occasioned by the Bhopal Gas disaster and the pressing urgency to provide immediate and substantial relief to victims of the disaster" there was a need for the "overall settlement between the parties covering all litigations, claims, rights and liabilities related to and arising out of the disaster" It therefore ordered the payment of the sum of U.S. Dollars 470 million (which upon immediate payment and with interest over a reasonable period, pending actual distribution amongst the claimants, would aggregate very nearly to 500 million US dollars or its rupee equivalent of approximately Rs. 750/- crores) by the UCC on the basis of the offer and the counter offer by the parties. All criminal proceedings related to and arising out of the disaster were also quashed.

This settlement order was challenged in the case *Union Carbide Corporation v. Union of India (UOI) and Ors. Jana Swasthya Kendra, Bhopal, M.P. Zahreeli Gas Kand Sangharsh Morcha, Bhopal*[1]. The court took into consideration the delay in the judicial proceedings and the provision of relief to the victims, which had resulted in great distress and agony. The court

[1] *Union Carbide Corporation v. Union of India (UOI) and Ors. Jana Swasthya Kendra, Bhopal, M.P. Zahreeli Gas Kand Sangharsh Morcha, Bhopal* , (1989) 3 SCC 38

further observed that the compensation amount that was decided was according to the data provided by the plaintiff (Union of India) and so there was no reason to disbelieve it. The court considered the settlement to be just and fair.

However the major critique of the judgement is that the court had considered only the visible damage and injuries resulted to the human beings and had paved zero assistance towards the nature i.e. damages to the environment and the harmful effects of the gas on future generations and victims whose symptoms were not visible then but they developed complications later on. The court also observed that the decision in *M.C. Mehta v. Union of India*[2] was influenced by the Bhopal Disaster and the principle of absolute liability was laid down for this case even before it came before the Supreme Court; hence the court did not apply the principle. Hence we see how the Bhopal Gas Disaster was a failure of the Indian judicial system to deliver justice and that the opportunity given to it by Justice Keenan, to stand tall before the world was wasted.

III. INDUSTRIAL DISASTERS OF OTHER COUNTRIES: A COMPARATIVE ANALYSIS

THE THREE MILE ISLAND ACCIDENT

The accident occurred on 28 March 1979 at the Three Mile Island Unit 2 nuclear power plant near Middletown, Pennsylvania as equipment malfunctions, design-related problems and worker errors led to the partial meltdown of the core of the reactor[3] The estimate that was brought out projected a cost of US $ 1.034 billion and the cleanup should have been completed by 1986, but it took 14 years for the total cleanup and 2.23 million gallons of water had been processed only to get it rid off the radioactive

[2] *M.C. Mehta v. Union of India* (1987) 1 SCR 819
[3] US Nuclear Regulatory Commission (2009) " Backgrounder on the Three Mile Island Accident"

substance. Thus we see how long it takes to overcome the effects of a nuclear disaster and the cost which is incurred by the damage caused thereby.

CHERNOBYL DISASTER

On 26 April 1986, the worst nuclear power reactor disaster occurred in Ukraine, about 20 km south of the border with Belarus. It resulted in the release of large amounts of radioactive substances being released. In around 36 hours of the accident 45,000 inhabitants of Pripyat who lived in a 4 km radius of the site of incident were evacuated in buses. Till today the town remains uninhabited. About 1,30,000 people from the 76 settlements living within a radius of 30 km in the area near the accident site had to be evacuated till the 5 May 1986. More than 4000 thyroid cancer cases were detected in children and adolescents (0–18 years) diagnosed in 1992-2002 in Belarus, Russia and Ukraine.[4]

IV. LEGISLATIVE FRAMEWORK IN INDIA: THE CONSTITUTIONAL POSITION

The constitution of India envisages for socio. Economic and political justice[5] for the citizens, being the welfare state it has to carry out certain measures for the advancement of the living of the people but at the same time being the guardian of the people it has to take care of the community by providing compensatory relief for the people in case of any accidental hazards which take place due to the activities conducted by the state. Constitution of India is a public law which governs the relations between the private individual and state. It confers certain fundamental rights upon the peoples which are enforceable against the action of state among those the most important is right to life and personal liberty. It provides that no person shall be deprived of his life or liberty except according to the procedure established by law. Theory of compensatory jurisprudence had been evolved by the supreme

[4] http://www.chernobyl.info/index.php?userhash=564160&navID=12&lID=2, viewed on 27 May 2011.

[5] Preamble of the constitution of india

court of India by giving liberal interpretation to Article 21 and had included every facet of life under the umbrella of Article 21. Such as in *Bhagalpur blinding case*[6] the question was arose before the supreme court that whether the court can award compensation to one who may have unduly suffered detention or bodily harms at the hands of the state and whether the victim can move a writ petition for this purpose rather than take recourse to an ordinary civil suit. Bhagwati justice ordered the state to meet the expenses of housing these men in a blind home in Delhi. From this judgement of the court the journey of compensatory jurisprudence started. Even thereafter in *Rudual shah v. State of Bihar*[7] the Supreme Court in writ petition U/A 32 awarded Rs 35,000 as compensation against the state of Bihar to the petitioner because he was kept in jail for 14 years after he had acquitted by the criminal court. Not only in the criminal justice system but also in some other domains the compensatory jurisprudence had marked its significance. Like quality of life[8] right to livelihood[9] slum dwellers [10]hawkers[11] medical care[12] education[13] sexual harassment[14] environment[15] etc.

Apart from fundamental rights there are certain directives which are given by the constitution to the state as a guiding line and spirit for framing the governmental policies. Though these directives principles are not enforceable in the court of law but they are very basic for the governance of

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[6] *Khatri* v. S*tate of Bihar* AIR 1981 SC 928

[7] *Rudual shah v. State of Bihar* AIR 1983 SC 1086

[8] *Francis Coralie* v. *Administrator, Union Territory of Delhi* AIR 1981 SC 746, *Chameli Singh* v. *State of Utter Pradesh* AIR 1996 SC 1051, *CERC* v. *Union of India* AIR 1995 SC 922

[9] *Olga Tellis* v. *Bombay Munciple Corporation* AIR 1986 SC 180

[10] *Ahmedabad Munciple Corporation* v. *Nawab Khan Gulab Khan* AIR 1997 SC 152

[11] *Sodan Singh* v. *New Delhi Muncipole Corporation* AIR 1989 SC 1988

[12] *Permanand Katara* v. *Union of India* AIR 1989 SC 2039

[13] *Mohini Jain* v. *State of Karnataka* AIR1992 SC 1858, *Unni Krishanan* v. *State of Andhra Pradesh* AIR 1993 SC 2178

[14] *Vishakah* v. *State of Rajasthan* AIR 1997 SC 3011, *Chirman Central railway Board* v. *Chandrima das* AIR 2000 SC 988, *Bodhisattawa Gautum* v. *Subhra chakraborty* AIR 1996 SC 922

[15] *Subhash Kumar* v. *State of Bihar* AIR 1991 SC 420, *A.P. Pollution Control Board* v. *M. V. Naidu* AIR 1999 SC 812 *M. C. Mehat* v. *Union of India* AIR 1997 SC 734, *M.C. Mehta* v. *Kamal Nath* 2000 (6) SCC 213

the country.[16] Among all Article 47 imposes a positive duty on the state to raise the level of nutrition, the standard of living and to improve public health. It makes it primary duty of the state. Article 48-A imposes a duty on the state to protect and improve the environment and safeguard forests and wildlife. Even Part IV A of the constitution confers certain fundamental duties on the citizens the most important duties in this context are to protect and improve the natural environment[17] to develop the scientific tamper and spirit of inquiry[18] to safeguard public property[19] etc

A mere perusal of these provisions of the Constitution leads us to the conclusion that environment and human life hold great importance in the Constitution. A conjoint reading of the Articles shows that it is the duty of the state to protect human life and the environment as they are inseparable for a dignified and complete life.

V. ENVIRONMENT PROTECTION ACT, 1986

The aims and objectives of the Environment Protection Act provide that the Act was brought into force in order to implement the decisions taken in the Stockholm Conference in 1972. It says that the aim of the law is to fill the gaps in the existing laws and to provide control mechanisms against slow, insidious build up of hazardous substances.

This definition of Environment[20] makes it very clear that everything around us constitutes our environment and thereby in the light of this definition, the provisions of the Act seek to protect the Environment. The definition of 'hazardous substances' as given in Section 2(e) is that it means any substance which due its chemical or physio-chemical properties is liable to cause harm

[16] Article 37 Of The Constitution Of India
[17] Article 51A (g) of the Constitution of India
[18] *Ibid* Art. 51 A (h)
[19] *Ibid* Art. 51 A (i)
[20] Section 2(a) of the Act provides that 'environment' includes water, air and land, and the inter-relationship that exists among them and between them and human beings, other living creatures, plants, micro-organisms and property.

to human beings or other components of the environment. This shows the concern of the legislature to protect the environment. It has included all substances which may cause harm in the ambit of hazardous substances. Section 8 of the Act says that no person shall handle or cause to be handled any hazardous substance without complying with all the safeguards and the procedure which is prescribed. Hence the Act seeks to prevent any damage being caused to the environment, especially by hazardous substances, and has widened the scope of the term 'environment'.

VI. ATOMIC ENERGY ACT, 1962

The Atomic Energy Act and the Rules, as of now, permit only the Central Government to do certain acts relating to the use of radioactive substances and their production and the production of atomic energy.[21] It would be relevant here to quote Section 3 of the Act confers power on the Central government in relation with the atomic energy.[22]

Similarly the Sub-rule (2) of Rule 1 of the Atomic Energy (Factories) Rules, 1996, specifically provides that the Rules shall apply only to all factories owned by the Central Government and engaged in carrying out the purposes of the Atomic Energy Act, 1962.

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[21] Section 3(a), Atomic Energy Act 1962.

[22] Subject to the provisions of this Act, Central Government shall have power -

(a) to produce, develop, use and dispose of atomic energy either by itself or through any authority or Corporation established by it or a Government company and carry out research into any matters connected therewith;

(b) to manufacture or otherwise produce any prescribed or radioactive substance and any articles which in its opinion are, or are likely to be, required for, or in connection with, the production, development or use of atomic energy or such research as aforesaid and to dispose of such described or radioactive substance or any articles manufactured or otherwise produced.

(bb) (i) to buy or otherwise acquire, store and transport any prescribed or radioactive substance and any articles which in its opinion are, or are likely to be, required for, or in connection with, the production, development or use of atomic energy; and

(ii)to dispose of such prescribed or radioactive substance or any articles bought or otherwise acquired by it either by itself or through any authority or corporation established by it, or by a Government company;

(f) to provide for the production and supply of electricity from atomic energy and for taking measures conducive to such production and supply and for all matters incidental thereto either by itself or through any authority or corporation established by it or a Government Company;

Hence we see that the Act and the Rules in clear terms lay down that only the Central Government has the power to use radioactive substances in industries for the purposes of mining or power generation. Private companies had been intentionally excluded by the legislature. We can understand that this had been done because of two reasons. Firstly, placing a sensitive substance like radioactive substance in the hands of private persons could lead to dangerous consequences if such persons are negligent. Secondly, for security reasons it is important that the Government, who is directly responsible to the people of the country, should bear the responsibility of protecting the radioactive substances from falling into wrong hands and should take appropriate measure for the generation of atomic power. Also information which may sometimes be vital for country's defence should not be leaked to private parties and hence this legislation was in the interest of the country and its people.

VII. THE CIVIL LIABILITY FOR NUCLEAR DAMAGE BILL, 2010

The object of the bill is to provide for civil liability for nuclear damage, appointment of claims Commissioner, and establishment of Nuclear Damage Claims Commission and for matters connected therewith or incidental thereof. The Civil Liability for Nuclear Accidents Bill, 2010, has been a bone of contention for some time. The Left parties, Bharatiya Janta Party (BJP) and others have been opposing it. Let us take a look at the provisions of the Bill which are in contravention of the well established principles of national as well as international law by the provisions of this Bill. The bill interalia provides for imposition of civil liability for nuclear damage[23], clause 3 of the bill empowers to the atomic energy regulatory

[23] **4.** (*1*) The operator of the nuclear installation shall be liable for nuclear damage caused by a nuclear incident —

(*a*) in that nuclear installation; or

(*b*) involving nuclear material coming from, or originating in, that nuclear installation and occurring before —

(*i*) the liability for nuclear incident involving such nuclear material has been assumed, pursuant to a written agreement, by another operator; or

board to notify the nuclear incident. At the same time clause 5 of the bill provides certain exceptions in which operators are not liable for the nuclear damage such as a grave natural disaster of an exceptional character; or an act of armed conflict, hostility, civil war, insurrection or terrorism, this clause goes counter to the basic principle evolved by the Indian supreme court i.e. principle of absolute liability[24].

Clause 6 is the most controversial provision of the Bill. It fixes the maximum amount of liability of the Government of India as well as the operator in case of any nuclear incident. The clause fixes a cap on the liability of the operator at Rupees 500 Crores and maximum total liability arising out of any incident has been fixed at the Rupee equivalent of 300 million Special Drawing Rights. The Clause also provides that the amount of liability shall not include any interest or cost of proceedings. It also empowers the Central Government to decrease the maximum liability of any operator to Rupees 100 Crores.

(*ii*) another operator has taken charge of such nuclear material; or

(*iii*) the person duly authorised to operate a nuclear reactor has taken charge of the nuclear material intended to be used in that reactor with which means of transport is equipped for use as a source of power, whether for propulsion thereof or for any other purpose; or

(*iv*) such nuclear material has been unloaded from the means of transport by which it was sent to a person within the territory of a foreign State; or

(*c*) involving nuclear material sent to that nuclear installation and occurring after—

(*i*) the liability for nuclear incident involving such nuclear material has been transferred to that operator, pursuant to a written agreement, by the operator of another nuclear installation; or

(*ii*) that operator has taken charge of such nuclear material; or

(*iii*) that operator has taken charge of such nuclear material from a person operating a nuclear reactor with which a means of transport is equipped for use as a source of power, whether for propulsion thereof or for any other purpose; or

(*iv*) such nuclear material has been loaded, with the written consent of that operator, on the means of transport by which it is to be carried from the territory of a foreign State.

(*2*) Where more than one operator is liable for nuclear damage, the liability of the operators so involved shall, in so far as the damage attributable to each operator is not separable, be joint and several: Provided that the total liability of such operators shall not exceed the extent of liability specified under sub-section (*2*) of section 6.

[24] See infra note 30

Clause 7 provides for responsibility and liability of the Central Government.[25] Clause 14 provides for the *locus standi,* that the person who has been injured or whose property has been damaged or their legal representatives or their duly authorised agent may make an application. Here there is no provision for the Government to make an application on behalf of the victims. Clause 15 provides that the application should be made in the prescribed form and within three years (subject to the limitation under Clause 18) of discovering the damage caused. Clause 31 of the Bill makes a similar provision for the procedure before the Nuclear Damage Claims Commission. Clause 16(5) provides for the finality of the orders of the Claims Commissioner. Clause 18 is another most debated provision of the Bill. It lays down a limitation period of 10 years, from the date of incident, for the right to claim compensation for a nuclear damage. Clause 35 imposes a bar on the jurisdiction of the Civil Courts to entertain civil suits or proceedings of any matter which the authorities under the Act are empowered to adjudicate upon. Clause 45 empowers the Central Government to exempt any nuclear installation from the application of this Act, if having regard to the quantity of the nuclear material it is of the opinion that the risk is insignificant.

This Bill is generally being looked upon as a continuum of that process, allegedly, in order to ensure a "level playing field" for the American enterprises – to let them have a significant share of the cake[26], the Indian nuclear market – a part payback for the American generosity bestowed upon India, for its very own reasons though. The move had, however, been first conceived by the then NDA government way back in 1999[27].

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[25]The Central Government has been made liable for-

1. any amount over and above the liability of the operator as specified in the Clause 6(2),
2. entire liability arising out of any installation owned by it and
3. liability that arises out of an incident which is effected by the causes mentioned in Clause 5(1), i.e., a grave natural disaster or acts of terrorism, civil war, armed conflict, hostility or insurrection.

[26]http://indiacurrentaffairs.org/civil-nuclear-liability-bill-prefering-interests-of-us-companies-over-indian-people

[27]http://www.business-standard.com/india/news//govt-open-to-raising-nuclear-liability-cap//388512

VIII. INTERNATIONAL CONVENTIONS ON NUCLEAR LIABILITY

In wake of rapid growth of the nuclear industry, a special international regime for nuclear third party liability was necessary since ordinary common law is not well suited to deal with the particular problems in this field. Therefore international community had to come up with an international instrument to provide for a uniform system for the liability arising out of nuclear accidents. Hence first of these was the Paris Convention.

IX. VIENNA CONVENTION ON CIVIL LIABILITY FOR NUCLEAR DAMAGE, 1963

The Vienna Convention is in essence the predecessor of Convention on Supplementary Compensation. Article IV (1) provides for absolute liability of the operator. Article V (1) provides that liability of the operator shall not be less than US $ 5 million[28]. But the Convention was amended by the Protocol to Vienna Convention on Civil Liability for Nuclear Damage, 1997 and the amended document provides that the Installation State may limit the liability of the operator to not less than 300 million SDRs or to not less than 150 million SDRs if the State is willing to pay the difference.[29] Thereby the Convention seeks to impose absolute liability on the operator for all damage caused by the nuclear incident. Article VA further provides that interest and costs shall be awarded in addition to the aforesaid amount. Article VI (1)(a) provides for limitation period. The period has been prescribed as 30 years for loss of life and personal injury and 10 years for any other damage. Article VI (1)(b) provides that if the insurance agreement of the operator covers a longer period then that period shall constitute the limitation.

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[28]Article V(3).The United States dollar referred to in this Convention is a unit of account equivalent to the value of the United States dollar in terms of gold on 29 April 1963, that is to say US $35 per one troy ounce of fine gold.

[29]International Atomic Energy Agency,(2007, Vienna), "The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage- Explanatory Texts", IAEA International Law Series No. 3, [STI/PUB/1279] (2007) [hereinafter Explanatory Texts] available at http://www-pub.iaea.org/MTCD/publications/PDF/Pub1279_web.pdf, viewed on 30/5/2011

X. CONVENTION ON SUPPLEMENTARY COMPENSATION, 1997 (CSC)

Article III of the CSC provides that the contracting party shall ensure availability of at least 300 million SDRs or a greater amount prior to any nuclear incident. The Bill seeks to limit the maximum liability at the minimum amount specified in the convention. The CSC does not limit the liability of the operator. It is the Government of India which seeks to limit it at a meagre amount of Rs. 500 Crores.

The CSC provides for absolute liability of the operator[30] and also that the installation state may provide for liability of the operator in case damage is caused by a grave natural disaster of exceptional character[31]. But the Bill exempts the operators from any liability in such a scenario. As regards the period of limitation, the CSC provides that it shall be 10 years but if the law of the installation state prescribes a longer duration that shall be valid[32]. Our Government is being callous in ignoring these provisions and making law only to favour the foreign players.

Article XX of the CSC provides that the Convention shall come into force on the ninetieth day following the date on which at least 5 contracting states with a minimum of 400,000 units of installed nuclear capacity have submitted their relevant documents with the depository. Hence this clause makes this convention ineffective as of now. The Indian Government has been harping on the point that we shall be able to access international funds after the passage of the Bill but it is not so as the CSC is still not in force.

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[30] Article 3(3), Annex, Convention on Supplementary Compensation, 1997. Hereinafter referred as Annex. See also Explanatory Texts, Supra, Sections 1.3.1 and 3.3.2

[31] Article 3(5)(b

[32] Article 9(1)

XI. PARIS CONVENTION ON NUCLEAR THIRD PARTY LIABILITY, 1960

The drafters of the Paris Convention set out to provide adequate compensation to the public for damage resulting from a nuclear accident and to ensure that the growth of the nuclear industry would not be hindered by bearing an intolerable burden of liability.[33] With this in mind the Paris Convention limited the liability of the operators and the limitation period was kept as low as possible. The main highlight of the Convention is that the liability of the operator is "strict", as opposed to general tort law which is based on fault or negligence.[34] Thus the nuclear installation operators were held liable, regardless of whether fault could be established. The Convention kept the maximum liability of a nuclear installation operator at SDR 15 million and the minimum liability at SDR 5 million.[35] This low level of liability is worth criticism and most of the States have not adhered to this. The Convention made it mandatory for the operators to have insurance for an amount equal to that of their liability.[36] It also provides for a limitation period of 10 years for all claims arising out of the nuclear accident.[37]

XII. JUDICIAL POSITION IN INDIA

The Indian Judiciary has from time to time laid down guidelines and has evolved principles in order to protect the environment from the scientific and technological development made by the human being In order to understand the evolution of law in India, first let us study the case of *Rylands v. Fletcher*[38]. The House of Lords in this case evolved the principle that "a person who for his own purposes being on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his

[33] Available at http://www.nea.fr/law/nlparis_conv.html, viewed on 30/5/2011
[34] *Ibid*
[35] Article 7
[36] Article 10
[37] Article 8
[38] *Rylands v. Fletcher* , [1868] UKHL 1

peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape." This rule laid down a principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. This rule applies only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority.

Therefore this rule laid down in this decision was found inadequate by the Supreme Court of India in *M.C. Mehta v. Union of India*[39]. The court evolved the principle of absolute liability as it said that new principles were necessary to be evolved to deal with problems arising in a highly industrialised economy. The Court therefore held that any enterprise or industry which is engaged in a hazardous or inherently dangerous activity posing a potential threat to the health and safety of the persons working in the industry and residing in the surrounding areas, owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The court further held that the enterprise should take all possible and best measures for ensuring the safety and all activities must be carried out with the highest standards of safety but in case any harm results from the inherently dangerous activities, the enterprise shall be liable for the same and it cannot be excused on the ground that it had taken all possible measures for ensuring safety. It was observed that such hazardous activities can be tolerated only if the enterprise indemnifies all those who suffer harm as a result of its profit making activities. It was also observed that the larger

[39] *M.C. Mehta v. Union of India,* AIR 1987 SC 1086

and more prosperous the enterprise, the greater should be the amount of compensation to be paid by it.

One another principle evolved by the Indian judiciary is The Polluter Pays principle which was first mentioned in the Recommendation by the OECD Council on Guiding Principles concerning International Economic Aspects of Environmental Policies in 1972[40], wherein it was stated that "The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called Polluter-Pays Principle." The Recommendation further added that "This principle means that the polluter should bear the expenses of carrying out the above-mentioned measures decided by public authorities to ensure that the environment is in an acceptable state." It is also mentioned in Principle 16 of the Rio Declaration on Environment and Development, 1992. In literal terms the polluter pays principle means that one who pollutes should bear the costs for the cleanup. The principle thus reduces the burden on taxpayers and the Government and remedial actions are to be carried on by the person who caused the pollution. Thereby it acts as a deterrent as well as a corrective measure. In *Indian Council for Enviro-Legal Action v. Union of India*, Supreme Court of India held that Section 3, 4 and 5 of the Environment Protection Act, 1986 empower the Central Government to take measures for prevention and repairing of any damage caused to the environment. In this case the Court held the 'Polluter Pays Principle' to be a sound principle. It observed that under the principle "it is not the role of government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer."The Supreme Court in *Vellore Citizens Welfare Forum v. Union of India and Ors,*[41] linked the

[40] http://sedac.ciesin.org/entri/texts/oecd/OECD-4.01.html, viewed on 28/5/2011
[41] *Vellore Citizens Welfare Forum v. Union of India and Ors,* AIR 1996 SC 2715

'Principle of Sustainable Development' with the 'Precautionary Principle' and 'Polluters Pays principle' and explained them. It held that:"Some of the salient principles of 'Sustainable Development', as culled out from Brundtland Report and other international documents, are Inter Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays principle, Obligation to assist and cooperate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that 'The Precautionary Principle' and 'The Polluter Pays' principle are essential features of 'Sustainable Development'. [42]Thus the Court concluded that these principles mean that industries which cause pollution or harm to the environment owe an absolute liability towards all and they should take all measures for restoring the quality of environment in addition to the compensation to be paid to victims. It was observed that restoring the environment was a part of the concept of 'Sustainable Development' and the 'Public Trust Doctrine'.

