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FOREWORD

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
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JUDICIAL DISSENT: A PLEA TO POSTERITY

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I. INTRODUCTION

While deciding a matter, judges especially in higher appellate courts at times differ on perception of facts as well as law. Such dissents are expressed in separate judgments and in constitutional cases they emphatically display the democratic and pluralistic character of judicial process. In simple terms, dissenting opining is an opining delivered by any judge or judges of a bench who disagree, in whole or part, with the judgment of the majority. A dissenting cannot be taken into account in determining the ratio decidendi of the decision; but a dissenting opining, particularly a powerful one, can greatly weaken the value of the majority decision and even influence the views of the court in later case. Dissenting opinions are some times approved and upheld in later cases.

The questions that arise in the Supreme Court whether they be in India or the U.S., involve the weighing of difficult and often subtle considerations. They also involve in many cases not the easy choice between right and wrong but hard choice of emphasis between contending rights and social interests. Opinions expressed by majority of the judges are supposed to define as clearly and concisely as possible the meaning and application of law in context of a particular case.

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Dissenting as well as concurring opinions on the other hand, are meant to convey the individual views of the judges who write them. Here in such cases the dissenters-, the dissenting justices freed from the constraints entailed in Dissents are written in courts of appeals, usually in High Courts and the Supreme Court as the judge or the judges who feel highly perturbed by the majority view in a particular case of enormous significance and implications for future, want to make it known to the public, that they do not share in a judgment that seems to them fraught with folly. Chief Justice Hughes in this context remarked:

> "Dissenting opinions enable a judge to express his individuality. He is not under compulsion of Speaking for the court and thus of securing the concurrence of the majority. In dissenting he is a free lance."[1]

In India of course during earlier days before independence, the Federal Court, the predecessor of the Supreme Court had a limited role to play and the judges had been brought up in the tradition of black letter law; where the Court adopted a purely administrative law and positivist law methods of strict construction of statutes only[2] There was thus hardly in ground for serious differences among judges. After independence with guaranteed fundamental rights the Supreme Court of India assumed the role of the "protector and guarantor of fundamental rights'[3] Difficult and troubling question in the 1950s and 1960s and still later on, of constitutional interpretations started confronting the Judges of the Supreme Court giving rise to the court. In the brief critique of the survey that follows, attempt is made to bring out how dissent has played a seminal role, eventually placing the Supreme Court on the centre stage as the custodian of country's conscience.

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[1] Charles Evans Hughes, The Supreme Court of the United States (New York : Columbia University Press), 1928, p.68.

[2] Pre-independence examples can be seen in decisions such as Keshav Telpade v. Emperor, AIR 1943 FACTS AND CIRCUMSTANCES OF THE CASE 1; Machindra shivaje v. The king, AIR 1950 FACTS AND CIRCUMSTANCES OF THE CASE 129.

[3] Ramesh Thappar v. state of Madras, AIR SC 124, at 126.

II. GREAT DISSENTS IN THE U.S. SUPREME COURT

Although the dissents in these articles are mainly drawn from the Supreme Court of India, since dissenting opinions delivered in the Supreme Court of United States have often had great significance and influence on the Indian Court, are also briefly referred. In acknowledging this it also needs to be accepted that the U.S. record is not entirely unblemished and there have been frequently senseless aberrations and folly in dissent but occasionally it is only because of such incisive understanding and dissent, as we view in retrospect is to find out whether later on has it been recognized in the majority view? Great dissenters are, as the cases discussed here will vindicate are men who foresee as

it were the future who speak like oracles; who speak before their time like the great Indian sears of yore like being 'Aarsh Drishts', that is to say, men who foresee the coming events and prophesize. In Plessey v. Ferguson[4] where Homer Plessey, a black African American, was prosecuted and held liable to imprisonment for crime of traveling even when he had a valid ticket, in a railway compartment that was exclusively meant for the white race. Majority view remaining blind to the corrosive consequences of segregation and discrimination retrograde view; Justice John Marshall Harlan dissenting asserted:

> "...In view of the Constitution, in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our Constitution is color-blind and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful"[5] His argument that "our constitution is color-blind" anticipated by fifty years the unanimous overturning by the warren Court of the doctrine of

[4] Civil Rights cases, 109 U.S. 3 (1883)
[5] Ibid

"separate but equal". In Brawn v. Board of Education[6] Justice Warren found racially segregated schools out of time with the contemporary would of the mid-fifties and asserted that the time had come for completely abandoning racial segregation. In Olmstead v. United State[7] 1928, Louis D. Brandeis J., dissenting said in the famous wiretapping case, that "the makers of our constitution conferred the right to be left alone.. .. .. .. the right most valued by civilized man". In the famous "flag salute" cases Minerville School District v. Gobitis[8] The dissenting view was upheld and validated only three years later in 1943 in another war time West Virginia State board Education v. Barnette[9] won majority acceptance. It sounded a note of tolerance for heterodox belief highly becoming to a powerful pluralistic society.

In Betts v. Brady[10] Justice Hugo Black in a case where the Supreme Court reviewed the conviction of a poor and luckless outcast who had been sentenced to prison for a robbery without having any legal aid. The Supreme Court majority Judges found nothing wrong in it and held that the convict who could not afford a lawyer was not deprived of any constitutional rights. Justices Black speaking for his other brother Judges, Justices Bouglas and Murphy vehemently dissented[11] ironically twenty one years same Justice Hugo L. Black in Gideon v. Wainwright[12] Firmly established the rule that the assistance of counsel appointed at public expense when a defendant charges with a felony could not afford to retain a lawyer himself was an essential Element of the due process assured by the Fourteenth Amendment. His earlier note of dissent in Betts v. Brandy[13] Starting "No man shall be deprived

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[6] 347 U.S. 483 (1554)
[7] 277 U.S. 438 (1928)
[8] 310 U.S. 586 (1940)
[9] 319 U.S. 624 (1943)
[10] 316 U.S. 455 (1942)
[11] Ibid.
[12] 372 U.S. 335 (1963)
[13] Supra at 12.

of counsel merely because of his poverty ... any other practice seems me to defeat the promise of our democratic society" proved prophetic. In Colgreve v. Green[14] the majority obstinately denied equal representation by a majority Judges led by Justice Frankfurter. Justice Hugo Blach in a clearly and emphatically written dissenting judgment raised his voice against 'intolerable wrong violating a fundamental promise of the U.S. Constitution. Justice Black's view was providentially proved the guiding light later in Baker v. Carr[15] "One man, one vote decision". Eleven American Communist Party leaders advocating the violent overthrow of the Government in Dennies v. United States[16] Were convicted. Justice William A. Douglas basing his dissent with an exposition of First Amendment observed:

> "Free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed[17]

III. ROLE OF DISSENT IN JUDICIAL ACTIVISM IN INDIA

The above view of Justice Douglas was upheld in Yates[18]**.** It is a matter of the practice for each individual Court whether expression of dissenting opinion is permitted or not. Not till 1966 were dissenting opinions allowed to be expressed in Privy Council cases. Pre-independence Indian Courts, Under the comprehensive sweep of the winds of 1950s under the influence of the Charter of the United Nations[19]**,** the Human Rights revolution[20] and the

[14] 328 U.S. 549 (1946)
[15] 396 U.S. 186 (1962)
[16] 341 U.S. 494 (1951)
[17] Ibid
[18] Yates v. United States, 354 U.S. 298 (1951) The case resulted in an acquittal of five of fourteen defendants by direct order of the Supreme Court and indictment against others was subsequently dismissed by the trial court eventually making the "sedition' Sections of the smith act a dead letter. The case is also remarkable for the fact that Justice Oliver wandell Holme's original concept of "clear and present danger" was given credit for blazing this trail !
[19] UNTSxvi

ethos and human rights jurisprudence of the U.S. Supreme Court, the feudal-structure of the colonial Federal court tottered and the Supreme Court of the new Republic assumed the responsibility of promoting human Rights jurisprudence that could promote a modern welfare State. Supreme Court had to be the guardian of Fundamental Rights abandoning its past positivist approach[21] The Judges for the first time faced the challenging task of interpreting the Constitution, resulting at times in clash of differing perception. Under the colonial rule court was brought up in the tradition of black letter law as there was no bill of rights.[22]

Under the constitution the Judgments of the Supreme Court Judges reflected for the first time collective thinking, concerning views and at times seminal dissenting opinions that were to be look beyond the circumstances of a particular case and delve deep into implications and impact for the future.

In A.K. Gopalan v. State of Madras[23] in the Supreme Court of India, Gopalan, a communist leader, who was detained under the preventive Detention Act, 1050, had mainly challenged the validity of his Detention on the ground that it had resulted in depriving him of the freedoms guaranteed under Article 19 of the Constitution of India. The Court was also required to decide the meaning of the words 'personal liberty, in Articles 21.

The majority of the Judges said that Articles 19 and 21 had to be read as mutually exclusive. Justice Fazl Ali gave a dissenting judgment and held that the words 'personal liberty' included in Articles 19 Justice Fazl Ali also declined to take a narrow view of the phrase 'procedure established by law'

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[20] Jurists Academics and Judges as well as part III especially Article 21 of the Indian constitution recognized certain basic rights as fundamental to the development of human personality and essential to societal happiness and well-being

[21] Under the Government of India Act, 1935 or any earlier British Statute the law was not only conservative but the constitutional interpretation remained circumscribed

[22] See Ramesh Thapper v. State of Madras, AIR 1950 SC 124,at 126

[23] AIR 1950 SC 27

also included principles of natural justice as 'procedural due process that was as he observed "deeply rooted in our ancient history"[24]

A Year later in 1951 in Keshvan v. State os Bombay[25] In another dissenting judgement Fazl Ali insisted on going by the spirit of the Constitution. In 1963 in Kharak Singh v. U.P[26] Justice Subba Rao supported the views of Justice Fazl Ali in A.K. Gopalan that the words 'personal liberty' having a wider meaning. The thrust of the views of powerful dissenters like Fazl Ali J., and Subba Rao J. ultimately prevailed in Maneka Gandhi v. Union of India[27] 1978and conclusively and finally decided to read Articles 19 and 21 cumulatively and also to read the words 'life', 'personal liberty' and 'procedure established by law' more liberally as urged by Fazl Ali J. in his dissenting judgment that peered into the future.[28]

Dissenting opinions reflect the Judges' individuality and his adherence to the views that have carried his firm and clear signature throughout his judgments. Justice Subba Rao was one of them. In Makhan Singh[29] Chief issue of Presidential order issued under Articles 359[30] laid down that the order had the effect of totally taking out the jurisdiction of the High Courts and the Supreme Court towards the protection of the Fundamental Rights that were mentioned in the order, Justice Subba Rao affirmed his minority view in holding that the order should be read restrictively, so that the jurisdiction under the Code of Criminal Procedure would survive even in the face of the Presidential Order under Articles 159[31]

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[24] qIbid Later on in Rathesham v. State of M.P. Justice K. Subba Rao in his dissenting substantially Strengthened to the 'Natural Law' principles

[25] AIR 1951 SC 128

[26] AIR 1963 SC 1295

[27] Makhan Singh Tarasikka v. Punjab, AIR 1964 SC 381

[28] Articles 359 provided for suspension of enforment of rights conferred by part- III during emergencies

[29] Code of Criminal procedure, 1973, enacted later on deletes the provision of habeas corpus altogether

[30] AIR 1976 SC 1295

[31] Supra at 23

The approach of Justice Subba Rao testified, of course his concern for the individual liberty and the Court's duty to protect it.

During emergency, in 1975 the majority view in Makhan Singh[32] snatching away the jurisdiction of the High Court and the Supreme Court was further sharpened and made lethal by a majority view in ADM Jabalpur v. Shivkant Shukla[33] held that rule of law itself could be suspended during emergency as presidential Order under Articles 359 could effectively block any challenge to any State action. Justice H.R. Khanna with biting vigour dissented and insisted that even when a Presidential Order was in force preventing resort to fundamental rights the citizen could validly raise the plea that the State's action was not in accordance with law. Justice Khanna also asserted that right not to be

deprived of one's liberty except by authority of law was a principle which did not emanate by exclusively from Articles under natural 21, but existed independently of note that Justice Khanna toed the line of Justice Fazl Ali Gopalan[34] Subsequently constitutional amendments [35] Removed the power of the government to declare emergencies on ground of 'Internal disturbance' and such an emergency could be declared only if the security of India is threatened by 'armed rebellion". These amendments strongly carried the imprint of Justice Khanna's minority views in Shukla[36].

It seems Justice Subba Rao had envisaged 'Fundamental Rights' as bulwarks the positivist restrictive tyrannies of the majority judges. This is very much evident in the popularly known Searchlight case, M.S.M. Sharma v. S.K. Sinha[37] Justice Subba Rao in this dissent had held that Parliamentary privilege must not used to curb the freedom of speech.

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[32] See 39 and 37
[33] Ibid at 33
[34] AIR 1960 SC 1186
[35] AIR 1965 SC 845
[36] AIR 1980 SC 1989
[37] AIR 1973 SC 1461

Another great dissenter earlier was Justice Hidayatullah,. Hidayatullah, a great Titan, derided the fact that the Fundamental Rights had become a play thing of the majority . in 1965, in Sajjan Singh v. State of Rajasthan [38] he asserted that if fundamental rights were to be really fundamental, they should be beyond the reach of the temporary majority in Parliament. This note of powerful dissent against the Subba Rao (C.J.) In Golaknath v. State of Punjab.... Justice Subba Rao held that fundamental rights were 'inalienable' and transcended rights which could not be taken away even by a constitutional amendment. In Kesavanand Bharati v. State of Kerala...the majority veered round the Golak Nath view and held that Parliament's constituent power under Article 268 could not be used so as to destroy the 'basic structure' of the Constitution.

IV. IN SEARCH OF THE SOUL OF CONSTITUTION

The constitution whether it be of the United State or India is only a writer lifeless document till it is constructed imaginatively by the court. Justice Holmes once wrote, - the provisions of the Constitution, are not mathematical formulas having their essence in their form in English" They need to be therefore, nursed, nurtured and nourished with sensitive care and concern. The provisions of the constitution are not always to be construed literally but at times imaginatively with an eye on the broader implications. In both United States and India, the entire constructions and creative reading of the judges, includes dissenting judges.

Some of the Great dissenters in U.S. like john Marshall, Louis Brandeis Harlam Stone, Hugo Black and William Douglas and Justices such as Fazl Ali, Subba Rao, Hidayatullah and Socially powerless minorities against sometimes positivist populist majoritarian views and proved providential because they did not merely looked at the body of law but had the capacity to enter into the spirit, the soul of the Constitution. Such dissents are of course

[38] xxx

few that embody great wisdom. Most of the time a dissent only expresses an aberrant view and expression of personal prejudice but occasionally there have been dissents that have stirred the conscience and deeper sense and internal reasoning and intelligence of a future day. Dissenters, as the above record shows, are men who have envisioned the future much before it could be perceived by their contemporaries.

RESTRUCTURING THE INDIAN POLICE SYSTEM: THE NEED FOR ACCOUNTABILITY AND EFFICIENCY

Prof. Joshua Aston* and Dr. V.N. Paranjape**

The present instrument which governs theIndian Police Force is the Indian Police Act of 1861 and any discussion on Police Reform in India eventually gravitates towards the demand for replacing this Act. The Indian Police Act of 1861 was drafted by the British colonizers as a direct consequence of the first war of independence to ensure the police system's subservience to the executive and to remain authoritarian in its contact with the public.

Not only the Indian Police Act but also the Criminal Procedure Code, the Indian Evidence Act and the Indian Penal Code need to undergo changes in order to suit the present needs of the justice system of India. Thestructure of the police force is strictly hierarchical and decision-making is centralized with a few highranking police officers. Postings and transfers are commonly interfered in by political influence.

There have been many attempts to reform the Indian police system both at the State level and at the central level. Since 1971 there have been five major reform committees namely, the Gore committee, theNational Police Commission, the Riberio Committee on Police Reforms, the Padmanabhaiah Committee on Police Reforms and the Malimath Committee on Reforms of Criminal Justice System. Dueto the politicization

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of the police many significant recommendations were addressed to cold storage.

It is necessary that a New Police System be brought in India in order to ensure greater accountability, efficiency and a citizen service minded approach.

I. BIRTH AND DEVELOPMENT OF POLICING IN INDIA

The Indian Police Act 1861 (Act No. V of 1861) was formulated to reorganize the police in order to make them an efficient instrument for the prevention and detection of crime in the society. It was enacted bythe British during the First War of Independence[1], to suit the purpose of crushing any demand or movement for self government. The then Court of Directors provided detailed guidelines for the reorganization of the police all over the country in their dispatch of September 1856, in which they pronounced : ‘’That the police in India has lamentably failed in accomplishing the ends for which it was established is a notorious fact; that it is all but useless for the prevention, and sadly inefficient for the detection of crime, is generally admitted. Unable to check crime, it is with rare expectations, unscrupulous as to its mode of wielding the authority with which it is armed for the functions which it fails to fulfill, and has a very general character of corruption and oppression.’’[2] It is palpable that the British created the said Act to serve their own colonial interests, and hence, it was loyal only to the British government. But after independence, it has undergone a dramatic change and today its loyalty is not merely to the government, but also to the state, the constitution and to the laws of the land.[3]

The Indian Police Act no doubt was passed in the year 1861, when there was no representative ruling government in India, however all the laws which

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[1] M. Daruwala, G. Joshi, G. & others, *Police Reforms too Important to Neglect too Urgent to Delay* (2005)

[2] A. Gupta, *The Police in British India 1861-1947,* (1979)

[3] Assam Police. (February 12, 2011) http://www.assampolice.com/aphistory.htm

were in force in the territory of India, continued to remain in force evenafter the implementation of the constitution in 1950.[4]This Act functions in several states of India despite far reaching changes in the governance and India's transition from being a colonized nation to a sovereign democratic republic state. Though many states like Mumbai, Hyderabad, and Delhi etc. have their own Police Act,[5] it needs to be mentioned that these Acts are primarily based on the role model of the Indian Police Act of 1861.[6] It was fundamentally enacted with a very limited purpose as its preamble itself mentions that"it is expedient to reorganize the police and to make it a more efficient instrument for the prevention and detection of crime". This has led to frequent allegations by the police as well as the public, that they have no other role towards the society, given their duties under the Act, which are to obey and execute all orders and warrants lawfully issued by any competent authority, collect and communicate intelligence affecting the public peace, prevent commission of offences and public nuisances, detect and bring offenders to justice.[7] The Police Act 1861 needs to be replaced by suitable legislations which reflect the democratic nature of India's polity and the changing times, because although successful in protecting the British commercial and diplomatic interests in the past, it no longer serves the recent needs of India. A civilian model similar to that of the British, needs to be developed to suit the present day requirement of India.[8]

Thus the present Act is weak in almost all the parameters that must govern democratic police legislation. Unlike India there is a lot of emphasis on good community-police relationship in Britain, and this is one of the reasons why British "Bobbies" are popular and looked upon by the community with

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[4] Article 372 (1), Constitution of India.
[5] B. David, *The Police and Political Order in India*, 23 ASIAN SURVEY, 484-496 (1983)
[6] D. Das, A. Verma *The Armed Police in the British Colonial Tradition: The Indian Perspective* (1998)
[7] Section 23, Indian Police Act, 1861
[8] Das, D., & Verma, A, *op cit.*, p.30.

admiration and trust.[9] These are clear missions laid down for police forces in Britain. Let us briefly look at the history and development of policing in India during the British Raj and furthermore make a comparative analysis between the system of policing in India and Britain.

II. THE CONCEPT OF COMMUNITY POLICING IN INDIA

Community policing often referred to as Neighborhood policing[10] is one of the most dynamic steps taken towards the democratization of Policing. This approach requires officers to be open minded, unbiased and sensitive to the concerns and problems of the society. Without the support of the community, the police cannot function effectively and efficiently.[11]A neighborhood team can be made up of police officers, police community support officers, community wardens, special constables, volunteers and partners, all working together in partnership. For preventing crime and maintaining law and order in any society, the support of the community is a *sine qua non*.[12]Democratic policing requires public inputs and public participation and broadly signifies a collaboration between the police and the community to identify and solve community problems. A successful community-policing programme requires traditionally centralized police organizations to shift decision-making and responsibility downward, and recognize that it is street-level officers who have to make the new community policing approach work. Community Policy also entails public inputs into all police processes from preparation of policing plans and budgets, to providing all crime related information. The police and public have to interact with one another with a sense of shared values, duties and

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[9] History UK, History of England (January 4, 2011) http://www.historic-uk.com/HistoryUK/England-History/SirRobertPeel.htm

[10] G.P. Alpert, R.G. Dunham, *Community policing*, 14 JOURNAL OF POLICE SCIENCE AND ADMINISTRATION, 212-22 (1986)

[11] Hazelwood Police Department Organization. (May 7, 2011) http://www.ci.hazelwood.mo.us/department/police/organizn.cfm

[12] Training for Transformation, (July2, 2011) http://www.india-seminar.com/1999/483/483%20sankar%20sen.htm

responsibilities. In diverse societies with unequal power relations, community policing must engage with diverse groups so that it is not hijacked by dominant groups to the detriment of the marginalized and vulnerable.[13]

Community policing, problem oriented policing and intelligence led policing all comprise reform movements for the police. Community policing model aimed at improving the quality of service and customer satisfaction. Problem oriented policing which is often bracketed with community policing calls for a close specification of the problem. Intelligence led policing on the other hand describes the way of doing police business.[14]In Indian context it is a need for Intelligence led policing rather than community based policing. Table 4.1.1 sets out core features of intelligence led policing community and problems oriented policing.

III. SUCCESS OF COMMUNITY POLICING IN INDIA

The Indian Police System is not aloof from the concept of Community Policing. In fact several Indian states have taken initiatives to bridge the vast communication gap between the police and the public. However, more needs to be done in this matter i.e. more states must adopt Community Policing. Especially states like Bihar where the Police System often finds itself in a dilapidating state. Let us briefly have a look at what is being done throughout the country in terms of community policing.

A. Friends of Police – State of Tamil Nadu

'Friends of Police' (FOP) is a pro-active organization that lends a psychological approach to policing in the state of Tamil Nadu. It is a true example of partnership between the police and the public where citizens are empowered with certain rights and duties. FOP provides opportunities for

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[13] Commonwealth Human Rights Inniative. (August 12, 2011) http://www.humanrightsinitiative.org/publications/nl/newsletter_spring_2006/article9.htm

[14] *Supra* n. 12

ordinary citizens to effectively contribute to the prevention and detection of crime. Any member of the public who is not involved in civil or criminal case, can seek membership of FOP The members of FOP not only provide useful information leading to solving of crimes but also prevent the abuse of Police power. Friends of Police movement has proved to be extremely significant in creating channels for receiving the right information at the right time thereby helping the police to come closer to the community. This system is functioning effectively and successfully in all districts of Tamil Nadu over the last six years[15]

B. *Samarth Yojna Community Policing Experiment, Coimbatore City*

Coimbatore City (T N), is a crucial witness to two communal holocausts, religious and ethnic riots, rampant violence, inhuman brutality and increasing criminal activities etc.[16] Hence the necessity of community policing was felt and introduced by the then Commissioner of Police Mr. K. Radhakrishnan. The objectives of this experiment were to perceive and resolve the communal problem and also to win the trust and confidence of the people.[17]

C. *Trichy Community Policing*

Trichy is known for its high crime rate.[18] The city has been the core of racial and religious conflicts, rioting, murder and other anti social activities in Tamil Nadu. The police had to instill a sense of confidence amongst the people and to achieve this motive, Mr. J Tripathy, the then Joint

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[15] Punducherry Police. http://police.pondicherry.gov.in/Community%20Policing%20Scheme.htm

[16] Defend Voiceless Vulnerable Billion, Crimes Against Humanity, (September 05, 2006) http://genocidehomicide.blogspot.com/2006/09/crimes-against-humanity.html

[17] Community Policing Experiments / Outreach Programmes in India,http://www.humanrightsinitiative.org/new/community_policing_experiments_in_india.pdf.

[18] Crime Prevention, http://www.tn.gov.in/police/crimeprev.htm

Commissioner of Police, introduced the following community policing strategies in Trichy.

B. *Beat Officers' System* - The city was divided into fifty-seven beat zones and each beat zone was manned by four constables called Beat Officers. This instilled pride in them and empowered them to make independent decisions and be more responsible to public needs.[19]

C. *Wide Area Network* - Wide Area Network was introduced in July 2000 connecting all the police stations and offices with Internet connectivity and email service. This facility has brought the police closer to the public, making the police more responsive, transparent and interactive.[20]

D. *Help line for Women in* Distress - To reach to those women who need help and assistance, a help line was launched on 15th August 2000 to receive distress calls round the clock by a team of police, activists and students. The authorities under this system visit the victims; provide counseling, legal help, medical support etc.[21]

E. *Complaint Box System* - Complaint Boxes were kept at different locations of the city to receive information from public who may prefer to remain unidentified and yet participate in their effort to assist the police. Such letters were collected daily and acted upon quickly to encourage the informants.[22]

F. *Slum Adoption Scheme* - Due to poverty and other socio economical factors, slums have become the breeding ground for criminals and other anti social elements. To access these areas where the police had difficulty in gaining entry, attempts were made to improve the living

[19] Community Policing Experiments / Outreach Programmes in India, *Op-Cit*.
[20] *Ibid*.
[21] *Ibid*.
[22] *Ibid*.

condition of the people. Mass awarenessprogrammes were conducted on hygiene, evils of drug/alcoholism, and AIDS. Women self-help groups were formed, vocational training was imparted and assistance was given to them for manufacturing and marketing their products.[23]

D. The Tuticorin Experiment

In this experiment, a number of police camps were organized in communally sensitive villages. The main objective of this camp was to restore the confidence of the people on the police force, to improve the police - public relationship and to maintain law and order situation. In these camps nobody was allowed to act as a mediator between the police and the public. The police officers personally sat with the villagers and discussed petty matters on the spot thereby giving solution to the satisfaction of both parties.[24]

E. 'PRAHARI': The Community Policing Initiative in Assam

The concept of Community Policing was introduced in Assam on 3 July 1996 by the then S.P. ShriKuladharSaikia, to discuss the concept and launching of "neighbourhood watch scheme" to promote policing through community participation. The community policing initiative was also aimed at changing the attitude of the average policeman at the police stations towards the public, to make them people friendly and to improve their living and working conditions. The goal of community policingwas to tackle social problems and match the wave lengths of the police and community.[25]

F. *Community Policing Initiative in Himachal Pradesh*

With the purpose of mobilizing public support and involving active public participation in prevention and detection of crime as well as maintaining law and order, a Community Policing Scheme was introduced in the state of

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[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*

Himachal Pradesh in November 2000. It has proved to be a big success story today.

G. *Community Policing Experiment in Ludhiana*

The community policing experiment in Ludhiana was launched on October 12, 2002. Thirty member community groups were set up in 400 beats and community members were to sit together every fortnight or once a month to discuss major problems confronting the area. Each group comprising a beat officer, associated with the resource centre was to "police the community".[26]

H. *Community Policing Initiative in Kolkata, West Bengal*

The community policing initiative in Kolkata involves the civil society and the police personnel. These programmes include Drug Awareness Programmes, health check up programme for the street children of the city, weekly blood donation programme etc.[27]The main objectives of this project were to involve people in the resolution of disputes, ensuring speedy delivery of justice in a cost-effective manner, ensuring a reconciliatory situation for the parties for achieving long lasting solution and to develop a sense of belongingness with the State, with an ultimate bearing on national integrity.

I. "MAITHRI" - Community Policing In Andhra Pradesh

"Maithri" which means friendship is a community policing initiative launched in the year 2000, by the government of Andhra. The mission of Maithri was to 'render courteous, compassionate and caring responsive police personnel and increase public confidence in police with respect to maintenance of peace and order and a feeling of safety from crime.' It rests on the belief that contemporary com unity problems require a decentralized

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[26] Official website of the Government of Punjab, (June, 30 2011). http://punjabgovt.nic.in/news2011/march/march_14.htm
[27] *Supra* n. 19
[28] *Ibid.*

and personalized police approach, which involved citizens in the process of policing themselves.[28]

J. Mohalla Committee Movement Trust, Mumbai

Mohalla is the Hindi word for locality. Citizen-police committees were set up in the wake of the 1992-93 Hindu-Muslim communal riots that paralyzed Mumbai and killed 1000 people.[29]The Mohalla Committee Movement was formed under the initiative, of the then Commissioner of Police, Mumbai, Mr. J.F. Riberio. The Mohalla Committee which is also known as the Peace Committee, has now become a part of the civil society structure in a city that usually has little time or mental space. The concept works on the simple principle**:** Give people some power and make them responsible for it. The primary task of the committee members is to maintain more than cordial relations between the two communities, largely Hindus and Muslims.[30]

K. Community Policing Initiative in Pune

Community policing initiative was taken up by the police in Pune in 1992. To prevent future communal flare-ups and to restore the public confidence Mohalla committees were set up throughout Pune. There are 30 odd Mohalla committees in Pune where committee members work with the police to maintain law and order. Mohalla committee meetings are held before the onset of every festival to maintain peace and communal harmony in the locality. In this way, every beat officer should hold a meeting of the MohallaCommittee once a month. Likewise the Senior Inspector of Police of the concerned police station holds a meeting at least once in every three months which is attended by the ACP.[31]

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[29] Vibhuti Narain Rai, Handling Communal Riots (November 1999), http://www.india-seminar.com/1999/483/483%20rai.htm
[30] *Supra* n.30
[31] *Ibid.*

L. The Parivar Paramarsh Kendra, Madhya Pradesh

It is a unique effort in community policing where the Kendra (centre) focuses on resolving family conflicts, by identifying the causes that contribute to family discord. Here the Kendra takes up a social decision making role and strives to save a family from being broken. It mainly acts as a centre for counseling family problems. The idea behind such a venture is to improve the social environment, in a city by solving family disputes. By solving personal problems at an early stage, the police personnel have found that it often prevents criminal tendencies within an individual to further violate the law. Though theprogramme lacks statutory backing, the Kendra has been functioning successfully for the last seven years and has contributed to the wellbeing of the society. By satisfying the community and involving them in performing such an important service such as protecting families from being broken, the police has also effectively improved their tarnished image but becoming more people-friendly.[32]

Not only in India, but all over the world the police are the white blood corpuscles of the body politic. The Police in general, constitute the internal defence mechanism of the country and they protect the nation by maintaining law and order. Terrorism is increasing at a fast rate all over the globe[33] and the terrorists are becoming more and more dangerous. It's becoming tough to detect, apprehend or punish such people of anti social behaviour as they are not confined to any state or nation boundaries. The ever increasing crime and violence, international terrorism, narcotics smuggling, assassination of national leaders, bombing in different states are part of the growing challenges to the police force all over the world. The police force in practically every nation suffers a problem of not just a "no

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[32] *Ibid.*

[33] Philip V. Prateep, Friends of Police Movement : A Concept for Empowerment and an Experiment in Community Policing, Policing Central and Eastern Europe (1996), http://www.ncjrs.gov/policing/fri149.htm

image" or 'low image" situation but a highly negative image among the public at large. A general atmosphere of lack of mutual trust, respect and confidence between the public and police prevails and this surfaces and erupts into an open hostility between different sections of the public and police. Many a times the police fails to distinguish between the law abiding people and the law breakers. The irony is that though the police exists for the safety of the public, it works in a vacuum of lack of goodwill, lack of information and feedback and general lack of co-operation.

On the other hand, Community Policing can to a large extent correct this tarnished image of the policeman among the public and the skeptical eye with which the people view the police. It is often said that prejudice is born out of ignorance and to a large extent the police are responsible for the way in which people think about them. This is because the police keep the public at arms length. If the police were to work together with the public, then the public would know the ground realities of police work and they would certainly be sympathetic towards the police and their tendency to judge them harshly would be reduced to quite an extent.

In India we have a several examples wherein institutions and organizations assist the police in maintaining law and order and this is welcomed. Experience tells us that community policing is of greater importance and advantage in having a smooth functioning of the society in particular and the government in general. Thus Community Policing is certainly a boon and is one of the major democratic principles of Indian Policing.

A. THE INDIAN POLICE SYSTEM IN CRISES

Participation of the public to help the police in restoring law and order has considerably reduced over the past few years and today most of the people have little, if anything to do with the police.[34]Isn't this strange, considering the large role allotted to the police in a democratic setup? A nation's police

[34] D. Lawday, *Policing in France and Britain* (2001)

cannot perform its role effectively and efficiently without the complete cooperation of the public. Ever since 1979, successive governments of our nation have promised police reform to the people of India. In this connection a number of high level Commissions have carried out extensive analysis of the problems in policing and have provided specific recommendations to realize systemic reform of the police but unfortunately everything remains on paper till date.[35]The common man today fears to remain in the sight of the police. Moreover, people in India are afraid to be eye witnesses in cases as they are aware of the crucial interrogation and suffering they will have to go through. Be it people's mistrust in the police or fear of being stalked by the killer's accomplices, police also find it difficult to get eyewitnesses in most of the cases. There are instances of witnesses being gunned down by accomplices, years after they testify, which deter people from going to the police.[36]

The police in India is known for being extremely unfriendly and antagonistic towards the people and much more so when it comes to minorities.[37] However, what is more surprising is that even sixty years after independence from the British rule our democratic rulers have not made any change in the Police Act neither are they ready to implement recommendations of 5th Police Commission.[38]The reason is but obvious that our political rulers want to use police for their political gains. They do not want police to be friendly with the public because if the police become people friendly, politicians will not be able to use them for their personal gains. The Indian Police has a long tradition of being a partisan instrument in the hands of the rulers since colonial times. Organized crime cannot flourish without some police connivance.[39]Public criticism for Indian police varies from its alleged

[35] A Democratic Police Act of India. (March 2, 2006) http://www.humanrightsinitiative.org/new/2006/democratic_police_act_for_india.pdf
[36] Human Rights Watch, http://www.hrw.org/reports/1999/india/India994-02.htm
[37] B. Jan, *Silencing the Voice of Agricultural Labourers in South Gujarat*, 33 MODERN ASIAN STUDIES, 1-22 (1999)
[38] Role of the Police in Gujarat Carnage, http://ecumene.org/IIS/csss81.htm.
[39] *Supra* n. 35

overzealousness and brutalization at one end of the spectrum, to ineffectiveness in controlling crime and criminals at the other. The low image of the police, in some states like Bihar, has darkened even further. A study by Transparency International India (T I I) and the Centre for Media Studies (CMS) states that Bihar has been rated as the most corrupt state in India.[40]Instead of being an instrument to enforce the rule of law, police is increasingly seen as a pliable tool in the hands of unscrupulous politicians. The Indian Police of today is condemned for being the judge, jury and executioner. The general image of today's police in the eyes of the common man is that it is a corrupt force incapable of protecting the public.

V. POLITICIZATION OF POLICE

The doctrine of "separation of powers" is acknowledged as an integral part of the basic features of our Constitution.[41]It is also commonly agreed that all the three organs of the State, namely the Legislature, the Judiciary, and the Executive are bound by and subject to the provisions of the Constitution, which demarcates their respective powers, jurisdictions, responsibilities and relationship with each another. It is believed that none of the organs of the State, including the judiciary, would exceed its powers as laid down in the Constitution. It is also expected that in the overall interest of the country, even though their jurisdictions are separated and demarcated, all the institutions would work in harmony and in tandem to maximize the public good.[42]However the separation of power is merely a myth and the real picture is completely different.

Under the umbrella of the Indian Constitution, every state has its own police force. In addition to this, there are central police organizations established by the national government for specialized work. The statistics of the

[40] The Hindu,(July 1, 2005) http://www.hindu.com/2005/07/01/stories/2005070103931500.htm

[41] B. Shiva Rao, *The Framing of India's Constitution*, 6 MODERN ASIAN STUDIES, 357-360 (1972)

[42] G. Austin, *The Indian Constitution: The Cornerstone of a Nation*, (1966)

combined strength of the state and central police in India in 2003 was more than two million personnel from which 1.47 million belong to the state or union territory police forces and the remaining to the Center.[43]

The Police Act of 1861 has given innumerable powers to the state government. The executive under this authority seeks to control the legislature thereby abusing the doctrine of separation of powers. Section 3 of the Indian Police Act 1861 says, '' The superintendence of the police throughout the general police district shall vest in and shall be exercised by the state government to which such district is subordinate and except as authorized as under the provisions of this Act, no person, officer or Court shall be empowered by the state government to supersede or control any police functionary".[44]This section very clearly cuts the powers of the court too. The head of the state police i.e. D.G. or I.G.P. enjoys his tenure at the pleasure of the Chief Minister of the concerned state. This state of affairs has resulted in wide-spread politicization of the police where increasingly, allegiance is owed not to the law but to the ruling political elite.

Unfavorable political interference in the investigation of the police terribly hinders the rule of law. Police Officers are often under pressure to use their powers to shield those who enjoy the support of politicians belonging to the ruling party.[45] On the other hand, officers who resist to bow before these politicians have to face frequent transfers and in extreme cases, departmental inquiries and even false legal proceedings. This further leads to the formation of a weak and a paralytic Criminal Justice System in the country.

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[43] Police Accountability in India: Policing Contaminated by Politics.(September 30, 2005) http://www.hrsolidarity.net/mainfile.php/2005vol15n005/2448/

[44] Section 3. Indian Police Act of 1861.

[45] P. S. Appu, Need for Thoroughgoing Reforms, (June 9, 2002) http://www.boloji.com/opinion/0014.htm

VI. POLICE ACCOUNTABILITY

Power tends to corrupt and absolute power corrupts absolutely. This is commonly referred to as Lord Acton's dictum.[46]This is indeed the bitter truth as far as the Indian police is concerned. The growing criminalization of politics and politicization of criminals have taken heavy toll on policing in the country. This phenomenon has further eroded the credibility and effectiveness of the police and resulted into lack of trust and confidence in police forces in large sections of the society.[47]Responsibility is accompanied by accountability and thus the police must be answerable to the public. Rule of law is said to be the corner stone of democracy. Rule of law implies equality before law and equal protection of law.[48] These values have been enshrined in Article 14 (Fundamental Rights) of the Indian Constitution. Does Rule of Law really exist in India? Traditionally, the police are accountable to their departments and the judiciary for any abuse of power. However, many countries realize the importance of augmenting internal systems with civilian oversight to ensure that police misconduct is investigated without bias. Hon'ble Chief Justice of India, Justice Y. K. Sabarwal, pointed out that "the `Public Accountability' is a facet of administrative efficiency.[49]

At the same time we do have several instances among the police fraternity where senior and daring officers are denied promotion because they do not fit in the frame made by some politicians and other officers. One such glaring incident has been reported in the Times of India, Pune, India on page 15 dated the 27th of July 2007.which itself stands testimony that the Police Act needs to be drastically reformed as it is outdated and not relevant to present

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[46] Per Bylund, Power Corrupts, (March 2, 2004) http://www.strike-the-root.com/4/bylund/bylund3.html

[47] James Whitfield, Policing the Wind rush Generation, (May7, 2000) http://www.historyandpolicy.org/archive/policy-paper-45.html

[48] Part III, Constitution of India.

[49] Human Rights Watch. http://www.sifyblogs.com/blogs_preview.php?blogid=1430

day. India's first woman IPS Officer and super cop KiranBedi was denied to the Delhi's police top post, though her credentials were very strong and she possessed all the adequate qualifications to be the Commissioner of Police New Delhi. Her junior was appointed Commissioner of Police because ' She didn't indulge in 'networking' and didn't have ' booze buddies' . How does one account for this grave injustice done to KiranBedi. obviously there is immediate requirement that the Police Act should be completely revised. In Sunday Times of India dated the 29th of July, page 3 KiranBedi observes that a lot of human energy was required to improve the system and make it healthy. A lot of reforms are required. For example we are still following the Indian Police Act, 1861 and the Prison's Act, 1894. Comparing the corporate sector to the government sector, the super cop Bedi said' the latter lacked transparency and accountability and there were no performance appraisals. Once someone enters the government sector, he is never questioned and his performance doesn't matter. It is the other way around because if someone raises his voice against the system, he is pulled up for trying to bring about reform, Bedi said.

Accountability can appear in two forms namely,[50]

a) Internal Accountability

b) External Accountability

An internal mechanism of accountability would dwell in a hierarchical set up, a system wherein a police officer is answerable to his senior officer. There is a mention of such accountability in the Indian Police Act of 1861. The Police Act of 1861 authorizes senior police officers of the rank of superintendent of police and above to dismiss, suspend or reduce in rank any police officer below the rank of inspector of police who they think is negligent in the discharge of his duties or is unfit for the same. The senior

[50] Association of Police Authorities, *Pounding the beat: A guide to police finance in England and Wales*, (1999)

officer is also authorized to impose punishments which could be in the form of a fine not exceeding one month's pay, confinement to quarters not exceeding fifteen days, deprivation of good conduct pay and removal from any office of distinction or special emolument.[51]Internal accountability mechanism is often condemned to be weak and biased.

An external mechanism of accountability would constitute the organizations like the courts, the human rights organization and the non governmental organizations. Writ petitions and public interest litigation can be filed in higher courts and criminal prosecutions can be launched in lower courts. A number of significant judgments have been rendered by the higher courts prescribing safeguards or guidelines to regulate police conduct during arrest, interrogation and other stages of investigation and also asking the government to pay compensation in cases of custodial violence etc.[52] Sadly the delay in the court procedure and the lack of accountability of the police department have literally alienated the poor in the country.

The human rights organizations across the country as well as institutions like Red Cross, Amnesty International etc. play a very important role in holding the police accountable in cases of gross misconduct. The most important of these commissions is the National Human Rights Commission, which was established on 12 October 1993.[53]The N.H.R.C. undoubtedly has some achievements to its credit in terms of its efforts to make the police accountable for their actions. However, the commission's work has suffered due to certain infirmities and deficiencies in the law governing its operations. The Right to Information[54] in India can be said to be a recent development ensuring accountability of the government including the police.

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[51] Section 7. Indian Police Act 1861.

[52] G. Joshi, *Police Accountability in India: Policing Contaminated by Politics*, 15 ASIAN HUMAN RIGHTS JOURNAL, 422 (2005)

[53] Amnesty International Report 2000, http://www.pucl.org/reports/National/defenders.htm

[54] Right to Information Act 2005.

The widespread use of custodial torture has been reported from various parts of the country. This was possible only due to the active external accountability mechanism which includes media. The number of custodial deaths that have been reported from regions that are not normally associated with such violence by the police, like Kerala,[55] has been on the rise. The crime rate has been on the rise ever since independence, see table 5.3.1. Cases received by the Asian Human Rights Commission indicate that torture was used as a central part of criminal investigation. Even though India was to soon ratify the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,[56] the Asian Human Rights Commission has doubts whether any progress has been made in this direction. To date, custodial torture remains to be looked upon as a crime in India. There are no practical and reasonable avenues through which a victim of custodial violence can seek redress in India, other than via the expensive process of approaching the constitutional courts.[57]

On 18 December 1997, the Honorable Supreme Court of India pronounced a landmark judgment aimed at insulating the C.B.I. and Directorate of Enforcement from external influences so that they could function efficiently and impartially to serve the rule of law. The judgment also declared null and void the Single Directive, which required the C.B.I. to seek permission from the government before undertaking any inquiry or investigation against senior civil servants of the rank of joint secretary and above.

The Right to Information Act 2005 comes as a ray of hope that each one of us abides by the law and there is justice to all and malice towards none. Each one of us, whether a government servant or otherwise be accountable to our words and deeds.

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[55] Asian Human Rights Commission, Government of Kerala Must Criminalize Torture to Prevent Custodial Deaths, (August 14, 2006) http://www.ahrchk.net/statements/mainfile.php/2006statements/688/

[56] United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 10 December 1984. United Nations, Treaty Series, vol. 1465, p. 85

[57] *Supra* n. 57

VII. HUMAN RIGHTS AND THE POLICE IN INDIA

According to Watson's Law Lexicon, a right is a "liberty of doing or possessing something for the infringement of which there is a legal sanction". Thus we can say that a right is an interest which is protected by law. It is the fundamental duty of the police to ensure that people who live in a democratic society enjoy their rights freely. Every human being has certain rights which are universal, inalienable, inherent, fundamental and basic,[58] the enjoyment of which is the foundation of freedom in the world. But history shows that man has not been allowed to enjoy these rights due to diverse means of administrative, political, social, economic, cultural or fiscal exertions. The improper use of power and authority by the police has time and again been found to be responsible for the denial of some of these rights.[59]In doing so, some police officers do not understand that they are violating the human rights of the people for whose welfare and protection the very service is created and maintained. We are following the same old Indian Police Act 1861 which governed the police in India in 1919 where Brigadier General Reginald Edward HarryDyer ruthlessly opened fire to an unarmed crowd at JallianwalaBaug leaving several innocent people dead.[60]

The Indian Police Act 1861 under which the police functions today did not assign any role of protecting human rights by the police; rather it gave a very narrow and reactive role of maintenance of law and order and prevention and diction of crime[61] The Police Acts which are enacted by the states after independence do not have any room for human rights. One of the main reasons why human rights are frequently violated in India is the grant of arbitrary powers to the security forces by the 'black laws' such as the National Security Act, TADA, (The Terrorist and Disruptive Activities Act)

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[58] S. Ed, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*. 36 *STANFORD LAW REVIEW*, 26-39 (1984)
[59] G. Pandher, R. Tewari & others , INDIAN POLICE JOURNAL (1996)
[60] Britain India Massacre 1919, http://www.onwar.com/aced/data/india/india1919.htm
[61] S. Pachauri, *Prisoners and Human Rights* (1999)

the Armed Forces (Special Powers) Act, POTA[62] etc. The National Security Act which provides for preventive detention, may be necessary in some cases in terrorist affected areas when witness are unwilling to come forward to give evidence, but even in such cases the Act must be used very sparingly and that too by responsible and highly placed officials. Laws like the National Security Act and TADA have been, however unfortunately extended to areas which are free from insurgency.[63]

VIII. POLICING AND HUMAN RIGHTS, THE INDIAN SCENARIO

In spite of the declaration and adoption of human rights by our constitution,[64] violations of different types of freedoms and human rights are an everyday experience. Frequent incidents of violation of human rights and the complaint against the use of third degree method, tortures, custodial deaths, assaults, illegal confinement and fake encounters come to the notice and are reported by the media very now and then. Instances are too many to quote, however custodial crimes and abominable cases of the use of third degree methods, uncalled for harassments and glaring misuse of power, authority and position are some of the sordid manifestations of serious violation of human rights by the police.[65] Here are some news paper headlines to prove the point. ' Six members of the family in Thanjavur commit suicide due to police harassment, Jugta Ram bobbited in a police station in Rajasthan, Members of the family of a secretary to the government of India beaten up by the police in Delhi, Vipin and Gogia abducted by the police in Punjab, Pro Narmada Dam agitators handcuffed and paraded by police in Gujarat, Person in custody beaten up by the police in the Supreme

[62] POTA The Latest Black Law (May 2002). http://www.geocities.com/aipsg/charcha/May2002/alok_pota.htm
[63] Human Rights and Human Rights Instruments. http://www.hri.ca/partners/sahrdc/india/fulltext.shtml
[64] Human Rights and the Indian Constitution. http://www.boloji.com/perspective/256.htm
[65] V. James, *Human Rights and the Police in India*, (1999).

Court Premises. A sheer case of violation of human rights was that of Dhananjoy Chatterjee an Indian citizen who was executed by hanging in August 2003 after spending 13 years in prison. He had been convicted of rape and murder in 1990.

In one of the most recent cases the Punjab State Human Rights Commission (PSHRC) last month recommended that the Punjab government should pay Rs. 25,000 to a man from Mohali who was allegedly tortured by the local police. The Commission determined that the nature of the injuries prima facie suffered by the victim warranted immediate interim relief. Mohali was brought to the police station, beaten by a cane, and given electric shocks, after which he was abandoned in Daun village.[66]This is the plight of the common man in India.

A. Handcuffing in India

Handcuffing has been a rule of the Indian Criminal Justice System. Every male person who has to be escorted in police custody, and where under police arrest, remand or trial, shall be handcuffed on arrest and before removal from one building to another. Arrestees in India are often physically restrained in the name of security. Mandatory handcuffing has been held by the Supreme Court as violation of Article 21 of the Constitution. International law also addresses the issue of handcuffing. The lack of opposition from the legal profession and civil society is the result of attempts by the police to have handcuffing made mandatory. The most striking example related to handcuffing which India could ever witness was the arrest of Justice A. S. Bains, and his subsequent production in handcuffs before a magistrate, have exposed the arrogant highhandedness and utter lack of decency of the Punjab government and the police in that State.[67]Handcuffing

[66] Human Rights in Punjab, http://blogs.law.harvard.edu/jaskaran/
[67] Police and Human Rights.,http://www.pucl.org/from-archives/Police/human-rights.htm

is a practice which is certainly against human dignity as it qualifies to be described as degrading treatment to offenders.

In Altamesh Rein vs Union of India, the Supreme Court of India announced the guidelines as regards to handcuffing. The Apex court declared that

- Handcuffs should not be used in routine
- Handcuffs are to be used only where the person is
    a) Desperate
    b) Rowdy, violent, disorderly, obstructive or is likely to attempt to escape or commit suicide.

The supreme court also added that there should ordinarily be no reason to handcuff persons occupying a good social position in public life or professionals like Jurists, Doctors, Advocates, Educationists, Writers as well as Journalists and Political Prisoners. And if handcuffed they should not be made to walk through streets. This judgment can be criticized as it is left wholly to the discretion of the police officer whether to handcuff the offender or not.

During the course of this study police officers who were interviewed in Mumbai City unanimously said that criminals have started taking advantage of the general rule of 'no handcuffing' resulting to the increase in the escape of criminals from police custody. The police men escorting them find a readily available excuse in 'no handcuffing'. In India escape from police custody is treated as an offence.[68]It is a bailable offence and can be tried by any Magistrate. The punishment for escaping from police custody is not deterrent. That is why the hardened criminals have started escaping from police custody at will. Prohibiting the use of handcuffs has made the escape from police custody easy and inviting. Along with the rule of 'no

[68] Section 22, Indian Penal Code, 1860

handcuffing', escape from police custody should have been made a heinous crime and such criminals should be denied all judicial concessions in future. In order to protect the human dignity of the offenders, they cannot be allowed to escape from custody in the larger interest of the society.

IX. HUMAN RIGHTS COMMISSION AND THE POLICE

The National Human Rights Commission in India is governed by the Protection of the Human Rights Act 1993, (Act 10 of 1994).[69]There is apprehension among police officers that the intervention of the commission in their work will create a lot of problems in law enforcement and investigation of crime. Hitherto, the police used to take people in custody in the way the investigation officer might think fit. Sometimes this used to violate the principles enshrined in the Indian Police Act, the CPC, the CrPC as well as the principles of Human Rights. Accountability of police actions becomes more in the light of the provisions of the Act and the possible intervention of the commission in the police work. Will this intervention dilute the morale of the police men? This is to be seen in years to come.

Behavioral reforms and attitudinal changes both at individual and departmental levels are to be introduced with a view to developing a professionally democratic, socially courteous and morally strong people in the police force. Specialized courses in group behavior must be made part of the training programmes. Such behavioral changes can be brought about by associating the police with the community programmes so as to bring about extra organizational and non situational contacts. This will positively help in building informal relations and shall restrain the police in taking an authoritative attitude. A police-community relation is a must for understanding operational realities, for handling dilemmas of human rights, controlling the police and the community. A system of checks and balances if created can make the community appreciative of the performance of its own

[69] National Human Rights Commission, New Delhi, India. Official Website, http://nhrc.nic.in/

police.[70] Professional competence and efficiency need to be developed at the departmental levels. Effective and qualitative programmes of merit recruitment and job oriented training can contribute to added efficiency and professional competence. The implementation of various schemes of decentralization of police functions can also be tried to enhance efficiency and competence to minimize violation of human rights by the police.[71] On the organizational front, the question of reorganizing the police structure is more than overdue. A few structural innovations like the establishment of public relation cells and grievance redresses agencies, at different levels may also be introduced. On the personnel front, the policies regarding recruitment, promotion, training and service conditions should be revised. It has been noted that ill educated and beset by poor socio economic conditions, the constables are unable to understand the sophisticated problems of the police organization and its role in the society. If the above schemes are well implemented then instances of the violation of human rights by the police will decrease substantially.

Several other National Police Commissions as well as State Police Commissions, at different periods of time, suggested structural reforms in the department and emphasized the need to insulate it form extraneous (political) pressures, but their core recommendations were never implemented by the executive. The Kerala Police Reorganization Committee (1959)[72] said that "the greatest obstacle to efficient police administration flows from the domination of party politics under the state administration... the result of partisan interference is often reflected in lawless enforcement of laws, inferior service and in general decline of police prestige followed by irresponsible criticism and consequent widening of the cleavage between the police and the public." The West Bengal Police Commission (1960-61)[73]

[70] *Supra* n. 67
[71] *Supra* n. 67
[72] Manithan. Lifes Right for Human Rights., (December 6, 2004) http://www.tamilinfoservice.com/manitham/article/2004/1.htm
[73] Police Reform in India- A Distant Dream,(December 8, 2011) http://www.milligazette.com/Archives/15042002/1504200253.htm.

found that investigation of offences was sought to be interfered by influential persons who were highly placed in society. The Punjab Police Commission (1961-62)[74] deplored that "members of political parties, particularly of the ruling party, whether in the legislature or outside interfere considerably in the working of the police for unlawful ends". The Delhi Police Commission (1968) observed that political interference was the main source of corruption. The Tamil Nadu Police Commission (1971) stated that the problem of political interference had grown over the years in spite of the most explicit public declarations made by the successive Chief Ministers.[75]

It is clear that the recommendations perturbed the entrenched elite at the prospect of losing control over an organization that they had been misusing for so long resulting in subverting the rule of law and in obstructing the growth of a healthy and professional system of policing.