In *M.C. Mehta v. Union of India*[43], the Apex Court followed its earlier decisions and again applied the principle of 'Polluter Pays'. In *Research Foundation for Science Technology and Natural Resources Policy v. Union of India*[44], it was held that 'Polluter Pays' means that the person producing goods or other things should be responsible for the cost of preventing or dealing with any pollution that the process causes. The industries are under an obligation to prevent any harm being caused and not just to take measures for remedying the damage. The principle also does not mean that

[42]The 'Precautionary Principle' - in the context of-the municipal law - means:(i) Environment measures - by the State Government and the statutory authorities - must anticipate, prevent and attack the causes of environmental degradation.(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.(iii) The Onus of proof is on the actor or the developer/industrialist to show that his action is environmentally benign."

[43](1997)2SCC411, *Calcutta Tanneries Case*.

[44](2005) 13 SCC 186

the polluter can pollute and pay for it. The costs and damages may vary from case to case.

XIII. CONCLUSION

As the major challenge before the India is to meet the need of electricity and get the ordinary peoples free from the crutches of load shading. India has an ambitious goal to increase 5-fold the amount of electricity produced from nuclear power plants to 20,000 MWe by 2020. This will be further increased to 63,000 MWe by 2032.In this way; India will produce 25 percent of its electricity from nuclear power plants by 2050. India's present production of electricity through nuclear power is 4780 MWe. To increase the share of nuclear power, foreign companies would need to be involved in the manufacture and supply of nuclear reactors.[45]

However at the same time the horrible experiences given by the history like Bhopal gas disaster must be taken it to account while framing any future policy. As the compensation itself cannot be the true justice, but steps must have to be taken in such way that there are no nuclear disasters. Though the remedial setup framed by the Government of India s well as by the international community and Indian judiciary is comprehensive however it should not be remain only on the papers, but its active implementation should be advocated by the every responsible agency.

Similarly the recent bill for civil liability seeks to bypass these provisions and limit the liability of the operator and prevent the victims from getting full compensation for the damage caused to them. It is clear that the Constitution imposes a duty on the state not only to protect the environment but also to improve it as a clean and healthy environment is necessary for the proper, meaningful and dignified existence of man. Any derogation from the required norms would result in violation of Article 21 which is included in the Part III of the Constitution.

[45] http://in.reuters.com/Articles/idiNIndia retrieved on 11/05/2011

WHITE COLLAR CRIME IN THE PROFESSION OF LAW

Mahim Raj*

In light of the controversies surrounding Senior Advocate R.K. Anand & Justice Dinakaran, this article is a humble attempt to examine the white collar offences endemic in legal profession and scrutinize the ambiguities in the existing mechanism, formulated to discipline the errant lawyers and judges. While there have been quite a few instances which have raised voices criticizing the Bar Council(s) for not paying proper attention for the restoration of high professional standard among lawyers; the process for impeachment of Judges imbibed under Article 124(4) & (5) of the Constitution of India and the Judges (Inquiry) Act, 1968, is craving for one successful implementation.

Although, the Judges (Inquiry) Act, 1968 is now sought to be replaced by the Judges Standards and Accountability Bill, which intends to set up a National Judicial Oversight Committee; the article appreciates the recommendations by the Committee on Judicial Accountability, comprising of eminent jurists, calling for the establishment of a National Judicial Commission and making the Bar Council(s) accountable to an independent statutory authority.

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I. INTRODUCTION

"Crime committed not for need but for greed"[1] The concept of "white collar crime" found its place in criminology for the first time in 1941 when Prof. Edwin H Sutherland published his research paper on white collar criminality in the American Sociological Review.[2] He defined white collar crime as a violation of the criminal law by persons of respectability, upper socio-economic class, in the course of their occupational activities;[3] which evoked a lot of criticism.[4] Nevertheless, it is said that even if he had been precise and consistent in his usage, the term would still have generated uncertainty and misunderstanding among other users of the term[5]as his concept was so inherently complex and multifaceted that it seemed unlikely that one single definition could ever prevail.[6]

However, in 1981, the U.S. Department of Justice, Bureau of Justice Statistics came up with a comprehensive formulation, which defined white collar crime as a non-violent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities; also, non-violent crimes for financial gain utilizing deception and committed by anyone having special technical and professional knowledge of business and government, irrespective of the person's occupation.[7]

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[1] Praphulla Dutta Goswami, *Criminology* 249 (1t ed. 1964).

[2] Edwin H. Sutherland, *White-Collar Criminality*, 5 Am. Soc. Rev. 1 (1940).

[3] Edwin H. Sutherland, *White Collar Crime* 9 (1t ed. 1949). See, Edwin H. Sutherland and Donald R. Cressy, *Priciples of Criminology* 40 (6h ed. 1960).

[4] For instance, on the lack of a definite criteria for determining who are 'persons of respectability and class' and that it included even those violations of law which were not committed in the course of occupation or profession and such violations did not mandatorily belonged to the 'upper socio-economic class'.

[5] Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, Buffalo Criminal Law Review, 103 (2004).

[6] Id

[7] Bureau of Justice Statistics, U.S. Dep't of Justice, Dictionary of Criminal Justice Data Terminology 215 (2d ed. 1981).

The emphasis, in cases of white collar crime, is on the connection with occupation. The commission of crime of this category is facilitated by the office, calling, profession or vocation of the individual concerned. It is regarded dangerous to the society because, the financial stakes are steep and irreparable damage to public morals is caused.

However, the actual threat of this crime is believed to be in the fact that "it transcends the visibility of ordinary cheating practices";[8] and the social, occupational status of criminals, making the implementation of the criminal law difficult.[9]

These are precisely the factors behind the sabotaged credibility of the mechanism formulated to discipline errant lawyers and judges, leading to strong voices demanding for a far more effective mechanism. Therefore, this paper is a humble attempt to comprehensively analyze the white collar criminality endemic among lawyers and judges, and the impugned practical inefficiency of laws governing the same.

II. PROFESSIONAL MISCONDUCT BY LAWYERS AND ROLE OF THE JUDICIARY

"So long a lawyer handles his defence in a legal and ethical manner; he is only dispatching his duty as an attorney. It is when he carries his defence beyond the law and the ethical standards of his profession that he may be labelled a lawyer-criminal"[10]

White collar crime by lawyers is termed as 'Professional Misconduct' under the Advocates Act, 1961. Section 35 and 36 of the Act empower the State Bar Councils and the Bar Council of India respectively, to take disciplinary action against lawyers guilty of professional or other misconduct. The term

[8] Reckless, *The Crime Problem* 206 (2d ed. 1955).
[9] Law Commission of India, 29th Report on, *Proposal to include certain social and economic offences in the Indian Penal Code*, 6 (1966).
[10] H.E. Barnes & N.K. Teeters, *New Horizons in Criminology* 49 (3d ed. 1959).

however, has neither been defined in the Act nor in the Amendment Bill of 2002.

In *George Frier Grahame v. Attorney General Fizi,* 'Professional Misconduct' was defined as betraying the confidence of a client; attempt by any means to practice a fraud or empower on or deceive the Court or the adverse party or his counsel and any conduct which tends to bring reproach on the legal profession or alienates the favourable opinion in which the public should entertain concerning it.[11] In *P. D. Khandelkar v. Bar Council of India*[12], the court opined:

"The test to be applied in the cases of 'professional misconduct' of advocates is whether the proved misconduct of the advocate is such that he must be regarded as unworthy to remain a member of the honourable profession to which he has been admitted, and unfit to be entrusted with the responsible duties that an advocate is called upon to perform".

The Supreme Court, in its recent judgement, opined that the word 'misconduct' though not capable of a precise definition, however, may involve moral turpitude, improper or wrong behaviour, unlawful behaviour, wilful in character, forbidden act, a transgression of established and definite rule of action or code of conduct; but not a mere error of judgment, carelessness or negligence in performance of the duty; the act complained of must bear forbidden quality or character. Its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs.[13]

Misconduct has myriad forms, which are rampant in advocacy and entail the instances of lawyers accepting money in the name of a judge or on the pretext of influencing him; or tampering with the court's record; or actively taking part in faking court orders, (fake bail orders are not unknown in

[11] AIR 1936 P.C. 224.
[12] AIR 1984 SC 110.
[13] *Noratanmal Chourasia v. M.R.Murli and Anr.,* AIR 2004 SC 2440.

several High Courts);[14] or browbeating and abusing judges and getting the case transferred from an 'inconvenient' court; or sending unfounded and unsubstantiated allegation petitions against judicial officers and judges to the superior courts,[15] are universally known. "Unfortunately these examples are not from imagination. These things are happening more frequently than we care to acknowledge".[16]

However, the Judiciary acting responsibly, has given some commendable judgements punishing the "lawyer criminals", along with requisite directions to the entire lawyer fraternity, in its attempt to bring back the dignity of the profession and efficient administration of justice. Below discussed are some landmark instances of the judiciary's effort in curbing this menace which has become for lawyers, an integral part of their 'legal practice'.

a) *Ex-Capt. Harish Uppal v. Union of India (UOI) and Anr.:*[17]

The issue in this case entailed whether lawyers had a right to strike and/ or give a call for boycotts of Courts. The Court realized that the phenomenon of going on strike at the slightest provocation was on the increase. Strikes and calls for boycott had paralyzed the functioning of Courts.

Reference was made to, *Indian Council of Legal Aid and Advice v. Bar Council of India,*[18] wherein it was observed that members of the legal profession have certain social obligations and since their duty is to assist the court in the administration of justice, they must strictly and scrupulously abide by the Code of Conduct and must not indulge in any activity which may tend to lower the image of the profession in society.

[14] *R.K. Anand v. Registrar, Delhi High Court,* 2009 (10) SCALE 164.
[15] Id
[16] Id
[17] (2003) 2 SCC 45.
[18] AIR 1995 SC 691.

In Re:Sanjeev Datta,[19] it was opined that the legal profession is a solemn and serious occupation. Although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the Court.

"The regard for the legal and judicial systems in this country is in no small measure due to the tireless role played by the stalwarts in the profession to strengthen them. They had taken their profession seriously and had practiced it with dignity, deference and devotion. If the profession is to survive, the judicial system has to be vitalized. No service will be too small in making the system efficient, effective and credible".

Hence, it was held that lawyers had no right to strike and that they shall be answerable for the consequences suffered by the party.

b) *Vikas Deshpande v. Bar Council of India and Ors.:*[20]

The issue in this case was of misappropriation of clients' land. An advocate on obtaining signatures of his clients, facing death penalty, on some stamp papers, on misrepresentation, had later informed them that he had sold their land on the basis of power of attorney executed in his favour by them authorizing him to sell the land. That he had appropriated the money received by him towards his fees.

Expressing its distress and owing to the regularity of such misconducts, the court held that the preservation of mutual trust between an advocate and his client was a must otherwise the prevalent judicial system in the country would collapse and fail. Such acts apart from affecting the lawyers found guilty also erode the confidence of the general public in the judicial system.

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[19] (1995) 3 SCC 619.
[20] AIR 2003 SC 308.

"It is more so because today, hundred percent recruitment to the Bench is from the Bar starting from the subordinate judiciary to the higher judiciary. We cannot find honest and hard working Judges unless we find honest and hard working lawyers. Time has come when the society in general, respective Bar Council of the States and the Judges should take note of the warning bells and take remedial steps and nip the evil or the curse, if we may say so, in the bud".[21]

The Accused was permanently debarred from practicing and had a fine imposed of Rs. 25,000, payable to the heirs of the complainants because by that time the complainants had already been put to death in execution of the sentence imposed upon them.

c) *R.K. Anand v. Registrar, Delhi High Court:*[22]

The trial, in this case, commonly called as the "BMW Hit and Run case", was meandering endlessly even after eight years of the accident. On May 30, 2007, through a programme by a news channel, New Delhi Television (NDTV), it was revealed that an eye witness was being influenced by the defence lawyer in collusion with public prosecutor to shield the main accused.

The Supreme Court admitted the facts of the case to be a manifestation of the general erosion of the professional values among lawyers at all levels. "Leaving aside the many kinds of unethical practices indulged in by a section of lawyers we find that even some highly successful lawyers seem to live by their own rules of conduct".[23] It asserted that unless the trend was immediately arrested and reversed, it shall have very deleterious consequences for the administration of justice in the country.

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[21] Id at 9.
[22] 2009 (10) SCALE 164.
[23] Id at 199.

"No judicial system in a democratic society can work satisfactorily unless it is supported by a bar that enjoys the unqualified trust and confidence of the people, that share the aspirations, hopes and the ideals of the people and whose members are monetarily accessible and affordable to the people".

Another grave concern of the court was the trial at the Delhi High Court, which was allowed to be constantly interfered with, until it almost became directionless. "There was nothing to show that the High Court, as an institution, took any steps to thwart the nefarious activities aimed at undermining the trial and to ensure that it proceeded on the proper course".[24] The court added that this indifferent and passive attitude was also shared in greater or lesser degrees by many other High Courts.

"Every frustrated trial defies and mocks the society based on the rule of law. Every subverted trial leaves a scar on the criminal justice system. Repeated scars make the system unrecognizable and it then loses the trust and confidence of the people".

Also criticising the quantum of punishment[25] awarded by the Delhi High Court as wholly inadequate, the Supreme Court issued a show cause notice to Anand seeking an explanation as to why his punishment should not be enhanced as under Section 12 of the Contempt of Courts Act, 1971 which prescribes imprisonment up to six months, for the gravity of the act.[26]

The court also highlighted the Bar Council(s) performance on the issue of maintaining high professional standards and enforcing discipline among lawyers, as hardly matching to its achievements in other areas. "It has not shown much concern even to see that lawyers should observe the statutory norms prescribed by the Council itself. We hope and trust that the Council

[24] Id at 204.

[25] The Delhi High Court had debarred R K Anand and I U Khan for four months from appearing in any court in Delhi along with a fine of Rs 2,000 each on both Anand and Khan.

[26] However, Anand in March, 2010 tendered an unconditional apology vide an affidavit, stating that he faces "great humiliation and loss of reputation is worse than death". The matter is still pending.

will at least now sit and pay proper attention to the restoration of the high professional standards among lawyers worthy of their position in the judicial system and in the society".[27]

However, even after the aforesaid statement and the show cause notice, the Bar Council of Delhi's (BCD) disciplinary committee, on December 5, 2009, proposed not to impose any penalty of suspension or revocation of Anand's enrolment as an advocate. Instead, it criticized the courts for trenching on its disciplinary authority and asserted that the power to take action against advocates for professional misconduct and debarring them from appearing in the courts was within the domain of the Bar Council(s) only and the High Court and Supreme Court had no legal power and competence to award such a punishment.

However, the aforesaid contention/ issue had already been put to rest in *Harish Uppal*, which was also reiterated in *R. K. Anand*, wherein it was opined that the right of the advocates to appear in courts is within the control and jurisdiction of courts. Article 145 of the Constitution of India and section 34 of the Advocates Act confer upon the Supreme Court and the High Courts respectively, power to frame rules including rules regarding condition on which a person, including an advocate can practice in the Supreme Court and / or in the High Court and courts subordinate thereto. Furthermore, such directions by the court could not be equated with punishment for professional misconduct.

"Let the Bar take note that unless self-restraint is exercised, courts may now have to consider framing specific rules debarring advocates, guilty of contempt and/or unprofessional or unbecoming conduct, from appearing before the courts. Such a rule if framed would not have anything to do with the disciplinary jurisdiction of the Bar Councils. It would be concerning the dignity and orderly functioning of the courts... even in the absence of the

[27] *Supra* note 24, at para 205.

Rule the High Court cannot be held to be helpless against such threats... the High Court would be free to exercise the powers vested in it under section 34 of the Advocates Act notwithstanding the fact that Rules prescribing the manner of exercise of power have not been framed".

Thus, even the absence of rules under section 34 were not held to be a restriction in matters as fundamental and grave as preserving the purity of judicial proceedings.

d) *Rohini Court Judge assault* case:

On July 8, 2009, Additional District and Session Judge, Mr. Pankaj Gupta, who was making an enquiry about a fictitious petition, was allegedly manhandled by a group of lawyers after one of them tried to obstruct the proceedings and then entered into an altercation with him.

An urgent meeting of the office-bearers and special invitees of the Delhi Judicial Service Association and the Delhi Higher Judicial Service Association was called and a resolution was passed which said, "acts of hooliganism and misbehaviour by the lawyers in the courts are on the rise and it has gone to the extent of physically assaulting the Judge while he was discharging a judicial function on the dais. Such act of hooliganism is unprecedented and must be condemned in the strongest possible words".[28] The High Court took *suo moto* cognizance of the matter and constituted a special three- judge bench[29] which on June 3, 2010 in an interesting judgement, asked nine lawyers allegedly involved in the manhandling to provide free legal aid to 24 people in two years and a fine of Rs. 50,000, to be paid by all of them together and quashed the F.I.R. and the contempt proceedings after the lawyers tendered an apology.

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[28] http://www.thehindu.com/2009/07/09/stories/2009070959230300.htm (visited Jan 3, 2011).

[29] Comprising Justice Vikramjit Sen, Justice Sanjay Kishan Kaul and Justice A.K. Sikri.

III. MISBEHAVIOUR BY JUDGES

"Half of the Last 16 Chief Justices Were Corrupt"[30]

The aforesaid statement was given by Mr. Prashant Bhushan, a renowned civil liberties lawyer and a member of the Committee on Judicial Accountability (COJA),[31] in an interview to the Tehelka Magazine. Mr. Harish Salve, as *Amicus Curiae*, filed a contempt petition against him, alleging that Mr. Bhushan's statement eroded public confidence in the judiciary. A contempt notice, in Nov. 2009, was issued to Mr. Bhushan who in response, by way of an affidavit, explained, contextualised and elaborated his impugned remarks. The court decided to pursue the matter and vide its order dated 14th July, 2010, stated:

"The issues involved in these proceedings have far greater ramifications and impact on the administration of justice and the justice delivery system and the credibility of the Supreme Court in the eyes of the general public than what was under consideration in either Duda's case or Bal Thakeray's case".[32]

Mr. Shanti Bhushan, former Law Minister and Senior Advocate, on 16th September, 2010, through an affidavit also concurred to his son's assertions and reiterated that "eight were definitely corrupt, six were definitely honest and about the remaining two, a definite opinion cannot be expressed whether they were honest or corrupt".[33] He further pleaded to be added as a respondent to the contempt petition owing to his public statement as aforesaid. "The applicant would consider it a great honour to spend time in jail for making an effort to get for the people of India an honest and clean judiciary".[34]

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[30] Prashant Bhushan, *Tehelka Magazine, Vol 6, Issue 35, Dated September 05, 2009,* http://www.tehelka.com/story_main42.asp?filename=Ne050909half_of.asp *(visited Jan 11, 2011).*

[31] A few other members are: Ram Jethmalani, Shanti Bhushan, D.S. Tewatia, Anil B. Diwan, Indira Jaisingh etc.

[32] http://www.outlookindia.com/article.aspx?267149 (visited Jan 20, 2011).

[33] Application for Impleadment as Respondent No. 3, http://www.outlookindia.com/article.aspx?267128 (visited Dec 3, 2010).

[34] *Ibid*

This boiling controversy first call for a study of the present mechanism formulated to impeach judges, alleged to have committed 'misbehaviour'.[35]

Article 124 (4) of the Constitution of the India specifies that:

"A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity".

The Parliament exercising its powers under Article 124(5), in 1968, had enacted the Judges (Inquiry) Act for laying down the procedure for investigation and proof of misbehaviour by Judges (SC and HC) and for the presentation of an address by Parliament to the President and for other such related matters.

The act entails a notice of motion signed by either 100 Lok Sabha[36] or 50 Rajya Sabha[37] members, as the foremost requisite to initiate the process of impeachment against a judge, after the presentation of which, the Speaker/ Chairman, keeping the motion pending, shall be required to constitute a committee[38] for investigating the grounds on which the removal of the judge is sought. The charges framed along with the grounds on which they are based, shall be communicated to the judge, giving him a reasonable opportunity to present his defence.[39] After the completion of the investigation, if the report by the Committee, submitted to the Speaker/Chairman,[40] contains a finding that the judge is guilty, the motion

[35] The special law envisaged by Article 124 (5) for dealing with the misbehaviour of a Judge is wide enough to include within its ambit every conduct of a Judge amounting to misbehaviour including criminal misconduct: *K. Veeraswami v. Union of India,* JT 1991 (3) SCC 655 at 744.
[36] Section 3(1)(a).
[37] Section 3(1)(b).
[38] Section 3(2).
[39] Section 3(4).
[40] Section 4(2).

shall be taken up for consideration;[41] and on the motion being adopted in accordance with Article 124(4), the misbehaviour, incapacity of the judge shall be deemed to be proved and an address praying for his removal shall be presented to the President,[42] in the same session in which the motion had been adopted, for his assent.

However, there have been quite a few instances (some below mentioned),, where judges were sought to be impeached on documentary evidences, owing to which, the very initial task of urging the MPs to sign the motion is deemed to be an Everestian one as, "most M.P.s or their parties have cases in court, and nobody wants to invite the wrath of the judiciary".[43]

1) Justice K. Veeraswami: The former Judge of the Madras High Court was found guilty of 'Criminal Misconduct' under section 5 (1) (e) of the then Prevention of Corruption Act, 1947[44] ("Corruption Act, 1947"). The matter when reached the Supreme Court, the Court confirmed that the definition of public servant as envisaged under section 2 of the Corruption Act, 1947 was wide enough to include Judges of Supreme Court as well as of the High Courts. However, it created an embargo that a sanction from the Chief Justice of India shall be obligatory for registering a criminal case against a Judge.

This restraint, the court held, was necessary to protect the Judges from harassment by the executive who controlled the investigating agencies[45] and

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[41] Section 6(2).

[42] Section 6(3).

[43] Prashant Bhushan, *Securing Judicial Accountability Freedom of Speech v. Contempt Towards an Independent Judicial Commission*, at 1, http://judicialreforms.org/files/securing_judicial_acc_pbhushan.pdf (visited Feb 1, 2011).

[44] Criminal Misconduct by a public servant:
if he or any person on his behalf is in possession or has, at any time during the period of his office, been in possession, for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

[45] However, this apprehension is argued to be lacking a strong basis as there has not been a single case of a Judge being harassed by any malafide investigation. In fact the police authorities are argued to be very apprehensive and reluctant to register FIRs against Judges of the superior Judiciary because they often have to appear before Judges in several cases, who have the power

was inferred from reference made to section 6 (1) (c)[46] of the Corruption Act, 1947.

With reference to the aforesaid section, Shetty, J. opined that the President is given the power to appoint the Judges of the Supreme Court[47] as well as of the High Courts[48] by warrant under his hand and seal. Similarly, even after passing of an address by both the Houses of the Parliament in the manner provided in Article 124, Clauses (4) and (5) and placed before the President, a Judge cannot be removed from his office unless an order to that effect is passed by the President. The President, therefore, being the authority competent to appoint and to remove a Judge, may be deemed to be the authority to grant sanction for prosecution of a Judge under the provisions of Section 6(1)(c) in respect of the offences provided in Section 5(1)(e) of the Prevention of Corruption Act, 1947. However, in order to adequately protect a Judge from frivolous prosecution and unnecessary harassment, the President has to consult the Chief Justice of India who will consider all the materials placed before him and tender his advice to the President for giving sanction to launch prosecution or for filing FIR against the Judge concerned, after being satisfied in the matter.