In many developing nations the policing model inherited from the former colonial power was designed to ensure stability and allow commerce and trade to flourish. Policing was characterized as being militaristic, accountable only to the colonial power. The Indian Police Act of 1861 was one such Act legislated by the British, of the British and for the British. The Act is highly militaristic and needs to undergo several reforms in order to co-exist peacefully with democracy. Although India has been independent for sixty years, neither central nor state government have taken appropriate initiative to replace the out dated Police Act of 1861 with new legislation that would be in tune with the requirements of democratic policing.

Providing a sense of security to ordinary citizens and attending to their grievances depends on the establishment of an efficient, honest and a professional police force. The fact that such a police force does not exist in India is attested to the findings of various commissions and committees, the complaints received by the human rights commissions, the stories reported

[74] *Ibid.*

[75] Dialogue Volume 6 No. 1, (December 22, 2004) http://www.asthabharati.org/Dia_July04/Prakash.htm

by the media and the experiences of the common people on the street. The need for police reform is self-evident and urgent.[76] Why should we be concerned with the governance and accountability of the Indian Police System? The answer to this question is most evident. Perhaps the most important reason for our interest in such questions concerns the unique relationship between policing and the institutions of democracy and their legitimacy.[77]

This article gives a brief overview over the current police system and a description about the problems and solutions. In India, the training facilities and forensic science equipment are not up to the standard and the police force is also understaffed. Politicization of policing has ruined the democratic set up of the nation.

One potential way of improving the linkage between performance management in policing and professional practice is through public participation in policing[78] also known as community or neighbourhood policing. Community policing has certainly been introduced in states and union territories but more needs to be done in this field. Though the police could become professional, technically proficient and have sparkling integrity, they would still lack legitimacy without negotiating their mission, strategies and tactics with local and national communities.

X. CONCLUSION

Several aspects of the police administration, organizational structure, work culture, training, politicization, accountability, magisterial control, corruption, brutality, etc. have been discussed and reviewed in order to bring about reforms since independence and for this purpose it has appointed commissions and committees from time and again. The appointment of the

[76] Human Rights Solidarity, (2005) http://www.hrsolidarity.net/mainfile.php/2005vol15n005/ 2448/

[77] N. Walker, *Policing in a Changing Constitutional Order*, 138 (2000)

[78] M. Fitzgerald, M. Hough, & others, *Policing for London*, (2002)

working group on police by the Administrative Reforms Commission in 1966 was the first sign of the Union government's interest towards reforms. This was followed by the setting up of the Gore Committee on Police Training in 1971. Then came the appointment of the first National Police Commission after 1947. Later, the government set up the Riberio Commission on police reforms in 1998 followed by the Padmanabhaiah Committee reforms in 2000. Despite all the expert bodies, the quality of policing has continued to deteriorate. Some of the recommendations made by the committee must be implemented fairly as none of them are unfeasible. It is important to create and effective, citizen-centered, transparent and accountable system that fulfils the needs of the modern Indian society.

The Union government can and should take the lead in introducing reforms in the police. It has the capacity to encourage state governments to reform their police forces by setting norms and standards, issuing policy directions and making the release of central grants dependent on police performance and behaviour. What is required is genuine interest and will to bring about police reforms.

JUDICIAL ADJUDICATION OF SOCIO-ECONOMIC RIGHTS: INDIAN PERSPECTIVE

Dr. Uday Shankar and Saurabh Bindal*

Prefatory:

Both, Civil-Political Rights and Socio-Economic Rights find mention in the Indian Constitution. Constitution of India stands as the real safeguard of our freedoms.[1] It represents the basic document on which the whole framework of this "Sovereign, Socialist, Secular, Democratic, Republic" stands. The foundations of this Republic have been laid on the bedrock of justice.[2] The cluster of socio-economic rights represents the hopes and aspirations of millions on which the fabric of this sovereign republic stands.

India, a prominent member of the new world order, was predestined to be a welfare state, deeply committed to twentieth century social and economic goals. The Constitution of India assembled the values of freedom struggle to promise dignified life to all in new dispensation. Genesis of the vision, need, recognition, protection and enforcement of human rights, which lies in the

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[1] "Constitution is the vehicle of nation's progress. It has to reflect the best in the past traditions of the nation; it has also to provide a considered response to the needs of the present and to possess enough resilience to cope with the demands of the future." H.R.Khanna, Judge, Supreme Court of India (Retd.) Making of India's Constitution, Eastern Book Company, Second Edition, 2009.

[2] *Bharat Bank Ltd. v. Employees*, A.I.R 1950 SC 188.

freedom struggle of Indians for more than a century, culminated in the form of Fundamental rights and Directive principles of State Policy on which the mammoth structure of Indian Republic stands today.[3] On the one hand, fundamental rights guarantee autonomy to individual and on the other hand, directive principles elaborate on the guidelines for making autonomy meaningful.[4]

Directive principles of State Policy are not the only charter of social and economic rights in India. Social and economic rights like the right to form association and unions,[5] the right to carry on any occupation, trade or business,[6] the right to education[7] and cultural and educational Rights[8] are placed in the chapter of fundamental rights. Fundamental rights also contain the provisions relating to right against exploitation.[9]

It is interesting to note that all social and economic rights are not clothed in the language of 'rights' in the Constitution. They are formulated in the form of guidelines or objectives to be followed by the state. It is required to chart out the rights which are coloured as guidelines by the framers of the Constitution. Article 39(a) states that "the citizens, men and women, equally have the right to adequate means of livelihood." Article 41 provides "The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases unemployment, old age, sickness and disablement, and in other cases of undeserved want." This is the only provision in Part IV of the Indian Constitution which refers to implementation of rights, subject to the economic development of the State. The realization of rights to work,

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[3] Dadwal, L., *Position of Human Rights: An Indian Profile*, 39 Civil and Military Law Journal (Oct-Dec 2003), 221 at 225.

[4] Part III and Part IV of the Constitution of India provides for Fundamental Rights and Chapter IV provides for Directive Principles of State Policy respectively.

[5] Article 19(1)(c) of the Constitution of India.

[6] Article 19(1)(g) of the Constitution of India.

[7] Article 21-A of the Constitution of India

[8] Articles 29 and 30 of the Constitution of India.

[9] Articles 23 and 24 of the Constitution of India.

education and social security has been qualified to the economic condition. There is a similar condition for implementation of social and economic rights laid down in the International Covenant of Economic, Social and Educational Rights.[10]

Apart from these rights, other social and economic rights are imposed as duty upon the state to give effect to them. Rights such as equal pay for equal work,[11] childhood and youth are to be protected from exploitation,[12] just and humane conditions of work,[13] a living wage, conditions of work ensuring decent standard of life and full enjoyment of leisure,[14] free and compulsory primary education,[15] and raising level of nutrition and the standard of living and the improvement of public health[16] are not framed in the language of rights. These are important conditions of life enumerated in the Part IV. Mere non assertion of such essentials of life in the language of rights does not dilute their significance and importance. It is pertinent to note that Article 47 which speaks about 'raising of the level of nutrition and the standard of living... and improvement of public health' is also formulated in the nature of duties for the State.

This article endeavours to chalk the judicial approach towards the adjudication of issues related to socio-economic rights in India. The leitmotif of this article is not to divulgate the scholarly writing's on the aspect of socio-economic rights in India. Instead, this article provides enough food for thought to the very aspect that the fundamental nature of socio-economic rights demand them to be a guarantee by the government. The question of realization of the socio-economic rights is completely based on the question that whether the Courts should sit over the adjudication of socio-economic

[10] Article 2(1) of ICESCR.
[11] Article 39(d) of the Constitution of India.
[12] Article 39(f) of the Constitution of India.
[13] Article 42 of the Constitution of India.
[14] Article 43 of the Constitution of India.
[15] Article 45 of the Constitution of India.
[16] Article 47 of the Constitution of India.

rights or not.[17] Realization of socio-economic rights should be left to the sphere of State. Intervention by Courts might result in detouring the course, which was not what was intended by the Constitution makers.

A more substantive approach to justiciability, looks to the nature of the rights and obligation in question, and whether complaints about their violation are susceptible to a rational and meaningful resolution by a duly empowered decision maker.[18] The judiciary has been efficiently and effectively discharging its responsibility of enforcement of civil and political rights. The determination of violation of social and economic rights by judiciary has failed to gain much desired acceptance in the legal plane. The non-justiciability of social and economic rights is challenged on both the grounds of 'legitimacy' and 'competency'. Most of the constitutions of the world express unwillingness to empower judiciary to examine violation of social and economic rights. Though, the judiciary indirectly exercises power to adjudicate upon these rights by reading general provisions of the constitution,[19] despite such activism, the Court has not been very consistent on protecting wide range of social and economic rights.

The Big Brother: Indian Judiciary

Article 37[20] of the Indian Constitution provides that the provisions of Part IV cannot be enforced in any Court. The judicial organ of the State has been deliberately kept away from the matters relating to implementation of the

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[17] (This is contrary to the view held by Dr. S. Muralidhar, *Economic, Social & Cultural Rights: An Indian Response to the Justiciablity Debate,* in Yash Ghai and Jill Cottrell, *Economic, Social & Cultural Rights in Practice*, Interights, 2004.)

[18] Dennis M J., & Stewart D P., *Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?,* 98 AJIL 462, 474 (2004).

[19] The Indian Supreme Court has been expanding the meaning of the right to life to include the right to health, right to shelter, right to livelihood to list a few.

[20] "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws." Article 37, Constitution of India, 1950.

directive principles. In doing so, the framers of the Constitution had also kept social and economic rights along with other principles of fundamental importance out of the purview of the court.

Supreme Court elaborated upon the relationship between rights enumerated in Part III and Part IV in *Minerava Mills's*[21] case. While explaining the relationship between the two set of rights in *ABSKS v Union of India*,[22] Justice Krishna Iyer gave reason for not making social and economic rights enforceable in these words: "It is now universally recognized that the difference between two sets of rights primarily lies in the fact that the fundamental rights are aimed to bring political freedom to the citizens by protecting them against excessive State Action, while the directive principles are meant for promoting social and economic freedom by appropriate state action while fundamental rights are intended to avoid and prevent the dictatorship rule to secure ideal political democracy, they are of no value unless they can be enforced through court. They are made justiciable. It is also evident but not frequently that they get importance but the directive principles in the very nature cannot be enforced in court of law and it is also unimaginable that no court can compel legislature to make law. If the court can compel legislature to make law that certainly parliamentary democracy

[21] *Minerva Mills Ltd. v. U.O.I*, 1981 SCR (1) 206. Justice Bhagwati categorically stated that Directive principles are part of human rights. He observed that: "it is not possible to fit fundamental rights and directive principles into distinct and defined categories, but the reality is that fundamental rights represent civil and political rights while directive principles embody social and economic rights. Both are clearly part of the broad spectrum of human rights. If we look at the declaration of human rights adopted by the general assembly of UNO on 10-12-1948 we find it contains not only rights protecting individual freedom they are from art. 1 to 21 but also social and economic rights intended to secure socio-economic justice to everyone. These are contained form Arts. 22 and 29 to other international covenants adopted by the general assembly for securing human right. One is the international covenant, civil and political rights and other is the economic, social and cultural life. Both are international instrument relating to human rights. It is therefore, not correct to say that the fundamental rights alone are based on human rights while directive principles fall in some categories other than human rights. The section of human rights embodied in directive principles, are as much as part of human rights as the fundamental rights."

[22] AIR 1981 SC 246.

shall be reduced to Anarchy of Judges." In *I R Cohelo v State of T.N.*,[23] the Supreme Court reasserted the need of balance between fundamental rights and directive principles.

Indian Courts have been adopting different methodologies to deal with the conflict between the fundamental rights and the directives. Judicial journey, dealing with the conflict between the fundamental rights and the directive principles, can be summarized in four leading steps. The description is in the order of the approach taken by the Court. It is to be noted that the first two approaches stand obsolete today and the latter two govern the current state of affairs at the judicial realm. The authors here provide a picture of the fourth approach as a Pandora box.

The First Rung:

Under the first approach, the judiciary was reading the meaning of "shall not be enforceable" under Article 37 in *strictu sensu*. In doing so, it was conferring a higher status to the fundamental rights over the directive principles. In relation to the first approach, the Court has been interpreting provisions of Article 37 vis-a-vis Article 13 of the constitution to give precedence to Fundamental rights over Directive principles. Thus, the judiciary was critical in conferring status to social and economic rights at par

[23] "The fundamental rights have always enjoyed a special and privileged place in the Constitution. Regarding the status and stature of fundamental rights in the constitutional scheme, it is to be remembered that fundamental rights are those rights of citizens or those negative obligations of the State which do not permit encroachment on individual liberties. The State is to deny no one equality before the law. Economic growth and social equity are the two pillars of our Constitution which are linked to the rights of an individual (right to equal opportunity), rather than in the abstract. The object of the fundamental rights is to foster a social revolution by creating a society egalitarian to the extent that all citizens are to be equally free from coercion or restriction by the State. By enacting fundamental rights and directive principles which are negative and positive obligations of the States, the Constituent Assembly made it the responsibility of the Government to adopt a middle path between individual liberty and public good. Fundamental rights and directive have to be balanced. That balance can be tilted in favour of public good. Te balance, however, cannot be overturned completely overriding individual liberty. This balance is an essential feature of the Constitution. ...Part III and Part IV together constitute the core of commitment to social revolution and they together, are the conscience of the Constitution." (2007) 2 SCC 1.

with civil and political rights.[24] The Court, in declaring the directives subordinate to the fundamental rights, had given its verdict primarily on the interpretation to the clause "shall not be enforceable in any court of law".[25]

The Second Rung:

Under the second approach, the Court was reading the reason of incorporating directive principles in the Constitution in a sacrosanct manner. Directive principles are aspirations of millions of people to establish a social and economic order. Therefore, the fundamental rights must pave way and can be sacrificed for their effective implementation. In the second approach, the Apex Court realized that the directive principles must be read in much constructive fashion for their meaningful inclusion in shaping the life of an individual. There was recognition of the fact that although the directives were non-justiciable in character, the Courts should recognize their importance for the simple reason that the directives formed a vital part of the constitutional document. The Court resorted to the 'directives' for the purposes of interpretation, maintainability or otherwise of a law. The Court observed that legislation enacted in furtherance of the directives must be understood as reasonable restrictions in the exercise of the fundamental rights. The Land Reform legislations were validated on the ground of 'public purpose'. It was observed that the legislations were giving effect to the interest of the community over the interest of individual.[26] These principles were drawn to define the content of reasonable restriction, so as to limit the

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[24] "The Directive principles of the state policy, which by Article 37 are expressly made unenforceable by a Court, cannot override the provisions found in part III, which, notwithstanding other provisions, are expressly made enforceable by appropriate Writs, Orders or directions under Article 32. The chapter of fundamental rights is sacrosanct and not liable to be abridged by any Legislative or Executive Act or order, except to the extent provided in the appropriate article in part III. The Directive principles of State Policy have to conform to and run as subsidiary to the chapter of fundamental rights." *State of Madras v Champakam Dorairajan*, AIR 1951 SC 226; see also *M H Quershi v State of Bihar*, (1959) SCR 629; see also *Kerala Education Bill*, 1957, Re, AIR 1958 SC 956.

[25] *Jagwant Kaur v State of Bombay*, AIR 1951 Bom 461; see also *Ajaib Singh v State of Punjab*, AIR 1952 Punj. 309; see also *Biswambhar v State of Orissa*, AIR 1957 Ori 247.

[26] *State of Bihar v Kameshwar Singh*, AIR 1952 SC 252; see also *Bijay Cotton Mills v The State of Ajmer*, AIR 1955 SC 33.

freedom guaranteed under article 19.[27] The court maintained that the Directives should conform to and run as subsidiary to the chapter on Fundamental Rights.

The Third Rung:

Under the third approach, the court has been reading both fundamental rights and directive principles as a part of integrated constitutional scheme to achieve welfare for all.[28] In pursuance of this approach, it has been giving harmonious interpretation to the conflicting legislations.[29] In the third approach, the court adopted a purposive role to read the provisions of the directives while interpreting various legislations.[30] It started referring to the principles when there was no conflict between the Part III and Part IV of the constitution.[31] Interestingly, the court completely transformed its approach towards the directives.[32] It initiated a method of reading the directives to justify the legislative measures of the State. It started interpreting the

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[27] *Nuserwanji Balsara v State of Bombay*, AIR 1951 SC 318.

[28] "Keshvanand Bharti has clinched the issue of primacy as between Part III and Part IV of the Constitution. The unanimous ruling there is that the Court must wisely read the collective Directive principles of State Policy mentioned in Part IV into individual fundamental rights of Part III, neither Part being superior to the other! Since the days of Dorairajan, judicial opinion has hesitatingly tilted in favour of Part III but in Keshvanand Bharti, the supplementary theory, treating both Parts as fundamental, gained supremacy." *State of Kerala v N M Thomas,* AIR 1976 SC 490.

[29] "...what was fundamental in the governance of the country could be no less significant than that which was fundamental in ht elide of an individual and therefore fundamental rights and DPSP were complementary." *Keshvanand Bharti v State of Kerala*, (1973) 4 SCC 225.

[30] "... what the injunction means is that while courts are not free to direct the making of legislation, Courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the Directive principles of State Policy. This command of the Constitution must be ever present in the minds of judges when interpreting statues which concern themselves directly or indirectly with matters set out in the Directive principles of State Policy." *UP State Electricity Board v Hari Shankar Jain,* AIR 1979 SC 65.

[31] "It is thus well established by the decisions of this Court that the provisions of Parts III and IV are supplementary and complementary to each other and that fundamental rights are but means to achieve the goals indicated in Part IV of the Directive principles."*J P Unnikrishnan v State of AP,* AIR 1993 SC 2178.

[32] "the dialectics of social justice should not be missed if the synthesis of part III and part IV is to influence state action and court pronouncements. Constitutional terms cannot be studied in a socio-economic vacuum, since socio-cultural changes are the process of the newly equity-loaded. The judge is a social scientist in his role as a constitutional invigilator and fails functionally if he forgets this dimension in his complex duties." *State of Karnataka v Ranganatha Reddy,* AIR 1978 SC 215.

various directives to provide meaningful content to welfare legislations like labour laws.[33]

The Fourth Rung: The Pandora Box

The fourth approach witnesses assimilation of social and economic rights into fundamental rights. The Court has been reading various social and economic rights as a component of justiciable fundamental rights. The court ushered in a new era by interpreting social and economic rights under the scheme of fundamental rights. It started reading the various rights of Part IV into Part III of the constitution. In *Randhir Singh v Union of India*,[34] the Court read the objective of equal pay for equal work enshrined in the Directive principles into Article 14 and 16 (1) of the Constitution. The principle relating to the right of free legal aid under Article 39 A has been read into Article 21 in *M H Hoskot v State of Maharastra*.[35] Right to free and compulsory education up to the age of 14 years was read into right of life and liberty.[36] The whole gamut of environmental jurisprudence has been developed by interpreting Article 21 along with Article 48 A of the constitution.[37] Article 49 of the constitution got shelter under Article 21 in the form of direction to protect and maintain national monument in the case of *Rajeeva Mankotia v. Sec. to President of* India.[38] The right to life has been read to include the right to doctor's assistance[39], the right to a reasonable accommodation to live in[40], the right to shelter[41] including the necessary

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[33] *Bijay Cotton Mills v State of Ajmer*, AIR 1955 SC 33; see also *Crown Aluminum Works v The Workmen*, AIR 1958 SC 30; see also *Express Newspaper Ltd v Union of India*, AIR 1958 SC 578.
[34] AIR 1978 SC 1548.
[35] (1978) 3 SCC 544.
[36] *J P Unnikrishnan v State of Andhra Pradesh*, (1993) 1 SCC 645.
[37] *M C Mehta v Union of India*, AIR 1987 SC 1086; see also *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh*, 1987 Supp SCC 487; see also *Subash Kumar v Union of India*, (1991) 1 SCC 598;see also *N D Jayal v Union of India*, (2004) 9 SCC 362; see also *M C Mehta v Union of India*, (2006) 3 SCC 399.
[38] AIR 1997 SC 2766.
[39] *Pt. Parmanand Katara v Union of India*, AIR 1989 SC 2039.
[40] *Shantisar Builders v N K Totame*, AIR 1990 SC 5151.

infrastructure to live with human dignity[42]. The right to life has invoked for the upliftment of and dignified life of prostitute[43] and also includes right to reputation[44]. In *Paschim Banga Khet Majdoor Samity v State of West Bengal*,[45] the Supreme Court carved out the right to emergency medical care for accident victims as forming core component of the right to health, which in turn was recognized as forming an integral part of the right to life. The judicial creativity has been witnessed in a case of *Farhad K Wadia v. Union of India* wherein the court has added new dimensions to right to health in the context of right to freedom from noise pollution..[46] In *Olga Tellis v Bombay Municipal Corporation*,[47]the Supreme Court read right to livelihood under the ambit of Article 21. In *Francis Coralie v Union Territory of Delhi*,[48]the Court read under the enshrined right of life, the right to live with dignity. Under the percussion of human dignity, the Court in *Bandhua Mukti Morcha v Union of India*,[49] read the right to have access to basic essentials as the part of right to life. The court declared that non-enforcement of welfare legislation like the Minimum Wages Act, 1948 and the Bonded Labour (Abolition) Act, 1976 would tantamount to denial of the right to live with

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[41] *Gauri Shankar v Union of India*, (1994) 6 SCC 349; see also *Shiv Sagar Tiwari v Union of India*, (1997) 1 SCC 444.

[42] *Chameli Singh v State of Uttar Pradesh*, (1996) 2 SCC 549; see also *J P Ravidas v Nav Yuvak Harijan Uttapam Society Ltd.*, (1996) 9 SCC 300.

[43] *Gaurav Jain v Union of India*, (1997) 8 SCC 114.

[44] *State of Bihar v L K Advani*, (2003) 8 SCC 361.

[45] (1996) 4 SCC 37.

[46] (2009) 2 SCC 442. The Court has observed that "Interference by the court in respect of noise pollution is premised on the basis that a citizen has certain rights being "necessity of silence", "necessity of sleep", "process during sleep", and "rest", which are biological necessities and essential for health. Silence is considered to golden. It is considered as one of the human rights as noise is injurious to human health which is required to preserved at any cost."

[47] AIR 1986 SC 180. See also, Centre for Environment and Food Security v. Union of India, (2011) 5 SCC 676 – Right to livelihood is higher than a mere legal right. It is an integral part of right to life under Art. 21.

[48] "We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."AIR 1981 SC 746.

[49] "...these are the minimum requirements which must exist in order to enable a person to live with human dignity, and no State...has the right to take any action which will deprive a person of the enjoyment of these basic essentials." AIR 1984 SC 802.

human dignity enshrined under Article 21 of the Constitution. In *Sodan Singh v NDMC*,[50] the Supreme Court had held that: "In view of the global development in the sphere of human rights these judicial decisions are a strong pointer towards the recognition of an affirmative right to the basic necessities of life under Article 21."

It is to be noted that the fundamental rights christened in our Constitution represent the negative rights of an individual, whereas the directive principles provide a positive right to an individual.[51] The reading of positive rights under the banner of negative rights presents a parlous state of affairs. Judiciary, while reading the socio-economic rights under the domain of fundamental rights, has walked on unguided straits. It is the responsibility of the state to provide for the realization of socio-economic rights. Realization of the socio-economic rights depends upon the resources of the state. State is entrusted with the duty to provide such rights to the society. By reading them under the umbrella of fundamental rights, the state is casted with a bounden duty of not to violate such rights. Such being not intended by the Constitution, only represent the overzealous attitude of the judiciary. In *CESC Limited v Subhas Chandra Bose*,[52] the Court justifies its overzealous attitude by placing importance on socio-economic justice and observing that: "Right to human dignity, development of personality, social protection, right to rest and leisure as fundamental human rights to common man mean nothing more than the status without means. To the tillers of the soil, wage

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[50] (1989) 4 SCC 155.

[51] "Articles 38, 39 and 46 mandate the State, as its economic policy, to provide socio-economic justice to minimize inequalities in income and in opportunities and status. It positively charges the State to distribute its largesse to the weaker sections of the society envisaged in Article 46 to make socio-economic justice a reality, meaningful and fruitful so as to make life worth living with dignity of person and equality of status and to constantly improve excellence. Though no person has a right to encroach and erect structures otherwise on footpaths, pavements or public streets or any other place reserved or earmarked for a public purpose, the State has the constitutional duty to provide adequate facilities and opportunities by distributing its wealth and resources for settlements of life and erection of shelter over their heads to make the right to life meaningful." *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan,* (1997) 11 SCC 123.

[52] (1992) 1 SCC 441.

earners, labourers, wood cutters, rickshaw pullers, scavengers and hut dwellers, the civil and political rights are "mere cosmetic" rights. Socio-economic and cultural rights are their means and relevant to them to realize the basic aspirations of meaningful right to life. The Universal Declaration, International Covenant on Economic, Social and Cultural Rights recognize their needs which include right to food, clothing, housing education, right to work, leisure, fair wages, decent working conditions, social security, right to physical and mental health, protection of their families as integral part of the right to life. Our Constitution in the Preamble and Part IV reinforces them compendiously as socio-economic justice, a bedrock to an egalitarian social order. The right to social and economic justice is thus a fundamental right."

The Indian Supreme Court did not limit itself by reading socio-economic rights under part III of the Constitution. The Court has also transgressed in an arena of policy making by passing specific orders to the executive.[53] In the case of *PUCL v Union of India*,[54] the Supreme Court made a giant leap in matters of social and economic rights by passing an order on the matter relating to social welfare policies. The Court expressing its concern on drought, identified the area of immediate attention. "To see that food is provided to the aged, infirm, disabled, destitute women, destitute men, who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases of where they or members of the family do not have sufficient funds to provide food for them," the States were directed to ensure that all the Public Distribution System shops were reopened and made functional. Thereafter, the States were asked to identify families below poverty line in a time-bound schedule and information was sought on the implementation of various government schemes that were meant to help people cope with the crisis. Subsequently, the Court made a detailed order regarding the policies of the government: 'the benefits available under eight

[53] *Consumer Education and Research Center v. U.O.I*, (1995) 3 SCC 42.
[54] (2001) 5 SCALE 303.

nutrition related schemes of the government were recognized as entitlement, all the state governments were asked to provide cooked mid-day meals for all children in government and government-assisted schools and governments were asked to adopt specific measures for ensuring public awareness and transparency of the programmes.'[55] The Court has, time and again, directed the executive to frame policies on issues of advancement of socio-economic rights.[56]

Rationale for non-justiciability of socio-economic rights:

Non-justiciability of social and economic rights is attributed to three main reasons. They are: firstly, the vagueness of social and economic rights discourages any adventurous step from the judiciary. Judiciary prefers to keep its judicial adjudication process away from imprecise nature of considerations involved in it. Courts have refused to entertain alleged violations of the social and economic rights, reasoning that its "boundless and indeterminate principles" resist judicial application.[57] Secondly, the perception of positive obligation for the fulfillment of social and economic rights opposes negative judicial intervention. It would be difficult to monitor the obligations of the legislature and the executive in promoting these rights. Courts, generally, hesitate to evaluate commitment of executive and legislature in budgetary allocation, due to the principle of separation of powers. It is pertinent to mention that the adjudication of civil and political rights often involves expenditure of resources by the state. For instance, the judicial dicta regarding maintenance of human condition in prison involves expenditure by the state. There is no reluctance on the state to agree to such determination, involving reordering of priorities of budget in compliance

[55] Order dated 28rth November 2001 in W.P.(C) NO. 196/2001.
[56] Karnika Sawhney (3) v. Union of India, (2007) 15 SCC 637 (Eradication of and rehabilitation of beggars); Ramakant Rai (3) v. Union of India, (2007) 15 SCC 645 (Regulation of sterilization procedures).
[57] Eide, A., *Realisation of Social and Economic Rights and the Minimum Thresh old Approach, in Human Rights in the World Community*, Richard P Claude & Burns Weston (ed.), 159.

with the pronouncements. Third, the doctrinaire approach of 'progressive realization' defers judicial determination which requires presence of resources for implementation of these rights. The progressive realization requirement contributes to the vagueness of social and economic rights, since; states can never be sure exactly what their obligations are at any particular time.[58]Moreover, the judicial pronouncements, which are in the nature of "none or all"[59], do not fit the legal nature of socio-economic rights.

Indian Courts have assumed the jurisdiction to classify as justiciable rights, entitlements, which are not specifically given in the Constitution. Having assumed this discretion, Courts have not provided sufficient guidance on the criteria for the exercise of the discretion.[60] By taking on these functions, they have not always been fully aware.[61] It has been argued that judiciary lacks competence to examine the details of social and economic rights due to indeterminate and imprecise features.[62] Another related argument is made against the practicability of legal enforcement: that cases involving social and economic rights are too complex for judges to analyze adequately, as the social and economic issues they raise, tend to be embedded in a complex web of causes and effects.[63] It is argued that courts have more difficulty monitoring a government's obligation to take positive steps than its duty simply not to interfere with individuals' existing entitlements.[64]

[58] Robertson, R., *The Right to Food in International Law, Human Rights in the Twenty-First Century: A Global Challenge,* Kathleen E Mahoney & Paul Mahoney (eds), 1993, 453.
[59] Scheppele, K L., *A Realpolitik Defense of Social Rights*, 82 Tex. L. Rev. 1921 (2004), 1931.
[60] "Too much reliance by the Supreme Court on Article 21 and its extensive extension by judicial extrapolation has given rise to the criticism that all sorts of goodness so derived as right from Article 21 are only euphoric – they simply cannot be enforced." Fali S Nariman, *Fifty Years of the Supreme Court – A Balance Sheet of Performance* (R B Datar Memorial Lecture), Lawyers Update, July- December 1999.
[61] Cottrell, J & Ghai, Y., *The Role of the Courts in the Protection of Economic, Social and Cultural Rights,* in Yash Ghai and Jill Cottrell (ed.), *Economic, Social and Cultural Rights in Practice*, Interights, London, 2004, p 89.
[62] Mureinik, E., *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, (1992) 8 SAJHR 464, 471.
[63] "There exist a danger by creating multiplicity of rights without possibility of adequate enforcement", Dr. Anand, Former CJI, Inaugural Speech delivered on August 29, 1999 at the Golden Jubilee Celebration of the Rajasthan High Court.
[64] Tomasveki, K, *Justiciability of Economic, Social and Cultural Rights*, 55 The Review Int'l Comm'n Jurists, Dec. 1995, 203, 217.

Legitimacy of judicial adjudication of social and economic rights is challenged on the ground of separation of powers. The adjudication process tends to encroach upon the domain of legislature and executive.[65] The proprietary of judicial determination challenges on the nature of order passed by the judiciary. The judiciary expresses reluctance to evaluate measures adopted by the executive in its entirety in order to ascertain the complete realization of rights.[66] The legitimacy and competency in matters relating to social and economic rights are described by the Supreme Court in *Narmada Bachao Andolan*,[67] the Court has observed that "if a considered policy decision has been taken, which is not in conflict with any law or is not malafide, it will not be in public interest to require the court to go into and investigate those areas which are the functions of the executive"[68]. Further, "whether to have an infrastructural project or not and what is the type of project to be undertaken and how it is to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken."[69] In an area where the court is of view that the issue is in the realm of executive or legislative policy, it is usually reluctant to intervene although such policy may have implications for social and economic rights.[70]

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[65] Gainda Ram v. MCD, (2010) 10 SCC 715 – Interestingly, the court has directed the legislature to enact a law within a stipulated time. It is apt to quote that "With the enactment of the Model Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill, 2009, the initial decision making in the field of legislative exercise is complete. It has, of course, to be converted into a law by following the constitutional process. That is why time till 30-6-2011 is given. Within that time, the appropriate Government is directed to legislate and bring out the law to regulate hawking and hawkers's fundamental right so that the hawkers may precisely know the contours of their rights."

[66] *Balco Employees Union v Union of India*, the court refuse to examine disinvestment policy on the ground of public policy; see also *Soobramoney v Minister of Health*, (1997) 12 BCLR 1696, the Court observed that it will not inquire whether other desirable measures or favourable measures could have been adopted or whether public money could have been better spent.

[67] *Narmada Bachao Andolan v Union of India*, (2000) 10 SCC 664.

[68] Ibid at 763.

[69] Ibid at 762.

[70] Murlidhar, S, *Judicial Enforcement of Economic and Social Rights: the Indian Scenario*, in *Justiciability of Economic and Social Rights*, Yash Ghai and Jill Cortell (ed), Intersentia, 2006, p 256.

Social and economic rights require a process of balancing, trade-offs, elaboration of standards and negotiation. Process of realization of social and economic rights involves various agencies. The realization of these rights involves budgetary expenditure, a defined domain of legislature. In fact, the implementation of social and economic rights is not feasible and possible through traditional adjudication mechanism. Real and substantial concern for social and economic rights evaporates due to overemphasis on judicial intervention. The legislature and the executive, in light of the judicial intervention, evade or shrink their responsibility to formulate meaningful programme for fulfilling constitutional obligations. The judicial creativity fails to bring the benefit to the rights in their substance. In fact, the government is constitutionally obligated to take more realistic steps for fulfillment of the socio-economic needs of individual. The fourth approach of the judiciary does not contribute to the progress of the rights in question. It disturbs the constitutional scheme.

Therefore, the social and economic rights enumerated in the Indian Constitution, need focused attention for their realization. The realization of these rights must be debated outside the judicial realm. The dynamic nature of these rights requires structuring of dedicated methods for their enforcement. The significance of the rights must not be undermined due to unenforceability in a Court of law. The social and economic rights are enforceable interest of individual. The rights are to be backed by adequate implementation mechanism in order to justify the pledge “fundamental in the governance of the country”.

Peroration:

Social and economic rights are perceived as rights for welfare of an individual as a member of society. Individual enjoys guaranteed right to lead dignified and decent life. These rights are for general welfare of an individual. They ensure well-being of individual for the good of a society.

Generally, these rights come in conflict with the autonomy oriented rights. The conflict is more visible due to conferment of power to the judiciary to enforce autonomy rights. These rights conferred in the Fundamental rights and the Directive principles have also got confronted with each other. The conflict between these two rights had been foreseen by the first Prime Minister of India while referring to relationship between the Directives and the Fundamental rights. He pointed how an occasion for a conflict between the two could arise in the following words: "The Directive principles of State Policy represent a dynamic move towards certain objective. The Fundamental rights represent something static, to preserve certain rights which exist. Both again are right. But somehow and sometime it might so happen that dynamic movement and that static standstill do not quite fit into each other."[71]

The question of determination of welfare principles is being attacked when it comes on the way of civil and political rights. Judiciary empowered to enforce fundamental rights, finds difficult to balance the conflict between them. In India, the judiciary has been empowered to enforce rights enumerated in Part III whereas judicial intervention is forbidden with regard to rights in Part IV of the constitution. The absence of power to enforce social and economic rights is not to offend the prime role of protector and guardian of the constitution. The realization of the directive principles, including social and economic rights, involves factors of budget, human resources, and infrastructure and like. The judiciary has been kept away from adjudication on the matters where the state seeks to formulate policies for the society as a whole in respect of social and economic matters. It is arising out of this fact that the nature of rights requires different mechanism and institution of their enforcement.

[71] Parliamentary Debates (Lok Sabha), Part II, 16th May 1951, Constitution (First Amendment Bill), col. 8822.

The enumerated social and economic rights must be read in a spirit of the ideals scripted in the Preamble. The realization of social and economic rights necessarily implies complete satisfaction of rights. The court may succeed in enforcing the duty *to respect* and *to protect,* to some extent, but *to promote,* constitutes essential element of obligations, particularly for those who are deprived and disadvantaged. This tripartite obligation, points to the duty of state in relation to complete fulfillment of rights.[72] The importance of obligation of '*to fulfill*' should not be negated due to incompetency of Court in ordering priorities. On cautionary note, even if the judiciary is said, allegedly, to be treading on the right path, the complete realization of socio-economic rights falls within the realm of the executive and the legislature as their realization warrants comprehensive implementation and enforcement of policy and dedicated legislative enactment.[73] Ideally, the intervention of judiciary should be restricted to the cases of lackadaisical approach of the executive or lop-sided effort of the legislature.[74]

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[72] Avinash Mehrotra v. Union of India, (2009) 6 SCC 398. – The court has observed that "The right to education requires that a child study in a quality school, and a quality school certainly should pose no threat to a child's safety. State thus bear the additional burden of regulation, ensuring that schools provide safe facilities as part of compulsory education."

[73] Swami Shraddananda v. State of Karnataka, (2007) 12 SCC 288 – the court cannot amend the constitution by judicial verdict or legislate or amend the law by process of interpretation.

[74] Som Lal v. Vijay Laxmi, (2008) 11 SCC 413 – the court should be slow to interfere with the mandate of legislature except for compelling reasons. Refer also, The Prime Minister Shri Manmohan Singh in a Conference of Chief Ministers and Chief Justices cautioned that "the dividing line between judicial activism and judicial overreach is thin one. All organs including, the judiciary must ensure that the dividing line between them is not breached. This calls for harmonious functioning." (2007) 4 SCC (J) 12.

INTERNATIONAL OIL CORPORATIONS IN THE ERA OF GLOBALIZATION: THIRD WORLD EXPERIENCE CHALLENGES AND OPPORTUNITIES

Arpita Gupta*

I. INTRODUCTION

Globalization presents a situation which is much more complex than mere de-bordering or "international integration."[1] The web of powerful transnational non-state entities including inter-state organizations of various denominations and international business corporations (IBCs) is prime indicator of the move in the world order beyond traditional, state-centeredsystem of organization. But, the control mechanisms ensuring accountability and responsibility under international law have not kept pace with these Post-Westphalian developments. The experience of resource curse is a grave reality for many of the natural resource exporting nations,primarily encompassing countries in Asia, Africa and South America, bringing to the fore deep economic asymmetries betweenGlobal North and the Global South. Various economic, environmental, social and political dimensions of resource curse have been extensively observed and studied in case of low income, primarily oil export dependent countries, where large scale oil extraction activities are conducted by economically and politically powerful international oil corporations (IOCs). The central theme dealt with

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[1] M. Albert, *On Boundaries, territory and Post-modernity*, 3 GEOPOLITICS 53, 53 (1998); *See* Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM.J.INT'L. L. 489,489-490 (2001).

in this paper is howthe oil-curse related challenges faced by these regions can be accosted through sustainability measures and the requisite international law reforms.

Part I of this paper draws a brief background of this study by exploring the concept of oil curse; its historical, domestic and international dimensions; Part II critically examines various sustainability indicators used by IOCs as a mark of compliance with international best practices. Part III examines the existing position of transnational business corporations like the IOCs under international law. It underlines the necessity of a move towards a 'new international law' and explores various possibilities of regulation of such trans-national actors in general and IOCs in particular.

II. CHALLENGES: ECONOMIC ASYMMETRIES AND RESOURCE CURSE

A. Overview of Natural Resource (Oil) Distribution

International Energy Agency projections reveal that about 90% of the new primary energy production in future would come from transitioning and developing countries as against 60% in the last three decades.[2] Many developing and LDCs are very well endowed with natural resources. Most of these reserves are located in Africa, Asia and Caspian basin. Some of the less developed countries which are rich in oil reserves are Nigeria, Bahrain, Chad, Cameroon, Sao Tome and Principe, Cambodia, East Timor, Democratic republic of Congo etc.[3] Africa alone possesses around 9.6% (127.7 billion barrels) of total world reserves.[4] In 2009, its share of global energy

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[2] *World Energy Outlook 2006*, INTERNATIONAL ENERGY AGENCY (May.12, 2011), http://www.iea.org/textbase/nppdf/free/2006/weo2006.pdf.

[3] *World Energy Outlook 2010*, INTERNATIONAL ENERGY AGENCY(May.12, 2011), http://www.iea.org/weo/docs/weo2010/factsheets.pdf.

[4] BP Statistical Review of World Energy June 2009, BRITISH PETROLEUM, (May.12, 2011), http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/statistical_energy_review_2008/STAGING/local_assets/2009_downloads/statistical_review_of_world_energy_full_report_2009.pdf

production was around 12% as compared to its energy consumption which was only 3.7% of the global energy supply.[5]

B. Oil Curse: Phenomenon, Symptoms and Causes

But, mere presence of these vast oil reserves does not ensure and an increased per capita income and overall development of the region. This is evident from a study of oil rich nations like Nigeria, Sudan and Algeria which held great promise in terms of overall development, a few decades back. Most of these countries still suffer from high rate of poverty, huge disparity in income distribution, poor governance, internal conflicts and volatile political environment. Oil wealth has been observed to "exacerbate latent tensions" and trigger conflicts through economic instability resultant from the cycles of booms and busts, by helping fund insurgents and fueling demands for secession.[6] Paradoxically, in spite of being rich in resources, these countries have much lesser rate of development vis-à-vis countries not so well endowed with natural resources.[7]A study of simulated commodity booms in 14 African countries, disclosed that "resource curse is a reality"[8] and in long term, "there is a reduction in output relative to the counterfactual by around twenty-five percent."[9]

1. The Nigerian Experience

The experience of Nigeria is a typical illustration of operation of resource curse. Nigeria is endowed with the eleventh largest oil reserves in the world

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[5] BP, Statistical Review of World Energy Report (June 2010), BRITISH PETROLEUM, (May.12, 2011),

[6] Michael L. Ross, *Blood barrels: Why Oil Wealth Fuels Conflict*, 87 FOREIGN AFF., May-June 2008, at 2, 3.

[7] *See* Jeffery D. Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth* (, Nat'l Bureau of Econ.Research, Working Paper no. 5398, 1995), *available at* http://www.imf.org/external/pubs/ft/scr/2006/cr06233.pdf.

[8] Paul Collier, *Laws and Codes for the Resource Curse*, 11 YALE HUM. RTS.& DEV. L. J. 9, 12-13 (2008).

[9] Paul Collier &BenediktGoderis, *Prospects for Commodity Exporters: Hunky Dory or Humpty Dumpty?*, 8 WORLD ECON. 1, 9 (2007).

with one of the best quality light crude oil in the world. Petroleum extraction consists of about 95% of the State earning.Though in 1995 Nigeria came out of more than 18 years of dictatorship, yet the income inequality, human development index etc. continue to be abysmally low.

Over 72.2% of the Nigerian population earns less than 1$ a day. It is placed 151st in HDI (among 174 countries), 62nd in the Human Poverty Index (among 85 countries)[10] and has a Gini coefficient of 51.[11]In the petition to the secretary, African Commission on Human and Peoples Rights, The Social and Economic Rights Action Center and The Centre for Economic and Social Rights indicted the International Oil Corporations and the Nigerian Government for "widespread contamination of soil, water and air; the destruction of homes; and the climate of terror that has been inflicted upon the Ogoni communities in violation of their rights to health, a healthy environment, housing and food."[12] The life expectancy of the local population has reduced to a little above 40 years. According to the figures released by the Nigerian federal government, between 1970 and 2000, more than 7000 oil spills have taken place, most of which have still not been cleared.[13] The amount of oil that leaks into the environment annually in Nigeria is more than the Gulf of Mexico oil spill!

2. The Sudanese Experience

In addition to the problems of environmental degradation, corruption, laundering away of the proceeds received through sale of petroleum, the Sudanese story exemplifies another trend in countries afflicted by 'resource

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[10] Nigeria Country Profile, UNODC, *available at,* http://www.unodc.org/nigeria/en/social_context.html.

[11] Earth Trends and Country Profiles, Economic Indicators- Nigeria, http://earthtrends.wri.org/pdf_library/country_ profiles/eco_ cou_566.pdf (last visited June 30, 2011).

[12] Petition on Nigeria before the Secretary, by African Commission on Human and Peoples Rights, http://www.cesr.org /downloads/nigeriapetition.pdf (last visited, August 15, 2011).

[13] John Vidal, *Nigeria's agony dwarfs the Gulf oil Spill,* THE OBSERVER, May 30, 2010, http://www.guardian.co. uk/world/2010/may/30/oil-spills-nigeria-niger-delta-shell.

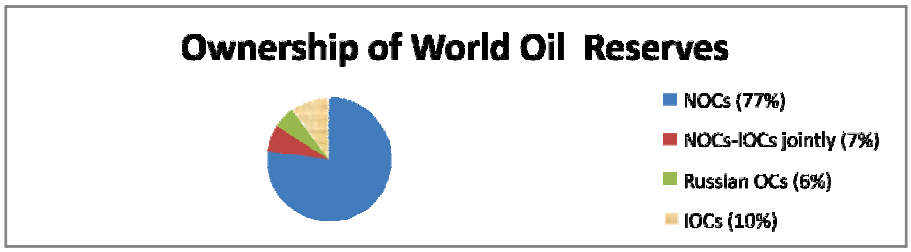
curse.' This is the intensification civil war in form of secessionist movements in areas which are rich in natural resources and are reluctant to share the proceeds with other parts of the country. Sudan has witnessed civil war and strife since 1962 when the British colonial rule was formally withdrawn. More than 200,000 people have been displaced and severe atrocities committed against the civilians since the war began. The seeds of unrest, sown during the colonial era germinated into incessant unrest. The major oil fields in Sudan are located in southern part of the country which is home to the secessionist Sudanese People's Liberation Movement/Army (SPLM/A).

The complicity of IOCs in the human rights violations committed by the non-democratic host government which uses the proceeds received from contracting out oil exploration and exploitation to quell the secessionist movements, has come under severe criticism from many non-governmental organizations and UN surveys. It has been repeatedly suggested that the oil companies can play an important role in reconciling the differences between the government at Khartoum and the Southern rebels. The oil companies can decide to cut the production, thus discouraging the government to rely on disproportionate use of force by cutting down the resources available for purchase of arms and ammunitions, used against the anti-government protest movements. The role of multinational corporations in fuelling civil wars in mineral rich host companies by providing revenues to sustain war to both the rebels and the government by being embroiled in the internal strife has often been pointed out.

C. Historical Roots of Economic Asymmetries in Oil Extraction

The history of economic asymmetry in context of oil extraction can be traced to the early oil contracts called "concession agreements" between International oil corporations and the host governments. The classic concession agreements gave meager rights and proceeds to the host governments. Starting with the Persian D' Arcy Agreement of 1901, these

agreements were characterized by grant of right to extract over an area of vast acreage over a relatively long period of time, vesting of major ownership and proprietary rights with the international oil companies and scant power with the host government to participate in the process.[14] In response to the undue control of international oil corporations over oil prices and the quantity of production and lack of de-facto sovereignty with host governments over their own oil reserves, OPEC was formed in 1960 at the Baghdad Conference on by Iran, Iraq, Kuwait, Saudi Arabia and Venezuela. It was subsequently joined by other oil producers like Qatar, Libya, UAE, Algeria, Nigeria and Ecuador. Currently more than 77% of the world oil reserves are owned by the National Oil Corporations and about 10% are controlled by international oil corporations.[15] (fig.1)



(fig.1)

Subsequently concession agreements gave way to new forms of contracts like production sharing contracts, risk service contracts, technology sharing contracts and participation contracts which provide considerable rights to the host governments.[16] Usually these new forms of contracts have sliding

[14] *See* Ernest E. Smith and John S. Dzienkowski, *A Fifty–Year Perspective on World Petroleum Arrangements* 24 TEX. INT'L L. J. 13 at 17–23 (1989); John S. Dzienkowski, *Concession, Production Sharing, Risk Service, and Participation Agreements For Developing A Country's Natural Resources, in* INTERNATIONAL PETROLEUM TRANSACTIONS393-4 (E. Smith et aled., 2000); Ana Elizabeth Bastida, *Mineral Tenure Regimes in the Context of Evolving Governance Frameworks: A Case Study of Selected Latin American Countries*, (Centre of Energy, Petroleum & Mineral Law & Policy, University of Dundee, International energy Law and Policy Research Paper No. 2010/01).

[15] Amy Myers Jaffe, *supra* note 2.

[16] *See generally,* John S. Dzienkowski, CONCESSION,PRODUCTION SHARING, RISK SERVICE, AND PARTICIPATION AGREEMENTS FOR DEVELOPING A COUNTRY'S NATURAL RESOURCES, IN INTERNATIONAL PETROLEUM TRANSACTIONS (2010).

scales for determination of royalty, profit, bonus, cost recovery limits and tax rates unlike the fixed rates under the earlier concession agreements. Yet, oil curse continues to afflict many oil producing regions, where extraction activities are conducted by IOCs. This is apparent from indicators like human development index, per capita income, standard of living, infrastructure and availability of basic amenities for the citizens.

1. Factors linked to global dynamics

Historically most of the countries facing oil curse were colonies of Western imperialist powers. Their independence in the 20th century was not accompanied by stable democratic governance. In fact these were politically and socially fragile and faced instability due to internal ethnic conflicts and external aggression. Partially this was a result of division of African continent into countries by the imperialist powers on the basis of their convenience to rule and exploit, without much consideration to the social and ethnic divisions.

The globalized world facilitated the expansion in scope and reach of multinational corporations, but it failed to create the institutions to which these multinational corporations could be made accountable for the activities conducted by them. The emergence of actors other than States at the international level like transnational bodies and multinational organizations has made the national boundaries porous. This has led to a situation where the hitherto existing accountability mechanisms at the national level have been rendered ineffectual in putting a tab on activities of these transnational bodies. In case of oil extraction, a major instance of such a situation is the environmental deterioration caused in the form of oil leaks and the resulting damage caused to the land, vegetation and the water bodies in the proximity. This has a direct and severe impact on both the health and economic activities such as agriculture, fishing and hunting pursued by the local inhabitants, pushing them even further down the poverty scale. Greater the

dependency on the primary sector of economy, greater is the adverse impact on economy due to environmental degradation.

Such accidents are partly attributable to the pressure of cost cutting in the age of extreme competition between different oil companies (both IOCs and NOCs). Due to a greater exertion of control over the resources by the host government cost cutting cannot be done in the proceeds paid to the host government. Thus, the primary areas left for cost cutting are the precautionary measures required to be taken in order to prevent any environmental casualty and other best practices like drilling back the polluted water which is obtained when drilling is first commenced, dumping the toxic waste in the cement lined pits so that the toxics do not percolate to the nearby environment, periodical maintenance of the pipelines carrying the oil etc.

In case the economy of a country is heavily dependent upon extraction and export of natural resources, the likelihood of volatility in the price of the commodity in the international market makes the chances of long term stability precarious. During the times of stability, enhanced exports lead to the currency of that country to become stronger vis-à-vis other currencies. This has an adverse impact on the exporters of other products and renders the domestic products in the local market less competitive as compared to the imported products. This situation, called the Dutch disease is often cited as one of the major rationales for resource curse. But, this explanation for the resource curse has been questioned. There are certain policy tools such as tighter fiscal policies, temporary subsidies to the affected sectors etc. which can be used to counter the Dutch disease like situation. Also, the Dutch disease explanation in case of developing countries has been considered inadequate as due to a plethora of labor force, resource concentration in one sector does not necessarily affect the other sectors adversely.

Further, the notions of "oil security and scarcity" have governed foreign policy decisions of many Western governments and are used to justify aggressive foreign policy in order to ensure energy security. Fallout of the aggressive foreign policy of Western States in order to ensure oil security is a rise in fundamentalist reaction at times, culminating in terrorist activities. Due to technological, communication and commercial revolution in the globalized world today, the threats too are not confined to the domestic boundaries. The rise of international terrorism has become one of the greatest threats to the global economy. Also, prices of a commodity like oil are bound to be volatile as the oil market "assumes new forms" and escapes the established control mechanisms. Very low prices of oil are detrimental to both the exporters and the importers. In the case of former, profit margins take a deep plunge and in case of latter, development of effective alternative technology is greatly impeded. In consideration of these severe consequences, the misguided "oil myths" need to be cast aside and caution need to be observed by the Western governments in their foreign policy determination and implementation.

Finally, the "Washington consensus" approach, requiring the host governments to undertake "Structural Adjustment Programs" has often been criticized as being aligned to the interests of the multinational corporations rather than the host governments. Measures such as opening up of their markets for international trade, limiting the role of government in the economy, reduced budget spending etc. in case of developing countries/LDCs, does not necessarily ensure development and decrease in income inequality.

2. Domestic factors contributing to the resource curse

This phenomenon of resource curse is a result of cumulative effect of various factors, some of which are common to most of the LDCs whereas others are

country specific. Part II discussed some of the external factors linked with globalization. Complementing these, are various internal factors.