Therefore, the requisite of obtaining a sanction from the C.J.I. for filing a criminal case against a Judge was warranted.

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to pass various orders and strictures against them. The instances of the S.S.P. in the Ghaziabad scam stating that the police felt handicapped in investigating Judges of the Higher Judiciary and the S.P. of Noida police not having the courage to seek permission from the Chief Justice of India for registration of an FIR against Justice Bhalla accused of purchasing property worth seven crores for five lakhs from members of land mafia who had several cases in courts under him, tend to corroborate the same. *See*, Background Paper for Panel Discuss on Judicial Accountability- Appointment, Investigation and Removal, http://www.judicialreforms. Org/files/background_note_panel_discussion_sept_08.pdf (visited Jan 17, 2010)

[46] Previous sanction necessary for prosecution:

(1)- No court shall take cognizance of an offence punishable under Section 5 of the Act, alleged to have been committed by a public servant, except with the previous sanction-

(c) of the authority competent to remove him from his office.

[47] CONSTITUTION OF INDIA, Art. 124.

[48] CONSTITUTION OF INDIA, Art. 217.

However, it is argued that the judgment has rather increased the impunity of Judges who have now got used to the feeling that they can get away with any kind of misbehaviour, without fear of any criminal action or action for removal. Armed additionally with the power of contempt, they also have little fear of public exposure.[49]

Nevertheless, this requisite must be given a second thought pertaining to the prevailing circumstances as, since the Veeraswamy judgment, a Chief Justice has rarely given permission to investigate a sitting Judge of a High Court or the Supreme Court, "obviously not because there has been no corruption in the judiciary".[50]

Only after 17 years since the Veeraswamy judgement, Mr. K.G. Balakrishnan, became the first Chief Justice of India (C.J.I.) to have exercised the aforesaid power. In a letter dated August 4, 2008, to the Prime Minister, the then C.J.I. asked for the impeachment of Calcutta High Court Judge Soumitra Sen on the basis of his indictment by an in-house procedure of inquiry. Seeing the government not making any attempt to proceed with the impeachment till early 2009, the Campaign for Judicial Accountability and Reform (CJAR),[51] wrote to the Members of Parliament (MPs) of the Rajya Sabha sending them a prepared impeachment motion and urging them to sign the motion so that it could be presented to the Chairman of the Rajya Sabha for proceeding with the impeachment. In response, the motion was signed by 58

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[49] Prashant Bhushan, *The Lack of Judicial Accountability in India*, (Talk delivered at Princeton University on March 10, 2009 at the Department of South Asian Studies), http://www.judicialreforms.org/files/the_lack_of_judicial_accountability_in_india.pdf (visited Jan 17, 2011).

[50] Prashant Bhushan, *Judicial Accountability*, at 1, http://judicialreforms.org/files/judicial_acc_pb.pdf (visited Jan 19, 2010).

[51] The CJAR was formed in March 2007, the result of many vexing meetings of its precursor, the Committee on Judicial Accountability. "There was barely a lawyer willing to take a stand against Judges, or even to seek accountability. So we had to go the people. That's when the Campaign came about". Prashant Bhushan, *Status Report: Campaign for Judicial Accountability and Reform*, http://docs.google.com/viewer?a=v&q=cache:VPMQNA2zsPEJ: www.judicialreforms.org/files/cjar_status_report_2008_2009.pdf+CJAR+Status+Report&hl=en&gl=in&sig=AHIEtbTSueDQ6tYazUQ4pAYfAj9ADWvLzg (visited Jan 11, 2011).

Rajya Sabha MPs and submitted to the Chairman.[52] An enquiry committee[53] was then set up by the Chairman, which after serving Justice Sen with a chargesheet, to which he responded, denying the allegations of financial irregularities, submitted its report to the Chairman, which will serve as the basis for the debate in Parliament on the impeachment motion pending against Justice Sen since February 2009.

2) Justice V. Ramaswamy:The son-in-law of K. Veeraswamy was the first Judge to face impeachment for immense financial irregularities committed during his term as a Punjab and Haryana High Court Judge. However, impeachment process could be successfully completed as the same was not supported by 205 Congress MPs.

An inadequacy of the existing mechanism was witnessed in *K.Veeraswami* and the infructuous impeachment proceedings in the case of *V.Ramaswami*, even after the adverse finding of the Judge's Committee under the Judges Inquiry Act, 1968, affirmed that impression.[54]

3) Justice Y.K. Sabharwal: The Central Vigilance Commission in January 2008, charged Justice Sabharwal with misusing his official position to promote the business interests of his sons, by ordering for the demolition of commercial outlets in Delhi and his alleged involvement in the Ghaziabad Provident Fund scam. The infructuous impeachment proceedings were initiated, however, ultimately going abortive.

However, what received much criticism was the conviction of the Mid Day journalists, for articles depicting how Justice Sabharwal passed the sealing

[52] An Inquiry Committee was set up by the Hon'ble Chairman of Rajya Sabha, which issued a chargesheet on 18th April, 2010, asking Justice Sen to respond to the charges made against him latest by 5th May, 2010. Justice Sen, however, in his 95- page reply, denied the charges and challenged the jurisdiction of the Committee that being an executive authority; it could not examine the indictment against him which was obliterated by a division bench of the Calcutta HC.

[53] Comprising of Justice B Sudershan Reddy (Supreme Court), Justice Mukul Mudgal (Chief Justice of Punjab and Haryana High Court) and a noted jurist Fali S Nariman

[54] Justice J.S. Verma, *Mechanism for Judicial Accountability*, http://www.judicialreforms.org/files/mechanism_jud_acc_verma.pdf (visited Dec 19, 2010).

orders for the interest of his sons, on contempt of court despite their offering to prove the truth of all their allegations. The High Court held that the truth of the allegations was irrelevant since they had brought the entire judiciary into disrepute. It held that: "The nature of the revelations and the context in which they appear, though purporting to single out former Chief Justice of India, tarnishes the image of the Supreme Court. It tends to erode the confidence of the general public in the institution itself. The Supreme Court sits in divisions and every order is of a Bench. By imputing motive to its presiding member automatically sends a signal that the other members were dummies or were party to fulfil the ulterior design".

4) Justice P.D. Dinakaran: This recent 'Criminal Misconduct' came into light when the District Collector of Thiruvallur, Mr. Palani Kumar, in his report to the Supreme Court confirmed that Karnataka High Court Chief Justice P.D. Dinakaran had encroached upon public land[55] illegally.

The Forum for Judicial Accountability, Chennai, also made several allegations against Justice Dinakaran after it became known that he had been recommended for appointment to the Supreme Court of India. On, 8th September, 2009, the Forum comprising of several senior and responsible lawyers of Chennai wrote to the Supreme Court collegium ("collegium") requesting it to ensure that the recommended Judges declare their assets before their appointments are notified. Concurrently, it also approached the Committee on Judicial Accountability ("COJA") conveying serious misgivings about the integrity of Justice Dinakaran.

COJA on 9th September handed over a detailed representation of the Forum to the Chief Justice of India with respect to the complaints against Justice

[55] It is alleged that more than 350 acres of land had been put under a common fence. Furthermore, allegations of acquiring other expensive immovable properties, including a commercial complex, in 2001-02, in the name of his wife where, it is alleged that over 2.5 crores were spent for construction, also a residential house in Anna Nagar, Chennai, in the name of his wife in 2004-5 worth over 90 lakhs. There are several other allegations regarding the dishonest manner in which Justice Dinakaran dealt with a number of cases, in Tamil Nadu, while he was a Judge there and then as Chief Justice of Karnataka.

Dinakaran. Subsequently, his elevation to the Supreme Court was dropped[56] from the list of those recommended for elevation to the Supreme Court.

Later, a united opposition on 14th December, 2009 initiated the process of impeachment of Justice Dinakaran, by moving a notice in Rajya Sabha, signed by 75 members, for his removal.[57] On 8th April, 2010, the collegium recommended to transfer Justice Dinakaran to the Sikkim High Court, after considering his insolent attitude refusing to abide by the advice to go on leave.[58]

Ghaziabad Provident Fund Scam: This scam surfaced in 2008 when an ex-vigilance judge of the Ghaziabad District Court reported to the Allahabad High Court that more than 7 crores had been siphoned out of the Ghaziabad treasury by District Judges of Ghaziabad with the help of an administrative officer of the court, in the guise of Provident Fund advances to class 3 and 4 employees. The HC holding the report to be, *prima facie,* having merit, directed the vigilance judge to file an FIR on the basis of which the administrative officer of the Ghaziabad Court, Ashutosh Asthana was arrested on April 28, 2008.

Since the Ghaziabad police found it difficult to investigate the case[59], it was transferred to the CBI.[60] However later, Asthana died under mysterious circumstances, which his family believes to be a murder.[61]

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[56] As decided by the Supreme Court collegium headed by the C.J.I. on 1st Nov. 2009.

[57] http://timesofindia.indiatimes.com/india/76-Rajya-Sabha-MPs-for-Dinakarans-impeachment/articleshow/5338074.cms (visited Jan 11, 2011)

[58] See, Dhananjay Mahapatra, *Dinakaran's transfer: Prez decision soon,* Times of India, June 4, 2010, http://www.judicialreforms.org/files/times_of_india_dinakaran_transfer.pdf (visited Jan 11 2011).

[59] Restriction imposed in the *Veeraswamy* judgement restrained the police froms investigating criminal offences by judges without the prior written permission of the Chief Justice of India; and as per the directions given by the then C.J.I., the police were not allowed to directly interrogate the High Court judges and could only send written questions to them.

[60] http://www.judicialreforms.org/files/Tehelka%20Burn%20after%20Reading.pdf (visited Jan 23, 2011).

[61] *Supra* note 50, at 1.

Similar scandal known as the "cash at judge's door scandal"arose where a packet containing Rs. 15 lacs allegedly meant for Justice Nirmal Yadav, was mistakenly delivered to Justice Nirmaljit Kaur. The CBI was again called upon to investigate and an in-house inquiry committee of 3 judges[62] was also constituted by the C.J.I. In its 92 page report, the inquiry committee stated that:

"There is substance in the allegations and the misconducts disclosed are serious enough for initiation of proceedings for removal of Justice Yadav".[63]

The committee also found various other serious irregularities committed by the Justice. However, in Nov. 2009, a clean chit was given to Justice Yadav and the CBI filed a closure report before the Special court. In response to this, the Punjab & Haryana High Court Bar Association opposed CBI's request to close the case and terming it as a "grave and flagrant miscarriage of justice", filed a petition against the same. However, it got rejected on Mar. 26, 2010.[64] Justice Yadav was also transferred to the Uttarakhand High Court in February, 2010. A commendable turnaround took place when in September, C.J.I., S.H. Kapadia granted permission to the CBI to probe upon the allegations against Justice Yadav.

Indeed, such controversies are 'snowballing' and diminish the image of the judiciary with every passing hour.[65] They have not only depicted the non-credibility of the collegium system, for investigating complaints against the judges, but also brought forth the focus on Judicial Appointments[66] and transparency in the judiciary.

[62] Comprising of Justice Hemant Lakshman Gokhle (Chief Justice of Allahabad High Court), Justice K S Radhakrishnan (Chief Justice of Jammu and Kashmir High Court) and Justice Madan B Lokur (Delhi High Court).

[63] http://beta.thehindu.com/news/states/other-states/article82587.ece (visited Jan 11, 2011).

[64] http://www.deccanchronicle.com/national/cash-judges-door-case-confidential-sc-383 (visited Jan 11, 2011).

[65] Anil Divan, Judicial integrity: Lessons from the past, Oct 21, 2009, http://www.hinduonnet.com/2009/10/21/stories/2009102155680800.htm (visited Dec 18, 2010).

[66] Therefore, the Centre is now getting ready to come forth with a constitutional amendment to change the present system, the collegium system, of appointment introduced by the SC in 1993. This will indeed, abolish the monopoly of judiciary over the appointment of judges of HCs and the SC. The BCI is also of the view of scrapping the current system. See, Prakash Satya, *Colloegium system to be scrapped?*, Hindustan Times, http://www. hindustantimes.com/Collegium-system-to-be-scrapped/Article1-552324.aspx (visited Jan 11, 2011).

"The manner of functioning of the collegium of the Supreme Court of India has drawn flak from all sections of society and it is a matter of utmost concern and even a matter of shame for the members of the judiciary that the collegium of the Supreme Court is blissfully remaining insensitive to public opinion/reaction, but, is only playing GOD by not responding".[67]

Therefore, the allegations raised by the Bhushans seem to have raised a heuristic challenge. "How can the courts close its eyes and pretend to be asleep?"[68]

In 2006, the Judges Enquiry Bill was introduced to amend the Act of 1968. It proposed for a 'National Judicial Council' which, again being an in- house council of sitting Judges[69] reposed the objective of fairly dealing with the errant judges. Further, it seems that efforts were made to keep the complaint procedure a private affair.[70] The interpolation of power to impose "minor measures"[71] had also been questioned as anything below "removal" is "not at all contemplated by the constitutional text or spirit".[72]

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[67] Justice D.V. Shylendra Kumar, Errant Judges and Secretive Collegium of the Supreme Court, Mar. 9, 2010, at 1- 2, http://judicialreforms.org/files/Errant_judges_and_secretive.pdf (visited Jan 5, 2011).

[68] V.R. Krishna Iyer, *A Challenge before the Nation,* The Hindu, September 21, 2010, http://www.judicialreforms.org/files/v_r_krishna_iyer_a_challenge_before_the_nation.pdf (visited Nov 3, 2010).

[69] Section 3 (2) :—

(a) The Chief Justice of India — Chairperson;

(b) Two senior most Judges of the Supreme Court, to be nominated by Chief Justice of India— Members;

(c) Two Chief Justices of the High Courts, to be nominated by Chief Justice of India— Members.

[70] Section 33. ... all papers, documents and records of proceedings related to a complaint, preliminary investigation and inquiry shall be confidential and shall not be disclosed by any person in any proceeding except as directed by the Council.

[71] Section 20**.** (*1*) (*b*)

(*i*) issuing advisories; (*ii*) issuing warnings; (*iii*) withdrawal of judicial work for a limited time including cases already assigned; (*iv*) request that the Judge may voluntarily retire; (*v*) censure or admonition, public or private.

[72] Justice R.K. Abichandani, *Judicial Independence of Dependant Judiciary,* GNLU Law Review Vol. 1, Issue 1, 14 (2008).

All this and a right of appeal[73] to the Supreme Court even after Parliament votes for removal, made the COJA to opine that the Bill will reduce whatever little accountability of Judges that existed in the Judges Enquiry Act, 1968.[74] "All this will ensure that no judge will be removed till he retires".[75]

The Bill was subsequently withdrawn as the Parliamentary Committee in August 2007, came up with an adverse report on it, mainly on the ground, "for seeking to entrust the disciplinary action to a body composed only of judges".[76]

However, the Judges Standards and Accountability Bill, 2010 has now been finalized and was introduced in the Lok Sabha on Dec. 1, 2010, which, according to the Law Minister Mr. Moily will, "facilitate the judiciary to ensure that nobody points any finger at them...and would make it accountable for its acts of omission and commission and clear clouds over corruption...It is a result of an exhaustive study of eight months and we have examined various legislations of the world (to draft it)".[77]

The proposal of the bill is to set up two authorities to investigate complaints against judges:

i) National Judicial Oversight Committee; and

ii) Scrutiny Panel.

The Scrutiny Panel shall be constituted in the Supreme Court and every High Court. It shall consist of a former Chief Justice and two sitting judges of that

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[73] Section 30. A Judge aggrieved by-
(*i*) an order of removal passed by the President; or
(*ii*) a final order passed by the Council imposing one or other "minor measure" on the basis of a complaint; may, notwithstanding anything contained in any other law for the time being in force, prefer an appeal to the Supreme Court.

[74] See, Comments of the COJA on the Judges Enquiry Bill, 2006, http://www.judicialreforms.org/files/4%20Comments%20of%20COJA.pdf (visited Jan 10, 2011).

[75] *Supra* note 43.

[76] http://www.pib.nic.in/release/release.asp?relid=43506 (visited Jan 19, 2011).

[77] http://indiagovernance.gov.in/news.php?id=158 (visited Jan 20, 2011).

court. On receiving the complaint, if the Scrutiny Panel finds that there exist sufficient grounds for proceeding against the judge, it shall report accordingly and vice versa. Furthermore, on finding a complaint to be frivolous or vexatious, the Oversight Committee shall have the power to penalize the complainant.

The Oversight Committee shall consist of a retired CJI as the Chairperson, a judge of the Supreme Court nominated by the sitting Chief Justice of India, a CJI of a High Court, the Attorney General for India, and an eminent person which shall be appointed by the President.

If the Scrutiny Panel recommends investigation against a judge, the Oversight Committee will constitute an investigation committee for the same. The committee will consist of not more than three members. It will have some powers of a civil court and also the power to seize documents and keep them in its custody.

The committee after framing the charges shall communicate the same to the judge after which he shall be given an opportunity to present his case, but if he/ she choose to the contrary, the proceedings may be heard without him.

If the charges get proved, the Oversight Committee may recommend that judicial work shall not be assigned to the judge. It may also issue advisories and warnings if it feels that the charges proved do not warrant the removal of the judge. If the Committee feels that the charges call for the removal of the judge, it shall:

(a) request the judge to resign voluntarily, and if he fails to do so;

(b) advise the president to proceed with the removal of the judge. In such a case, the President shall refer the matter to Parliament.

Furthermore, a motion for removal of a judge can also be introduced in Parliament by members of Parliament. In such a case, the Speaker or the

Chairman can either admit the notice, or refuse to admit it. If the notice is admitted, the matter shall be referred to the Oversight Committee for inquiry.

On the other hand, the COJA, responding early to the clamour for a more effective mechanism, had recommended for the establishment of a totally independent[78] constitutional body called the National Judicial Commission ("NJC"), empowered to investigate charges against judges and take action against them. It had suggested the Commission to be constituted in the following manner:

i) A Chairman: selected by all the judges of the Supreme Court; and,

ii) The Chief justices of the High Courts; the Cabinet; Committee comprising the Speaker of the Lok Sabha; the leaders of opposition in the Lok Sabha and the Rajya Sabha; Committee comprising, the Chairman National Human Rights Commission, the Comptroller and Auditor General of India and the Central Vigilance Commission; each appointing one member, bringing the total number of members to five.

But, a view has always been propagated by the judiciary that it cannot be made accountable to anybody outside itself.[79] However, it is because of this concept of self accountability[80] that our lawyers and Judges continue to reap personal benefits at the expense of the entire legal system. Independence of the judiciary means independence from the Executive and the Legislature, but this; in no sense connote an independence from accountability. Independence from accountability from any outside body in practice means independence from accountability altogether, which cannot be countenanced

[78] This independence is from the government as well as from the judiciary, as opposed to an in-house Judicial Council, which is what the judiciary wants. See, Prashant Bhushan, *The Dinakaran Imbroglio: Appointments and Complaints against Judges,* 2009, http://www.judicialreforms.org/files/Prashants%20Articles%20The%20Dinakaran%20imbroglio.doc (visited Jan 26, 2011).

[79] *Supra* note 74, at 7.

[80] This self accountability is akin to a Judge sitting to decide his own cause, something which has been declared by the courts themselves to be violative of the principles of Natural justice.

for anybody or any institution in this country. Judicial independence ought not to be misconstrued as a mere slogan to ward off legitimate inquiry and criticism, nor is it a curtain behind which the judiciary should hide.[81]

IV. SUGGESTIONS AND CONCLUSION

After a comprehensive analysis of the present scenario, it seems evident that something apart from the Bar Council(s) and the Committees, exclusively comprising either of judges or lawyers, need to be introduced, for acting strictly upon the errant lawyers and judges. The performance of the Bar Council(s) has been below par in disciplining the delinquent lawyers and therefore, "must be made accountable to an independent statutory authority".[82]

The Judges Standards and Accountability Bill is now looked upon with great expectations. However, the NJC recommended by COJA seems to be a better mechanism as it embraces appointments from other bodies, Commissions as well, apart from the Courts; furthermore, the matter need not be referred to the Parliament.

The assertion is for establishment of independent bodies, which indeed seem to be indispensable for curbing the white collar criminality endemic in the profession of law thereby bringing the lost trust and integrity of this noble profession.

As former Justice Mr. V.R. Krishna Iyer speaking upon the affidavit filed by Mr. Shanti Bhushan states:

"If Parliament has a sense of shame, now is the time to act; it cannot wait till tomorrow... To fail here will put the nation's reputation under grave suspicion".[83]

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[81] J.B. Thomas, *The New Guide for Judges: Some Ethical Issues*, IIPE Conference (5-7 October 2002).
[82] *Supra* note 50, at 2.
[83] *Supra* Note 68.

LIBERALIZATION OF HIGHER EDUCATION IN INDIA – EASY TO LEAD OR DIFFICULT TO DRIVE?

Nikhil Varshney and Devaditya Chakravarti*

Education is becoming vital in the new world of information. Higher education has, in this respect, assumed great significance for a developing country like India as it facilitates enhancement of its capacity for participation in an increasingly knowledge based world economy. While potential benefits such as enhancing economic growth and reducing poverty cannot be overlooked, the Indian higher education system has not been able to sustain and cater itself to the spiraling demand for higher education. This paper seeks to assess the status quo wherein with the fact acknowledged wherein private sectors contribution has increased owing to resource constraints of the public sector and excess demand, liberalization as a solution is debated upon.

This paper while leveraging the positives of the Foreign Education Providers (Regulation) Bill deals at length with impact that foreign universities and liberalization as a whole may set off in India.

The latter part of the paper is dedicated towards striking a harmony with the existing legal framework wherein the hands-on approach of the judiciary is hailed. Lastly, the role of WTO and the impact of General Agreement on Trades and Services (GATS) in assuaging the Indian growth

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story and the potential it has to open up a Pandora's Box is well commented upon.

I. INTRODUCTION

It is just above 50 years when the Government initiated a planned development of higher education in the country particularly with the establishment of University Grants Commission in 1953. Thus early 1950's is an important reference points from which one could look back at India's progress in higher education sector.

A bill "Foreign Education Provider (Regulation) Bill 2010" has been introduced to facilitate operations of foreign educational institutions in India. The proposed legislation would regulate the entry of foreign education providers as per India's priorities.

Though 100 percent Foreign Direct Investment through automatic route is permitted in the education sector since 2000, but the present legal structure in India does not allow granting of degrees by foreign educational institutions in India.

The need for global collaboration in higher education is the best solution to face the challenges of requirement of skilled manpower in 21st century. The proposed Foreign Education Providers Bill would facilitate globally renowned institutes and universities to participate in India's higher education sector. It will also bring in foreign education providers for vocational education and training.

Investment in higher education sector in India by foreign institutions would not only benefit Indian students but also help other countries in getting skilled human resource for their economy.

II. IMPORTANCE OF FOREIGN UNIVERSITIES IN INDIA

Education is a regulated sector across the world. Most countries do not easily

allow foreign universities to operate in their country and if they do allow, it is allowed with lot of regulations.

The Foreign Education Providers (Regulation) Bill seeks to regulate the entry, operation and maintenance of foreign education providers. Presently, there are many foreign universities offering degree courses in India in partnership with local universities. Once the Bill is passed, foreign universities may be able to offer independent degrees, without tie up with any local university.

One of the benefits of this Bill is that it will save millions of dollars of Indian students, as they will be able to study in foreign universities while staying in India. More than 2, 50,000 students from India are studying in various universities outside India.