First, the political structure of a country has a huge bearing on the economic state of affairs. Most of the LDCs, being usually under dictatorships with a rich natural resource base are politically very unstable. There is a serious violation of the principles of accountability and transparency. Even those which have recently become democratic like Nigeria are fragile, still dealing with the relics of previous dictatorships, factionalism, and secessionist movements. Other resource rich countries like Sudan, Iraq, Algeria, Chad, Sao Tome and Principe etc. have been under prolonged political strife. Such prolonged unrest accompanied by high poverty rate prevents growth in spheres like education, employment etc., thus creating a vicious circle of illiteracy, violence and lack of vision. The negative impact of resource revenue on the democratic process has been emphasized by Paul Collier. Out of the two facets of democracy, "electoral competition" and "checks and balances," the former is easier to conduct whereas the latter being processes of continuing nature and non-beneficial for those in power do not usually get implemented.

Second, as a follow up of undemocratic form of political structure, transparency in the fiscal and decision making sphere is lacking and thus in turn facilitates gross corruption. Before 2002, when the Extractive Industry Transparency Initiative (EITI) began, usually the amount paid by IOCs to the host government was confidential. But, Alex Kardon points out that EITI also does not ensure foolproof transparency because it requires voluntary disclosure by the host government and the host government marred with corruption might not have a high incentive to disclose the revenues received.

Third, due to lack of accountability of those in power towards the citizens, the pressure to enact and enforce laws designed to safeguard human and animal health, environment and proper public investment of the proceeds

received as oil revenues is non-existent. The lack of an active and democratic public sphere impedes the exercise of control over IOCs and NOCs through the host State machinery.

Finally, the investment decisions for utilizing the oil revenue often are unwise. Instead of attempting to attain distributive justice at least by attempting to fulfill basic needs like food, health, and education, usually these funds are diverted towards personal coffers of leaders in power or wasted in unproductive projects of white elephant proportions or in buying military armaments in order to counter opposite factions. It has been remarked that as opposed to non-agricultural windfalls which accrue primarily as government revenue, agricultural windfalls accrue primarily to the farmers who have a capacity to use it more sensibly!

III. REMEDIES AND OPPORTUNITIES

With the help of a comprehensive development strategy, the multidimensional challengesfaced by those regions which are undergoing the experience of oil curse due to extraction activities, can be moulded into opportunities with help of the superior technological and financial capacity of IOCs. Planning, with the aim of achieving the Millennium Development Goal of multi-dimensional poverty alleviation is central to bring about this transformation. Mineral discovery in a region presents a unique opportunity for employment, education and poverty alleviation, i.e. an enduring change in the form of sustainable development. But, mere monetary revenue for granting exploration rights is not sufficient to attain sustainable development, as the development needs of these regions include economic, educational, and technological progress. It is the innovation in non-monetary efforts undertaken by the IOCs which would constitute the key for attaining lasting gains inthe overall development of a region. It is these non-monetary contributions which should be the primary criteriaused in

evaluating the candidacy of IOCs for granting them exploration and exploitation rights.

A. Existing Efforts: Positive Indicators of Sustainability Efforts by IOCs

Factors such as enhanced human rights and environmental awareness at the global level have led to declaration of general good governance guidelines for IBCs like UN's global compact, as well as specific sustainability guidelines for oil industry by international organizations like AIPN, API, IPIECA and OGP.[17] In light of these developments, most of the major IOCs have started annual voluntary public disclosure of their sustainability efforts.[18] These efforts are mainly classified under three broad heads of economic, social and environmental indicators.

1. Economic indicators

Local content, infrastructure development and technology transfer are the three primary economic indicators. Local content provides a lasting solution for maladies like unemployment and illiteracy by providing direct employment to local and migrant populace of the oil producing region, as well as indirect employment by use of goods of domestic origin. It stimulatesthe economy by increasing spending power of people. Three important parameters of local content are employment, training of the local populace and providing business opportunities to the domestic traders and manufacturers

Recruitment from both the local and migrant population of a region for extraction operations is a primary indicator of percolation down to the grass root level, the benefits accrued by an IOC in a country. For instance, in

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[17] API ET AL., OIL AND GAS INDUSTRY GUIDANCE ON VOLUNTARY SUSTAINABILITY REPORTING (2010).

[18] *See, e.g.,* BP Sustainability Review 2010 [Hereinafter *BP 2010*]; Royal Dutch Shell Sustainability Report 2010 [Hereinafter *Shell 2010*].

Kazakhstan, through direct and indirect activity, about 137,000 jobs have been created by BP. In Trinidad and Tobago almost all of 1.1 million hours worked on the contract were undertaken by Trinidadian nationals, half of whom lived within five kilometres of the site.[19] In 2010 more than 90% workforce of Royal Dutch Shell business operations comprised of the nationals where the extraction was carried on.[20] IOCs also report the value of the domestic goods and services used. This gives direct stimulation and an enhanced international competitiveness to the domestic industry.

Infrastructure developments like roads, rail roads, bridges etc. built by IOCs for oil extraction are long termassets for the region andform the base for development of other industries and services. Most developing countries/LDCs are deficient in modern technology due to paucity of funds and infrastructure to undertake cutting edge research and development. Modern oil contracts usually have a clause whereby technologically rich IOCsare required to share technology with the state oil company, thus, facilitating technology transfer to the host country, which the host country could not have been a position to afford otherwise.

2. Social indicators

Social indicators like promotion of both general and employment oriented education, public health care services, designing compensation packages for indigenous people inhabiting the excavation areawithhuman rights focus reflects the importance attached by IOCs to the welfare of local population. Use of updated ethnographic, cultural and socio-economic baseline information shows the depth of effort at devising most optimum region-specific sustainable development strategies. Such measures are especially required to be taken when working in a country with multiple warring factions and where devising a viable social strategy would be a complex

[19] BG, Sustainability Report 2008.
[20] *Shell*2010,*supra* note 18, at 12.

process. In case the resource deposits occurring along the coastline of a country than, the fishing communities of the area are bound to be affected. A socio-economic analysis of these communities in the affected area should be undertaken.

Benefit sharing packages, local training institutions to create employment opportunities, health and safety awareness campaigns and large scale regional development projects would definitely play an important role in development of the affected communities.

Through its local content based programs, Chevron claims to ensure lasting community benefits and creating direct business value. Under its Science, Technology, Engineering and Mathematics (STEM) program, graduate level studies are supported, scholarships provided and technical training imparted.[21] IOCs are also investing in the public health sector as part of their corporate social responsibility, for instanceChevron's smiling sun clinics in Bangladesh and Exxonmobil's Malaria Initiative in Sub-Saharan Africa.[22]

3. Environmental indicators

Most IOCs recognise the gravity of global warmingand risks to environment, as a result of technological malpractices and spills. They emphasise undertaking detailed Environment Impact Assessments (EIAs) before conducting extraction activities especially in eco-sensitive areas. Information collected under the EIAs should be used to engineer solutions for specific environmental sensitivities at the very beginning of the operation itself.

In 2010, Shell worked on more than 30 projects with environmental organisations like International Union for Conservation of Nature (IUCN) on conservation of wetlands, improving sustainability of biofuels and sustainable development of Arctic.[23] BP has reported undertaking projects

[21] Chevron, Corporate Responsibility Report, 2009.
[22] Exxonmobil Sustainability Report, 2010.
[23] *Shell*2010,*supra* note 18, at 9.

like the Sound and Marine Life Joint Industry Project seeking to understand the effect of sound waves from off shore drilling platforms on the marine animals and use of techniques like Megaflow well-testing separator which reduces GHGs; energy enhancement techniques like gas-fired heat and power co-generation and use of ISO 14001 certification.[24] In recognition of the fact that proper management of waste is crucial for minimising adverse effects on environment, technologies have been developed to use less fresh water, recycle process water and use lined pits to dispose of the residual sludge.

Specific commitments towards the affected communities by way of opening schools, creating funds for future generations; a minimum work program scheme in order to facilitate quicker discovery and extraction; and detailed decommissioning provisions due to the danger posed by these installations to marine life inhabiting the sea bed need to be carried out. These provisions should be incorporated both in the commissioning contract itself. Rather than using blanket strategies, IOCs should develop country and region specific sustainable development strategies based on socio-economic studies, environmental studies and consultation with the indigenous population.

B. Yet, Much is Left Wanting

In spite of these sustainability efforts, the fact remains that much is left wanting in terms of regulation of IOCs. The fact that numerous cases are still pending in the US courts, against various IOCs concerning environmental degradation, human rights violation etc. under the ATS and occurrence of unfortunate incidents like the Gulf of Mexico oil spill, is a constant reminder of inadequacy of the current control regime of multinational corporations. Empirical studies conducted in Africa reveal the stark gap between the words

[24] *BP* 2010, *supra* note 18, at 35

and deeds of the IOCs.[25] The reality in terms of human development indicators shows that these efforts made by IOCs need to be result oriented and more directed.

Due to a selective publication of data, these reports published by the IOCs have a limited informative utility in gauging the extent of non-monetary contributions made by IOCs for the development of the region where the extraction activities are conducted. Also, the use of different methods, which "the companies may use to measure, normalise and report specific indicators",[26] restricts the possibility of a realistic comparison between the corporate social responsibility performances of different companies.

CSR codes, best practices, guidelines as well as initiatives like Extractive Industries Transparency Initiative (EITI)[27], due to their voluntary nature can only play a supplementary role to an enforceable and binding set of legal instruments both at the domestic and international level,more so, in the case of latter due to the transnational nature of IOCs. The primary economic, social and environmental sustainability indicators should be incorporated within a binding legal code.

IV. INTERNATIONAL LAW AND IBCs: LEGAL STANDING AND REGULATION

The international state of affairs has been rendered much more complex due to emergence of various inter-state entities, sub-state bodies[28] and

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[25] Jedrzej George Frynas, *The False Developmental Promise of CSR: Evidence from Multinational Oil Companies*, 81 INT'L AFF. 581-598 (2005); Gabriel Eweje, *Environmental Costs and Responsibilities Resulting from Oil Exploitation in the Developing Countries: The Case of the Niger Delta in Nigeria*, 69 J. BUS. ETHICS 27-56 (2006).

[26] API, *supra* note 17, at 1.

[27] Initiatives like EITI have even more limited utility in case of countries with a high rate of corruption, unstable form of government or autocratic rule, as these are voluntary codes which have mere declaratory status. *See* Alex Kardon, Response to Matthew Genasci and Sarah Pray, *Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice*, 11 YALE HUM RTS. & DEV. L. J., 62 (2008).

[28] *See* ChristophSchreuer, *The Waning of the Sovereign State: Towards a New Paradigm in International Law?* 4 EUR. J. INT'L L.447-471 (1993).

transnational organizations, especially IBCs which have come to possess considerable economic and political clout in national, regional as well as at the international sphere. Traditionally, IBCs have not been considered to be subjects of international law. Under the doctrine of espousal, the state whose national a corporation is has been required to act on behalf of the corporation.[29] The international law has thus not kept pace with evolution of international society, whose composition has radically changed from predominantly comprising of sovereign states before to include powerful transnational bodies and organizations now.In absence of a well-structured redress mechanism at the international level, those adversely affected by the activities of IBCs, have limited options. One such option is found underthe domestic legislations of some nations like the Alien TortStatute(ATS) of US. But, the US courts have given inconsistent decisions over applicability of ATS to the Corporations.[30]

In response to the changing global order,gradual inroads towards the modification of international law norms have started to be made.For instance, Iran-US claims tribunal set up under the Algeria Declaration in 1981, went beyond the espousal doctrine and endowed individual corporates with legal personality. There are other developments in the world which can guide the direction of international law. For instance, cue can be taken from the European Union, one of the most evolved transnational law arenas, where the Court of Justice of European Union in a series of cases has ascribed legal personality to IBCs;[31] and the corporates are required to

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[29] *See* Barcelona Traction, Light and Power Company (*Belg*. v. *Spain*), 1970 I.C.J. 44 (Feb. 5).

[30] Redress to the victims of oil operations in various cases involving IOCs has been provided under this Act in the US courts. But, this is merely a domestic remedial measure and not resolves the problem of accountability of IBCs. Furthermore, redress is not guaranteed as there is a disagreement amongst the US courts over liability of IBCs under international law. Recently, the 2nd circuit, in the case of *Kiobel* v. *Royal Dutch Shell* rejected corporate liability under the Customary International Law, as Corporations are not subject to liability under International Law.But, the 7th circuit, in *Flomo* v. *Firestone*, upheld corporate liability under the ATS.

[31] *See, e.g.,* Case 212/97, *Centros Ltd* v *Erhvervs- ogSelskabsstyrelsen*, E.C.R. I-1494 (1999); Case 208/00, *Uberseering BV* v. *Nordic Construction Company Baumanagement* GmbH (NCC), E.C.R. I-0991 (2002).

adhere to various industry-specific European standards and EU Codes of conduct.

A. The Present Scenario: Soft Law Regulation

New 'soft law' modes of control like best practices (including ethical codes like the Global Compact), codes of conduct, resolutions etc. too have been developed. But, these means have limited efficacy. The working of most transnational corporations is marred by democracy and legitimacy deficit. Their disproportionate influence in international economic, political and social institutions[32] has raised concerns. In order to balance the skewed power distribution and to adhere to principles of justice,[33] fairness and equality at the international sphere, it is imperative to develop binding control mechanisms for these entities.

B. Proposal for a Move towards Hard Law Regulation; and a New International Law

I propose a multi-pronged approach towards developing an international framework for regulation of IBCs. This framework should be based on four basic principles i.e., binding nature, transparency, accountability and equality. The fundamental ideal necessary to realize these principles is democracy. Democratic principle would serve as a crucial check over arbitrary exercise of power of IBCs[34]

International Law norms pertaining to the subjects of international law need to undergo change. In recognition of the reality of IBCs' increasing presence in international sphere and the fact that certain IBCs are ranked above many States as economic entities,[35] IBCs should be attributed legal personality

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[32] *See* B.S. Chimni, *International Institutions Today: A Global State in Making*, 15 EUR. J. INT'L L. 1, 3 (2004).
[33] *See*HisashiOwada, *Some Reflections on Justice in a Globalizing World*, AM. SOC'Y INT'L L. PROC. (2003).
[34] *See* Andrew L. Strauss and Richard Falk, *Globalization Needs a Dose of Democracy*, INT'L HERALD TRIB., Oct. 5, 1999, at 8.
[35] *See* J. BRAITHWAITE & P. DRAHOS, GLOBAL BUSINESS REGULATION (2000).

under international law. The International Court of Justice can play an active role in giving effect to this change. An attempt towards minimizing disproportionate influence of IBCs in international organizations like UN should also be undertaken in order to ensure their neutrality and legitimacy.[36]

Along with the development of these principles, an independent international body having a binding mandate should be established to regulate the working of IBCs. This would be the much needed definite move towards a hard law regulation. The principles of Global Administrative Law (GAL) which have been proposed for a just working of global governance,[37]encompassing normative diversity and devoid of any imperial remnant as pointed out by the third world scholars,[38]should definethe working of this body as well. This body should have jurisdiction to deal with areas affected by IBCs, for instance, in case of IOCs, environmental protection and human rights are two crucial areas, which must be comprehensively governed.The composition of this body would be the most important determinant for its global acceptability and legitimacy. The question of its acceptability falls within the larger issue of reform of existing international bodies ranging from UN organs[39] to IMF and World Bank,[40] in order to give both de jure and de facto equality of voice and power to the Global South. All these reforms together would substantially modify the

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[36] *See* Chimni,*supra* note 32, at 32.

[37] Benedict Kingsbury, *The Emergence of Global Administrative Law,* 15-61 (New York University Public Law and Legal Theory Working Paper No. 1, 2004).

[38] B.S. Chimni, *Global Administrative Law: Winners and Losers* (New York Institute for International Law and Justice Working Paper, 2005).

[39] *See* Ian Hurd, *Myths of Membership: The Politics of Legitimation in UN Security Council Reform,* 14 GLOBAL GOV., Apr.-June 2008, at 199; Jean Krasno, *Security Council Reform*, 1 YALE J. INT'L AFF.,Spring 2006, at 93-102.

[40] *See generally,* Domenico Lombardi, *Report on the Civil Society (Fourth Pillar) Consultations with the International Monetary Fund on Reform of IMF Governance* (Sept. 7, 2011), http://www.idasa.org/media/uploads/outputs/files/ Report%20on%20IMF% 20Consultations%20with%20Civil%20Society.pdf;

For an overview of reform proposals with regard to the World Bank, see Catherine E. Weaver, *Reforming the World Bank: Promises and Pitfalls*, 13 BROWN J. WORLD AFF.55-65 (2007).

nature of international law, thus, leading to the formulation of a 'new international law.'

Specific codes of conduct pertaining to various industries need to be drawn up which should have provisions for recourse to punitive measures in case of violation of these codes. This is imperative for having a preventive effect and thus a reduction in the incidents of violation of these codes of conduct. It is proposed that instead of forming a new institution, theUN Center for Transnational Corporations (UNCTC) which was shut down in 1993 should be renewed as a body having binding effect on working of IBCs. The UNCTC had made commendable efforts at regulation of transnational corporations.

Scholars have made numerous proposals, falling under the scope of soft law like laying down comprehensive voluntary codes,[41] formulation of a "natural resource charter" and setting international standards for environment related governance.[42] These proposals should be encouraged to materialize as they constitute a dynamic source of regulatory innovations as per the changing spirit and needs of time and circumstances, which would serve to supplement the hard law and could also be incorporated in it.

V. CONCLUSION

The regulatory changes at international sphere, suggested with respect to the IBCs in general and IOCs in particular, comprise a part of the larger project of reforming, realigning and re-building international law and international institutions in order to make the process of globalization equitable and to shape a just world order. This project would have far reaching consequences for international law; in fact, it would be a step towards formulation of a 'new international law,' and would pave the path for a substantial contribution of

[41] Paul Collier, *supra* note 8, at 22-28.
[42] *See* Paul Collier, *The Bottom Billion: Why The Poorest Countries Are Failing And What Can Be Done About It* (2007).

international law towards the development of regions which suffer from the prevalent global asymmetries.

Within the larger confines of this 'new international law,' the article emphasisesthe need for constituting a comprehensive international legal and institutional framework for enhancing accountability and transparency of IOCs. Central to this proposal is the idea of establishing an independent international body, endowed with compulsory jurisdiction over business activities of multinational corporations. But, till the time this framework is prepared and enforced, a viable intermittent solution would be to vest regional organisations such as the African Union in African, ASEAN in South-east Asia and UNASUR in South America with power to demand accountability from IBCs and to take punitive actions against violation of specific guidelines issued by these organizations.

ASTRONAUTS AND SPACE TOURISTS – KINDRED ENTITIES

Dipayan Bhattacherjee and Abhipsita Kundu *

Astronauts, as envoys of mankind, were first referred to in the United Nations General Assembly Resolution 1962 (XVII). This resolution was unanimously adopted by the member states on December 1963. It is seen that this principle was incorporated later in the 1967 Outer Space Treaty. Article V of the Outer Space Treaty declares that astronauts shall be regarded as the "envoys of mankind". To give teeth to this declaration of astronauts as envoys of mankind, the Agreement on the Rescue and the Return of Astronauts and the Return of Objects was adopted.

The concept of Astronauts as Envoys of Mankind has in the present day raised quite a few controversial questions, of which there are no clear answers. The most important being, who is an 'astronaut'? This question becomes relevant in this era of space tourism, where doubts have been raised as to whether the space tourists would come into the ambit of the term astronauts? There is also question mark as to whether the drafters of the treaty intended to include them within the purview of astronauts and entitle them with the rights and immunities which have been given to the astronauts.

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Through this paper an attempt will be made to analyze and come to a rational conclusion as to who should be defined as the astronaut and who should have the privilege laid down under the Agreement on the Rescue of Astronauts? In answering the above two questions, veracity of the expression, 'astronauts as envoys of mankind' will also be weighed.

I. INTRODUCTION

Mankind has always extolled those who have done the extraordinary, achieved the impossible and have left an ineffaceable impact on us. Astronauts are no exception to that – they have always been lionized as heroes and have been looked up to by enthralled generations. Astronauts, as per the Space Treaty that governs the moon and other celestial bodies, are referred to as 'envoys of mankind' – a standing that is internationally acclaimed. 'Envoy' literally implies an ambassador or messenger who is sent on a mission to represent the interests of someone else. This declaration of astronauts as representatives of mankind was primary done due to three reasons – first, the exploration made by the astronauts would be for the benefit of all mankind; second, it was genuinely believed that there existed some extra-terrestrial life and astronauts when they come in contact with such extra-terrestrial life would meet them as representatives not merely of their parent country but of mankind as a whole.

The concept of Astronauts as Envoys of Mankind has in the present day raised quite a few contentious questions, especially with the advent of space tourism, of which there are no definite answers. Through this paper an attempt will be made to analyze and come to a rational conclusion as to who should be defined as an astronaut and who should have the privilege laid down under The Agreement on the Rescue of Astronauts (*hereinafter* ARRA). In answering the above two questions, the veracity of the expression, 'astronauts as envoys of mankind' will also be weighed. This Article addresses one of the more important issues from the perspective of space

tourism, namely, whether the duty to rescue astronauts and return spacecraft under existing space law treaties also requires states to rescue space tourists and return the spacecraft to the launching state following an accident.

II. A BRIEF HISTORY OF THE ASTRONAUTS AGREEMENT, 1968

Astronauts, as envoys of mankind, were first referred to in the United Nations General Assembly Resolution 1962 (XVII). This resolution was unanimously adopted by the member states on December 1963. But due to the differences between the United States and the Soviet Union, the resolution could not be adopted. The imminence of man's landing on the moon following the success in 1966 of Luna IX and Surveyor I led the United States in May 1966 to approach the Soviet Union for the finalization of a treaty on general principles governing 'outer space and celestial bodies.' Further on January 27th 1967 United States astronaut died when fire broke on board on Apollo I and on April 24th of the same year Colonel Vlamir Kamorv of the Soviet Union perished in Soyuz I on landing. It was then realized and recognized that profession of astronaut was ultra hazardous and involved unknown risks.

Hence the international community embarked upon the journey to give legal teeth to the Resolution 1962 (XVII). Paragraph 9 of the resolution called for the astronaut to be aided when required and for their return to the state of registry of their vehicle in appropriate cases. It is seen that this principle was incorporated later in the 1967 Outer Space Treaty. When the Outer Space Legal Sub-Committee reassembled at Geneva on June 19, 1967, the Soviet representative contended that among the various items on the memorandum, viz., liability for damage caused by launching objects into space, assistance to astronauts, and definition and utilization of space, the topmost priority should be awarded to assistance of astronauts.[1]

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[1] Bin Cheng, *Studies in International Space Law,* 266 (1997).

On November 3, 1967, the United Nations General Assembly in its resolution 2260 (XXII) requested its Committee on the Peaceful Uses of Outer Space 'to continue with a sense of urgency its work on the elaboration of', *inter alia,* 'an agreement on assistance to and return of astronauts and space vehicles'.[2] The agreement was circulated on December 13, 1967, was opened for signature to 'all States' on April 22, 1968, simultaneously in London, Moscow and Washington, and came into force, upon sanction on December 3, 1968.

III. LEGAL PROVISIONS UNDERLYING THE CONCEPT OF ASTRONAUTS, AS ENVOYS OF MANKIND

1) Article V of the Outer Space Treaty

   i. Emergency assistance to be given to astronauts in case of accident, distress or emergency landing

   ii. Astronauts of one state party to assist the astronauts of other

   iii. Any natural phenomenon dangerous to the health of astronauts found in the space to be informed to Secretary-General of the UN

2) Astronauts Agreement

   i. Article 1 of ARRA provides that a state party to ARRA must immediately notify the launching the authority if it receives information or discovers that the personnel of a spacecraft have suffered an accident, are experiencing conditions of distress or have made emergency or unintended landing in territory of its jurisdiction or on the high seas or any place not under the jurisdiction of any state.[3]

   If it cannot identify the launching authority then the contracting state must immediately make a public announcement of the same.[4]

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[2] *Id.* at 265.
[3] Francis Lyall & Paul B. Larsen, *Space Law: A Treatise,* 137 (2009).
[4] Damodar Wadegaonkar, *The Orbit of Space Law* 17 (1984).

The contracting state has to also notify the UN Secretary General about the information.

ii. Article of 2 of ARRA lays down that in cases of accident, distress, emergency or unintended landing, assistance has to be provided to the personnel in the spacecraft. The state under whose territory the event had occurred is under obligation to take all possible steps to rescue personnel by rendering them.[5] The launching state must cooperate, if necessary. It is the primary duty of the contracting state to take all the pains in rescuing the astronauts and that the launching authority can extend help only when it is seeked by the contracting state. This duty imposed on the contracting state, to rescue the citizen of some other launching state, clearly shows the status of an envoy of mankind enjoyed by the astronauts.

iii. Article 3 of ARRA lays down that in case the spacecraft lands in high seas or in a place beyond national jurisdiction of any state then on receipt of information, states parties to ARRA, in position to provide assistance, shall render assistance

iv. If any astronaut land in the territory of a contacting state or have otherwise been recovered by it they shall, under Article 4 of ARRA, be safely and promptly returned to representatives of launching authority.[6]

IV. WHO ARE ASTRONAUTS?

When we talk about outer-space, inevitably the topic of astronauts comes up. The term astronaut conjures up an image of a white suited-helmet clad-man, going to explore a world beyond Earth. As far as Space Law is concerned

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[5] R. Cargill Hall, *Rescue and Return of Astronauts on Earth and in Outer Space*, 63 AM. J. INT L LAW REV. (1969).

[6] Cheng, *supra* note 1, at 273.

'astronaut' is an oft-used word but there is no formal definition of an astronaut[7].

Different countries have different names for their astronauts. While most of the countries call them as astronauts, Russians call their astronauts as 'cosmonauts' and Chinese call them 'taikonauts'.

The Soviet Union described a cosmonaut as 'a person who was specially trained in medical, biological, scientific a technical fields and who participated in a space flight as a pilot-commander or a member of the crew.'[8] The U.S. defines astronauts as all those persons who have made space flights and those who are test pilots, chosen for participation in different space flight projects.[9]

An analysis of the international space laws and treaties, reveal that there is not only no clear definition of an astronaut but also the term 'astronaut' has been variously attributed to indicate different types of space-farers.[10]

Space scholars like Francis Lyall and Paul B. Larsen believe that 'any definition of astronaut for legal purposes would appear to require two elements, an element of training and an element of altitude'[11]. G.S. Sachdeva defines astronauts as 'a person who is a professional so selected and trained and assigned a duty on board a space ship during or after its blast-off or on any space station or the Moon or any celestial body towards achievement of mission of that particular space ship and that his activities are connected with the exploration and use of outer space in accordance with the principles and rules of international space law, provided that the spaceship had commenced the blast off.'[12] The Outer Space Treaty's use of the term

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[7] Lyall & Larsen, *supra* note 3, at 129.
[8] Kosmonavitika, Malenkaya Entsiklopediya, 239 (1970).
[9] G.S. '*Astronauts: Envoys of Mankind: An Analysis of Legal Basis*', *in* RECENT TRENDS IN INTERNATIONAL SPACE LAW AND POLICY 210 (V.S.Mani S Bhatt v. Balkista Reddy ed., 1997).
[10] *Id* at 211.
[11] Lyall & Larsen, *supra* note 3, at 131.
[12] G.S. Sachdeva, *supra* note 10.