If foreign universities start operating in India, it will give students a choice and also expand their higher education offerings in India. There is a huge gap in the demand and supply in higher education sector and foreign universities will reduce some gap. It is expected that, some of the foreign universities will also improve the culture of research in India.

Some of the best universities in the world are waiting to set up their base in India. Students in India will get a better choice and competitive pressures will also improve the quality of the present education providers in India.[1]

III. IMPACT OF LIBERALIZATION ON EDUCATION SECTOR IN INDIA

Liberalization refers to relax in reforms and policies in India. These reforms can be termed as relaxation of previous government's restrictions usually in areas of social or economic policy. India is economically liberal but the education system is not liberal. There are many reasons, one of them is that

[1] Foreign Collaboration and Investment (Higher Education Sector India), INDIA JURIS, www.indiajuris.com (last updated 14th May, 2011)

the national education industry does not want competitiveness and Government does not want to give away its control. The higher education system in India suffers from lack of autonomy and burden of affiliation and is characterized by extreme rigidity and lack of flexibility. The real weakness of the higher education is in the structure itself, and there is a need for introspection and reflection[2]. The policy in terms of education is focused more on only expanding the system with no focus on for quality education. One of the basic problems today is the inability of the university system to provide higher education to all who aspire for it. Also there is no political commitment of public funds. Lack of research oriented education devalues the quality of education to a large extent. There are very few institutes and companies that really carry out research work which is useful for the masses.

IV. POSITIVE IMPACTS

The Foreign Universities are expected to provide much needed capacity and new ideas on higher education management, curriculum, teaching methods, and research. They will bring investment. Top-class foreign universities are anticipated to add prestige to India's postsecondary system. All of these assumptions are at the very least questionable. While foreign transplants elsewhere in the world have provided some additional access, they have not dramatically increased student numbers.

Foreign providers will bring some investment to the higher education sector as the new law requires an investment of a minimum of $11 million, a kind of entry fee but the total amount brought into India is unlikely to be very large[3].

There is hope for foreign universities in the form of Foreign University Bill that is seemingly on the cards as of 2009. If the government ensures that no fraud takes and if it delimits the bureaucracy by placing only minimal

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[2] Ashutosh Sheshabalaya, *Rising Elephant- The Growing Clash With India Over White-Collar Jobs And Its Challenge To America And The World*, 205-06 (2005)

[3] 'India and the Knowledge Economy- Leveraging Strength and Opportunities', The World Bank, Report number 31267-IN, April 2005

restrictions on the incoming foreign universities, there is a chance for a vast improvement in quality of Indian higher education system which suffers from the government's neglect.

Liberalization will expand the supply which is in shortage and the competition among educational institutions will ensure that they do not charge excessive premium for education. Increase in the supply of education will automatically result in the fall of education expenditure. The education sector will add fire to the fuel of Indian economy which is currently majorly fuelled by the service industry. Hundreds of thousands of Indian students study abroad at an annual estimated cost of around US$ 1 billion and it can even stem the exodus of thousands of students who left the country to study abroad. This will save India's immense capital[4].

Allowing corporates would ensure the development of better industry oriented graduates with specific skill sets and also curbs brain drain. Increase in educated population implies rapid developments in technology and communications. It also implies the shift of society from industrialization based towards an information-based society.

V. NEGATIVE IMPACT

Experience shows that sponsoring universities abroad seldom spend significant amounts on their branches — major investment often comes from the host countries such as the oil-rich Gulf States. It is very likely that the foreigners will be interested in "testing the waters" in India to see if their initiatives will be sustainable, and thus are likely to want to limit their initial investments.

Global experience shows that the large majority of higher education institutions entering a foreign market are not prestigious universities but rather low-end institutions seeking market access and income[5]. The new for-

[4] *India Finance and Investment Guide*, http://finance.indiamart.com. (last updated 21st May, 2011)

[5] Pratap Bhanu Mehta, *Regulating Higher Education* (published in three parts), INDIAN EXPRESS, New Delhi Edition, July 14th, 15th and 16th, 2005

profit sector is especially interested in global expansion as well. Top universities may well establish collaborative arrangement with Indian peer institutions or study/research centers in India, but are unlikely to build full-fledged branch campuses on their own.

The proposed legislation requires an investment of $11 million upfront by a foreign provider in the Indian operation. Moreover, the foreign provider is restricted from making any profit on the Indian branch.

It is not clear if the Indian authorities will evaluate a foreign institution before permission is given to set up a branch campus or another initiative — or if so, who will do the vetting. It is not clear if the foreign branches will be subjected to India's highly complicated and controversial reservation regime (affirmative action programmes) that often stipulates that half of the enrolments consist of designated disadvantaged sections. If the foreigners are required to admit large numbers of students from low-income families who are unlikely to afford high foreign campus fees and often require costly remedial preparation, creating financially stable branches may be close to impossible[6].

A complication may arise regarding the role of state governments in setting their own regulations and conditions for foreign branches. Indian education is a joint responsibility of the Central and State governments[7] — and many States have differing approaches to higher education generally and to foreign involvement in particular.

The international higher education is largely an unregulated market. There is no dearth of mere sub-prime and low-end private institutions which are seeking to stave off bankruptcy through the export market.

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[6] Saikat Neogi, *India's Higher Education needs Policy*, HINDUSTAN TIMES, 28 November 2005.

[7] Department of Education, National Policy on Education, Government of India, http://www.education.nic.in (last updated on 14th May, 2011).

Corruption is rampant in India. Recent reports have evidence that some Indian institutions were granted a coveted "deemed" university status after questionable practices between the applicants and high government officials[8]. It is unclear if the foreign branches will be evaluated by the Indian authorities or overseas quality-assurance and accrediting agencies will be fully involved.

Local institutes which have limited capital will not be able to survive, rendering many jobless. Even the reputed ones will face competition as their national certificates will be less valued as compared to the world recognized certificates.

VI. POSSIBLE SOLUTION

A possible solution to this policy is that the government should be kept out of the education business, partially if not fully. Its role should be restricted to regulating the sector. Just like in other markets, the educational market might have its share of market failures. Rectifying these should be the responsibility of the regulator and it must be independent from the government.

To ensure that national interests are served and the students do not receive an inferior service from unscrupulous providers, there needs to be transparency. It can be done by the government authority. This will also help universities think about their motivations for entering the market.

An effective educational regulator in India like SEBI, the RBI or TRAI is also needed which will regulate the capital markets, the banking sector and the telecom sector respectively. Certain independent rating agencies like CRISIL, ICRA or CARE are also required to rate the institutes and these ratings need to be made public as well.

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[8] S Mallick, *The Incidence of Corruption in India: Is the Neglect of Governance Endangering Human Security in South Asia?*,103 IDSA (2006)

In order to provide a level-playing field to Indian institutes, the government should also allow them to set up overseas campuses. Further, the government should also allow Indian institutes to have deans of foreign institutes and industrialists on their board of governors[9].

Strong disincentives, such as forfeiture of substantial security deposits will ensure that foreign players and their partners do not discontinue their operations after a few years, leaving students in the lurch[10].

Only foreign universities from countries that offer Indian universities a business opportunity abroad should be allowed in.

Effective registration and certification systems are also needed. Such a regulation should prevent unapproved institutions from partnering, protects and informs the consumers, enables good quality foreign institutions to enter the Indian market and which create a level playing field between domestic and foreign institutions so that the former can compete effectively in a liberalized environment. This way, the benefits from the liberalization of higher education services will be unilaterally and multilateral, on the import as well as export fronts. Furthermore, this will ensure that students are fully informed about the educational institutions.

Through these and other intelligent reforms, jobs which are more productive and human-capital enhancing, from a much more organized private sector will be a reality[11]. These regulations will go a long way towards fostering accountability and responsibility on the part of the foreign universities and

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[9] Bakul Dholakia, *Experts Speak on Foreign Education Institution Bill* , ECONOMIC TIMES, (March 15, 2010) http://articles.economictimes.indiatimes.com/2010-03-16/news/27584025_1_foreign-institutes-education-sector-quality-education (last updated on 15th May, 2011)

[10] David D. Dill, *Allowing the Market to Rule: The Case of the United States*, Department of Public Policy, University of North Carolina at Chapel Hill (Public Policy for Academic Quality Research Program, Department of Public Policy, Abernethy Hall, December 2002,www.unc.edu/ppaq (last updated on 15th May, 2011)

[11] Department of Secondary & Higher Education, Government of India Ministry of Human Resource Development, order No. V.11014/20/2002-CDN, 26 February 2003.

institutions. The same can be implied on all Indian universities and institutions as well, whether public or private. India needs to improve the availability, affordability and quality of high education which can be achieved through Effective Liberalization of the education system, encouraging the migration of students from one state to another and providing more scholarships and loans to students from the poor and middle class. Only then Indian Education system will become a sound one and one which will be the foundation of sustained growth[12].

"This bill, if passed, will bring in a revolution for sure with the potential of having the same impact that the Indian economy experienced following the liberalization and deregulation of the early1990s[13]."

For India's education sector, particularly higher education, this bill is indeed welcome. Experts say that heavy regulation and over-protection of the education sector from global forces may have allowed Indians to get education cheap comparatively[14]. But the growth and quality of higher education has suffered immensely as a consequence of that protection, resulting in an inability to cope with the surging demands of university education.

The economy, will benefit since the country could save $ 7.5 billion in foreign exchange outflows each year. The lobby said over 5,00,000 students choose to go overseas every year for higher education, causing an outflow of $ 10 billion a year[15].

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[12] Vijender Sharma, Indian Higher Education: Commodification and Foreign Direct Investment, XXIII THE MARXIST 2(April 2007).

[13] Inderjit Basu, *India shows an open mind*, SOUTH ASIA, March 24, 2010, http://www.atimes.com/atimes/South_Asia/LC24Df01.html (last updated on 15th May, 2010)

[14] Dr. K.D.Raju "Trade in Education Services under the WTO GATS Regime: An Indian Outlook" *Beyond the Transition Phase of WTO: An Indian Perspective on Emerging Issues* (1 ed). Ed. Dipankar Sengupta, Debashis Chakraborty, Pritam Banerjee, eds., Academic Foundation, 2006. New Delhi: Academic Publishers, 2006.

[15] Data by the Associated Chambers of Commerce and Industry of India

VII. POSITION ELSEWHERE

In *China*, the entry of foreign institutions is by invitation only and the conditions under which the foreign educational provider can come to China include: (1) foreign institutions must partner with Chinese institutions; (2) partnerships must not seek profit as their objective; (3) no less than half the members of the governing body of the institution must be Chinese citizens; (4) the post of president or the equivalent must be held by a Chinese citizen residing in China; (5) the basic language of instruction should be Chinese; and (6) tuition fees may not be raised without approval. There is no provision for online and distance learning[16].

In *Malaysia*, foreign institutions can enter only by invitation from the ministry of education. Such an institution has to establish a Malaysian company with majority Malaysian ownership and has to be registered with the government. Permission for each course is required. Courses should be accredited and approved in the home country and recognized by an appropriate professional association in Malaysia[17].

In *Singapore*, foreign institutions can enter by invitation and only elite universities are invited. Their collaboration with local partner is permitted, but they cannot use terms like university, college and academy. Applications for setting up higher education institutions are considered on a case-to-case basis. There is no regulation governing foreign education providers and it has also not made any offers under GATS in higher education.

In *Australia*, Australian higher education system is being largely financed by the foreign students. According to Michael Gillan[18]:

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[16] Konark Sharma,, *FDI in Higher Education: Aspirations and Reality*, XLV MAINSTREAM 25 http://www.cscsarchive.org/dataarchive/textfiles/textfile.2008-05-06.8530293590/file (last updated on 15th May, 2011.

[17] *Ibid.*

[18] Gillan, Michael, et al, *Australia in India: Commodification and Internationalisation of Higher Education* , ECONOMIC AND POLITICAL WEEKLY, April 5, 2003,pp. 1395 – 1403.

"Given the immediate necessity of supplementing rapidly decreasing commonwealth operating grants, the direct financial returns from foreign student fees are of much greater priority than idealized projections of international research or cultural/institutional exchanges."

For this purpose, "overly aggressive marketing practices" are used and "private education agents are employed by most Australian vocational colleges and higher education institutions operating in India in order to identify and recruit potential students and process student applications for academic admission and student visas.

VIII. COGENT CRITICISMS

It is to be an easy guess that for India to realize its dream of becoming a knowledge superpower in keeping with the 'India Vision 2020', the higher education sector has to play a crucial role. India, a country which does well at leveraging its abundance of people, has a large pool of technical manpower. This vast reserve of skilled hands has a fair proportion of it finding gainful employment in foreign, developed countries, resulting in a big boom in the outsourcing (BPO/KPO) sector[19]. So as to ensure that India does not throw away this growth momentum, it is imperative that the government and the people at large provide a favorable academic and economic setting to ensure a steady flow of highly skilled manpower at an accelerated pace. Some of the criticisms are-

- If one is to go by the recommendations of the Central Advisory Board of Education, the highest advisory body to advise the Central and State Governments in the field of education, in its 55th meeting report proceedings[20], education outlay should be increased to six percent of the

[19] *Technology Vision for India 2020*, TIFAC, Department of Science and Technology, GOI, August 1996

[20] Report of the Central Advisory Board of Education (CABE) Committee on Autonomy of Higher Education Institutions, Ministry of Human Resource Development, Department of Secondary and Higher Education, Government of India, June, 2005.

GDP, which should include one percent for higher education. This way, by ensuring a greater allocation of funds for scientific research, it would be able to counter the arguments of the naysayers who are persistent for Foreign Direct Investment (FDI) as a remedy for shortage of funds for scientific and industrial research.

- The Trade Policy Division of the Department of Commerce, Government of India few years ago circulated a consultation paper[21] on trade in education services. This paper, its disastrous proposals notwithstanding, drew equal attention from both the Left and the Right. Critics, amongst whom stand out esteemed scientists and seasoned academics[22], argue that foreign investors have so far brought in commercialized products and are expected to clog the Indian market with copyrighted courses and workshop modules in order to suit its ends[23]. There is no hope for them to give vent to sharpening the skills and expertise of Indian students or to meet the stumbling requirements of Indian science and research.

- Vide a paper, the finance ministry in 1997[24] had proposed that higher education including secondary education be considered as a "non-merit good" for which the government allocation of subsidies for it ought to be stripped down. This was rejected following protests from the Left. Not taking any lessons from this, the finance ministry has again described education (other than elementary) as "merit II good" in a report.[25]

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[21] Higher Education in India and GATS: An Opportunity, in Preparation for the On-going Services Negotiations at the WTO, Trade Policy Division, Department of Commerce, Government of India *commerce.nic.in/trade/Consultation_paper_on* ***_Education_GATS****.pdf* (last updated on 15th May, 2011).

[22] While telling the plight of higher education in India, the paper has argued that with a multi-billion dollar industry involving foreign education providers, distance learning and franchisees, "GATS could provide an opportunity to put together a mechanism whereby private and foreign investment in higher education can be encouraged."

[23] George Iype, Foreign Universities In India? No, Say Arjun Singh, Left Parties, September 14, 2006, Rediffnews.

[24] Distorted Perceptions: Government Subsidies and Fiscal Crisis, Vol. 32, No. 22, May 31- June 6. 1997, ECONOMIC AND POLITICAL WEEKLY, http://www.jstor.org/stable/ i397784 (last accessed on 16th January, 2011).

[25] Central Government Subsidies in India, Government of India, Ministry of Finance, Department of Economic Affairs, December 2004.

The report further demonstrates an earnestness to relegate Merit II goods below Merit I goods in terms of desirability of subsidization. It also presses for a case to treat education as a private good on the justification that "higher education does display many characteristics of private goods in a number of countries."

The government here needs to be exhorted to take the matter seriously as this "passage of relegation" would only foment further degeneration of our higher education system rather than solving its problems. It is advised here that education be once again be elevated to its status as a "public merit-I good."

- As for performance of foreign educational programs, most of them have been provided by second and third tier institutions, so much so that most of them have not yet been able to come up with a campus of their own, still operating out of rented premises. In many cases, the programs offered in India are not even accredited in the host countries. The point lost out here is that foreign investment in scientific research will only lead to further exploitation of gullible India students. It is suggested that the government has to be extremely careful in formulating a fool-proof, comprehensive policy to filter out foreign programs that do not meet the credentials in their own birthplaces. The government here is pushing this reform agenda with tremendous haste without any regard to the opposition of academia and states[26].

- The government as of now has not yet put in place firm guidelines that allocate the areas in which investment could be invited, the credit-worthiness of the institutions that will be permitted to invest and parameters governing distribution of the fruits of research. It is imperative that investment in scientific research and development

[26] Rohan Mukharjee, "Higher Education in India: An Overview and Opportunities for Foreign Participation", Centre for Policy Research, India 2008

should be permitted only after the government shortlists better known universities as preferred investors and that too in domains where we are not necessarily leaders ourselves[27].

- A leaf could be taken from Singapore's book in the matter of framing a policy framework that has allowed it to capture a niche in the global scientific research economy, especially in the field of biotechnology[28]. This country permits the entry of only world-class institutions, such as MIT, University of New South Wales, and that on their own money. This has helped it to become a regional hub for higher education and also a nodal centre for cutting edge programs and skills that help upgrade their own research capabilities.

- Before India rushes to invite foreign money, it has to exercise proper due diligence and assess the areas in which investment from outside should be entertained. Strategic areas such as microorganisms, defense industry should be excluded as this would severely compromise the sovereignty of the nation as a whole.

- It is an open secret that by striking "a balance" between "domestic regulation and providing adequate flexibility to such Universities in setting syllabus, hiring teachers, screening students and setting fee levels", the woes of average, middle class Indians would only increase further while the indigenous fabric of Indian universities would die a slow death[29]. It is high time that it is realized that foreign education providers have been and are insensitive towards cultural and educational ethos of any country. And India is no different for them.

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[27] RupaChanda, *Concerns Of Opening Up Higher Education*, The Financial Express, December 14, 2004.

[28] Beh, S. G. (2004). "Singapore overview: courting Western R&D, manufacturing", in K. Hardy et al., eds, On the Threshold: The Asia-Pacific Perspective, Global Biotechnology Report 2004 (Singapore:Ernst and Young); Dent, C. (2003). "Transnational capital, the State and foreign economic policy: Singapore, South Korea and Taiwan", Review of International Political Economy, 10(2), pp 246-277.

[29] G.D. Sharma, "Internationalisation Of Higher Education: Status And Policy Suggestions", NIEPA (Mimeo).

IX. FUTURE SCOPE

Till 2010, higher education spending saw a nine-fold increase. This infused a fresh lease of life to a sector characterized by limited supply and ambiguous quality. Further, India needs to nearly double its number of students in higher education by 2012 and ensure a major portion of it to get proper access to education. This ought to be followed right down to the word; otherwise the country's demographic dividend would soon turn into a demographic disaster.

The government here via the Foreign Universities Bill, ought not only to encourage the entry of foreign institutions but also of foreign investments in this sector. The government's is encouragement of indigenous private investment in education should be more and flexible.

Since nearly one-third passing out of India's premiere institutes like the IITs and the IIMs move and settle in the U.S., brain drain here could be interpreted as a larger exchange of brain power around the globe. A sophisticated Indian higher education system would not only allow the country to harness its own talent but also attract foreign talent.

Another priority of the government on which economic growth is to be predicated is maintaining standards in higher education whereby a proper regulatory mechanism can check the unwarranted mushrooming of universities every other day. Certain Regulations in the Bill should be done away with and a harmonious construction should be developed. A National Policy and guidelines providing for an oversight mechanism on the private sector should be taken up seriously by the states as this will go a long way in avoiding conflicting opinions by the judiciary. The future for such an endeavor would look even better if emphasis is laid on high quality of education at an affordable price. The future success of this project cannot be assured unless and until a deterrent mechanism is come out with, for checking those who impart poor quality education.

For India to evolve as a knowledge-based society, the competitive edge of Indian higher education institutions can only be maintained if all the bureaucratic process of administration is dissolved and the corruption being sidelined.

X. CORRELATION WITH THE LAW - PROACTIVE ROLE OF THE JUDICIARY

For a considerable period the higher education sector was managed by the State and Central Universities. It was only later that private institutions in the garb of aided institutions came into being, paving the way for self-financed institutions all over the country. These institutions started working in the wrong direction towards the commercialization of education. The Apex Court has intervened on a number of occasions to interpret the provisions of various legislations and the mandate of the Constitution, given out a very confusing picture of conflicting judgments shifting its stand from suspecting private sector to the acceptance of the present reality.

In *St. Stephens College v. University of Delhi*[30] in 1992 the Supreme Court made clear its moral, impassioned stand in the following words, "the educational institutions are not business houses and they do not generate wealth." In the same vein, the Supreme Court ruled that the exorbitant fee demanded was in reality a capitation fee with a different tag in *Mohini Jain v. State of Karnataka*[31] in the same year. Herein the Court pointed out that when the State Governments granted recognition to the private educational institutions they created an agency to fulfil their obligations under the Constitution, i.e. to make its citizens enjoy their "right to education."

Following closely on their heels was *J.P. Unnikrishnan v. State of Andhra Pradesh*[32] in 1993, where the issue of state intervention in admission policy

[30] (1992) 1 SCC 558

[31] *Miss Mohini Jain v. State of Karnataka and others*, (1992) 3 SCC 666. See also AIR 1992 SC 1858.

[32] Decision of Andhra Pradesh High Court dated 18 September 1992 in Writ Petition No.8248.

and fee structure of private professional institutions was revisited. The Court ruled that capitation fee is patently unreasonable, unfair and unjust thus practically banning high fee charging in private colleges[33]. However such foresight was cut short in its practical application as this judgment would only go on to enable the growth of capitation fee colleges in the name of self-financing colleges and the further loot of students.

While struggle of students continued all across the country, in 2002 the majority of a Constitution bench of the Supreme Court in *TMA Pai Foundation v. State of Karnataka*[34], while upholding the arbitrariness of capitation fee or profiteering, argued that "reasonable surplus to meet the cost of expansion and augmentation of facilities, does not however, amount to profiteering." Several questions emanating from TMA Pai judgment were attempted to be interpreted in *Islamic Academy of Education v. State of Karnataka*[35], often hailed as a reincarnation of the Unnikrishnan Scheme.

The most forward-looking, constructive judgment came in the form of *PA Inamdar & Anr. v. State of Maharashtra*[36] in 2005 wherein the Apex Court withheld the power of States to carve out for themselves seats in the unaided private professional educational institutions or impose their policy on reservation. Every institution was however empowered to devise its own fee structure whereas a committee headed by a retired judge was proposed to act as a regulatory measure aimed at protecting the interests of the students. However, by sanctioning 15 per cent of the seats for NRIs, a virtual legal license was given to convert education into a commodity for those who can afford it.

In a situation such as this where the State is increasingly withdrawing itself from investing and expanding facilities in higher education it is only natural

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[33] J.P.Unnikrishnan Judgement, p. 60, 64, 68.
[34] *T.M.A Pai Foundation V. State of Karnataka*, AIR 1994 SC 13.
[35] *Islamic Academy of Education v. State of Karnataka*, (2003) 6 SCC 773.
[36] AIR 2005 SC 3226

and self-evident that commercialization of higher education would follow. It is known to all that today, the steadily rising numbers of private institutions in the country have opened only for making a quick buck and that very few of them have adequate infrastructure to impart quality education[37].

XI. GATS AND INDIA'S HIGHER EDUCATION

The General Agreement on Trade in Services, covered in the World Trade Organization (WTO), is a legally enforceable agreement aimed at the task of deregulating international markets in the domain of services including education. Being an instrument of business as it is, its Preamble states visibly, "the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations." The WTO has expressly come on record to state that one of the advantages of the GATS is that it will aid "overcome domestic resistance to change". Even though it proclaims to be consisting of nation states as its hallowed members, in reality its agenda is shaped by transnational corporations of the US, European Union, Japan and Canada that sit on all the important "advisory" committees and determine policy.

Two principles apply to all member countries without any exception. As per the first principle of "Most Favored Nations (MFN) Treatment" there cannot be any discrimination between the members of the agreement[38]. According to the second principle of "National Treatment" there is not permissible any discrimination between foreign-service providers and other domestic service providers in the country[39]. These rules, with an aim to eliminate all

[37] An opinion well attested by the fact that since 1991, 11117 colleges have sprung up, a vast majority of which include self-financing colleges, especially in Andhra Pradesh and Karnataka.

[38] Article II, subsection 1, GATS: "each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country." That is, there should be no discrimination between the Members of the agreement.

[39] Article XVII, subsection 1, GATS: "each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers." That is once a service provider from a Member country enters another Member country under specific commitments, it cannot be discriminated from other domestic service providers in the other country. (Emphasis added)

restrictions mandate governments to treat each nation's corporations equally, thus ultimately ending all attempts by developing countries to insulate their economies.

Article I.3 defines "services" to include "any service in any sector except services supplied in the exercise of government authority;" and "a service supplied in the exercise of government authority" means "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers." That is, a service has to be entirely free in order to be out of the purview of the GATS rule[40]. However, when services have been provided either by the government partially or some prices are charged (as happens in education where some fee is charged) or provided by the private providers, it shall fall under the GATS rule.

The idea behind this is the creation of an open, global marketplace where services, like education, can be traded to the highest bidder. India here is at a peculiar disposition[41]. This is because higher education is not entirely free as some fee is being charged for it. Since India has chosen to make commitments in this field, market access and national treatment rules are bound to apply to it as well.

It is to be pointed out here that the European Union has put clear boundaries on trade in higher education except 'consumption abroad'. It is suggested that in keeping with the EU's stand on this, India should replicate if not the entire, at least a semblance of it[42]. The lackadaisical attitude of the Indian government is best summed up when it states, "Given that India needs all the investment that it can get in the higher education sector, such fears and reservations seem to be somewhat overstated." It goes on further that trade

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[40] *Konark Sharma, FDI in Higher Education: Aspirations and Reality,* XLV MAINSTREAM WEEKLY 25, 2007

[41] K.D. Raju, *"Barriers To Trade In Education Services Under The Gats: An Indian Experience"*, Vol. 5, Part 1, Amity Law Review, , January 2004-June 2004.

[42] Joanna Mastalerek, The European Union as an Actor in the General Agreement on Trade in Services - Contents, Chances and Risks of Negotiations, V34908, Jagiellonian University in Krakow (Europaeistik), 2005 p. 14.

in higher education is already taking place through the movement of students, teachers, programmes and even institutions.

XII. CONCLUSION

It is high time that a World Bank-WTO dictated policy on higher education be reversed. Even though the CNR Rao Committee Report had warned of taking a hasty approach on the issue and further when a draft bill seeking to project and alleviate national concerns was circulated, the same has been delayed and the vested interests have triumphed. Even though a considerable share in the Indian intellectual domain would argue for opening up of its higher education sector to the private players so as to prepare and equip it to compete in the international market place, meaningful participation of the State should never be overlooked[43], since ultimately at the end of the day, State intervention is the "balancing factor", as bailout, stimulus packages, whatever you call it, rejuvenated the American economy from a downslide. Since we already know that with the entry of foreign universities, a university will be run on a market-model approach whose students will be its consumers, and its head will be a salesman travelling around the world promoting its programmes. Cultural streams, thinking, capacity building that are unique to each educational institution will be lost in this pursuit of standardization. Having said that, if at all foreign universities are to find acceptance in the country, the Foreign Universities Entry and Operations Act has to address the following concerns-

- Regulation of fees should be such as commercial success of the foreign universities should go hand in hand with service quality.
- Government oversight mechanism over deciding admissions criteria should be done away with, and the foreign entities should be allowed their own discretion in the same matter.

[43] Devesh Kumar, PratapBhanu Mehta *"Indian Higher Education Reform:From Half-Baked Socialism to Half-Baked Capitalism"*, Working Paper No. 108, Centre for International Development at Harvard University.

- To check profit motive while aiming at high quality in provision of such education is almost impossible. The middle path lies in interaction of the profit motives of both private domestic and foreign providers and conducting their periodic evaluations and setting and enforcing regulatory guidelines to ensure compliance. This way, profit making will not be exploitative but channeled to raise the quality of education.
- More efficacious and open registration and certification systems which ensure that preferred institutions make the cut, while the unapproved stay back to fight another day.
- Ensuring a level playing field between domestic and foreign institutions so that the former can compete and improve effectively in a favorable environment.

Emphasis on public higher education system will still remain the backbone for increasing capabilities and knowledge for further development as the State would have to preserve public interest by warding off predatory beliefs that money is the solution to every issue.

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HUMAN RIGHTS: A CONCEPT OF EAST OR WEST?

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Arijeet Ghosh**

There has always been a debate which has been raging over the coffee tables of the intellectuals. The debate concerns the topic as to where the Human Rights has originated. The opinions differ from the place the scholars are resident. While the Western Scholars have tried to prove that the origin is from the west, the eastern scholars have tried to put forward the eastern origin of the notion.

The problem traces its origin to a debate which has existed in the platter of scholars for a long time. Though weak may be the verse, misleading may be the documents, yet the question remains a centre stage of controversy which has to be reckoned with, recognized and satisfactorily answered.

In this paper, the authors have framed the hypothesis as follows: "Whether Human Rights is a concept of the East or West?"

I. INTRODUCTION

"O East is East and West is West and never the twain shall meet Till Earth and Sky stand presently at God's great judgment seat."

- Rudyard Kipling, The Ballad of East and West

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This is not a new debate. Discussions and deliberations have been tabled and fought over the armchair over this question for generations. The most intriguing fact of this question is that a satisfactory answer has not been provided. Though scholars have come out with documents and proofs, there always have been a raging controversy and criticism over the same. It is to be noted that the hypothesis is NOT rhetoric. The authors have taken into view both sides of the question before reaching to a definite conclusion based on documents and materials.

There is no dictum laid down about this question which has given it the status of an open question. The authors have answered this question in the conclusion with the whole paper as the reason for the final answer.

Flourishing it may sound to us about the existence of the problem, but a blissful resuscitation will prove otherwise. Going back to the chequered comparatives of an iconoclastic demeanour, we face the problem; "Whether *Human Rights is a concept of East and West?*"

Perspectives change. The world revolves around the basis of this change. People disagree. Opinions vary. Fields like human rights exist because opinions vary, perspectives change and people disagree.

Human rights is a subjective concept. If we look into the past of the human rights theory, we will see that it dates back centuries. Yet, the movement and the propaganda for the human rights has started very recently. Human right as a concept has bloomed very recently in the near past and is gaining more and more importance day by day. The growing importance of human rights has both a positive as well as a negative impact on the society at large. For once, if we try to look at the human rights concept in general, we find the path riddled with rhetoric and questions which has never really been answered.

The term human rights has a modern face but the concept is centuries old.

The great debate stands as to whether human rights is a concept which has originated in the west or the east. This debate is also not recent but has been discussed by several scholars in the recent past. Unfortunately, no concrete theories have been laid down and the debate still remains wide open. Several theories and conflicting anti thesis are now ruling the dais waiting to be deliberated on.

But human rights as a concept is intriguing which has mesmerized generations of thinkers and revolutionaries alike. The best part of the human rights field is that it has attracted the attention of the scholars and revolutionaries alike. The scholars have theoretically and the armchair politicians have taken up this topic as a matter to be deliberated upon.

Revolutionaries on the other hand have tried to take up the concept as the radical platform to address the issues of the troubled masses. Human rights as a concept has surpassed the barriers of limitations of any kind and gone to the wider penumbras of human existence and fight for rights in general. The chequered comparatives of an iconoclastic demeanour when performed bring us somehow in front of naked truth, that of a constant rhetoric which exists in the field due to its subjective nature and overall mystique appearance.

But the concept of human rights when compared on the basis of an east west comparative brings us to the question, the answer of which has been sought after for decades and even centuries now. In this paper, the author delves into the concept both from the eastern and western perspectives and tries to come up with a conclusion as to its fountain.

II. HISTORY OF HUMAN RIGHTS - THE ROMAN AND GREEK SAGA

History dates back both to western as well as eastern disciplines. One of the primary sources says that one of the first examples of the codification of laws

that contain references to protection of individual rights is denoted in the tablet of Hammurabi. This tablet has been contended by the historians to have been created by the Sumerian king Hammurabi about 4000 years ago.[1] Even though when measured by the yardstick of conferring human rights in the present day scenario it can be termed as barbarous, the system of 282 laws created a precedent for a legal system. This kind of a precedent of a legally binding document protects the citizens of the Mesopotamian Civilization from arbitrary prosecution and punishment. The lacunae with Hammurabi's Code were mostly due to the nature of its pure cause[2] and effect relationship, and that it held no protection on more abstract and subjective ideas such as race, religion, beliefs, and individual freedoms which used to effect the humankind in a large way.[3]

Ancient Greece became the hallowed portal where the concept of human rights flourished to a great extent and covered the several diverse fields which was later to become a part and parcel of human rights. It was no more limited to arbitrary prosecution. Human rights became synonymous with natural rights,[4] rights that spring from natural law. According to the Greek tradition of the first thinkers like Socrates and Plato, natural law is that law which reflects the natural order of the universe, essentially the will of the Gods who control nature and the natural forces.[5] A classic example of this occurs in Greek literature, when Creon reproaches Antigone for defying his command to not bury her dead brother, and she replies that she acted under the laws of the gods.

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[1] Heard Andrew, "*Human Rights: Chimeras in Sheep's Clothing?*", Human Rights Quaterly, December 1997

[2] David L. Kent, *The Code of Hammurabi: origin of the Ten Commandments*. Minneapolis, MN: Atheists for Human Rights, 2005 as accessed from archives.org last accessed on 23rd February, 2010

[3] Jerome J. Shestack, *"The Philosophical Foundations of Human Rights,"* Human Rights Quarterly, May 1998

[4] Stewart, Zeph. *The ancient world: justice, heroism, and responsibility.* Englewood Cliffs, NJ: Prentice-Hall, 1966 as available in the newworldencyclopedia.com

[5] Stanford Encyclopedia of Philosophy as available in platostanford.edu as last accessed on the 15th of February, 2010

Rome was not far behind. The ancient Greek tradition continued in Rome where natural rights soon became an idea to be reckoned with. Thinkers like the Roman jurist Ulpian believed that natural rights belonged to every person, whether they were a Roman citizen or not.[6]

III. THE FIRST EASTERN THINKERS

The Vedas and the Upanishads give us the image of a primitive system of rights[7] which cannot be termed human rights as it was not a right based approach. There was no system of enforcement of the rights. Debatably, it was not even a system of rights but just duties laid down for the individuals to follow.

If we examine the conditions of the East in the Ancient period and look at the Indian Subcontinent, King Ashoka, also known as Devanampiyapiyadasi[8] of

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[6] P.V. Subramanayam Dr., Key Contributions on the Concepts of Human Rights, as available in scribd.com as last accessed on the 22nd of February, 2010.

[7] Chandogya Upanishad, Chapter 6, Section 2, Verse 1 as accessed from evedas.com, vedamantranam.com

It is mentioned in the Chandogya Upanishad, Prapathaka(Chapter) 6, Khanda(Section)2, Shloka(Verse) "*Ekam evaditiyam*", "He is one only without a second".

The principal Upanishad by S. Radhakrishnan, page 447 and 448(sacred books of the east Volume 1 the Upanishads, part I, page 93)

a) Similar to what is mentioned in the Holy Qur'an in Surah Ikhlas, Chapter 112, Verse 1, "Say he is Allah one and only".

b) Svetasvatara Upanishad, Chapter 6, Verse 9

It is mentioned in the Svetasvatara Upanishad, Adhyaya(Chapter) 6, Shloka(Verse) 9, "*Na casya kascij janita na cadhipah*" "Of him there is neither parents nor lord".

"*na tasya kascit patir asti loke, na cesita naiva ca tasya lingam, na karanam karanadhipadhipo na casya kascij janita na cadhipah*".

"Of him there is no master in the world, no ruler, nor is there any mark of him. He is the cause, the lord of the lords of the sense organs; of him there is neither progenitor nor lord".

(The principal Upanishad by S. Radhakrishnan page 745 and in sacred books of the east Volume 15, the Upanishads, part II, page 263)

In Svetasvatara Upanishad, Chapter 4, Verse 19

It is mentioned in Svetasvatara Upanishad, Adhyaya(Chapter) 4, Shloka(Verse) 19,

"*Na tasya pratima asti*" "There is no likeness of him".

"*nainam urdhvam na tiryancam na madhye na parijagrabhat na tasya pratima asti yasya nama mahad yasah*" "There is no likeness of him whose name is great glory".

(The principal Upanishad by S. Radhakrishnan page 736 & 737 and in sacred books of the east Volume 15, the Upanishad, part II, page 253)

[8] As has mentioned in the Ashokan Edicts. Ashoka remained the mystery of the Indian History till scholars found that the person Devanampiyapiyadasi also as the name of Ashoka

the Maurya Empire of ancient India established unprecedented principles of civil rights in the 3rd century BC. The Kalinga war changed the policies of Ashoka and he became a Buddhist.

He adopted the policy of non violence or ahimsa and the protection of the human rights of his subjects as his priority. With the first welfare state being established. Ashoka also showed mercy to those who were imprisoned, including the prisoners of war, allowing them outside one day each year, and offered free education to common citizens. The right to equality was existent with equal treatment being meted out to his subjects regardless of their religion, region, political inclination, or caste.

The rights of freedom, tolerance and equality were guaranteed to the citizens of all religious and ethnic groups in the Maurya Empire.[9] The Prisoners of war were not subject to slaughter or capture during the reign of Ashoka.[10] The concept of slavery whether existent in India, is also debated with conflicting opinions by several historians.[11]

But the main criticism of this theory of this system of human rights remain that they are duty based approaches and not right based approaches. The rights and freedoms which are enumerated in the Eastern school of thought is totally on the discretion of the rulers. There was no definite system of punishing the king if he violated the rights himself.

IV. THE THEOLOGICAL CONCEPT OF THE WEST

The concept bloomed under the umbra of theology when Thomas Aquinas in his Summa Theologica explained the rights based approach of humanity.[12] Aquinas' conception held sway for several centuries: there were goods or

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[9] http://www.Archives.org as last accessed on the 24th February 2010

[10] Majumdar, Raychaudhuri, Dutta, *An Advanced History of India*, Mcmillan Publications, 2002.

[11] Thapar Romila, "*Early India: From the origins to A.D.1300*", University of California Press, 2004 Edition.

[12] Aquinas Thomas, Suma Theologica, 1920, http://www.newadvent.org as last accessed on 22nd February, 2010

behaviours that were naturally right (or wrong) only because God ordained it so. Right Reason was the dictate to be followed by humans in order to determine what was naturally right. Hugo Grotius further expanded on this notion in De jure belli et paci, where he propounded the immutability of what is naturally right and wrong.[13]

Despite this principle, the fundamental differences exist between the human rights which is in prominence today and the natural rights which were in practice in past. If we look at it from a practical point of view, it is seen that it was perfectly natural to keep slaves, but slavery as an institution of practice goes counter to the ideas of freedom and equality which are pervading the fields of human rights today. In the middle ages followed by the revolutionary renaissance, the decline in power of the theological school of human rights generally the church led society to place more of an emphasis on the individual being and not spiritual or divinity in general.[14] This change led to the paradigm shift which led the world to veer away from the feudal and monarchist societies, thus letting individual expression flourish.

V. THE INDIAN COMPARATIVE

Buddhism and Jainism are the classic examples of the Eastern Theologies. They allocated rights to every individual and went a step ahead by allocating rights even to animals, birds and insects at large. The system of rights of the Eastern religious doctrines stressed on the right to equality and freedom from discrimination.[15]

The movement of the allocating rights through religion in the Eastern side of the globe arose because of the rampant disregard of the human rights by the traditional religions. The society was caste ridden and the evils of the caste system were apparent.[16]

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[13] Grotius Hugo, The Law of War and Peace, p. 22
[14] Supra Note 13
[15] J. B. Patnaik, "*Human Rights; The Concept and Perspectives: A Third World View*", Vol. LXV,No.4, The Indian Journal of Political Science, Oct.-Dec., 2004
[16] Alam Aftab, *Human Rights in India; Issues and Challenges*, 2000

In this condition, the theologian school came as a respite to the discriminated. But again, the systems of rights per se were as elucidated by the West. They were more of an elusive branch of rights, completely subjective and the aspect of a positive duty was more prominent than the western rights which curtailed the authorities to do certain acts and were negative in nature.

VI. POSITIVE SCHOOL AND HUMAN RIGHTS

The next human rights philosophy can be attributed to the idea of positive law. Thomas Hobbes, (1588-1679)[17] was the main proponent of this theory and criticized natural law as being very vague and hollow putting the last pin to the coffin by saying that it was too open to vast differences of interpretation . Therefore under positive law, instead of guaranteeing absolute human rights, the rights can be given, taken away, and modified according to the needs of a given society. Jeremy Bentham[18] the proponent of utilitarianism, has summed up the essence of the positivist view.[19]

VII. THE INDIAN MUGHALS AND HUMAN RIGHTS

During this period in India, advent of Islam had taken place. The dynasty which rules the history text books for this period is that of the Mughals. Sadly, during this period, the system of human rights sank to an all time low in India. Though the period of Akbar the Great has been mentioned to be a period in which rights were granted to the individuals and the right to equality was practiced, there is a dearth of existing records which point out to the existence of a particular school of human rights which was existent. Aurangzeb was the last Mughal Emperor before the British invaded and he is

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[17] Hobbes Thomas, *" Leviathan"* as accessed from http://www.archives.org, http://www.platostanford.edu

[18] Bentham Jeremy, *"Anarchical Fallacies; being an examination of the Declaration of Rights issues during the French Revolution"*, in Jeremy Waldron (ed.),*Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man*, 1987, p.69

[19] Bentham J., Anarchichical Follies, quotes in N.Kinsella, *"Tomorrow's Rights in the Mirror of History"* in G. Gall, ed., Civil Liberties in Canada (1982), p.17.

known for his cruel measures, discriminations against the Hindus and the gross disregard to human rights in general.[20]

VIII. THE LIBERAL SCHOOL OF HUMAN RIGHTS

Human Rights as a concept bore the disguise of several names in the European line of thought, at least since the monarchy of King John of England. After the violation of a number of ancient laws and customs by the king, the subjects got over the fear of the divine Kingship concept and forced him to sign the Magna Carta, or the Great Charter,[21] which can be well be scholarly termed as the very first human rights document. Among them were the secular rights which were demanded by the peasants which enunciated the right of the church to be free from governmental interference, the ownership rights granted to all free citizens and the right of the citizens to be free from being imposed by excessive taxes. It also recognised the right to remarry or not by the widows who owned property, and for the very first time recognised the principles of due process and equality before the law. It also acted in the negative manner by forbidding bribery and misconduct in official capacity.

Human rights as a propaganda was started by the other political and religious groups in the other parts of the world. The main criteria was however to urge the rulers to rule justly and compassionately, and delineating limits on their power over the lives, property, and activities of their citizens.

The eighteenth and nineteenth century Europe saw several philosophers proposing the concept of "natural rights",[22] rights belonging to a person by nature as he is a human being, not by virtue of his citizenship in a particular country or membership in a particular religious or ethnic group. This

[20] Darlymple William, *The White Mughals*, (2002)
[21] Information updated from the Internet Medieval Source Book, as avalaible in http://www.fordham.edu as last accessed on the 21st of February, 2010
[22] Rawls, John, "*A theory of Justice*", Mass, (1971).

concept was considered blasphemy vigorously debated and rejected by some philosophers as baseless. Others saw it as a formulation of the underlying principle on which all ideas of citizens' rights and political and religious liberties were based.

Two revolutions shook the world to its core in the 1700s.[23] In the historic year of 1776, the British colonies in North America proclaimed their independence from the British Empire by incorporating in themselves a document which seems like a living being, stirring emotions of millions across the globe across the ages; the U.S. Declaration of Independence.[24] This document clearly mentioned the rights of equality and liberty to be provided to the individuals.

The people of France rose in rebellion and overthrew the monarchy and the first French Republic was established. The revolution gave birth to the "Declaration of the Rights of Man."

IX. CONSEQUENT EASTERN THINKERS

During the 1700s when the West was washed with the concepts of freedom, liberty and the flourishing concept of human rights, India remained in the darkened spheres with no definite system or school of human rights.[25] The art work and scriptures praise the Kings and the general will of the people which got priority in Europe was non existent in India during this period.

X. PHASING OUT OF THE NATURALIST SCHOOL

Natural rights which had gained much prominence in the early ages and even held its sway during the renaissance slowly broke down to the tide of the new ideas which kept flowing in.

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[20] Darlymple William, *The White Mughals*, (2002)
[21] Information updated from the Internet Medieval Source Book, as avalaible in http://www.fordham.edu as last accessed on the 21st of February, 2010
[22] Rawls, John, "*A theory of Justice*", Mass, (1971).

A new concept that of the Universal rights which provided a more holistic approach rather than the individual rights in general came in. The main proponent of this new theory was John Locke[26] for whom an empirical study was the only way to guarantee primary rights for a person. He perused a constitutional study of the ancient republics to understand the importance of the human rights being guaranteed on a more universal basis.

The drive for universal rights did not stop at this point. Liberty as a concept came in which spoke of radical new rights which should be granted to the individual. Not only did it guarantee more freedoms and equalities to be granted but for the first time some thinker thought about the greater problems which can be faced in the nature including that of providing basic needs to man.

Thinkers such as Thomas Paine, John Stuart Mill, and Henry David Thoreau propounded this concept.[27] John Stuart Mill in his "Essay on Liberty"[28] became one of the earliest proponents of the theory and Thomas Paine substantiated his views through the essay, "Rights of Man". [29]

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[23] Finley Gavin, *French Revolution v. American Revolution* as avalaible in http://www.endtimepilgrim.org as last accessed on the 17th of February, 2010

[24] *Ibid*

[25] The sourcebooks on Medieval India remain silent on the concept of Human Rights. None of the works of history give any citing. The closest reference we have is that of the Rajputana dynasties where equality only in name was followed but not in practicality. This information can be accessed from the Annals and Antiquities of Rajasthan, Colonel James Todd, as has been accessed from the archives.org as last accessed on the 17th of February, 2010

[26] John O'Manique, *"Universal and Inalienable Human Rights: A Search for Foundations"*, Human Rights Quarterly 465-485 (1990).

[27] It is a debatable issue as to whether Thoreau was the philosopher to use the term Human rights, because in his treatise Civil Disobedience we come across the term. This seminal work has been the subject of encouragement and influence to great thinkers across the ages and from all the walks of life, especially as Leo Tolstoy, Mahatma Gandhi, and Martin Luther King. Gandhi and King, especially were the persons who were most influenced by his work and developed the movement of a non violent basis basing it on this great seminal work.

[28] The references as to the finding of the view of Liberty is huge. But to name a few sources, the primary documents are those of On Liberty by J.S. Mill. Subsidiary books are those of Sushila Ramaswamy, Andrew Heywood on Politics, Partha Sarathi Sengupta on the Political Issue. The Wealth of Nations by Adam Smith has played a great part in the argument related to rights in this case as the arguments related to rights is dependant a lot of the classic theory of capitalism which went against the basic principles of the other theories which came into effect. But the problem arose when the world started going back to the normative forms in order to understand the right and wrong which led to the birth of a new theories and new thinkers alike.