"astronaut" as being 'Envoys of Mankind' has been understood by some commentators to limit the duty to rescue to (1) the pilot and crew[13] or (2) the pilot, crew, and any professional performing a service on board.[14] This declaration of astronauts as envoys mankind was primary done because of three reasons, firstly that the exploration made by the astronauts would be for the benefit of all mankind. Secondly, it was genuinely believed that there existed some extra-terrestrial life and astronauts when they come in contact with such extra-terrestrial life would meet them as representative of mankind as a whole. Thirdly and most importantly, back in 1967 the space powers found it expedient to characterize astronauts as envoys to fetch world-wide co-operation and co-ordination in handling rescue operations.

V. THE ADVENT OF SPACE TOURISM

Japan in the 1990s had two different kinds of astronauts. They were Mr. Toyohiro Akiyama and Dr. Mamoru Mori. Mr. Akiyama is a journalist who works in the private TV broadcasting corporation Tokyo Broadcasting Service (TBS) and Dr. Mori was a section manager of NASDA (National Space Development Agency of Japan After several years training the latter made some experiments in microgravity (First Materials Processing Test) and can be regarded as a type of traditional astronaut. Therefore, while Mr. Akiyama was an internally selected journalist of a private Company, Dr. Mori was a publicly authorized astronaut who was engaged in the scientific experiments according to the MOU between NASDA and NASA. This case shows us a new possibility of space utilization in which private entities and persons can go to outer space if they bear the necessary cost.

In 2001 the Russian Space Agency began to fly tourists to the International Space Station – a trip which has recently gone up in price from $20 million to $30 million – and has to date sent a total of six tourists to the space

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[13] Paul G. Dembling & Daniel M. Arons, *The Treaty on Rescue and Return of Astronauts and Space Objects*, 9 WM. & MARY L. REV. 642 (1968).
[14] *Id* at 642.

station without complication. Now private companies are preparing to do what only governments have done before and will be doing it on a far grander scale. In late 2010, a long-awaited moment in the history of space flight will finally arrive when private space tourism companies send their first customers into space.

As the private space industry evolves in these new and exciting ways, it is beginning to outgrow the existing space law regime that was created at the advent of the space age – when only governments had a presence in space and the private use of space was a distant dream.

The lack of proper definition of astronaut has emerged as a debatable topic with the development of space tourism. The primary questions in this regard being, whether the duty of rescue and return applies when the spacecraft in distress is a private commercial vehicle and whether tourists would be deemed to be 'astronauts' or 'personnel' under the treaties – and would therefore be able to rely on the assistance of state governments in the event of an accident.

VI. SPACE TOURISTS: A DILEMMA ABOUT THEIR STATUS UNDER SPACE LAW

The status of space tourists vis-à-vis astronauts has been a much debated issue for decades. Scholars argue that the hallowed terminology of 'envoys of mankind' best expresses the toils and privations of an astronaut and cannot be used loosely to denote the scores of space tourists, who are now traversing the domain of outer space. Hence, they contend that these space tourists cannot enjoy the same advantages that are bestowed upon astronauts. There are again other intellectuals who believe that although a space tourist does not satisfy the traditional understanding one has of an astronaut, he/she should still get the same privileges as an astronaut for the following reasons:

1) There was a belief that there exists some form of life forms in the other planets. In case of an encounter with such sentient and intelligent beings, the astronauts would act as the representatives of all states on the earth and envoys of mankind from the planet earth. If this was the reason behind calling astronauts as envoys of mankind, then if at all some extra-terrestrial form of life comes in contact with the people on the space-craft, the both the astronaut and space tourists will be in the equal position interacting with the extra-terrestrial creature as representative of mankind as a whole.

2) Irrespective of whether a space tourist is technically an astronaut or not in case of distress he/she should be provided with the same help as is provided to an astronaut on humanitarian grounds. "The concept of aid to be given to those in danger and difficulty is not an innovation. It is both a moral requirement and one of law. Whether it is a duty in a municipal legal system and its extent if any does vary from state to state, but it in international law it has long roots."[15]

3) Under the *lex posteriori* rule (which gives precedence to the provisions of the most recent treaty, unless the latter treaty specifies that it is subject to the earlier treaty), in Article 30 of the Vienna Convention, the Outer Space treaty applies "only to the extent that its provisions are compatible" with the Rescue Agreement. That the Rescue Agreement was intended to supersede the Outer Space Agreement with respect to the duty to rescue and return is clear. The Rescue Agreement elaborates upon, adds to, and, at times, changes the rules regarding rescue and return set forth in Article V of the Outer Space Treaty. There is no doubt that these changes were intended to supersede the earlier rules, since

[15] Lyall & Larsen, *supra* note 3, at 136.

the drafters would not bother creating a treaty that had no effect. Therefore, under the operation of the *lex posteriori* rule, the Rescue Agreement must trump the Outer Space Treaty where the terms are inconsistent. the question of whether the duty to rescue and return applies to space tourism are (1) the use of the term "personnel" in the Rescue Agreement instead of "astronaut" and (2) the omission from the Rescue Agreement of the phrase "envoys of mankind." The use of the term "astronaut" and the phrase "envoys of mankind" support a narrower reading of the duty to rescue – one which would exclude space tourists and commercial flights. The omission of this language from the Rescue Agreement changes the substance of the law by broadening the scope of the duty to rescue so that it applies to tourists and commercial flights – and this broader scope supersedes the narrower rule of the Outer Space Treaty under the *lex posteriori* rule. Thus terms are "astronaut" and "space vehicle", in the Outer Space Treaty, correspond to "personnel," "space object," and "spacecraft", in the Rescue Agreement. None of the terms in the Rescue Agreement exclude commercial enterprises in their ordinary meaning – in fact, "personnel" is typically used in a commercial context (e.g., cruise ship personnel) as well as in government contexts. This lack of any distinction between private and public spaceflight in the plain language of the Rescue Agreement supports a broad interpretation which would require states to rescue non-governmental personnel and return private spacecraft.[16]

4) Given the particular status accorded to an astronaut, it is unclear whether a commercial space tourist would fall within this classification. It is however probable that space tourists would

[16] Dictionary Mark J. Sundahl, The Duty to Rescue Space Tourists and Return Private Spacecraft (Mar. 25, 2009), http://ssrn.com/abstract=1357524.

constitute 'personnel of a spacecraft', thus bringing them within the rescue and return obligations of the rescue agreement. Indeed, if this were not the case, then those obligations would only extend to some of those on board a space tourism flight, e.g., the crew but not the paying passengers. Since the rescue agreement is prompted by the sentiments of humanity, it should be interpreted as applying to all persons involved in space tourism flight.[17]

5) According to the current edition of a leading English dictionary, the meaning of astronaut is "a person who travels beyond the earth's atmosphere" or "a trainee for spaceflight."[18] This definition is virtually identical to the definition of "astronaut" set forth in the 1965 edition of the *Dictionary of Technical Terms for Aerospace*, which includes in the definition of "astronaut" (1) those who engage in space flight and (2) those who train for spaceflight.[19] There is nothing in the first definition that would exclude private passengers.[20]

The arguments as to why the Space Tourists should not be given the status of 'envoys of mankind' and thus should not be provided with the same privileges of an astronaut are:

1) "According to the 'common interest' principle the exploration and use of outer space 'shall be carried out for the benefit and in the interest of all countries'. This stipulation is generally regarded to mean that the benefit and interest mentioned must be shared equally between all states"[21]. The main object of tourists is not the

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[17] Sandeepa Bhat, *Space Law in the Era of Commercialization,* 25 (2010).
[18] Merriam Webster, Webster's New Collegiate (11th ed. 2003).
[19] Elina Kamenetskaya, *'Cosmonaut ("Astronaut"): An Attempt of International Legal Definition,'* Proceedings of the 31st Colloquium on the Law of Outer Space, Bangalore, Oct. 1988.
[20] Mark J. Sundahl, *supra* note 17.
[21] B Reijnen, '*International Law and Business in Space - In Europe,'* Proceedings of the Thirty-Third Colloquium on the Law of Outer Space,Washington, D.C., Oct. 1991.

contribution to the public interest but their personal pleasure. Therefore, it is hard for these kinds of people to be invested with the status of 'envoys of mankind in outer space'[22]

2) According to ARRA, a contracting state is under an obligation to undertake all possible means to rescue and return an astronaut in distress. For this rescue operation, the entire financial burden has to be borne by the contracting state and the launching authority is not under an obligation to reimburse the expenses. So question arises that in case of a space tourist being in distress, will the contracting state be duty bound to extend all means possible to rescue him/her without having a legal guarantee of getting reimbursed of the financial bearings.

3) Another argument is that even giving a wide interpretation to the term, 'personnel' under ARRA, would not make it broad enough to include space tourists, this is because the drafters of ARRA back in 1967-68 could not have contemplated the exploration of space by tourists. Therefore it could not have been the intention of the drafters to keep 'personnel' so wide as to include space tourist.

From the above analysis we see that when considering the appropriate rescue system at present, treating the astronauts and tourists in different ways is an intricate problem. It will not only be difficult to promptly identify these two kinds of people in distress but also it is hard to change the treatment suddenly at the time when the rescue team knows they are not astronauts but tourists. Apart from the legal status problem all the people in an accident should receive adequate assistance, because a rescue action will be in fact taken because of law but from humanity.[23] But at the same time, the existing legal system is such that extension of help to space tourists on

[22] Elina Kamenetskaya, *supra*, note 20.

[23] Yasuaki Hashimoto, The Status of Astronauts Towards The Second Generation of Space Law (Feb. 7, 1993), http://www.spacefuture.com/archive/the_status_of_astronauts_toward_the_second_generation_of_space_lw.shtml.

humanitarian grounds would mean equating them with astronauts, who are deemed to be the 'envoys of mankind'. In this situation, the special status of astronauts as 'envoys of mankind' may change to the nominal prestige.

VII. ASTRONAUTS: ARE THEY THE ENVOYS OF MANKIND?

In this section of the paper, the author shall examine if the terminology 'envoys of mankind' is appropriate for astronauts and also make an attempt to assess as to why scholars have been undecided about the status of space tourists vis-à-vis astronauts. As has already been pointed out, scientists and scholars initially considered the existence of extra-terrestrial life and desired that when astronauts came in contact with such extra-terrestrial life, they would meet them as representatives of not any particular nation but the human race. However, with the help of various studies, the possibility of there being life on any other part of the universe has almost been ruled out and thus, this belief has been rendered almost redundant. Also, when astronauts discover a phenomenon in space that is unusual and out of the ordinary, they, when notifying the rest of the world about the same, speak on behalf of their parent country and not mankind as was initially proposed. As a result of the advanced technology and resources of one country as opposed to another, the accolades received from the 'province of mankind' become an issue of nationality over humanity. Finally, Space has long been an area of operation for military systems. More than a hundred military satellites orbit the earth, performing functions for the armed forces such as surveillance, early warning, communication and control. There are signs now that the growing military use of space could help develop weapons systems in future whose stationing on earth or in space could initiate an arms race. Then the question would arise as to whether a state party to ARRA be duty bound to extent help to an astronaut of an enemy state, who is using the space for military purpose and not for 'benefit and in the interest of all countries'.[24]

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[24] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, art. 1, Jul. 11, 1984.

It is somewhat unusual that the phrase 'astronauts as the envoys' has not been referred to after the Outer Space Treaty. It can be said that the drafters understood that the term was too difficult define, or to describe and impractical. Therefore they intentionally left the phrase merely as an inflexible declaration and made sure that such a phrase was not used again so as to steer clear of incompatible interpretations in redoubtable circumstances. Therefore it can be said that the main reason for the use of such a phrase was to elicit co-operation from the international community for the astronauts in the time of distress. This was purely a humanitarian consideration with the specific interest of the space powers and lacked legal foundations and practicalities.

VIII. SUGGESTED CHANGES IN THE OUTER SPACE LAW REGIME

As we have seen, there is some serious lacuna in outer space law, especially ARRA, with regards to the treatment of 'astronaut' and 'personnel'. This is creating a lot of problems in the present day due to the advent of space tourism with the question being about the legal status of a space tourist. The author would humbly like to suggest a few changes that can be incorporated to resolve this dilemma. The suggested changes are:-

1) The duty to extend help to the space tourist should be included in ARRA.

2) This duty should be extended to all space-flights irrespective of whether it is a governmental or non-governmental entity. "Though no such explicit statement is contained in Article VI of the Draft Convention regarding mutual assistance, the Draft Convention does propose to extend liability to states for damage caused by any of its space flights "irrespective of whether they are carried out by governmental or non-governmental entities."[25]

[25] Karl-Heinz Bockstiege, *Manned Space Flight: Legal Aspects In The Light of Scientific And Technical Developments*,12 (1993).

3) Considering the practical scenario a separate definition should be provided for 'astronauts', 'personnel' and 'space tourist'. This is because rescue and return of the men on board of a space-craft (in distress) would take a lot of financial expenditure, which most countries would not like to incur, without reimbursement, for rescue of space tourists, who in most occasions are multi-millionaires.[26]

4) The duty to rescue and return should apply during all stages of flight. Since it is likely that a mishap involving a suborbital flight could occur before the vessel reaches space, resulting in an unplanned landing in a foreign territory, the duty to rescue and return must be revised in a manner that allows for the duty to be triggered even if the spacecraft never reaches space.[27]

5) Finally a provision should be made to give an option to the contracting state to get special reimbursement in case of rescue and return of crew on board of a spacecraft (in distress) engaged for military purposes.

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[26] Mike Wall, First Space Tourist: How a U.S. Millionaire Bought a Ticket to Orbit (Apr. 27, 2011), http://www.space.com/11492-space-tourism-pioneer-dennis-tito.html.

[27] Mark J. Sundahl, *supra* note 17.

CREATING SMALLER STATES FOR DEVELOPMENT: THE CLASH OF LAW, ECONOMICS AND POLITICAL EXPEDIENCY

Jagdeesh Menezes*

There is a general sentiment that the creation of states in India has always been determined by political expediency rather than logic. While Uttar Pradesh has a population bigger than that of Brazil, at the other end of the spectrum, states like Sikkim, Mizoram etc. have just a fraction of that population. This piece examines the economic impact of State creation, and whether statehood actually augments the economic development of a region otherwise alleged to be neglected and treated in a step-motherly manner. Alongside is the issue of better governance and rule of law. The results are a mixed bag: creation of smaller states does not always yield positive results. The critical point for consideration is then whether better political governance and fiscal management within the bigger State is more economically prudent.

I. A BRIEF INTRODUCTION

The raging controversy over Telangana has once again brought to the fore the obstinate debate on creating new states in India. Previously, this demand had resulted in a domino effect, with demands for Gorkhaland, Vidarbha, the trifurcation of Uttar Pradesh and several others being sounded out. Such was the intensity of these demands, that suggestions were voiced to set up a

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second State Reorganization Commission to sort them out.[1] The Government kept its cool and managed to tide over the crisis, yet it is clear that these demands are only dormant and not dead.

Every demand has its own set of standpoints that are put forth by both proponents and opponents, which vary from the acceptable and justified, to the impractical and absurd. Telangana, in particular, has been a demand for decades now, and the current wave of protest could prove strong enough to force the Government's hand in a decisive direction.

The foundation of most claims lies in fears of dominance: minority groups afraid that their social, cultural or economic security will be overridden by larger and more powerful groups. Immediately after independence, demands for statehood were centred on linguistic or cultural differences among people within the erstwhile state. Since liberalization, statehood demands have however been linked more by an economic argument based on disparities in development between regions in a State. This piece breaks down this claim, to adjudge whether or not creating smaller states, in terms of area, would lead to development and economic prosperity for the inhabitants of the area.

Having set out an introduction in Part I, Part II proceeds to examine the formation of States in India post-independence. Part III analyses the relationship between Statehood and economic prosperity on a twin test of economic development and better governance. Jharkhand's fate since it acquired statehood in 2000 is discussed as a case study. Part IV presents a solution to the dilemma, proposing for the ARMA 69 Model to be implemented in these regions where statehood demands persist on economic lines. Finally, Part V sets out some comments in conclusion.

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[1] Renu Mittal, *Is it time to consider another state reorganisation*, REDIFF NEWS, December 12, 2009, http://news.rediff.com/column/2009/dec/12/is-another-state-reorganisation-on-cards.htm, (last accessed on September 30, 2011)

II. STATE FORMATION IN INDIA POST INDEPENDENCE

State formation in India is the prerogative of the Central Government, elucidated in Articles 2, 3 and 4 of the Constitution. This is in consonance with Indian federalism that considers the nation as a *"union of States",* unlike say the United States of America which is a federation of States. The overbearing powers are meant to help the Centre keep the Union in place, but have also allowed the Centre to sit on demands indefinitely without addressing them. Ironically, while creation of a new State, merger, alteration of boundaries etc. may be done by a simple procedure in Parliament requiring resolutions passed in both Houses by a special majority, State formation has been a convoluted political process.

The current controversies are not unusual. The creation of almost all the existing states in India had, at their time, been fraught with controversies of their own. Even before India achieved Independence, the nationalist leaders wanted to reorganize the political and administrative boundaries of the country, in consonance with its cultural diversity. They aimed at generating nationalist sentiments and unity among people belonging to different regions and communities. But the story of the 'integration of states' in post-colonial India is more a story of disintegration, as states were divided on the basis of linguistic and ethnic distinctiveness.[2]

The division was done based on the recommendations of the State Reorganization Commission, 1953, headed by Justice Fazal Ali. The Commission was mandated to seek a balanced approach between 'regional sentiments and national interests'. Though it considered issues such as the size, economic viability, planning and even the status of riparian states, it focussed more on redrawing the map along linguistic lines. This was in the background of political movements for such a division that had already

[2] Asha Sarangi, *Reorganization: Then and Now,* Vol. 26-Issue 26, FRONTLINE, January 1, 2010, p. 22. [Hereinafter "Asha Sarangi"]

begun in the northern portion of Madras, led by Potti Sriramulu's fast unto death.[3] Based on the Commission's recommendations, linguistic reorganisation created 14 States and six centrally-administered 'Union Territories', by the State Reorganization Act, 1956. This linguistic reorganization would sow the seeds for other conflicts. The subsequent decades continued to witness the process of rearrangements, with the creation of Maharashtra and Gujarat in 1960, Chandigarh, Haryana and Punjab in 1966 and finally Himachal Pradesh in 1971. For north-east India, the various States were created between 1960 and 1980 on the basis of ethnicity.[4]

The demand for new States continues and includes those for Bhojpur (Uttar Pradesh and Bihar), Bodoland (Assam), Bundelkhand (Uttar Pradesh and Madhya Pradesh), Coorg (Karnataka), Gorkhaland (West Bengal), Harit Pradesh (Uttar Pradesh), Marathwada (Maharashtra), Mahakaushal (Orissa), Mithilanchal (Bihar), Muru Pradesh (Rajasthan), Poorvanchal (Uttar Pradesh), Saurashtra (Gujarat), Telangana (Andhra Pradesh) and Vidarbha (Maharashtra), though not all of these are presently active demands.

III. STATEHOOD AND ECONOMIC PROSPERITY: LEGITIMACY OF DEMANDS

Following the 1956 reorganisation, it soon became obvious that language alone could not be a satisfactory basis for the division of States. Political scientists, public policy analysts, historians and sociologists began to doubt whether such reorganization would aid the integration of the country. Selig Harrison[5] called these years *"the most dangerous decades"*, while others linked up this linguistic regionalism with *"India's political problem of*

[3] Urmila Phadnis & Rajat Ganguly, *Ethnicity and Nation Building in South Asia,* 153 (1st ed. 2001)

[4] *Supra, note 2,* Asha Sarangi *at* 22.

[5] Selig Harrison is the Director of the Asia Program at the Centre for International Policy, Washington.

creating a sense of national citizenship."[6] Since then, there has been a shift in approach, and contemporary demands for several states, including Uttarakhand, Jharkhand and most of the pending demands have been based on the perception that the economic development of their area has been neglected in favour of the rest of the State, which may be more politically dominant.

The scrutinizing of this perception calls for a twin test: (A) Do smaller states solve the problem of uneven development between regions in the same State and; (B) Are smaller states better governed, since better governance directly influences economic prosperity.

A. EQUAL ECONOMIC DEVELOPMENT

It is obvious that all regions are not developing at the same pace and regional tension is often a consequence of such uneven development. For instance, the Mumbai-Pune region in Maharashtra is one of the most developed areas of the country. Yet, at the other end, Vidarbha is one of the poorest and most underdeveloped areas in India. The economy of Vidarbha is predominantly agriculture-based, centred on cotton-farming. The region has seen a spate of farmer suicides, caused primarily by apathy and lack of political concern toward welfare of the region. Almost 60 percent of the irrigation projects cater to the sugar belt in Western Maharashtra, whereas irrigation is practically inexistent in Vidarbha.[7] While the Government readily provides industrialists with tax incentives and access to finance, farmers receive little credit from banks, forcing them to turn to private moneylenders, who charge exorbitant interest rates.[8]

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[6] *Supra, note 2,* Asha Sarangi, *at* 23.

[7] Anupama Katakam, *Vidarbha's Cry,* Vol. 26-Issue 26, FRONTLINE, January 1, 2010, pp. 19-20.

[8] PB Behere, *Farmers Suicide in Vidarbha: A Myth or a Reality,* Vol. 50, Issue 2, INDIAN JOURNAL OF PSYCHIATRY, 2008, *available at* http://www.indianjpsychiatry.org/temp/IndianJPsychiatry502124-2895496_080234.pdf, (last accessed on September 8, 2010)

Uneven development within a state occurs because the larger state dominates politically and economically over the smaller region, since it has control over all its resources. To illustrate: despite the fact that the Telangana region has 68.5 percent of the catchment area of river Krishna and 69 percent of that of river Godavari, successive governments in Andhra Pradesh have denied it its rightful share of water. The Telangana region is not given any water from the Srisailam Project, while Nagarjuna Sagar has been so modified that 75 percent of the water goes to Andhra while only 25 percent is given to Telangana. Coastal Andhra has also been the major beneficiary of the water allocated by the Bachawat Tribunal to Andhra Pradesh from the river Godavari. As a consequence of these policy decisions, the benefit of major canal-system irrigation projects is enjoyed by Coastal Andhra. The farmers in Telangana have to depend primarily on well irrigation, which is far more expensive. It is the government that spends for construction of the dams and canals from tax-payer's money, but a farmer must pay from his pocket for a sinking well and for buying and maintaining a pump-set.[9] In fact, it is alleged that over the decades, the Telangana region has become a place for setting up highly polluting industries. These cause immense hardship to local people, and adding insult to injury, ignore them when appointing persons to jobs in the industry, including unskilled ones. There is no religious, ethnic or linguistic sentiment in existence, but simply lack of equality in allocation of resources and opportunity for enterprise.

Post-liberalization, the government's role in awarding contracts, locating private sector projects, technical institutions and SEZs, and patronizing different enterprises makes a great impact on the economy. Thus, uneven development is bound to occur where these are concentrated to favour regions already endowed with adequate resources, skills and influence.[10]

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[9] K. Jayashankar, *Telangana Movement: The Demand for a Separate State, available at* http://www.telangana.org/Papers/Article10.pdf, (last accessed on September 8, 2010)

[10] C.H. Hanumantha Rao, *Regional Disparities, Smaller States and Statehood for Telangana*, Vol XLVII, MAINSTREAM WEEKLY, March 7, 2009, *available at* http://www.mainstreamweekly.net/article1213.html, (last accessed on September 30, 2011) [Hereinafter "C.H. Hanumantha Rao"]

It is argued that smaller states would solve this problem of uneven development. The smaller size would allow for easier distribution of grants and development funds and better policing. More state capitals can serve as hubs of development and bring power centres closer to people. Infrastructural development on its part helps in the creation of employment and reduction of poverty.[11] The contrary view, however, is that division of states alone cannot guarantee development. Chattisgarh and Jharkhand are cited as cases in point, which still have large tribal belts and pathetic infrastructure and are plagued by Naxalism.[12]

More than drawing borders, a sound planning and enforcing mechanism that ensures a proper balance between developed and underdeveloped regions through an equitable flow of capital and labour is what is required. In today's liberalized economy, competition among States for domestic and foreign investment is high, but it is for the Government to create policies that ensure distribution of investment across the region. Public investment in physical and social infrastructure can have an equalising impact by being focused on backward regions. This in turn induces private investment into the area.[13] Regional imbalances are then merely a short term phenomena and in the long term, development will spread evenly across all parts of the state.[14]

B. BETTER GOVERNANCE

Statehood in India has always been determined by political expediency rather than logic. This is apparent from the fact that while Uttar Pradesh has

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[11] K Subhramanyam, *Case for Smaller States,* DAINIK JAAGRAN, January 10, 2010, *available at* http://www.maritimeindia.org/pdfs/CaseForSmallerStates.pdf, (last accessed on September 30, 2011) [Hereinafter "Subhramanyam"]

[12] Swaminathan Aiyar, *The economic case for creating smaller states,* THE TIMES OF INDIA, 20th December, 2009, http://blogs.timesofindia.indiatimes.com/Swaminomics/entry/the-economic-case-for-creating, (last accessed on September 30, 2011) [Hereinafter "Swaminathan Aiyar"]

[13] *Supra, note 10,* C.H. Hanumantha Rao.

[14] Ashish Sinha, *Its a mixed bag for smaller states old and new,* INDIA TODAY, December 15, 2009, *available at* http://indiatoday.intoday.in/site/Story/75047/India/It's+a+mixed+bag+for+small+states+old+and+new.html, (last accessed on September 30, 2011)

a population greater than Brazil, encompassing 198 million people, many small states hover around 1 million people, with Sikkim having just 0.6 million people. Similarly, states like Maharashtra, West Bengal and Andhra Pradesh have populations larger than those of France or the United Kingdom.[15] Proponents of smaller states argue then that many of the existing states are too big in area and population to be effectively governed and developed. For instance, the same per capita amounts were made available for primary education for all states after the first Five Year Plan. But the large *bimaru* states have not utilized the amounts effectively, as is obvious from their current states of literacy.[16] Bigger states have lax supervision that leads to siphoning off of development funds. Smaller states will hence lend themselves to more efficient policing and governance. Funds would be easier to distribute, and the target groups would be easier to identify in a smaller social milieu.