[29] Paine Thomas, "*The Rights of Man*", as available in the http://www.books.google.com as last accessed on the 26th February, 2010

After the movement of liberalism, it was felt that political rights were the only rights being fought for. New thinkers started coming in with more radical concepts in mind. This was because of the vast number of unemployed people who had no means of livelihood. The thinkers of human rights were not fighting for them but on the other hand for providing the rights for the state and political reasons in general.

XI. THE RISE OF ECONOMIC SOCIAL AND CULTURAL RIGHTS: THE AGE OF MARX

The world was ridden with the curse of inequalities, unemployment, hunger and frustration among the labour class of people. The dictum and fight for civil and political rights was not enough. This frustration led to a quest for answers which gave birth to the theory of communism which stressed on the allocation of economic social and political rights and not only civil and political rights.

Communism as a human rights theory is discreet in nature. This is because the theory was basically a mouth piece of only a particular class of people. But Marxism for the first time claimed distribution of wealth according to needs which till this time was unheard of. The concept gained prominence with the October Revolution toppling the Czars and the communists coming with the Red Army to march through the gates of Moscow.[30]

[30] All information regarding Communism and Marxism has been inducted from the following texts:
1845: Theses on Feuerbach
1846: [A Critique of] the German Ideology
1847: Principles of Communism
1848: The Communist Manifesto
1849: Wage-Labor and Capital
1859: Preface to Contribution to critique of political economy
1867: Capital, Chapter One
1871: The Civil War in France
1875: Critique of the Gotha Program
1880: Socialism: Utopian and Scientific
1886: Ludwig Feuerbach
(1875-1895) Critique of the Gotha Program, and Engels' popular explanations.
The following texts can be accessed from Marxists.org as last accessed on the 28th of February 2010

Literally facing the point of human rights, Communism[31] became the fountainhead to base all the theories of Economic, Social and Cultural Rights to be framed. This new theory of Human Rights paves the way for the modern day concept of radical protection of human rights.

XII. THE ERA OF GANDHI

Gandhi was the pioneer of human rights activities in India. He was influenced by the thoughts of the western philosophers. The concept of Socialism which was preached by Gandhi was not the same as was deliberated by the socialist philosophers of the Western world. His concept of socialism[32] was unique as it was indigenous in origin and there was a distinct character of the Indian subcontinent which was incorporated in the socialist thought of Gandhi.

True Socialism, according to Gandhiji, can be obtained only when mankind nourishes equality in the behavioural designs of human beings. The barriers of numerous differences were apparent in the Indian scenario. These differences are significant and cannot be ignored outright. Hence, Gandhiji stressed on equality and human dignity in India which was needed in the Indian Diaspora.

Mahatma Gandhi says, “Socialism is a beautiful word and, so far as I am aware, in socialism, all the members of the society are equal, none low, none high. In the individual body, the head is not high because it is at the top of the body, nor are the soles of the feet treated lowly because they touch the

[31] Ibid

[32] Sen Amartya, Thinking about Human Rights and Asian Values, This is an excerpt of a paper entitled “Human Rights and Economic Achievements,” presented at the Hakone Workshop of the Human Rights Initiative, June 23-26, 1995. as quoted by saiah Berlin, Four Essays on Liberty (Oxford: Oxford university Press, 1969), p. xl. Even as far as the idea of democracy itself is concerned,as Benjamin Schwartz notes, “in China, the model of the natural and sacred hierarchy of the patrilear family may have lenbt its own coloration to the concepts of hierarchy and authority, but we must again remember that even in the history of the West, with its memories of Athenian democracy, the notion that democracy cannot be implemented in large territorial states requiring highly centralized power remained accepted wisdom as late as Montesquieu and Rousseau.” (The World of Thought in Ancient China [Cambridge: Harvard university Press, 1985], 69).

earth. Even as members of the individual body are equal, so are members of the society."[33]

The struggle for obtaining human rights by Gandhi did not start in India. His goal of obtaining social justice started in South Africa. He spent 21 years of his life in that country where his struggle continued to restore the dignity of man and against social injustice. There, he succeeded to a great extent in uniting many in the anti apartheid movement. Gandhiji was a great leader. He was the person who united thousands in the struggle in South Africa, which bore a great human touch. He spread the ideal of equality and non violence in India.[34] This was not a new concept. He had obtained this concept from the religions of Buddhism and Jainism which spread the concept of non violence in India thousands of years ago. Gandhi was thrown in prison by General Smuts, the dictator and he was made to suffer rigorous torture. But the skills of Gandhi were honed by these imprisonments.

But Gandhi spread the word, "Hate the sin, and not the sinner." This was the basic concept which was spread by Gandhi. This concept of human rights preached by Gandhi was not only limited to India but was universal in its nature.[35]

The highest priority of Gandhi was to bring about a change in the social structure. The socialism concept of Gandhi involved the concept of Satyagraha. According to Gandhian human rights, the concept of Satyagraha can be used to bring about equality among the masses and the remove the disparities involved in the social structure of India.[36]

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[33] Dixit Sona, Dixit Arun Kumar, Gandhiji's Values, as accessed in dkshamli.wordpress.com/.../mahatma-gandhis-approach-towards-human-rights/ on 2nd February, 2010

[34] Mazumdar Haridas, Mahatma Gandhi: Peaceful Revolutionary, as can be found in www.questia.com as last accessed on the 25th February, 2010

[35] Gandhi M.K., All Men are Brothers: Life and Thoughts of Mahatma Gandhi, as can be found in www.questia.com as last accessed on the 18th February 2010

[36] Gandhi M.K., Non Violent Resistance (Satyagraha), as can be found from www.questia.com as last accessed on 22nd February 2010

Gandhiji propagated the ideals of education of faith,[37] self discipline, tolerance and e human values. This further has led to the development of cross culturalism with respect for mankind as a whole and to promote social transfusion.

In the current day, the world is full of hatred, inequalities, discrimination, human degradation, ill values and a complete erosion of value system. There is a vital need to recapitulate and apply the teachings of Gandhi, who was always a staunch believer of protection of human rights throughout his life.

XIII. THE DAWN OF THE NEW WORLD

This modern day concept of a prominent movement of human rights rose after the Second World War which became a benchmark in order to determine the present concept of human rights. The world saw destruction at levels which could not have been comprehended by the humanity in their wildest dreams.

This shook mankind to the core and gave rise to the development of human rights as a prominent field of study with the movement to enforce human rights gaining momentum all over the world.

The concept of human rights underwent a radical change and implementation of human rights became the first priority. This sweeping movement of human rights[38] was a direct result of the years of terror during the Second World War.

This new concept gave birth to the International Organization[39] which was

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[37] Wolpert Stanley, "*Gandhi's Passion: The Life and Legend of Mahatma Gandhi*" as can be found on http://www.questia.com as last accessed on the 18th of February, 2010

[38] Byrne, Darren J.O., *"Human Rights: An Introduction, Pearson Education Limited*", 2000 as can be accessed from http://www.books.google.com

[39] First it was the League of Nations founded after the First World War. But it failed due to non participation of certain nations and absence of a definite system of redressal. But after the second world war, the United Nations was founded which has been operating close to 70 years with remarkable success. Moreover, it has been the recipient of several Nobel Peace Prizes throughout its existence.

founded to give voice to the millions of depressed in the world. The Second World War witnessed the union of the world leaders in one world platform the enforce human rights and consequently the United Nations Declaration of Human Rights.[40]

This led to the union the East and West and finally the meltdown of the barriers between the East and West. The concepts and schools of the West merged with that of the East and the union led to the platform for redressal of human rights on an international level.

XIV. CONCLUSION

In this paper, we find that the concept of human rights is mainly limited to that of the western countries. It is not a disputed fact that the concept did not exist in the east but it was duty based and not rights based. It was the duty of the sovereign to serve the people so as to provide them with the rights to equality and a right against discrimination. But the King was never bound by this duty. It was a choice on him whether to follow this duty. We can say that the notion of human rights could be infringed by the rulers and it was basically subject to the nature of the ruler concerned.

The rulers who were just upheld the idea of human rights while the heads who were ruthless and cruel carried on the justice system as they deemed fit without referring to the concept of human rights at all.

But in the west, we see umpteen examples of the documents which existed which make human rights a mandatory provision to be followed. Besides, we have also seen several thinkers who have given this notion a new meaning by taking the rights concept to a different plane altogether by combining rights with freedom and synonymous with that of liberalism and secularism.

It can be further contended by the virtue of this paper that the first Indian to spread the concept of human rights was Gandhi who borrowed the concepts

[40] Ian Brownlie(ed.), *Basic Documents on Human Rights,* 6TH ed. 2009

from the west and applied it in an indigenous manner so as to make the Eastern countries follow this system of human rights.

But after the Second World War, it was evident that the world was united to put an end to the gross human right violations which had taken place during the war. The world has united to redress the system. Human Rights has evolved as one of the most advancing fields of study and research in the academic fields. The differences between the East and the West have dissolved into nothingness and it is now a united human rights agenda.

This provides a concrete answer to the hypothesis and the problem of the project by stating that the basic concept of human rights was western in origin. Though it existed in the East yet it was basically duty based and not rights based. It also convincingly satisfies the aim of the project which tried to search for a convincing answer as to the whether human rights was a notion from the East or West.

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ENFORCEMENT OF RAPE LAWS IN INDIA: GENDER JUSTICE OR GENDER SENSITIVE

Manika Kamthan *
Pankaj Choudhury *

"Any lawyer who says there's no such thing as rape should be hauled out at a public place by three large perverts and buggered at high noon with all his clients watching."

Hunter S.Thompson, Hell's Angels[1]

Suffering it has been said, is in the eye of the observer and not in the eye of the sufferer. Rape is one of the most heinous forms of sexual harassment against women. It not only harms the victim physically but also drains her mentally. The victim of forcible sexual intercourse is treated as an accomplice in the society which values chastity as the most important attributes of womanhood and does not hesitate to test it by subjecting the woman to the ordeal of fire without causing a ripple amongst the onlookers[2]*. Rape transgresses into the right to privacy of the victim and cripples her for life. Unfortunately, in a patriarchal society like India the victim is forced to suffer for the act of the accused and is held responsible for her fate in one way or the other. She has to relive the tragedy in the court rooms if she gathers enough courage to prove her innocence. It is very unfortunate that it is the victim and not the accused of rape that carries the social stigma for life.*

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[1] Macdonald.M.John; *Rape-Offenders &Their Victims*; pg.3

I. INTRODUCTION

Moreover, our criminal justice system carries within itself great challenges and hurdles for the victim. According to a survey in the Aligarh District Court, the rate of conviction in rape cases has toppled down from 16% in 1999 to 8% in 2003[3]. The situation was grimmer until the amendment of Indian Penal Code (IPC) and Indian Evidence Act in 1983. Various Amendments were introduced which shall be discussed later in this paper. Still the situation is very not very satisfactory. Though the Courts are on the way of imparting gender justice but their approach is still not gender sensitive. The concern of Courts is still limited to the patriarchal issues like the marriage prospects and the loss of virginity of the victim, so much so that they don't even hesitate to rely on such issues to establish the guilt of the accused. In a case while upholding the conviction by the Sessions Court the Rajasthan High Court held: *"The girl was a virgin up to the time of rape. It is difficult to imagine that an unmarried girl would unwillingly surrender her virtue. Virginity is the most precious possession of* ***an Indian girl*** *and she would never willingly part with this proud and precious possession.*[4]

In the following research paper we have tried to study the Rape Laws in India and the challenges in their enforcement. We have tried to ascertain the scope of further reforms in the laws so as to make the path less traumatic for the victim. Our assertion remains that though today our judiciary may be imparting so called gender justice but it still lacks in gender sensitive approach. The justice which comes to the victim after facing a lot of humiliation no more holds good and as it is said that ***"justice delayed is justice denied",*** the judiciary also needs to speed up the procedure.

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[2] Reference to the episode in Ramayana; Lord Rama had subjected Sita to fire to prove her virginity during her captivity in Lanka

[3] Rape Law: A Case Study of Aligarh District Court; Dissertation by Mohd. Tanveer Alam , Faculty of Law, A.M.U,2003

[4] *Babu* v. *State of Rajasthan,* 1984 Cri.L.J,74

II. RAPE LAWS IN INDIA

"*The law of rape is not just a few sentences. It is a whole book, which has clearly demarcated chapters and cannot be read selectively. We cannot read the preamble and suddenly reach the last chapter and claim to have understood and applied it.*" —Kiran Bedi[5]

Indian Penal Code: Sexual Offences: Section 375. IPC defines "Rape" as:

A man is said to commit "rape" who, except in the case hereinafter accepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:

First: Against her will.

Secondly: Without her consent.

Thirdly: With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly: With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly: With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly: With or without her consent, when she is under sixteen years of age.

[5] http://www.legalindia.in/rape-laws-in-india

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception: Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape.

Section 376 - Prescribes the "Punishment for Rape":

(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever: -

(a) Being a police officer commits rape-

(i) Within the limits of the police station to which he is appointed; or

(ii) In the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) On a woman is his custody or in the custody of a police officer subordinate to him; or

(b) Being a public servant, takes advantage of his official position and commits rape on a woman is custody as such public servant or in the custody of a public servant subordinate to him; or

(c) Being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) Being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) Commits rape on a woman knowing her to be pregnant; or

(f) Commits rape when she is under twelve years of age; or

(g) Commits gang rape,

Shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1 : Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2 : "Women's or children's institution "means an institution, whether called an orphanage of a home for neglected women or children or a widows' home or by any other name, which is established and maintained for the reception and care of women or children."

Explanation: 3 : "Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.

The Criminal Law Amendment Act 1985:

In the Mathura rape case[6], wherein Mathura- a sixteen year old tribal girl was raped by two policemen in the compound of Desai Ganj Police station in Chandrapur district of Maharashtra.

Her relatives, who had come to register a complaint, were patiently waiting outside even as the heinous act was being committed in the police station. When her relatives and the assembled crowd threatened to burn down the police chowki, the two guilty policemen, Ganpat and Tukaram, reluctantly agreed to file a panchnama. The case came for hearing on 1st June, 1974 in the Sessions court the judgment however turned out to be in favour of the accused. Mathura was accused of being a liar. It was stated that since she was 'habituated to sexual intercourse' her consent was voluntary; under the circumstances only sexual intercourse could be proved and not rape.

On appeal the Nagpur bench of the Bombay High Court set aside the judgment of the Sessions Court, and sentenced the accused namely Tukaram and Ganpat to one and five years of rigorous imprisonment respectively. The Court held that passive submission due to fear induced by serious threats could not be construed as consent or willing sexual intercourse.

However, the Supreme Court again acquitted the accused policemen. The Supreme Court held that Mathura had raised no alarm; and also that there were no visible marks of injury on her person thereby negating the struggle by her. The Supreme Court was probably following its Western counterpart in U.S.A., whereby the California Supreme Court in *People vs Mayberry*[7] held that "When a man misunderstands the intentions of a woman claiming rape, his actions are legal as long as he reasonably and genuinely believes that she desires intercourse."

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[6] *Tukaram* v *State of Maharashtra,* (AIR 1979 SC 185)
[7] 15 Cal.3rd 143

The judgment was bitterly criticized by the critics and thereby started a movement for changes in the rape laws. The response of the government to the movement was swift. When the issue was raised in Parliament in April 1980 the government promised the House that the Law Commission shall look into the demands. Finally, in 1983, The Criminal Law Amendment Act, 1983 was passed. By this act, Sections 375 and 376 Indian Penal Code (IPC) were amended and certain more penal provisions were incorporated for punishing such custodians who molest a woman under their custody or care. Sections 375 and376 have been substantially changed by Criminal Law (Amendment) Act 1983 and several new sections were introduced by the new act, i.e. 376-A, 376-B, 376-C and 376-D. Section 327 of the Code of Criminal Procedure which deals with the right of the accused to an open trial was also amended by the addition of sub-sections (2) and (3). The amended provisions of the Section 327, Criminal Procedure Code impresses upon the Presiding Officers to hold the trial of rape cases 'in camera' rather than in open court. It reads as follows:

Section 327: Court to be open.

(1) The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open court to which the public generally may have access, so far as the same can conveniently contain them:

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room building used by the court.

(2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code (45 of 1860) shall be conducted in camera:

Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court.

(3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court.

Indian Evidence Act, 1872:

The Section 114A was inserted in the Indian Evidence Act, 1872 which reads as follows:

Section 114-A. Presumption as to absence of consent in certain prosecutions for rape:

In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual inter course by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

In order to prevent the further humiliation and ostracism of the victim of rape Section 228A was inserted in the IPC. It makes the disclosure of identity of a victim punishable. The name of the victim is to be "suppressed". The printing or publishing of any matter which may make known the identity of the victim can be punished. It reads as follows:

Section 228A: Disclosure of identity of the victim of certain offences etc.

(1) Whoever prints or publishers the name or any matter which may make known the identity of any person against whom an offence under Section 376, Section 376A, Section 376B, Section 376C, or Section 376D is

alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is:-

(a) By or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or

(b) By, or with authorization in writing of, the victim; or

(c) Where the victim is dead or minor or of unsound mind, by, or with the authorization in writing of, the next of kin of the victim:

Provided that no such authorization shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognized welfare institution or organization.

Explanation: - For the purpose of this section, "recognized welfare institution or organization" means a social welfare institution or organization recognized in this behalf by the Central or State Government.

(3) Whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in sub-section (1) without the previous permission of such court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

Explanation: - The printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of this section.

Later few more amendments were made in order to make the path to justice easier for the victim of rape. In 2005, Section 164A was added to the Criminal Procedure Code which provides for the medical examination of the victim by a doctor employed in the government hospital and in his absence by any private doctor provided his name is enrolled in the State Medical Register.

The legislature brought about an amendment in by Act 4 of 2003 (sec. 3) by inserting a proviso to section 146 of the Indian Evidence Act 1872 that in a prosecution for rape it shall not be permissible to put questions in the cross-examination of the victim with respect to her moral character. This led to the deletion of the section 155 (4) of the Indian Evidence Act in 2003, whereby the 'generally immoral character' of the victim can be a ground raised by the accused for rape.

III. THE DISTURBING STATISTICS

It's the fastest growing crime in India. The challenge lies in the fact of low rate of conviction in the rape cases.

The occurrence of the offence hasn't diminished. Statistics of the National Crime Records Bureau (NCRB) show that in 2003, there were more than 15,000 cases of rape and 32,000 cases of molestation[8]. A study was conducted at University College of Medical Sciences and Guru Teg Bahadur Hospital, a tertiary hospital of East Delhi, India, over 4 year period from April 2001 to April 2005. A total of 50 case records of natural sexual assault were retrieved retrospectively from the Medical Record Section of the hospital and the data was analyzed. Majority (92%) of the victims were

[8] Rajalakshmi, T.K.; 2005; *In Defence of Women;* FRONTLINE; Volume 22 - Issue 24, Nov. 19 - Dec. 02,

unmarried girls between 10–19 years (62%). Victim gathered courage and reported the crime in only 10% cases. 60% of perpetrators were acquaintances, 6% of them were relatives.

Rape under threat of great bodily harm or death was noted in 2 (4%) cases. Thirty women (60%) reported after 24 hours of being raped[9].

According to the official statistics of NCRB 1991, one woman is molested every 26 minutes. These statistics refer to the reported cases. Whereas, if the unreported cases were to be included, it would be a matter of seconds- rather than minute's investigation of most cases are not reported by victims because of various reasons such as family pressures, the manner of the police, the unreasonably long and unjust process and application of law; and the resulting consequences thereof. According to the National Crime Records Bureau (NCRB) statistics, in 2005, 4,025 cases of child rape were reported. The figure went up to 4,721 in 2006, representing a 17 per cent increase. It is anybody's guess how many cases go unreported[10].

The statistics though only few of them being cited are mind numbing and thought provoking. It raises the question that where does our criminal justice system lacks and what can be done to set it right.

IV. THE FLAWS IN THE RAPE LAWS:

MARITAL RAPE:

Though sweeping changes have been introduced in the rape laws still few points remain untouched and are open to debate. The Section 375, IPC does not incorporates the idea of MARITAL RAPE. It clearly says that the sexual intercourse by the husband with his wife if the wife is above the age of 15 years. It clearly negates that notion that even as a wife of someone a woman

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[9] *Female Sexual Assault: A Study from East Delh*i; Volume : 6, Issue : 4; Indian Internet Journal of Forensic Medicine & Toxicology; Year : 2008,.

[10] Raghavan R.K.; 2008; *"Death for rape?"* FRONTLINE; Volume 25 - Issue 10, May. 10-23

holds absolute right over her body. It out rightly makes the will of husband as binding for the wife and valid in the eye of law.

DETERMINATION OF AGE OF GIRL VICTIMS:

Further there is difference between the ages of majority for all other legal purposes, i.e. 18 years and for the offence of rape i.e. 16 years. This has led to the dichotomy whereby the a girl is presumed to be incapable of taking independent decisions in other matters, but is deemed to be capable enough to consent to the sexual intercourse if she is above the age of 16 years. This difference should be removed. The proof of age of rape victim is significant because the consent of the victim is immaterial where she is below 16 years. The burden of proving the age of the victim lies totally on the prosecution. If it is not proved that the victim is below the age of 16 years, then it also has to be proved that she did not consent to the sexual intercourse. In the rape cases of rural areas the real problem arises when a satisfactory birth certificate cannot be produced. The credibility of the ossification test is still doubtful and where the test carry a margin of two years, the benefit of doubt has been given to the accused. Therefore, the determination of the age of the girl victim should not be left to the discretion of the judiciary.

MINIMUM PUNISHMENT:

Section 376 prescribes the minimum punishment of ten years and the maximum punishment of life imprisonment for the offence of rape. The demand for the award of capital punishment for the offence of rape remains unfulfilled. The problem arises with the proviso to section 376 which gives the discretion to the Courts to further lessen the minimum punishment of 10 years. This power has been used time and again by the judiciary. It raises doubts over the intention of the law makers. In my opinion rape is a barbaric act for which even stoning the accused to death is insufficient to compensate the harm caused to the victim.

In *Phul Singh v. State of Haryana*[11], one of the most progressive judges of the Supreme Court Justice V.R. Krishna Iyer reduced the sentence of the accused on the following reasoning:

"Youth overpowered by sex stress in excess. Hyper sexed homo sapiens cannot be habilitated by humiliating or harsh treatment. As part of the sentencing package the curative course for the prisoner should be designed to rid his aphrodisiac overflow and restore him into safe citizenship. The accused is barely 22 years. He has a young wife and farm to look after. Given correctional course his erotic aberrations may wither away. Taking an overall view of the criminal and familial factors involved, the societal proneness to sex and people's abhorrence of released prisoners, the sentence is reduced." The Court was probably influenced by the western psychological theories that placed the cause of rape in the minds of offenders. The rapists were treated as patients under this theory who had abnormal personalities. Thus they needed prescription rather than punishment.

In Bhan Singh vs. State of Haryana[12], a 7 years old girl was raped by a boy of 18 years. She was severely injured and left in an unconscious condition. The Sessions Court convicted the accused for 5 years rigorous imprisonment. The appeal to enhance the sentence was dismissed on the following reasoning:

"Although rape warrants a more severe sentence, considering that the accused was only 18 years of age, it would not be in the interest of justice to enhance the sentence of 5 years imposed by the trial court."

It is very unfortunate that while court laid so much emphasis on the young age of the offender, the innocent age of the victim was squarely ignored which in fact had made the crime more grave and brutal.

[11] 1980 Cri.LJ,8
[12] 1984 Cri.LJ,786

V. NEED FOR REVIEW

When the laws themselves carry an inherent bias, how far can the victim be assured of justice?

The National Commission for Women has identified nine[13] areas for review. These are:

1. Review of the definition of rape
2. Reduction of procedural delays
3. Uniformity in age of consent under Sections 375 and 376 of Indian Penal Code, 1860, bring it in conformity with the Child Marriage Restraint Act, 1869.
4. Whether exception to Section 375 should be deleted
5. Whether Section 155 clause 4 of the Indian Evidence Act, 1872 needs to be amended or deleted.
6. Whether statutory provisions are needed for compensation to the rape victim 7. Whether provisions for counselling legal aid should be made mandatory under laws.
8. Death penalty to persons convicted for rape.
9. Recommendation for enhancement of punishment in cases where the accused, with the knowledge of suffering from HIV infection/AIDS, infects the victim as a result of rape.

Moreover, a comprehensive piece of legislation covering almost every aspect of sexual assault against women and minors has been drafted at the initiative of the All India Democratic Women's Association (AIDWA). It is called the Criminal Law Amendment Bill. It is based on the 172nd report of the Law

[13] RAPE LAWS – ARE WOMEN REALLY PROTECTED; www.sakshijuneja.com/.../rape-laws-arewomen-really-protected

Commission to amend laws relating to sexual assault in Sections 375, 376, 354 and 509 of the IPC, the relevant sections of the Code of Criminal Procedure (CrPC), 1973, and the Indian Evidence Act. When it becomes law, the legislation will be called the Criminal Law Amendment Act, 2000. The proposals which include:

- provisions for speedy trials;
- recording the statements of victims at places of their choice;
- investigation of cases by women police officers; and
- Hearing of cases, wherever possible, by women judges.

Are they aimed at reducing the mental agony of rape victims? They are a tacit recognition that it is not enough to reform rape laws by increasing punishments or widening the definition of this awful sexual crime an acknowledgment of the importance of supplementing deterrent measures with those that alleviate the trauma of the sufferers. The definition of "Rape" under Section 375 has been enlarged, incorporating international legal standards. The offence is now called sexual assault rather than rape, at suggestion of the Law Commission and the National Commission For Women (NCW) sub-committee. However, the Bill drafted by AIDWA has a more nuanced approach to sexual assault, defining it as an offence committed by a man against a woman, rather than making it gender neutral.

It also distinguishes this from child sexual assault, which can be committed on a child of either sex by a man or a woman. Sub-sections within Section 375 deal in detail with forms of sexual assault on women as well as minors. Significantly, the Bill redefines consent whereby the absence of resistance cannot be deemed as consent. Consent is only the unequivocal voluntary agreement by a person to engage in sexual activity. This is important because under the existing law, if a woman alleging rape does not have any injuries on her person, she is often disbelieved and the absence of her consent is not

considered at all. Also, while raising the age of consent to 18 years, the Bill makes the provision that consent would be a valid defence if the complainant was between 16 and 18 years and the accused not more than five years older. The Bill, therefore, recognizes the prevalence of consensual sexual activity between young people. The Bill also deals with marital rape and proposes punishment for rape within marriage. But the Bill is still not the Act and is not the law of the land.

VI. THE PATRIARCHAL APPROACH OF JUDICIARY

The approach of judiciary in the rape cases has been confusing and fluctuating. The Courts though impart gender justice but simultaneously they comment heavily upon the patriarchal issues like sexuality and virginity of the victim. A judge should only look into the fact in issue i.e. whether the act of sexual intercourse was against the will of the victim or not? It is not our individual opinion but the opinion of the honourable Supreme Court in *Maharashtra v Madhukar Narayan Mardikar*[14] which says: *"...Even a woman with easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also, it is not open to any and every person to violate her person as and when he wishes. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard."*

The contention lies here that why the Court needs to even comment upon the Character of the victim? Why the patriarchal voices like "women of easy virtue" needs to be emphasized? By commenting upon the character of the victim you yourself shattered "the right to privacy" of the victim which you are condemning in the subsequent passages.

In 1984, the first year after the amendment, started off with a judgment which reflects an extremely negative view of women's sexuality. In *Jayanti Rani Panda vs. State of West Bengal*[15], a school teacher had seduced a young

[14] AIR 1991 SC 207
[15] 1984 Cri.LJ,202

girl but when she conceived he refused to marry her. The girl filed a complaint that since her consent to sexual intercourse was given under a false promise of marriage, it was not a valid consent. Hence the act amounted to rape. The Calcutta High Court held: *"Failure to keep the promise at a future uncertain date does not amount to misconception of fact. If a fully grown girl consents to sexual intercourse on the promise of marriage and continues to indulge in such activity until she becomes pregnant, it is an act of promiscuity."* The Court neglected the fact that the consent obtained under misconception of fact is no consent in the eye of law. As a matter of fact no one should be permitted to reap the benefits of fraud in sexual matters.

In *State of Maharashtra vs Vasanth Madhav Deva*[16], a tribal woman was raped by a police constable who entered her house at night on the pretext of searching the house. Her husband who was night watchman was away at work. The Bombay High Court upheld the acquittal by the Sessions Court at Dhulai, on the following ground: "*Probability of the prosecutrix who was alone in her hut, her husband being out, having consented to sexual intercourse cannot be ruled out. Benefit of the doubt must go to the accused and acquittal cannot be interfered with."* It is very unfortunate that the doubt which the Court had was that, *"are there any chances of refusal for sexual intercourse by a woman alone in her home in night?" The Court totally neglected the fact that the accused was a person of authority who could have easily put the victim into threat."*

There have been positive judgments where the accused were convicted but even in such cases the Court does not concern itself to addressing the trauma suffered by a minor girl and the extent of her injuries. The concern of the judiciary is limited to the loss of virginity and prospects of marriage. In *Babu vs State of Rajasthan*[17], a young girl was dragged into the forest, kept there

[16] 1989 Cri LJ,2004
[17] 1984 Cri.LJ,74

the whole night and was raped. While upholding the conviction by the Sessions Court, the Rajasthan High Court held: *"The girl was a virgin up to the time of rape. It is difficult to imagine that an unmarried girl would unwillingly surrender her virtue. Virginity is the most precious possession of an Indian girl and she would never willingly part with this proud and precious possession."*

The judiciary seems to endorse the view that virginity is more precious for Indian women, and hence its violation a grave offence. Conversely, the rape of *other* women is viewed as less serious. Hence rapes of foreigners are not taken seriously in our country.

In a *positive judgment* reported in 1988, a 10 year old girl was raped by a 45 year old man. While convicting the accused, the Court imposed a fine of Rs. 5000 and ordered the amount should be paid to the girl as compensation. But the reasoning behind the order *was "The amount will be useful for her marriage expenses and if married will wipe out the anguish in her heart.*[18]*"* One wonders whether the implicit statement that the marriage prospects of a raped girl is bleak and for sure the expenses shall be higher because the girl is a victim of rape. Moreover, why is the anguish and anger in her heart is linked to marriage? If a progressive judiciary like ours holds such views, what can we expect from an orthodox society like ours?

Moreover, there have been instances where the Courts have reduced the sentence of the accused merely because the victim got married during the pendency of the case. The Court presumes that since the rape did not "mar the chances of marriage", the offence is less grievous and merits reduction of sentence. We don't see the offence and the fact of victim getting married even remotely connected to each other. According to our learned judiciary the only harm caused by the offence of rape to the victim is this, that the

[18] *Mohd. Habib* v. *State*, 1989,Cri.LJ,137

prospects of her getting married becomes bleak and fortunately if she gets married then the harm caused is undone.

In a shocking statement the Court went on to the extent of saying that, *"Sexual morals of the tribe to which the girl belonged are to be taken into consideration to assess the seriousness of the crime.*[19]*"* What we are unable to understand is that as to how the Court is going to ascertain the sexual morals of the tribe???? We are shocked and left speechless!!! Even if the judiciary is imparting gender justice it is just of the concern over the loss of virginity or the marriage prospects of the victim. The Court forgets that by again and again emphasizing such issues they keep on hitting upon the sexuality of the women. The victim is made to believe that it's you who is crippled for life and not the accused. In our opinion the victim should only be asked that whether the act was against her consent if she is above the age of 16 years and once it is proved there should be conviction. There is hardly any need to comment upon the character, sexuality, virginity of the victim.

VII. CONCLUSION

At this historic moment feminism must reconsider its engagement with the language of rights and the law. The experience of the last decade not only raises questions about the capacity of the law to act as a transformative instrument, but more fundamentally, points to the possibility that functioning in a manner compatible with legal discourse can radically refract the ethical and emancipator impulse of feminism itself. There is growing feminist unease at the interface of the law with sexuality. The failure of the law to deliver justice in the feminist terms is understood to be a result of the interpretation of the law in the sexist ways so that the law's capacity to be just would be freed from the biases of individuals..

Changing social values and globalization certainly alters the general comprehension of a word. In a country rife with misconceptions about rape

[19] *Darayaram & Another* v. *State of M.P.*,1992 Cri.LJ,3154

and rape victims, corrupt and sloppy police work, widespread reports of police mistreatment of victims including custodial rape, and deeply ingrained cultural and religious stereotypes, more alertness by the courts is needed so that justice is seen to be done, and not thwarted by the letter of the law. The courts and the legislature have to make many changes if the laws of rape are to be any deterrence. The sentence of punishment, which normally ranges from one to ten years, where on an average most convicts get away with three to four years of rigorous imprisonment with a very small fine; and in some cases, where the accused is resourceful or influential- may even expiate by paying huge amounts of money and get exculpated. The courts have to comprehend the fact that these conscienceless criminals- who sometimes even beat and torture their victims- who even include small children, are not going to be deterred or ennobled by such a small time of imprisonment. Therefore, in the best interest of justice and the society, these criminals should be sentenced to life imprisonment.

Justice prides herself on being blind to everything but the truth-yet as far as rape is concerned; the facts paint a different picture. Rape is a weapon that distorts a woman's sexuality, restricts her freedom of movement and violates her human rights. It leaves a woman feeling exposed, humiliated and traumatized. A rapist not only violates the victim's privacy and personal integrity, but also causes serious physical and psychological damage. The judiciary needs to adopt a more serious and gender sensitive approach. It should not get into the complexities of the personal attributes of the victim since it in no way justifies the crime committed against her. Violence against women exists in various forms in everyday life in all societies. Women victims of violence should be given special attention and comprehensive assistance. To this end, legal measures should be formulated to prevent violence and to assist women victims. However since law, the legal system and society are closely interlinked it is not possible to enforce the rights

provided in law without changes in social institutions, values and attitudes. Social change cannot be brought about through law.

It is only through the process of sensitizing various branches of the government and more importantly the members of society to the rights and concerns of women can gender justice become a reality. Law is only one method by which the various problems of women can be resolved.

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FREEDOM OF THE PRESS AND THE LAW OF DEFAMATION

Dr. Dayanand Garg*

For a man of honour defamation is worse than death.
— The GITA

The law of defamation presents a conflict between individual and society.[1] *It has been described as, "a tale of two interests". These interests are the interest of the individual in the reputation, and the interests of the society that information should pass freely.*[2] *It may be said that when any person passes the freedom of speech and expression, so every person also possesses a right to his reputation which is regarded as a property.*[3] *Article 12 of the Universal Declaration of Human Rights proclaims:*[4]

No one shall be subjected to arbitrary attacks upon his honour and reputation. Everyone has the right to protection to the law against such attacks.

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1 See generally P.M. Bakshi, *Law of Defamation, Some Aspects*; P.C.I. and I.L.I., (1996).

2 See *Report of the Second Press Commission*, Vol. I., p. 43, para 66, (1982).

3 D. D. Basu, *Constitution*. Justice E.S. Venkataramiah says that while the basic purpose of the law of privacy is to safeguard a person's feelings, the idea beyond the law of defamation is to protect his reputation.

4 Universal Declaration of Human Rights, Article 12, in *International Bill of Human Rights*, p. 6.

I. INTRODUCTION

Since defamation[5] is considered a great evil, so provision for reasonable legislative abridgement on freedom of speech and expression and of press in relation to defamation has been made in the restrictive clause (2) of Article 19. The restrictive clause (2) of Article 19, as originally drafted did not contain the words 'defamation'. Instead the word 'libel' and 'slander' were there as grounds of restrictions. The Constitution (First Amendment) Act, 1951 deleted them and only word 'defamation' was substituted.

P.M. Bakshi opines that the importance of this branch of law grows with civilization. With an increase in the use of mass media of communication and with the spread of literacy, the growth of reading habit and the technological advances that enable the spoken and the written word to be conveyed to be a very large number of people, there is naturally an increase, not only in the volume of written as well as oral matter, but also in the audience that it reaches or is capable of reaching. This increases the likelihood of harm to reputation. At the same time, with the advent of democracy and the recognition of the importance of freedom of expression and the emphasis placed on the right of the public to know the truth on certain matters, some part of the law of defamation may need reform.[6]

At present the law of defamation consists of two parts one civil and another criminal. In India civil law relating to defamation is generally determined according to principles of English common law.[7] For example at common law a person cannot recover damages in regard to injury to a character which he does not possess or reputation to which he has no reasonable claim. Similarly, fair and honest comment made without malice and with respect to a matter of public interest is a good defense to an action for libel.[8] The

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[5] Defamation is a generic term of which 'libel' and 'slander' are species known to English Law.
[6] *Ibid.*
[7] D. D. Basu, *Law of the Press in India*.
[8] See also *A.D. Narayan Sah v. Kannama Bai*, AIR 1932 Mad 445.

principal ingredients of the civil law of defamation are four: (i) Defamation as a tort consists in the publication of a statement (concerning the plaintiff) to a third person, exposing the plaintiff to hatred, ridicule, or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or calling (ii) For the tort of defamation, what matters is the harm caused to the plaintiff and not the intention of the defendant. Hence, it is immaterial that the defendant had no intention to defame the plaintiff. (iii) The statement must be published by the defendant to a third person. Publication only to the plaintiff when no third person could have heard the statement or read it is not enough. (iv) The statement must be false. A true statement cannot attract civil liability.

The criminal law of defamation is contained in Section 499 of the Indian Penal Code which runs as follows:

Whoever by words either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person is said, except in the cases hereafter excepted, to defame that person.

There are four explanations to this Section. There are: Explanation (1). It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and if intended to be harmful to the feelings of his family or other near relatives. Explanation (2 it may amount to defamation to make an imputation concerning a company or an association or collections of persons as such). Explanation (3 An imputation in the form of an alternative or expressed ironically, may amount to defamation. Explanation).

No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral and intellectual character of that person or lowers the character of that person in

respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome State, or in a State genera considered as disgraceful.

The ten exceptions to the Section protect the following classes of statements from criminal liability for defamation: first, true statement made or published for the public good; second, expression in good faith respecting public conduct of public servants; third, expression in good faith regarding merits of cases decided in Court or conduct of witnesses and other concerned; sixth, opinion expressed in good faith regarding merits of public performance; seventh, censure passed in good faith by person having lawful authority over another; eighth, accusation preferred in good faith to authorized person; ninth, imputation made in good faith by person for protection of his or others interests; tenth, caution intended for good of person to whom conveyed or for public good. The criminal law in India thus recognizes no distinction between defamation in the spoken and the written forms. In the written form it is known as libel and in the spoken form it is called slander.

Section 499 of the penal code containing the criminal law of defamation if presented to Court for scrutiny, should be saved under the restrictive clause as imposing a reasonable restriction on the freedom of speech and expression.[9] It has been well established by the decisions that the freedom of the journalist is an ordinary part of the freedom of the criticism, and the press does not enjoy any special challenge.[10] Questions of defamation frequently arise in regard to newspapers and other publications.

In *Dr. Suresh Chander Banerjee v. Punit Goola*,[11] the petition – accused, were members of an editorial board of newspaper. Dr. Suresh Chander, who

[9] See *Suresh Chandra v. Pandit Goala*, AIR 1951 Cal 176; *K.V. Ramaniah v. Special Public Prosecutor*, AIR 1961 AP 190.

[10] *M.S.M. Sharma v. Srikrishan Sinha*, AIR 1959 SC 395 approving the Privy Council decision in *Arnold v. Emperor*, AIR 1914 PC 116.

[11] AIR 1951 Cal 176.

was also in M.L.A. made a speech in the Legislative Assembly, which was reported in the newspaper and in the speech some defamatory comments were made against the opposite party. The High Court held that freedom of speech and expression guaranteed to citizens[12] by Article 19(1)(a) is subject to the restrictions set out in Clause (2) of Article 19(2). Thus, Sections 499 and 500 of the Penal Code were held to be covered under restrictive clause (2) of Article 19.[13]

In *K.V. Ramaniah v. Spl. Public Prosecutor*,[14] the learned Advocate General, who represented the respondent urged before the High Court that the freedom of speech and expression as guaranteed by the Constitution does not confer an absolute right to speak or publish whatever one chooses. It is not an unrestricted or unbridled license that may give immunity and prevent punishment for abuse of the freedom. The learned judge quoted with approval of M. Kean, C.J., in *Lespublic v. Oswal*,[15] in which C.J. considering freedom of press under the Bill of Rights observed:[16]

The true liberty of the press is amply secured by permitting everyman to publish his opinion, but it is due to the pace and dignity of society to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to public good, and those which are intended merely to delude and defame.

It was held that Article 19(1)(a) must not be taken to mean absolute freedom to say or write whatever a person chooses recklessly and without regard to any person's honor and reputation. The right certainly has a corresponding duty to the other. Judge in that manner also, the right guaranteed cannot but

[12] *Ibid.*
[13] *Ibid.*
[14] AIR 1961 AP 190.
[15] (1788) 1 Law Ed. 155: Dall 31, p. 323.
[16] *Ibid.*

be a qualified one. Indeed, the right has its own limitations. Without these limitations, it is bound to be a scourge to the Republic.[17]

In our respectful submission this case does not intend to protect those who make defamatory statements or bring out defamatory publications against those who hold public position but it only suggest that not to talk of such things, attach importance to them and waste their valuable time and energy.

In *Sahib Singh Mehra v. State of Uttar Pradesh*,[18] the appellant was prosecuted under Section 500 of the Penal Code for publishing an article entitled *Ultachor Kotwal Ko Dante* (This Reprimands Police Officer) in the Aligarh paper Kaliyug dated September 23, 1960. The English translated version of the relevant portion of the Article read:[19]

How the justice stands at a distance as a helpless spectator of the show as the manner in which the illicit bribe money from plaintiffs and defendants enters into the pockets of the Public prosecutors and Assistant Public Prosecutors and the extent to which it reaches and to which use it is put.

In *Harbhajan Singh v. State of Punjab*,[20] the Supreme Court overturned the conviction of the appellant, who has been prosecuted and convicted under Section 500 of the Penal Code. Surinder Singh Kairon, son of Shri Pratap Singh Kairon, then Chief Minister of the State of Punjab, had complained about a statement published by the appellant in *Blitz*, a monthly magazine of Bombay, on July 23, 1957. Extracts from it, which were given publicity in a number of papers, were highly defamatory of Mr. Kairon. The statement read:[21]

The son of our Chief Minister, is not only a leader of smugglers but is responsible for a large number of crimes being committed in the Punjab.

[17] *Ibid.*
[18] AIR 1965 SC 1451.
[19] *Id.* at 1452.
[20] AIR 1966 SC 97.
[21] *Id.* at 99.

But because the culprit happens to be the Chief Minister's son, the cases are always shelved.

In setting aside the conviction, the Court said that, as the impugned statement was for the public good, the appellant was entitled to claim the protection of exception 9 of Section 499 of the Indian Penal Code.[22]

With regard to the damages awarded by the Courts in defamation cases, the *Blitz* case[23] is the *cause célèbre* where the newspaper had defamed the House of Thackersey. An award of Rs. 1,50,000 was made out of a claim of Rs. 3,00,00. This is the highest award made in a case in which the trial lasted 101 days. *Blitz* survived the sock. But this must have made a dent in its budget which could not have been recompensated by any increase in circulation which might have accrued as a result of that weekly's involvement in this controversy.[24]

In *Purshottam Vijay v. State*,[25] the Court observed:

It is certainly in the public interest that anything shaky or unjust or improper in the conduct of a minister making appointments should be brought to the notice of the country at large. It is, In fact, criticism without which any democratic system is doomed to failure and ministers inevitably suffer absolute corruption by their unscrutinized exercise of power. Whether the conduct of any particular individual should be publicly criticized and would be in the public interest, would naturally vary with the circumstances of each case.

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[22] The Ninth Exception reads:
"It is not defamation to make an imputation on the character of another, provided that the imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it or of any other person, or for the public good.

[23] *R.K. Karanjia* v. *K.M.D. Thackersey*, AIR 1970 Bom 424.

[24] *Id.* at 352.

[25] AIR 1961 MP 205.

In the famous *Blitz* case of *Sewakram v. R.K. Karanjia*,[26] briefly the facts were as follows. The Editor of Blitz was prosecuted under Section 500 of the Penal code for publication of a news item. The news item revealed that a detenue during the Emergency had illicit sexual contact with a married female lady. On being indicated, the newspaper requested that the Government's own report on the subject be made available to the Court. The report verified the newspaper's story.[27] The judgments were delivered. The majority took the view that the newspaper could not take the stand that it had acted in good faith and that the revelation was for the public good.

Charanjit Singh v. Arun Puri,[28] the essence of defamation has been stated to be publication of a false statement concerning another person without justification. There can be defense of privilege, fair comment, consent etc.[29]

J.B. Patnaik v. Bennett Coleman & Co. Ltd.,[30] case raises the question both of ethics and the law concerning the press.[31] Briefly the facts were as follows. The *Illustrated Weekly*, published an article under the caption "The Strange escapades of J.B. Patnaik", which dealt with the deviant sexual life of the Chief Minister. It followed it up with another article captioned "Why is J.B. Patnaik being allowed to gag the press". The second article unrepentantly supported the first. The Chief Minister responded by slapping a defamation suit in which he claimed Rs. 1 crore as damages. Several others cases were filed in Courts in Orissa and elsewhere in connection with the articles.[32]

The *Weekly* maintained the posture that it had committed no wrong; in fact it had done public service by exposing a chief minister who had been using his offices for strange purposes.

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[26] AIR 1981 SC 1514.
[27] *Ibid.*
[28] ILR (1982) Delhi 953.
[29] See *Dr. P.H. Daniel v. Krishna Iyer*, (1982) KLT 1.
[30] AIR 1990 Orissa 107.
[31] See S. Sahay, "Press, ethics and the Law", *Newstime*, 12 September, 1989, p. 7.
[32] *Ibid.*

After three years of legal battle the Weekly's will collapsed. It agreed before the Supreme Court to tender an apology to the Chief Minister. The text of the apology was filed before the Supreme Court, then to the Orissa High Court and sealed until published by the paper. The apology is interesting.[33] It said that the two articles were "based on information available to us. Subsequently we found that the information on the basis of which these articles were written was not true and politically motivated. We regret the damage done to Mr. Patnaik's reputation and offer our apology to him".[34]

Commenting upon the apology tendered by *The Weekly*, S. Sahay,[35] says that this is abject surrender. In support he points the words in apology "not true" and "political motivated", Sahay further says that mistakes do happen in newspapers and journals. Some mistakes are certainly unintended and if, in the process, someone has been wronged, then it becomes necessary for a newspaper to correct the mistake and even apologize for it. Generally speaking, this is done soon after the publication of the damaging article. The *Weekly* articles, now admitted to have been based on information "not true" and "politically motivated" were published with deliberate calculation.[36] The question in such cases, Sahay says is more of ethics than of law or the expression of press freedom.[37]

In America the law laid down by the U.S. Supreme Court in *New York Times v. Sulliva*,[38] has practically revolutionized the law of libel. The Court has placed strict standards limits on the circumstances under which public officials can recover damages for the publication of defamatory statements against them. It was held that even erroneous statements about public officials are entitled to constitutional protections, unless made with knowledge of falsity or reckless disregard of whether the statements are true

[33] *Id.* at 115, para 253.
[34] *Ibid.*
[35] *Supra* note 4.
[36] *Ibid.*
[37] *Ibid.*
[38] 376 U.S. 254 (1964).

or false. This decision affected the libel law not only against public officials but also against others including public figures. Justice Brenan observed that the *Sullivan* case avoided the "pall of fear and timidity imposed upon those who would give voice to public criticism".