Another point linked to this argument is that representative democracy loses its meaning if a constituency is too big and too populous for a legislator to be in effective communication with the people. In some states, an MLA represents a quarter million people or more in the legislature. Smaller states would hence bring power centres closer to people. The Government could be more responsive to people's needs and tailor their policies narrowly, to address the specific issues afflicting those societies.[17]

Still, one cannot accept that smaller states correspond to better governance. In terms of area, proportionately larger states in countries like Canada, USA and China have far better governance. In terms of better security, smaller states like Chattisgarh face Naxalism in equal intensity as do large states like Orissa and West Bengal. Smaller states increase administrative costs, while allowing people with greater economic and political clout to become

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[15] *Supra, note 12,* Swaminathan Aiyar.
[16] *Supra, note 11,* Subhramanyam.
[17] *Id.*

governing leaders. Consequently, state funds are often diverted and misused by those in power. The greatest beneficiary of this type of development is the capitalist class, who have their interests in industry and business.[18] Large bureaucracies are created, which involves spending of public resources on salaries and perks.[19] By way of example, the North-eastern states have received grants and favourable status from the Centre, but development continues to elude them. Deep fractures between social groups, such as the Kukis and Nagas of Manipur, have spawned a culture of violence and hatred, rather than ambition for economic prosperity. The common man is in reality, hardly concerned with Telangana's creation, if he is provided basic necessities of food, clothing and shelter in the present State. His is an anxiety of only 'ends' and not 'means'.

In summary, different regional interests can be protected at the highest level itself by ensuring that the Cabinet of a State Government has proportional representation from all regions, as was done for Telangana under the Gentleman's Agreement, 1956. But there is no guarantee of better governance simply by constructing boundaries. As Jharkhand has shown, it can in fact be counterproductive.

C. CASE ANALYSIS: JHARKHAND AND STATEHOOD

The present state of Jharkhand was carved out of from the state of Bihar in 2000, after a movement supported for over fifty years by the Adivasi people of the Chhotanagpur Plateau–Santhal Parganas belt and amidst much opposition from Bihar's politicians. The reason was that this new state was among the richest in India, in terms of natural resources like minerals, land and water. Yet Jharkhand is cited as the best example to counter both, the

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[18] Sucha Singh Gill, *Class, Ethnicity and Autonomy Movements, in* MANORANJAN MOHANTY, ET AL., PEOPLE'S RIGHTS: SOCIAL MOVEMENTS AND THE STATE IN THE THIRD WORLD 134 (1ST ED. 1998, SAGE PUBLICATIONS, NEW DELHI) [Hereinafter "Gill"].

[19] B.B. KUMAR, SMALL STATES SYNDROME IN INDIA 19 (1ST ED. 1998, CONCEPT PUBLISHING CO., NEW DELHI) (Hereinafter "KUMAR").

better development, and the governance argument made in favour of creating smaller states.

First, as regards development, growth figures do paint a rosy picture. As per the Eleventh Five-Year Plan, Jharkhand achieved a growth in its Gross State Domestic Product (GSDP) at a rate of 11.1 percent as against a targeted rate of 6.9 percent in the Tenth Plan. In contrast, its mother state, Bihar, achieved only 4.7 percent as against a targeted growth of 6.2 percent.[20] Yet these figures tell us nothing of the actual state of welfare of the inhabitants.

The facts on the ground are that even after statehood, Jharkhand continues to have one of the highest rates of poverty in India, at 44 percent, despite its substantial economic potential. The state has not taken advantage of its vast mineral wealth, and continues to remain backward, with poor urban and rural infrastructure. Health and education indicators are also lesser than the all-India average.[21] 59 percent of the children are malnourished, which is the highest for any state in India.[22] Land distribution is extremely uneven, with almost 41 percent of the land being owned by the richest 8 percent of the population. A mere 11 percent of rural households have access to electricity, as against the all India average of 48 percent. The growth the state has achieved is not inclusive as evidenced by high levels of rural poverty and income inequality.[23] Mining, coal and iron ore contribute 15 percent of the GSDP, and these sectors benefit only a select few in the State. Using GSDP as

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[20] Planning Commission, Government of India, *Eleventh Five Year Plan (2007-2012)*, Vol. 1, 2008, p. 138, *available at* http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11th_vol1.pdf, (last accessed on October 1, 2011)

[21] Rajni Khanna and Binayak Sen, *Jharkhand: An Opportunity Lost?,* THE WORLD BANK: NEWS AND BROADCAST, November 15, 2007, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21608536~menuPK:51340323~pagePK:64257043~piPK:437376~theSitePK:4607,00.html , (last accessed on October 1, 2011)

[22] Planning Commission, Government of India, *Eleventh Five Year Plan (2007-2012)*, Vol. 2, 2008, p. 132, *available at* http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v2/11th_vol2.pdf, (last accessed on October 1, 2011)

[23] World Bank Report, *Jharkhand: Addressing the Challenges of Inclusive Development*, 2007, *available at* http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-1181699473021/3876782-1181699502708/ref.pdf, (last accessed on October 2, 2011)

proof of development is hence foolhardy. Paul Streeten's criticism of GNP and other aggregative indicators as a measure of welfare sums up the paradox: *"When whiskey, consumed by the rich, goes up, and milk, consumed by the poor, down, the GNP figure may register an increase."* Disaggregation is far more illuminating than the large numbers that go into the GNPs.[24]

Secondly, Jharkhand best illustrates that smaller states do not necessarily imply better governance. At the top, the State has seen six Chief Ministers in as many years, including the infamous Madhu Koda, pioneer of an inter-continental hawala scam using public money. Most of Jharkhand's leaders have cornered fabulous wealth, although five years ago they belonged to the lowest economic strata. One crorepati MLA was a rickshaw-puller in Bihar before statehood. Corruption and power politics are rampant, which ensures that the riches from its vast resources never percolate down to the poor.[25] The State has isolated its large tribal population from the system and ignored their needs. No surprise then that Jharkhand is the country's worst-affected State with regard to Naxalism, with ten districts under intense Naxalite activity and 742 incidents in 2009 alone.[26]

Poverty, in any case, must not be adjudged in terms of income alone, but all factors that result in 'capability deprivation' including health, education and a control over one's environment.[27] In those terms, Jharkhand proves that creating smaller states does not lead to development or poverty alleviation, and may in fact turn things for the worse.

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[24] Paul Patrick Streeten, *Thinking About Development* 47 (1st ed. 1997).
[25] Girish Mishra, *Jharkhand: Economic Growth for Whom?,* Vol. XLVIII, MAINSTREAM WEEKLY, December 26, 2009, *available at* http://www.mainstreamweekly.net/article1848.html, (last accessed on October 3, 2011)
[26] Ministry of Home Affairs, Government of India, *Annual Report 2009-10*, p. 17, *available at* http://www.mha.nic.in/pdfs/AR(E)0910.pdf, (last accessed on October 3, 2011)
[27] AMARTYA SEN, DEVELOPMENT AS FREEDOM 10-11 (1ST ED. 2001, OXFORD UNIVERSITY PRESS, UNITED KINGDOM).

IV. THE ARMA 69 MODEL AS A SOLUTION

It is evident from the discussion thus far on statehood that one size can simply not fit all. It is important to remember that the demands for statehood are not purely on economic grounds, even if this is pressed as the primary argument. In India's multi-religious and multi-cultural society, the interests of various groups often diverge or conflict. Certain groups within a state fear that their identity or culture will be swamped by more dominant groups.[28] The present demands cannot be dismissed by simply getting the bigger states to balance development between regions and decentralize governance.

An interesting solution was put forward by P.S. Krishnan and again by Anil Nauriya.[29] They propose resurrecting the model tried for Meghalaya in 1969. Having passed the Twenty-Second Amendment, which inserted Article 244-A into the Constitution, Parliament could make Meghalaya an 'Autonomous State' within the state of Assam under the Assam Reorganisation (Meghalaya) Act, 1969.[30] As a result, Meghalaya had its own Chief Minister, Cabinet and Legislative Assembly, and its legislative responsibilities were divided with Assam. As many as 61 out of 66 entries in the State List were wholly or substantively placed in what was called the 'Autonomous State List', including agriculture and land. There was also a Concurrent List between the two states and the Finance Commission could recommend the criteria for distribution of revenues.[31]

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[28] Ashima Mathur, *Division of States,* THE VIEWSPAPER, July 31, 2008, *available at* http://theviewspaper.net/division-of-states/, (last accessed on October 3, 2011)

[29] Anil Nauriya is a practicing advocate in the Supreme Court of India. P.S. Krishnan is a retired secretary from the Ministry of Welfare.

[30] Hereinafter "ARMA 69".

[31] P.S Krishnan, *State within a State is a Workable Solution,* THE INDIAN EXPRESS, March 6, 2010, *available at* http://expressbuzz.com/news/state-within-a-state-is-a-workable-solution/153882.html; Anil Nauriya, *Statehood demands Time to try the Assam Model*, THE TRIBUNE, March 27, 2010. http://www.mainstreamweekly.net/article1971.html, (last accessed on October 3, 2011) [Hereinafter "Nauriya"]

It is important to note that these proposed Autonomous States are different from the 'Autonomous Regions', which have been given varying degrees of autonomy within their respective States, and are governed by an Autonomous District Council constituted under the Sixth Schedule. There are seven subjects upon which they can frame laws,[32] all of which relate to safeguarding the rights and interest of the indigenous tribes living within their jurisdiction.[33] An 'Autonomous State' would have far wider powers of governance than these councils.

Nauriya's argument is that with time, there would be greater administrative and political constraints on multiplying the number of States in India. Therefore, alternative methods of devolution of power must be explored. The ARMA 69 model is essentially a devolution model. Rather than thrusting statehood upon the administration, as he feels was done in Jharkhand and Chattisgarh, this model allows for an assessment of proposed statehood, as well as time for the administration to equip itself to handle full-fledged statehood, should a consensus evolve. Also, because the state is not actually broken up, the risk of resistance from sectarian groups in the states is lesser. For example, if Telangana were to be made an 'Autonomous State' within Andhra Pradesh, it would meet the twin objective of constituting a Telangana State without actually breaking up Andhra Pradesh, until a consensus evolves. By transferring state subjects like Industries and Mines and Mineral Development to the Telangana Government, grievances of exploitation and uneven development would be addressed. A similar model if applied in Vidarbha, would help undo the injustices caused to the region by successive governments in Maharashtra.[34]

While this solution is innovative, it is not fool-proof. Nauriya himself admits that because Meghalaya was given full statehood in 1971 itself, the ARMA 69

[32] ¶3, Sixth Schedule, Constitution of India.
[33] B. Datta-Ray & S.P. *Agarwal, Reorganization of North-East India since 1947 97-98* (1st ed. 1996).
[34] *Supra, note 31,* Nauriya.

model was not given a full trial.[35] To have a state running within a state is bound to give rise to several instances of conflict. Proponents have suggested commissions to sort out disputes regarding resource and revenue sharing. However, problems in governance due to delays in dispute resolution by commissions and protests over unfavourable decisions are two practical concerns. Moreover, building political consensus over proposals to transfer power over natural resources and industries is a mammoth task, as in the case of Telangana, where Coastal Andhra's fear of losing this control is the driving force behind its opposition to statehood in the first place. Significantly, West Bengal has taken a step in this direction under the new Trinamool Congress Government, which passed a resolution on 2nd September, 2011 in the State Assembly setting up the Gorkhaland Autonomous Authority. This has satiated their demands for statehood at the moment.[36]

V. COMMENTS IN CONCLUSION

B.R. Ambedkar, the architect of our Constitution, argued for smaller states as he felt it would be in the best interests of healthy federalism, with no State being large enough to exercise undue influence in the federation. He also cautioned that socially disadvantaged sections may face greater discrimination in bigger states due to consolidation of dominant groups.[37] Statehood demands are hardly restricted to these considerations, with linguistic, cultural, and ethnic identities often playing a role. Most importantly, balanced and inclusive economic advancement is an all important factor driving statehood agitations across the country. It would hence be appropriate to briefly conclude on each of these factors.

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[35] *Id.*

[36] Indrani Dutta, *Gorkhaland Territorial Administration Bill passed by Bengal Assembly,* THE HINDU, September 3, 2011, *available at* http://www.thehindu.com/news/states/other-states/article2420565.ece (last accessed on October 4, 2011)

[37] B.R. Ambedkar, *On Linguistic States,* Writings and Speeches, Part II, Vol. 1, *available at* http://www.scribd.com/doc/6841324/THOUGHTS-ON-LINGUISTIC-STATES-B-R-AMBEDKAR, (last accessed on October 4, 2011)

First, linguistic divisions ought to be avoided and are never to be exclusive. B.R. Ambedkar had supported linguistic homogeneity, but in the sense of *'one State-one language'* and not *'one language-one State'*.[38] One could have two Marathi speaking states etc., as all people speaking one language need not be within the boundaries of a single state. This would also dispel instances of linguistic chauvinism, as was seen in Maharashtra.[39]

Secondly, cultural and ethnic divisions are simply unjustifiable. Among the north-eastern states, it has only forced social, cultural and religious distancing among people.[40] Ethnic identity in itself can be a useful tool for mobilization of people, but the negative use of ethnicity, as has been done by the ruling classes for political gain etc. is dangerous.[41] Such divisions conflict with the Centre's duty of keeping the integrity of the Union in place.

Lastly, the argument of economic advancement by a smaller state must be weighed bearing in mind its principal constituents: uneven development within the larger state and better governance. This paper has argued that although it is true that uneven development plagues many States today, drawing boundaries need not be a solution. Sound planning and execution of policy that focuses on public investment, which in turn induces private investment into backward regions is what is needed. If it can be indisputably established that such action cannot take place in the larger state for whatever reason, then creating a smaller state of that region may be justified.

But this brings in the second aspect of better governance. As has been put forth earlier, creating smaller states are no guarantee of improved governance. Jharkhand has further demonstrated that poor governance ensures lack of development even if resources are abundantly available. The

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[38] *Id.*
[39] C.H. Hanumantha Rao, *Statehood for Telangana: The Current Stalemate*, Vol. XLVIII, MAINSTREAM WEEKLY, February 13, 2010, *available at* http://www.mainstreamweekly.net/article1897.html, (last accessed on October 3, 2011)
[40] *Supra, note 19,* KUMAR 20.
[41] *Supra, note 18,* Gill *at* 143.

ARMA 69 model has been suggested as a solution to this impasse, but it has its own set of problems, which must be resolved first.

It is important to remember, as discussed earlier, that the Constitution entirely empowers the Centre to carve out new States. The role of State legislatures is limited to merely expressing their views on any proposal.[42] Yet, politics cannot be wished away in a democracy like ours. The Centre cannot simply ignore the wishes of the state's legislative majority and the people's sentiments, especially at present, when inflated levels of aspirations and fast-changing social relations have brought the tensions in society to an explosive point.[43] Therefore, as long as linguistic, cultural and ethnic divisions can be avoided, and economic advancement kept the sole consideration, the problem may be addressed by proper governance and balanced attention to all regions in the State. This can be achieved through a separate smaller state, an 'Autonomous State-in-a-State' or as part of a larger state itself, so long as there is political will in that direction.

[42] Article 2, Article 3, Constitution of India.
[43] *Supra, note 18,* Gill *at* 145.

THE ROLE OF SOVEREIGN WEALTH FUND IN INTERNATIONAL INVESTMENT LAW

Arnab Basu* and Shouvik Kumar Guha*

With the onset of the recession and gradual collapse of hedge funds, investment banks and mercantile firms apart from state-owned central banks across the Western hemisphere, the study of the types and sources of wealth possessed by Governments is of utmost importance. Although the international investment climate is in doldrums, business is booming as far as India is concerned. In this article, the authors seek to trace a primary study of the concept, functions and operations of sovereign wealth funds. Special emphasis has been laid on the manner in which Governments employ and utilize such funds. In conclusion, the authors have attempted to establish links between global politics and diplomacy on international investments and the effects of the former on the investments made by states.

"You cannot get tough with your banker."
- Hillary Clinton, U.S. Secretary of State

I. INTRODUCTION

The term "Sovereign Wealth Fund" (SWF) is a description for a separate pool of financial assets owned or controlled by the government, also including international assets.[1] SWF have been distinguished from other sovereign

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assets such as central bank reserves, state owned enterprises, banks, pension funds etc. owing to the emphasis on cross border equity purchases.[2] The size and assets under the control of these entities have grown at a tremendous rate in the recent past from around $500 billion in 1995 to about $ 3.3 trillion in 2007 and are expected to quadruple by 2015.[3]

SWF are a heterogeneous group and may be distinguished on the basis of their *raison d'être*[4], such as:

(i) Stabilization fund, where the SWF is established by a commodity-exporting country (principally oil) to protect the economy from short-term and medium-term fluctuations;

(ii) Savings Fund, where the country (again a principally commodity-exporting one) makes provisions for future generations when these

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[1] Edwin.M.Truman, *A Blueprint for Sovereign Wealth Fund Best practices*, PETERSON INSTITUTE OF INTERNATIONAL ECONOMICS POLICY BRIEF (April 2008) available at http://www.petersoninstitute.org/publications/pb/pb08-3.pdf (Last visited February 8, 2009); The first sovereign wealth fund was established by Kuwait (Kuwaiti Investment Board) as early as 1953 for the purpose of managing the '*excess*' oil revenues that the country was to garner in the coming years. The next wave of funds was established during the oil booms of the 1970s. Oil exporters such as the United Arab Emirates, Saudi Arabia and Alberta established Sovereign Wealth Fund as a way to absorb excess liquidity that could potentially overheat their economies. Recently, another oil and natural resources boom-alongside a massive buildup of foreign exchange reserves among non-commodity exporters have spurred a new group of countries to establish sovereign wealth funds. However anomaly in the recent trend has been establishment of funds by countries such as Nigeria that do not necessarily possess excess financial liquidity and are often still quite economically underdeveloped; See *generally* Monk, Ashby H. B., *Recasting the Sovereign Wealth Fund Debate: Organizational Legitimacy, Institutional Governance and Geopolitics* (May 2008), available at SSRN: http://ssrn.com/abstract=1134862 (Last visited February 8, 2009); *Also see* Anders Aslund, *The Truth about Sovereign Wealth Funds,* FOREIGN POLICY available at http://www.foreignpolicy.com/story/cms.php?story_id=4056 (Last visited February 9, 2009); *Also see*, *Rise of State Capitalism* THE ECONOMIST (September 18, 2008) available at http://www.economist.com/specialreports/displaystory.cfm?story_id=12080735.

[2] Lyons, Gerard, *State Capitalism: Rise of Sovereign Wealth Funds* 14 LAW & BUS.REV.AM 179, 203 (2008).

[3] To put this number in perspective, the hedge funds and private equity funds some of the other prominent players in the financial system that are highly leveraged, have assets in the order of about $ 1.9 trillion and $0.8 trillion respectively

[4] *Sovereign Wealth Funds – A Work Agenda*, Prepared by the Monetary and Capital and Policy Development and Review Departments, INTERNATIONAL MONETARY FUND available at http://www.imf.org/external/np/pp/eng/2008/022908.pdf (Last visited February 9, 2009).

natural resources are no longer present; the objective is to create a more diversified portfolio assets;

(iii) Development Funds which are setup to fund the country's socio-economic projects that raises a country's potential growth output;

(iv) Contingent Pension Reserve Funds; and

(v) Reserve Investment Corporations.[5]

The Sovereign wealth fund landscape is in a state of flux as new players continue to enter the field and diversification and sophistication of investment strategies of the existing players. Over the past year, the SWF especially in United States have made significant investments to the tune of $40 Billion in some of the biggest corporations such as Citicorp (by Abu Dhabhi Investment Authority $ 7.5 Billion), Merrill Lynch (by Singapore's Temasek Holdings $ 5 Billion) and Morgan Stanley[6] (by China Investment Corporation $ 4.4 Billion) Recently, a government owned corporation from Dubai bought a 20% stake in NASDAQ and all hell broke loose when Dubai purchased the American operations of a British Corporation which controls certain ports in United States.[7] The prospect of an Arab state, a relatively moderate one at that and a steady ally controlling "critical infrastructure" was intuitively scarier than foreign ownership of stock exchange.[8] The question then arises to what if it had been communist-run China, instead of

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[5] Definition of a Sovereign Wealth Funds has been a contentious issue. There has been no literally no consensus on what constitutes a Sovereign Wealth fund and whether some of the entities such as contingent pension reserve funds and reserve investment corporations could be regarded as Sovereign Wealth Funds; See Balding, Christopher, *A Portfolio Analysis of Sovereign Wealth Funds* 5 (June 6, 2008) . Available at SSRN: http://ssrn.com/abstract=1141531.

[6] See Eric Dash & Andrew Ross Sorkin, *Citi group sells Abu Dhabi Fund $ 7.5 Billion Stake,* NEW YORK TIMES, 27 November, 2007, available at http://www.nytimes.com/2007/11/27/business/27citi.html?hp

[7] Jonathan Weissman, *Port Deal to have Broader Review,* THE WASHINGTON POST available at www.washingtonpost.com/wp-dyn/content/article /2006/02/26/AR2006226007737.htm

[8] Though this did not prevent the NASDAQ from submitting the deal to CFIUS for review, in fact, the deal is sound economically, where the Dubai corporation only gets 5 % of voting right shares in the deal. CITE

Dubai, buying into a major financial exchange? Hugo Chavez's Venezuela? Or even the re-energised Russia? The question then arises as to whether these are mere hypotheticals or are realistically foreseeable in the near future.[9]

The common fear has been that the investments by the SWF may later be used as leverage in geo-politics. The fear compounds significantly if a country were to receive investment from the SWFs that are traditionally not its allies in geo-political matters. This line of thought has received much currency in the United States which has been the recipient of quite a number of SWF investments, some of which come from countries that have never been its allies.[10] Whether these entities would use their stakes to exercise political influence over American firms was explored by Alan Tonelson testifying before the U.S-China Economic and Security Review Commission in February, 2008 where he articulated this concern: "*If for example, the Chinese government held significant stakes in a large number of big American finanial institutions, especially market-makers, and if our nation's current period of financial weakness persists, how willing would Washington be to stand up to Beijing in a Taiwan Straits crisis?*" That same month, the Secretary of State (then Senator) Hillary Clinton observed: "*You know, you cannot get tough with your banker. You cannot stand up if they have very different interests in the Middle East or in Asia than we do and they basically say, fine, you want us to dump dollars? Do you want us to pull our investments out?*"[11]

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[9] Sometimes the fears are plainly unfounded. In fact, the hysteria has reached such heights that countries in EU such as France and Germany where the SWF have hardly invested are contemplating high investment barriers to protect its national corporations against "aggressive" overtures of SWF from the East.

[10] For example China Naitonal Offshore Oil and Gas Corporation (CNOOC) takeover of Unocal, an American petrochemical company

[11] *See* Statement of Daniel W. Drezner, *Wounded Warriors*, COMMITTEE ON SENATE FOREIGN RELATIONS, CONGRESSIONAL TESTIMONY (June 11, 2008), 2 available on www.lexis.com ; Daniel.W.Drezner further goes on to note that such questions are based on tenuous assumptions. First, the foreign governments will know how to invest so as to maximize foreign policy leverage. Second, the existing laws in most of the countries have no provisions that prevent malevolent control over firms by the SWF if they tried. For example, in the United States, the National Foreign Investment and Security Act of 2007 already requires heightened scrutiny when a foreign government-controlled firm acquires a controlling stake in an American Corporation. Thirdly, in times of global crisis, it is the location of the asset than the identity of its owner as a cursory review of the past waves of foreign direct investments would show.

This argument rests on two factors: First, that the SWF will be used as foreign policy tool by the countries even though evidence may suggest otherwise. Second, the institutional practices of these entities do not inspire confidence that they will merely act as commercial players in the market. Many of these entities prefer to operate in the shadows of the international financial system. In darkness, a rope could be mistaken for a snake. Apart from a few notable exceptions such as Norway hardly anything is known about the operations of other entities. For example, the website of Abu Dhabi Investment Authority (ADIA), perhaps the largest fund in the world[12], till a year ago had a website that was merely one page detailing not an inch of its financial operations. The website only function seems to be the evidence of existence of the entity. The same has been the case with China Investment Corporation (CIC) one of the other larger SWF.

It is perhaps the lack of transparency coupled with the institutional framework for governance of these funds that provide credence to the assertion that these funds may be used as a foreign policy tool or may make "political investments". According to a study conducted by the International Working Group of Sovereign Wealth Funds[13], though the investment policies, management and operational decisions are often centralized within the SWF through a Board of Directors or Steering Committee that ensures operational independence, the entity is ultimately accountable to the government and the public.[14] Hence, when an entity is responsible to a political actor or is backed by it, the fear is that external factors will affect its decision-making as

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[12] Estimated Size of the fund is somewhere between $ 675 Billion- $ 800 Billion, the figures are again a guesstimate rather than a estimate since there has been no acknowledgement by ADIA of this statistic.

[13] The International Working Group of Sovereign Wealth Funds (IWG) established at a meeting of countries with SWFs on April 30- May 1, 2008, in Washington, D.C. In the meeting, it was agreed that the IWG would initiate the process, facilitated and coordinated by the International Monetary Fund. It comprises of 26 IMF member countries with SWFs. *See Sovereign Wealth Funds : Current Institutional and Operational Pratices* prepared by the IWG SECRETARIAT in collaboration with the members of the IWG (September 15, 2008) available at http://iwg-swf.org/pubs/swfsurvey.pdf.

[14] *Id.*

a shareholder in the recipient countries' corporations and its operations.[15] For example, if in an American corporation, Middle Eastern or Asian SWFs band together and oust a CEO, in normal circumstances, it would be regarded as positive activism by the shareholders. However in this case, the shareholders being foreign governments or entities controlled by them, there is an instinctive (and possibly knee jerk) reaction to such "activist" tendencies, since there exists a lingering suspicion as to whether this move was "strategic" in other ways. It could be argued that "counter party surveillance" – the incentive of investors to make sure that their investment funds are acting prudently and profitably is conspicuously absent in case of SWFs.[16] Though in some cases, where the country has a democratic structure of governance, counter party surveillance could be argued to exist at an abstract level in terms of the government's accountability to the electorate. However in countries such as China and Russia lack of accountability and consequently lack of transparency is much more problematic.

An additional concern for the recipient countries (especially United States) is the growth of SWF in authoritarian countries.[17] As Drezner notes, these entities could theoretically possess two advantages. First, since the decision-making is centralized and non-accountable, it allows them to act with greater agility.[18] Second, being authoritarian and increasingly capable of suppressing dissent, they are in a position to make investments that may be "unpopular" in the short term but may yield long term rewards.[19] It is essentially these entities that cause such heartburn among the recipient countries and these are entities that the recipient countries' policy makers have in mind

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[15] Ronald.J.Gilson & Curtis.J.Milhaupt, *Sovereign Wealth Funds and Corporate Governance : A Minimalist Response to the New Mercantilism,* 60 STAN.L.REV 1345 (2008); Authors advocate non-voting stakes for Sovereign Wealth Funds.