II. THE DEFAMATION BILL (1988)

The law of libel has deep roots in history.[39] It originated at a time when democracy had not yet made its appearance on the horizon of human civilization. The law of defamation imposed on India by British colonialism serviced the interests of imperialism during the freedom struggle, along with the law of seditious libel. Many of the colonial laws, some of them inappropriate in free India, remained on the statute book.

In 1971 the forty second report of our Law Commission, which reviewed the criminal law relating to defamation contained in Sections 499 to 502 of the Penal Code, rejected the suggestion to enhance punishment for defamation. In 1982 the Second Press Commission recommended protection of unintentional defamation. The Bill to amend the Penal Code, initiated in 1972, referred to the Joint Select Committee in 1976 and passed by the Council of States in 1978, was not taken to the lower House of Parliament.[40]

In 1988, the Bill, generally called the Defamation Bill[41] which was introduced by the Union Government, had an easy passage in the Lok Sabha in mid 1988. But it evoked much opposition, criticism, disappointment and even surprise in the entire press of India which was completely shaken by this provision.[42] By this Bill,[43] the freedom of the press was sought to be curbed in

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[39] See Chouse, Mohammad, "Freedom of the Press and Defamation", *Indian Bar Review*, Vol. XV (3 & 4), pp. 278-295 (1988).

[40] *Id.* at 281.

[41] See for an intensive study on "Defamation Bill", Pandhi, K.S., *Battle for freedom of the press in India.*

[42] A lot of articles appeared in the press regarding the opposition to the introduction of Defamation Bill; See Baxi, Upendra, "Democratic Faith and Defamation Bill", *Time of India*, New Delhi, September 19, 1988, p. 6; *Id.,* "Defamation Bill: Gateway to Censorship?", *Counter Media*, Vol. I, No. 5. 1988; V.R. Krishna Iyer, "Why defame our legal culture", *The Hindu*, September 3, p. 8; N. Ravi, "The Indictment of the Defamation Bill", *Id.* September 4, 1988 p. 6, S. Ambi Rajan, "Towards a new Depotism", *Id.* September 8, 1988, p. 8; Alladi Kuppuswamy, "Case for Bills Withdrawal", *Id.,* September 15, 1988, p. 8.

an ample measure. In other democracies the law of defamation is being liberalized. By means of the Defamation Bill provisions were sought to be made for imposition of unduly enhanced punishments. Indecent and scurrilous writings were not clearly defined and left beautifically vague. The provisions relating to false imputation alleging commission of an offence and certain other procedural changes of a drastic nature which would have been highly prejudicial to the accused persons would have become the law.

Prof. Upendra Baxi, says that the opposition to the Bill has been on the extension of the defamation defense in new, and perilous ways, in Sections 8 and 13. But Section 3, which also verbatim repeats Sections 499 of the Penal Code, has not been an issue. Prof. Baxi further says that we must raise the issue: why should free speech is criminalized at all to protect reputation? Why should defamation be a crime, rather than just a civil wrong? Can criminalization of speech be regarded as a reasonable restriction on the fundamental right to speech, expression and press at all? Fortunately, the government responded positively to the country wide opposition to the Defamation Bill and dropped it,[44] which was a matter of satisfaction and gratification to all concerned.

In our respectful submission one hopeful and bright stand in the functioning of our democratic institution is that public opinion has been respected whenever any curbs have been sought to be imposed on the freedom of the press.

It may be pointed out that the revision of the law of defamation has not been considered at any length except by the Second Press Commission in India. In the United Kingdom, the Porter Committee of 1939 and Faulks Committee,

[43] Rajeev Dhavan, says that the Defamation Bill was "entirely a bogus and incompetent basis for either discussion or reform", see his paper presented in *National Collegiums on the Press as Mediator Between State and Society*, held on October 28 & 29, 1988 at Vigyan Bhawan, New Delhi.

[44] In pursuance of an unprecedented public outcry against the dreaded Defamation Bill, pending before Parliament, the Prime Minister has announced that "We have decided not to make the Defamation Bill, 1988, into law". See *The Hindu*, Madras, September 13, 1988, p. 1.

1975, made many recommendations. The Defamation Act of 1952 incorporated many of the recommendations made by the Porter Committee but there has been no implementation so far of the changes suggested by the Faulks Committee.

The Second Press Commission in its 1982[45] report has, so far as civil liability is concerned, drawn a great deal from the English Act of 1952. It has been recommended that the provisions in Section 4 of the Act on unintentional defamation should be introduced in India. Similarly, in case of comment upon a man's character, conduct or work which could harm his reputation, there should be a special defense that the statement was a fair comment made in good faith upon a matter of public interest. The principle of Section 6 of the Act has been recommended for being adopted in our company. The gist of the Section is that a defense of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved provided the expression of opinion is a fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.[46]

The question of fair comment is one of great importance to the press. The Commission has also recommended that the publication of fair and accurate report of judicial proceedings shall have absolute privilege and that legislation should be enacted on the lines of Section 8 of the English Act with a few changes.[47]On the question of truth and public benefit as a defense, the Second Press Commission referred to the position in the United Kingdom as well as Australia and endorsed the recommendation of the Australian Reforms Commission in the following words:[48]

It has been represented to us that truth should not be a complete defense unless it is accompanied by public interest. This question engaged the

[45] R.P.C., 1982, Vol. I, pp. 43-48, paras 66-83.
[46] *Ibid.*
[47] *Ibid.*
[48] *Ibid.*

attention of the Australian Law Reform Commission and it was of the view that truth, by itself, should be a complete defense in civil actions as 'public benefit' is a vague term and publishers are entitled to a clear guidance as to the rules binding them. The requirement of public benefit would be adding too much of a burden on journalists. We see no reason for any departure from the present position. Truth alone should continue to be complete defense.

The press has felt great difficulties in the matter of filing of suits and criminal complaints against it in remote places. It seriously inconveniences the accused and leads to the harassment of newspapers and journalists. The view of the press that the action should lie against a newspaper in the State from where it is published did not find favor with the Second Press Commission.[49] It has, however, recommended that in the absence of malice, the magistrate should dispense with the personal appearance of the accused. Another difficulty in this regard is that every communication of the same defamatory matters by the same defamer gives rise to a distinct cause of action. The Commission has endorsed the recommendations of the Australian Law Reform Commission that separate publication rule should be abrogated and a single publication rule adopted. The multiple publications should give rise only to one cause of action but the plaintiff should have relief appropriate to all publications. Such a reform sounds very sensible and should be adopted.[50]

[49] *Id.,* at 47-48.
[50] *Ibid.*

BOOK REVIEW

INDIA: A PORTRAIT

Author: French, Patrick (2011).
Penguin Books, New Delhi,
pp. 435, price Rs. 699.

Isheeta Rutabhasini*

The book is divided into three sections and is an interesting journey that covers the shades of history to the future of India, the world's largest democracy. The authenticity of Mr. French's comment lies on the empirical research conducted in finding out the demographical allocation of parliamentary seats as well as the family background of the parliamentarians. The keen observations of behavioral trends of various communities in India suggests the fascination of the author on the socio-economic and political conditions that nurture the growth or marginalization of democratic trends in India. The book provokes a desire to understand the dynamics of the functioning of Indian politics and cannot be ignored as a mere narration of historical facts.

In Part-I titled 'Rashtra: Nation', which comprises of four Chapters, the author describes the political history of India from the period of British Raj till date. He traces the creation of provincial governments since 1930's and uses fascinating anecdotes to highlight the role of king-makers at various stages of the bifurcation of one nation into two, after the war of partition in 1947. The dilemma of the leaders and the astuteness of the bureaucrats are well-described to highlight the occurrence of this great phenomenon which was going to redefine the history of India. From being one-nation, sharing the same socio-cultural ethos, to being addressed as arch-rivals in

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International community is a distance covered by many personalities mentioned by the author. His description of the role of Jinnah, V. P. Menon and the Maharaja of Jodhpur adds insight into the finer details of the carving of a federation called India. The finesse of the partition, in terms of drafting the terms of agreement, is very well highlighted by the details spelt out in the role of Menon as a respected senior bureaucrat. Through umpteen examples, the author brings out the inter-dependence of politicians on bureaucrats in handling the most difficult and tricky situations.

The author triggers emotions when he describes the diversity of representation in the Constituent Assembly, which was supposed to be as historic as the Philadelphia Convention established in America, to secure for its citizens a society based on liberty, equality, justice and fraternity. With such burden of expectations the members of the Constituent Assembly opened the debate as to whether the villages should remain as the primary political unit as desired by Gandhiji or the control should remain with the Centre with a common interest for progressive change and reconstruction. The chapter opens up the discussions on a plethora of issues which were debated before the adoption of the Indian Constitution in 1950. He swims through the various General Elections, starting from J. L. Nehru as the first Prime Minister to Manmohan Singh, the present incumbent after the great sacrifice of Sonia Gandhi abdicating her claim to the top post of the nation even after winning a tough election for her party.

The author also mentions about the various incidents which have shaped the current political atmosphere in India. Mention must be made to the discussion of Babri Masjid issue, the rise of Shiv Sena, Godhra riots, the Rath Yatra of L. K. Advani to the firebrand speech of the next generation Gandhi scion, Varun Gandhi, representing the party in opposition.

The most fascinating Chapter in this section is Chapter-4 titled ‘Family Politics’ which describes how India is finally heading for a hereditary parliament where majority of the seats occupied by the parliamentarians would be on the basis of their family connections. The so-called phenomenon

of 'son-rise' in Indian Politics is no longer a distant dream but a hard reality. But what is startling is the empirical data collected and analyzed to state such a claim cutting across party lines and cadres. He has taken data covering parliamentary and assembly elections. However, his area of interest remains the 15th Lok Sabha elections with a pool of 545 Members of the Parliament. His observation ranks RLD as the top most party with all its members having family relations (5 out of 5 MPs) followed by NCP, a splinter group of INC with (7 out of 9 MPs) with hereditary tag. The list is followed by a whole lot of regional parties. However, the disbelief is that the two single largest nationalist parties (INC and BJP) also run high on the quotient of Hereditary Members of Parliament (HMPs).The above analysis compels the reader to think whether we are completing the Aristotelian cycle of returning to Monarchy through a well-carved out passage of Democracy where money and muscle decide the ruler of 1.2 billion people who have great faith in the institution of democracy, even though one may still want to believe that sovereignty ultimately rests with the people of the nation.

In Part-2 titled 'Lakshmi: Wealth', the author discusses in four chapters the political economy of India, though he begins the journey by a discussion of the visions of J. M. Keynes. The inheritance of debt laid a serious challenge to the new government to work out a stable currency for India. The big lure was definitely to adapt the gold standard so uniformly applied across the globe for stabilization of currency. But, history suggests that India may, back in 1913, was also open to the idea of using a global reserve currency rather than only relying on the price of gold. Of course, the details of Keynes personal and professional life arouse interest. The author points out that a concrete plan for the economic development of India was not made by revolutionaries, but, by successful industrialists like J. R. D. Tata, G. D. Birla, economists, like, John Matthai. They were successful businessmen who had made money but were sure that the construction of independent India should be based on a different strategy. The confusion was visibly shared by the members of the Constituent Assembly also. Like, for instance, B. R. Ambedkar was absolutely clear that the call for 'back to villages' would mean

'back to squalor poverty and ignorance'. Sardar Patel was convinced that a communist system would be extremely centralized and would not solve the purpose of modern India. Nehru as the first Prime Minister had to carry the burden of a middle path where we were able to generate as well as circulate money. Nehru found his man-friday for his practice of socialism in P. C. Mahalanobis, the statistician. He had impressed Nehru with his knowledge in mathematics and was the founder of Indian Statistical Institute, Calcutta. Nehru relied on him to navigate the Indian economy, who by then had become famous in devising the 'mahalanobis model' where he smartly used mathematical calculations for sociological studies. Of course, by the second five year plan the 'supra cabinet' called Planning Commission had started having a greater impact than the FM and John Matthai had resigned. Though there were critics to the 'Mahalanobis Model' who were of the opinion that ignoring the village and handicraft industry in favor favor of heavy industries would be a disaster and the plan holiday from 1966 to 1969 somewhat weighed in favor of the critics of Mahalanobis. The era of 'license-permit Raj' is very well-highlighted through the story of J. V. Sundaram Iyenger, a lawyer who had started south India's first motor bus service to holding a myriad of business by 1950s and 1960s by the name of TVS group. He was very candid in his confession that even if he had to travel very frequently to Delhi to get his requisite permission but he never succumbed to the pressure of paying bribe. He attributed his success to a new phrase called social relationship where business and Government were brought together on a common platform with the growing losses in PSUs, the politicians were quick to realize that the current policy was not conducive to good business and hence, the examples of Heavy Engineering Corporation (HEC) and CIL were nationalized by the Government.

The author takes in an interesting aspect in business in the next chapter. Juts take 'Family Politics'. India has also its own share of 'family business' which was very common to Indian ethos which believed in a joint family system. But what the author describes is the branching out of weaker siblings from the aegis of the 'family businesses' to make something of their own. The

philosophy was perhaps that everybody has a place under the sun. He brilliantly describes the rise of E. K. Ranganathan as a child in Cuddalore in the 1970s to the CEO of a Company called Cavin Kare. The name of the Company sounded close to Calvin Klein and stood testimony to the biggest revolution post-independence called the 'sachet revolution'. Everybody was a consumer, so one who could not afford a big bottle of shampoo definitely had the resources to buy a sachet. The popularization of sachet over a bar of traditionally used Shikakai was the new dynamics of business called 'marketing'. The author beautifully explains the simple marketing techniques used with examples, for instance, the cream sold by Cavin Kare company in South India termed as 'Fairever'. The cream is supposedly made out of saffron, generally, produced in Kashmir and they are fair complexioned people. It was sold in South where people are generally dark. The advertisements of such creams still exist where a prospective bride who is visibly dark is shown fair after a few weeks of application of the cream and can even measure fairness with a shade card. How true, and we were made to believe in the lessons of biology that human skin coloration is determined by the presence of the quantum of melanin and is often genetically and geographically linked.

India liberalized in 1993 and anybody who had an idea to sell could perhaps be the next businessman. A college dropout, Arunachalam Muruganantham from Coimbatore, was disowned by his relatives as he ventured out to manufacture sanitary towels. This was a domain least talked about in any household and women earlier did not want to spend money on it. But this man used his skills to manufacture it from pine wood pulp with very little use of electricity and chemicals but the procedure of sterilization was followed to ensure hygiene. Very soon he became the largest supplier of low cost sanitary towels across the country. Of course the author's observation that the people of south were talented and had a tendency to innovate stands tested through these examples.

The author next discusses the early life of Manmohan Singh, one among a huge family in retail business, to the policy maker of future India. His post

doctoral thesis published a year after Nehru's death titled 'India's Export Trends and the Prospects of Self-Sustained Growth' was perhaps the first analysis of the causes of our problems. To put things simplistically, it meant that until and unless we open our economy by selling things abroad to gain foreign currency and change the policy of licenses and permits, it would be difficult to sustain the balance of payments crisis. He was right as the Third Five Year Plan failed and we had to beg from the Soviets and the Americans. But his observations were hugely ignored initially and it lasted till the assassination of Rajiv Gandhi in 1991 and the next Congress incumbent Narasimha Rao as Prime Minister declared that India was clinching close to bankruptcy.

The rest is history they say when Manmohan Singh took up as the Finance Minister and prudently steered the Indian economy slowly out of the state of bankruptcy to a state of being called an economic power to reckon with. Of course the author also discusses the political growth of Manmohan Singh as well. The economic liberalization of India also brings out the next dimension of problems; it is the problem of economic disparity. The author explains it by the example of rise of TDP in Andhra Pradesh. The city of Hyderabad, which is often referred to as 'Cyberabad', was also struggling hard to cope up with the PWGs who had tried to kill Chandrababu Naidu, the CEO like Chief Minister a number of times.

The author has also analyzed the reason for the rise of Naxalite movement in various parts of India. The reason being when mines, dams and factories were built, the rehabilitation and resettlement was nominal. His observation is that the tribal people are often given a colonial treatment as they are considered to be far different from the rest of India whereas one forgets that they are aboriginals. He talks about his experiences of meeting people who have either joined or developed sympathy for the Maoists. Though, it is a war against the state, the author has tried to bring out the real issue such as lack of circulation of resources as the reason for the birth of rebels like Gaddar in Warrangal district, Suneetha Kukka, a women militant who had surrendered, Comrade Ganapathy operating in West Bengal and Kobad Ghandy arrested

in Delhi in 2009.The author, though not allowed to interview the inmates of Tihar jail, still manages to share his experiences with Mohammad Afzal where he was guided into the prison tour by S. A. R. Geelani.

The next chapter delves into an interesting aspect of Indian entrepreneurs. Unlike their counterparts in other developing nations the entrepreneurs in India had excelled in taking advantage of the sudden advancements in technology and had managed to create a space for themselves in the market. The author picks up Sunil Mittal to profile the rise of Bharati-Airtel group. Telecom revolution had arrived in India and possession of a mobile adds to one's status symbol. But a new thought process was also shared by this new genre of entrepreneurs that profit earned should also be used for the purpose of philanthropy. Sunil Mittal is not the only one sharing this view but we have also Narayan Murthy, Azim Premji, Tatas, Birlas, Jindals now spending lavishly on social sectors like education and health care. But in contrast the author also mentions the 27 storey mansion of Mukesh Ambani which epitomizes opulence or for that matter the wedding of Laxmi Mittal's daughter in Paris. Of course the new India was also seeing the growth of opulence not just through the eyes of the Punjabis, Sindhis or Marwaris but the new generation had by now absolutely got hooked to a new level of consumerism called - Brands. The author also traces the rise of the middle class who were now ready to mingle with the fashion and status conscious elite in India and their counterparts in the West. There was a certain disbelief in the world that a developing economy called India was ready to overtake Japan and our educational institutions were creating products to be the CEOs of American Companies (Indra Nooyi, Vikram Pandit). Brigade India was in a take-over note but the Government was busy taking a statistical calculation of those who had been left behind. The poor of India had to be identified and support had to be lent out in bridging the gap. The author with sheer brilliance points out that the level of euphoria of India's economic success was missing in rural India. He gives examples of prevailing bonded labourer system in India (he bases his observation on interview of stone quarry workers in Mysore) to female foeticides in the villages of

Rajasthan, which are now falling short of girls to marry off their sons. Human sufferings and human rights violations are still galore in an economically vibrant India.

In the third part titled 'Samaj: Society', the author discusses the uniqueness of the Indian federation and the caste system prevalent in our state for centuries. He picks up the example of B. R. Ambedkar to denote the sufferings of the lower castes in India and shows how with modernisation and education people from lower castes had started questioning the rationality of such a practice. During the freedom movement when the Britishers had agreed for separate electorate for the lower castes in India, it was Gandhi who took up fast unto death and which resulted in the Poona Pact. But, Ambedkar was not convinced with Gandhiji's stance of renaming the lower castes as 'Harijans' and blocking their participation in the political process. Later, though Ambedkar was the chairman of the drafting committee, he could not secure the interests of the lower castes and give them a status of equality in independent India. All that he could do was rename them as Schedule Castes and it depended if the government run by a majority of 'manuwadis' deemed fit would give them certain privileges in education and employment. It was distressing to read that despite all his efforts to bring equality amongst the various sections of the Indian society, Ambedkar could not escape from the humiliation for being born a 'Mahar' and hence, preferred dying as a Buddhist.

A similar voice was echoed later on in a meeting when the speaker was repeatedly referring the scheduled castes as harijans. But this time the voice was raised by a woman, a primary school teacher, named Mayawati. Under the mentorship of Kanshiram, the Dalit leader, she accomplished the unfinished agenda of Ambedkar, i.e., the possession of political power by lower castes to bring about significant and meaningful change in their social position. Mayawati soon climbed the ladder of politics and has now become the chief Minister of Uttar Pradesh championing the rights of Dalits. The chapter title stands justified as 'The Outcastes' Revenge'. The author also has an interesting chapter in this section where he describes the Arushi murder

mystery not just through the eyes of the police and media who had already crucified the parents as the culprit by floating different theories but he also tries to project the story of the grieved parents. He discusses the attitude of the people in the society who disown you at the time of crisis but were perhaps your friends in times of happiness. The author also takes us through an interesting side of the dark areas of cities in India where male strippers operate and girls of all ages are easily available over the phone of a manager whose clientele lists include NRI women on vacation in India, celebrities (Page 3 people), politicians and businessmen and their bored wives at home. We had so far understood prostitution as an act to make both ends meet and had been arguing for decriminalization of it.

Religion, another difficult domain the two neighbours were trying hard to deal with — India, with its Muslim population that chose to stay back after partition and Pakistan with the Shias and Sunnis caste war in its own state. India had its problems in accepting a Uniform Civil Code even though Ambedkar had tried hard during his tenure as the Law Minister of India to ensure equality among Hindus. The political prudence of Rajendra Prasad made him advice Nehru to defer the Code till the second General Elections. The issue of Kashmir has always remained a difficult domain for both the countries and the author understands the real reason for the growth of Islamic fundamentalism in both the countries resulting in terrorist activities as abject poverty. In the last chapter the author very light-heartedly describes various issues, anecdotes and examples of bizarre incidents that can happen 'only in India' - an apt chapter title.

I feel overall that the author has taken great pain in compiling the fine nuances of the Indian political system and the system of governance. He is very subjective in his approach and has authenticated all his observations. The book holds relevance to all the stake-holders of democracy, the citizens, but, I would recommend that the students and academician would highly benefit from this book. It is priced moderately and is definitely worth the buy.

NIRMA UNIVERSITY

Nirma University has been established in the year 2003 as a statutory university under Gujarat State Act at the initiative of the Nirma Education & Research Foundation (NERF). The University is also recognized by the University Grants Commission (UGC) under section 2(f) of UGC Act. Nirma University has been accredited by NAAC in March 2010.Nirma University is a member of Common Wealth University Association and also of Association of Indian Universities. Dr. Karsanbhai K. Patel, Chairman, Nirma Group of Companies and Chairman, NERF is the President of the University and Dr. N. V. Vasani is the Director General of the University. Nirma University is approximately 15 kms. from Ahmedabad City and adjacent to the state capital Gandhinagar. A 110 acres sprawling campus in picturesque surroundings provides a refreshing environment stimulating intellectual creations and innovations. Nirma University consists of Faculty of Doctoral Studies & Research, Technology and Engineering, Management, Pharmacy, Science and Law. The programmes offered by these faculties rated highly by accreditation agencies, Industries, Business Magazines and moreover by the Students. Innovation, excellence, and quality are the driving forces on the campus and this has translated the vision of this University into a reality over a short period of time. Today the campus vibrates with world class curricular activities and with myriad activities like international conventions, symposiums, conferences, student competitions, conclaves, short-term industry relevant programmes and cultural activities.

- Financial Express', has ranked Nirma University as 5th best university among the private universities that were established after year 2000 in the areas of placements, international relations, industry interface, intellectual capital, infrastructure in June, 2009 issue.
- Ipsos, the worlds third ranked research agency, Zee News and DNA, April 2010 has ranked Nirma University 16th among the top 20 Universities in India.

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