[16] See ALAN GREENSPAN, AGE OF TURBULENCE (New York: Penguin, 2007).

[17] *See* Daniel.W.Drezner, *Sovereign Wealth Funds and (in)security of global finance* available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/9-10-08_drezner_house_testimony.pdf

[18] *Id.*

[19] *Id.*

whenever they have outlined the concerns against SWFs in various global fora. It is the general belief that this "patient capital" in the words of Drezner of authoritarian states that cause their SWFs to act in a more strategic and profitable manner.[20]

A cursory review of all the literature on the "political" nature of the SWF rests on a single assumption that government participating in a market will never act like a private participant. Unlike, a private shareholder, whose objective is to maximize the value of his/her share, states/SWFs has different maximization objectives.[21] Thus, market intervention is warranted because these "private" participants have different value maximizing concerns and these interventions are designed to ensure that these participants follow a certain set of value maximizing objectives based on a narrow conception of wealth.

Larry Cata Backer notes that one solution to this impasse would be to embrace a fundamental assumption that states can act like private participants. For this assumption to work, the SWFs need to be treated like other private entities in the system. Backer enquires whether "would they also have to forego their own wealth maximizing behavior in favour of some mythological construct – the reasonable private investor?"[22] By these measures, sovereigns are being forced to benchmark sovereign conduct and what is essentially ungovernable – the motivations for investors and shareholder activism are sought to be governed by such measures. The problem with these proposals is that they are at war with themselves. They tend to hunger for investment, but wish to treat the investor differently from

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[20] *Id.*, 9

[21] *See generally* Larry Catá Backer, *The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law,* VOL. 82, NO. 1, TULANE LAW REVIEW, 2008. Available at SSRN: http://ssrn.com/abstract=1135798, 57-58.

[22] *Sovereign Wealth Funds and Hungry states: Adjusting the borders of Public and Sovereign activity across borders* available at http://lcbackerblog.blogspot.com/feeds/5882193399270747476/comments/default

others. However, severe control of investment strategies, trade volume and the like seem to suggest that sovereign is never treated as a private investor.

II. LEGAL RESPONSES TO SWF

As the impact of SWF on a country's investment landscape becomes clearer and the fact that it is viewed as a potential threat for strategic sectors, consensus has emerged that legal rules are needed to regulate the working of SWF. Even the SWFs realize that it is necessary for them to maintain increased transparency to ensure that protectionist barriers are not mounted by the recipient countries. Various responses to SWF may be[23] :

- International Soft Law, which consists of principles and best practices that may be voluntarily adopted by the SWF. OECD and IMF have been the two international organizations that are primarily associated with this endeavor. While the former primarily focuses on the recipient countries' policies towards SWF, the latter focuses on best practices and voluntary code of conduct that needs to be adopted by the SWF. For this purpose, International Working Group of Sovereign Wealth Funds was setup which brought a set of principles called the Santiago Principles in October 2008
- Domestic Law- Many countries in the past two years have toughened their domestic laws in response to the investment activities of SWF. The toughened laws include broad scope of national security or increased investigation of investment by foreign government owned entities or increased compliance procedures for companies that are owned by foreign governments or entities.

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[23] *See generally* Audit, Mathias, *Is the Erecting of Barriers Against Foreign Sovereign Wealth Funds Compatible with International Investment Law?*' (July 2, 2008). SOCIETY OF INTERNATIONAL ECONOMIC LAW (SIEL) INAUGURAL CONFERENCE 2008. Available at SSRN: http://ssrn.com/abstract=1154601

III. SANTIAGO PRINCIPLES

These Generally Accepted Principles and Practice (GAPP) aims at supporting the institutional framework, governance and investment operations of SWFs that is guided by their policy purpose and objectives, and consistent with a sound macroeconomic framework.[24] Publication of the GAPP should help improve the understanding of SWFs as economically and financially oriented entities in both the home and recipient countries. This understanding aims to contribute to the stability of the global financial system, reduce protectionist pressures, and help maintain an open and stable investment climate. The GAPP would also enable SWFs, especially newly established ones, to develop, review, or strengethen their organization, policies, and investment practices. Hence, the GAPP therefore is underpinned by the following guiding objectives for SWFs[25]:

i. To help maintain a stable global financial system and free flow of capital and investment

ii. To comply with all applicable regulatory and disclosure requirements in the countries in which they invest

iii. To invest on the basis of economic and financial risk and return-related considerations; and

iv. To have in place a transparent and sound governance structure that provides for adequate operational controls, risk management, and accountability

The GAPP seeks to establish a framework for SWFs that promote operational independence in investment decisions, transparency, and accountability. To achieve this, it covers practices and principles in three key areas[26]

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[24] *See generally, Sovereign Wealth Funds: Generally Accepted Principles and Practices,* INTERNATIONAL WORKING GROUP OF SOVEREIGN WEALTH FUNDS available at http://iwg-swf.org/pubs/eng/santiagoprinciples.pdf

[25] *Id.*, 4.

[26] *Id.,* 6-7.

- Legal framework, objectives, and coordination with macroeconomic policies
- Institutional framework and governance structure
- Investment and risk management framework.

The overarching theme of these principles is to provide assurance to the recipient country of the investment strategy.[27] For example, GAPP 2 states that "*the policy purpose of the SWF should be clearly defined and publicly disclosed*"[28] This facilitates formulation of appropriate investment strategies based on economic and financial objectives. The pursuit of any other types of objectives should be narrowly defined and mandated explicitly. This will ensure in the professional management of SWF which forsakes undertaking of any investment that directly or indirectly fulfills any geo-political agenda of the government.

This merely facilitates informational symmetry and consequently reduces uncertainty that prompts the recipient countries to erect wide protectionist barriers and frame comprehensive national security legislations. The public disclosure of the SWF's policy provides better understanding of what the SWF seeks to achieve and whether its behavior is consistent with the specified purpose.

The consistent view across the board has been that these principles satisfactorily address the purpose and objectives of the endeavor.[29] This belief is based on (i) the process by which the principles were developed, (ii) the credibility of the members of the IWG- the principles required the cooperation of the SWFs and any effort to frame any set of best practice without the involvement of these entities which are the primary stakeholders

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[27] *Minding the GAPP: Sovereign Wealth, Transparency and "Santiago Principles,* POINT OF VIEW (POV) prepared by Deloitte available at www.deloitte.com/dtt/article/0,1002,cid%253D233332,00.html

[28] See Generally Accepted Principles and Practices.

[29] *Supra* note 28.

would have ended up in wayside. The principles are more than encapsulated expectations of recipient countries; they form the basis of interaction between these entities and them. (iii) The likelihood that an ongoing mechanism will be created to carry forward the work relating to the Principles- The IWG is in favor of forming an on-going mechanism, in the form of a standing committee of SWF that would keep the GAPP under review, facilitate its dissemination, proper understanding, and its implementation once again reinforcing the notion that these principles are more than mere abstract ideals. Further, this standing group would provide SWFs with a continuing forum for exchanging ideas and views with each other and with recipient countries. It has also been suggested that the standing group could aggregate information on SWF operations for periodic reporting.[30]

There has been overwhelming support for these principles. The Norway expressed its support for the Santiago principles so did Abu Dhabi Investment Authority (ADIA).[31] The principles reflect pragmatism in that it is a compromise, a negotiated document.[32] Edwin.M.Truman, Senior Fellow of the Peterson Institute for International Economics and a long time observer and commentator on SWF believes that the weakest area is with respect to accountability and transparency.[33] Principles relating to disclosure for example only envisage disclosure to fund's owner and not to general public.[34] This approach, Truman avers does not promote the needed accountability to citizens of the country with the SWF or of other countries.

IV. DOMESTIC HARD LAW OPTION

This was the first responses to the phenomenon of SWF. Almost all recipient countries initially reacted to SWF investments by toughening the foreign

[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*

investment law which included extensive review and screening apart from exempting foreign investment certain sectors that were strategic. While the screening process in the countries differed, the reviews were triggered when foreign investment exceeds a certain threshold of ownership, implicates national security concerns or both.

For example, in the USA, review of investments and acquisitions is conducted as per the Foreign Investment and National Security Act of 2007 (FINSA). The legislation was a direct consequence of the controversies of China National Offshore Oil Company (CNOOC) attempted takeover of Unocal and Dubai Ports World of Peninsular & Oriental Steam Navigation Company's investment in a British company that controlled certain ports in America.[35] FINSA requires the Committee on Foreign Investments in the US (CFIUS) to :

- Review acquisitions by foreign persons of control of US businesses in the interests of US national security during a 30 day period after notice or its own initiation of the review
- Investigate such acquisitions during an additional 45 day period if the transactions threatens the national security of the US, is by a foreign government controlled entity, would result in critical infrastructure coming under control of a foreign person or the government agency leading the review so recommends and,
- Report its findings to Congress. The president is authorized, as a general matter, to prohibit or suspend, or to order divestiture in respect of, such transaction if, after consideration of specified factors, there exists credible evidence that foreign government owned entity exercising control might take action that may impair

[35] For more details see Jonathan.Weissman, *Port Deal to have Broader Review,* THE WASHINGTON POST available at www.washingtonpost.com/wp-dyn/content/article/2006/02/26/AR2006007737.htm

national security and other laws do not provide adequate protection.

In the USA, in 2006, of approximately 10,000 M&A transactions, 1730 were cross border of which 113 (6.5 per cent) came before CFIUS—none were blocked. CFIUS has reviewed approximately 2,000 cases since inception in 1988 of which only a few have been blocked.[36] Canadian government in 2007 (December) issued special guidelines under the Investment Canada Act 1985 (ICA) focusing on investments pursued by state-owned enterprises which would include SWFs.[37] It would assess apart from other aspects (such as corporate governance) whether these entities will do business as per commercial dictates. Australia followed Canada by adopting new guidelines in 2008 (February) adopted new guidelines for foreign investments in Australia. There was a national interest clause which allows for an investment to be prohibited. In this context, it would be examined whether the investor's operations had any extra-commercial basis. Germany too plans to create an American equivalent of the US Committee on Foreign Investments (CFIUS) by establishing an inter-ministerial commission with the power to review and possibly veto, acquisitions by state-owned enterprises. Acquisitions involving a stake of more than 25% are expected to come under its scrutiny. The aim of these legislations was to protect the strategic sectors of the economy from these entities and constitute a "protectionist" response.

As has been stated earlier, such protectionist responses were a result of information asymmetry that persisted in the market necessitating such interventions by the governments. While the foreign investments, in some cases, raise legitimate security concerns, it should not be used as an excuse

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[36] The only presidential divestiture order occurred in 1988 in connection with a Chinese company's acquisition of a US aircraft parts company; See David Marchick, *Sovereign Wealth Funds and National Security,* The Carlyle Group prepared for City of London Conference available at http://www.oecd.org/dataoecd/38/12/40395077.pdf

[37] *Supra* note 24, 7-8.

for pursuit of protectionist policies, industrial policy or the creation of national champions.[38] This assumes importance considering the fact that the economic downturn has forced the countries to re-think on their commitment to free trade. Though the countries should address national security concerns brought about by SWF investments, it is important that countries that receive foreign investment take actions that create and maintain open investment regimes.[39]

V. ROLE OF ICSID IN A DISPUTE BETWEEN SWF AND RECIPIENT COUNTRY

The international investment law regime is a true reflection of the spaghetti bowl. There exists no multilateral framework though initiatives have been taken in the WTO to that effect. Most of the countries have entered into tailor-made and customized bilateral agreements with others regarding flow of capital and cross-border investment.[40] These agreements could be regarded as standards of protection for investors. In principle, a country has complete sovereignty to accept or reject an investment made in its territory. Investment law (through Bilateral Investment Treaties) provides the necessary assurance to the investor that state action on such foreign investment will be within the framework agreed upon in the BIT. Hence, rather than relying on the contested meaning of substantive rights under customary international law such as expropriation, these instruments

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[38] *Id.*

[39] Further, SWF raise a number of raise a number of non-national security investment issues related to potential distortions from a larger role of foreign governments in markets. For example, through inefficient allocation of capital, perceived unfair competition with private firms, or the pursuit of broader strategic rather than strictly economic return-oriented investments, sovereign wealth funds could potentially distort markets. A particular example that is likely to raise concerns about unfair competition is if sovereign wealth funds pool their resources with domestic state-owned or private enterprises in making an overseas investment.

[40] Yet this patchwork of quilt of interlocking but separate bilateral treaties as observed by Campbell McLachlan & Ors, "betrays a surprising pattern of common features." Most of the agreements have a limited number of general guarantees expressed in a conventional form. Inclusion of standards such as "Most Favored Nation" and "National Treatment" has assisted in the emergence of a common lexicon of investment treaty law.; *See generally* MCLACHAN, CAMPBELL & ORS, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2007) 6-7;

articulate specific standards for investment rights.[41] Thus, investment treaties offer foreign investors a specific set of substantive rights.[42]

However, investment treaties are not revolutionary for the substantive rights that they grant.[43] The main draw of such instruments was mechanisms provided to the investors that enabled them to enforce the substantive rights directly.[44] Before the advent of these instruments, remedies available to investor in case of a government's violation of international law were very limited.[45] These treaties however offered the investor a right to arbitrate directly with the state for a violation of the treaty. It sought to provide a reliable, neutral forum for investor to enforce the provisions of the treaty.[46] World Bank setup International Centre for the Settlement of Investment Disputes (ICSID) to arbitrate exclusively on the investment disputes. ICSID provides a forum for private investor of countries who are members of the ICSID convention to bring claims against other member countries.

Can SWFs then bring an ICSID arbitration proceeding against a particular state if one of its investments is cancelled by the recipient countries? This jurisdictional debate is possible only if the SWF is able to prove before the arbitrator that it occupies a position of "investor" under the treaty. This

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[41] *Infra* note 44.

[42] Generally, these include compensation for expropriation, National Treatment, assurance of fair and equitable treatment, promises that investments will receive full protection and security, undertakings that a sovereign will honor its obligations, and assurances that investment will receive treatment no less favorable than that accorded under international law. See *generally* Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties,* 39 INT'L LAW 87, 87, 90-94(2005).

[43] Susan Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, VOL. 19, MCGEORGE GLOBAL BUSINESS AND DEVELOPMENT LAW JOURNAL, 337, 343 (2007). Available at SSRN: http://ssrn.com/abstract=882443

[44] *Id.*

[45] *Id*; Investors' remedies tended to be limited to the following either negotiating with the sovereign or ask the home government to undertake diplomatic negotiation on its behalf or lodge a claim in International Court of Justice. Suing the government in its own courts was never feasible since wide defenses of sovereign immunity were always available. Ultimately, even if any of these methods were chosen, there was no uncertainty as to the investor receiving any financial compensation as damages from the host country.

[46] *Id.*

implies that SWF has to prove that it is a separate and distinct entity from the government. If such distinction is not possible, then the SWF is regarded as the sovereign government itself and arbitral awards have been categorical in denying jurisdiction to state-state disputes.[47] Mathias observes that "state-controlled entities are not necessarily excluded from the protection system settled by international investment law, as long as they act *"in a commercial rather in a governmental capacity"*"[48] (Emphasis Supplied)

As much as ICSID represents an enlightened way to resolve investor-state disputes, structural deficiencies in the system prompt us to wonder whether the system would be suitable for adjudicating disputes between SWF and other member countries. Even if SWFs manage to establish the arm's length requirement between the fund and the government, its very nature and function and the investment being in most cases being the wealth of nationals in the most direct manner may cause friction between the states in case of an unfavorable award. Considering that ICSID offers very limited scope for review and even narrower grounds for setting aside the award coupled with the absence of any suitable appellate body to review the award makes it unsuitable for adjudicating these disputes.[49] These disputes have the potential to trigger a trade and investment war with countries adopting retaliatory measures due to its unique circumstances and context.

Further, when SWF as a group seek to negotiate with the recipient countries for mutually accepted standards of protection and promises, inconsistency in decisions will not be favored by them. ICISD arbitral tribunal, not guided by

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[47] *Maffeizini* v. *Spain*, Decision on Jurisdiction, 25 January 2000, 5 *ICSID Rep*.396, 434: "Center has no jurisdiction to arbitrate disputes between two states"; the ICSID as evidenced by the history of the Washington Convention has never barred or disqualified a "government-owned corporation" from accessing the dispute resolution mechanism unless it was acting as an agent for the government or is discharging an essentially governmental function; See *Salini v.. Morocco*, Decision on Jurisdiction, 23 July 2001, *ICSID Rep.400*, par.33; Furhter in *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, 5 *ICSID Rep*.335 (par.16-27) it was stated that a state-owned bank so long as its activities are similar to a private bank can avail of the dispute resolution mechanism provided by the BIT provision while investing abroad.

[48] *Supra* note 24.

[49] *Supra* note 44.

precedent have had the tendency to change course of the arbitral jurisprudence resulting in conflicting awards, this may not be acceptable for SWFs.

Susan.D.Franck details typical scenarios in which inconsistent decisions may arise.[50] First, different tribunals can come to different about the same standard in the same treaty.[51] More problematic scenario is when different tribunals organized under different treaties can come to different conclusions about disputes involving the same facts and similar investment rights.[52] ICSID has still not gained the unanimous acceptance among states of the world. Further, free trade areas may have separate dispute resolution mechanisms whose jurisprudence regarding certain standards of investment law may often conflict with that of ICSID. Hence, the current scheme of dispute resolution mechanisms under the international investment regime does not indicate the expectations in a consistent manner.

Thus, the inconsistency undermines the legitimacy of international investment regime to address suitably the concerns of SWFs. Without clarity and consistency of both the rules of law and their application, there will be a detrimental impact on negotiations between the SWFs and the recipient countries. Rule of law is the bedrock by which the both the sides in this process would seek to order their interactions and the current patchwork of arbitral tribunals and decisions do not inspire confidence. This, in turn could lead to a crisis of legitimacy.[53] Lack of coherence and indeterminacy which in turn beget unpredictability and unreliability and in this situation, SWFs and other entities cannot anticipate how to comply with the law and plan their conduct accordingly, thereby undermining legitimacy.

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[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] See James Willard Hurst, *Problems of Legitimacy in the Contemporary Legal Order,* 25 OKLA.L.REV.224, 224 (1971).

VI. WTO AS AN ALTERNATIVE FOR ADJUDICATING DISPUTES

Sovereign Wealth Funds are increasingly being looked upon as the starting point for resuscitating multilateral initiative in areas of investment. As much as investment was one of the four "Singapore" issues in the WTO, it never really took off due to extremely diverse interests of the states, unlike other issues, non-emergence of two or three blocks of states with common interests and goals proved to be its failing. It only meant that increased transaction costs for the states in negotiation rounds to find a common ground. These factors waylaid any progress of multilateral initiative of investment at the WTO level.

However as western economies seek to unravel the latest financial market turmoil and SWF countries (mainly eastern) look for new places to invest wealth, the only way to avoid a protectionist clash may be some kind of "grand bargain.[54] It is the general belief that world is on the cusp of an international financial revolution with the shift in global power and influence in the last century.[55] The existing international institutions such as World Bank and International Monetary Fund are thought to be inadequate in handling the global financial challenges of this century.[56] There is an increasing clamor for overhaul of these institutions since there exists no mechanisms in these institutions to regulate governmental financial institutions, much less quasi-governmental institutions such as the

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[54] See Katrin Bennhold, *Sovereign Wealth Funds seek balance against Western Regulation,* INTERNATIONAL HERALD TRIBUNE, January 24, 2008 available at http://www.iht.com/articles/2008/01/23/business/fund.php (Last visited February 9, 2009) ; Wu Jianmin, a senior Chinese diplomat and president of the China Foreign Affairs University in Beijing had stated on the sidelines of a panel discussion in World Economic Forum at Davos last year: "*We have to negotiate with one another- we need a kind of grand bargain*" (Emphasis Supplied) ; Also see Robert Hutchings, *A Grand Global Bargain,* THE WASHINGTON POST, November 17, 2008, Page A19 available at http://www.washingtonpost.com/wp-dyn/content/article/2008/11/16/AR2008111601732.html

[55] *Id.*

[56] In the recent past, leaders of the Group of 20 world economic powers that included emerging powers such as China, India gathered in Washington to consider a "Bretton Woods II" world financial architecture; See Sebastian Mallaby, *Bretton Woods, the Sequel?,* THE WASHINGTON POST, October 20, 2008, Page A15 available at http://www.washingtonpost.com/wp-dyn/content/article/2008/10/19/AR2008101901333.html

Sovereign Wealth Funds.[57] Further, leaders of influential countries such as China and India have made clear their disinterest in participating in global institutions that are dominated by Western powers.[58]

A mutually beneficial bargain is there for the taking and the opportunity should not be missed. Interestingly, WTO has a well-established precedent for regulating similar transactions. Aaditya Mattoo and Aravind Subramanian have convincingly argued for multilateral action in this regard.[59] They argue that SWFs would favor multilateral initiative since they do not want to be subjected to the vagaries of unilateral actions by recipient countries.[60] They further argue that unilateral action could take a protectionist slant and provoke retaliatory protection and spiral into a trade or investment war. Further, considering that WTO dispute resolution mechanism has a good track record for clarity and consistency of decisions, it offers "*an institutionalized consultation and, when necessary, impartial assessment of conformity with mutually agreed conditions*." [61]

Any multilateral initiative at this juncture to be successful should address both the security of access for investors and rules that the SWF should fulfill in order to benefit from access.[62] Using the WTO's GATS (that already contains a framework of rules governing investments (FDI) in services) as a springboard, future rules should be framed. The logic of using GATS as a springboard is due to the fact that recipient countries' greatest concern has

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[57] *Supra* note 42.

[58] See P.S.Suryanarayana, *India demands greater say in IMF decision-making process*, BUSINESS LINE, September 20, 2006 available at http://www.thehindubusinessline.com/2006/09/20/stories/2006092003800800.htm; *China urges IMF reform to reflect position of members,* CHINA DAILY, October 23, 2007 available at http://www.chinadaily.com.cn/china/2007-10/ 23/content_6198681.htm

[59] Mattoo, Aaditya and Subramanian, Arvind,Currency, *Undervaluation and Sovereign Wealth Funds: A New Role for the World Trade Organization* (January 1, 2008) PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS WORKING PAPER NO. 08-2. Available at SSRN: http://ssrn.com/abstract=1086476

[60] *Id.,* 15.

[61] *Id.*

[62] *Id.,*16.

been investments by SWF especially a controlling stake in sensitive areas such as communications, media, energy and financial distributions services all of which come under the services sectors.[63] In the GATS negotiations, countries have negotiated schedules of commitments allowing foreign investments in specific sectors subject to specific conditions. As Aaditya Mattoo & Aravind Subramanian note

> "*these schedules already contain restrictions on SWF – related activities*."[64] Theoretically, the commitments of countries in various sectors grant the SWFs right to invest in these sectors.[65] However, the GATS provisions (security exceptions) could be used by countries to restrict investments by SWFs.

The drawback of using GATS framework to regulate SWFs would be that it would be relevant only when there is a controlling stake involved. Hence, accepting the GATS framework would be an implicit recognition that minority portfolio investments (very often undertaken by SWFs) would be outside the multilateral framework. Aaditya Mattoo and Aravind Subramanian recommend exclusion of these minority portfolio investments from the discussion reflecting the "grand bargain" and other international financial institutions like IMF which is in fact significantly involved in the drawing up of best practices et al for SWF could regulate other aspects of SWF other than where effective control is involved.[66]

Another aspect of this discussion is the obligations that are to be assumed by the governments controlling these SWFs. There exists precedent in the WTO

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[63] *Id.,* 17.

[64] *Id.* For example, some countries have explicitly excluded foreign government ownership from the scope of their GATS commitments in a few sectors. The United States' commitment states that government owned or controlled insurance companies, whether US or foreign, are not authorized to conduct business in a large number of states, and in basic telecommunications and radio or television broadcast services licesnes may not be granted to or held by foreign governments or representatives thereof.

[65] *Id.*

[66] *Id.*, 18.

system dealing with state involvement in commerce. For example, Article XVII dealing with governmental agencies details rules that ensure that governmental agencies do not distort international trading pattern and act in a transparent and commercial manner. However it would be better institutionalize the Santiago principles into the multilateral framework. It is difficult to predict at this juncture whether such a move would be approved by the SWFs since the basis of framing such best practices during its time was to be its voluntary nature. SWFs would perceive any move to institutionalize the same and make it enforceable as an erosion of its negotiating capital. Only negotiation dynamics will finally conclusive resolve this impasse. Aaditya Matto and Aravind Subramanian further argue that given the novelty of issues involved the multilateral rules governing SWFs should be formulated broadly and avoid intrusive detail.[67]

Lastly, with regard to dispute settlement within the WTO, concern exists as to whether the institution has sufficient expertise to adjudicate on matters relating to investment. However, as has been the case where the dispute settlement body has sought the assistance of other international institutions notably IMF for BOP or WIPO for intellectual property cases, assistance of ICSID could be sought in such investment disputes.

VII. CONCLUSION

"*A journey of thousand miles begins with a single step*" – Lao Tzu

The whole debate regarding Sovereign Wealth Funds presents a golden opportunity to re-ignite the multilateral initiative at the global level that has been rudely consigned to the fringes in the recent past. The return of economic nationalism presents a somber state of financial affairs in the world. The recipient countries should recognize and acknowledge the SWF interests and their intentions in participating in the financial system as

[67] *Id.*, 19.

purely commercial players. The schizophrenic attitude of western economies should give way to pragmatism since SWFs are here to stay and if handled properly could be hugely beneficial restructuring the financial architecture this century. SWFs on the other hand should also conform to expectations and resist from making any "political investment" even though there may be great potential in it. Each side would have to concede some amount of ground from their current position in order to make this multilateral initiative a success. This in turn, could be a launching pad for global co-operation in further endeavors and contentious issues such as negotiations on service sector. The opportunity provides both SWF and recipient countries a chance to laugh together; it should not be squandered in pursuit of a last laugh by either.

A COMMENT ON BALDEV SINGH & OTHERS V. STATE OF PUNJAB[1]

M. Abijnan* and Abhinav Singh*

Whenever an accused is found guilty of an offence, the major question which arises is that of the appropriate sentence which is to be imposed on the convict. After trial is over in criminal process the last stage is left is sentencing which is no doubt much difficult as well as complex process. Judges must look into the various factors including the nature of the offence, the manner and circumstances of commission of the offence, gravity of the offence, his past, character, his family background, intention and motivation for the crime etc. All the legal system of the world grant a wide discretion on the judges to award the appropriate sentence But sometimes the discretion becomes so wide and unregulated that the result would be wide discrepancy and variation in sentences. This is not at all desirable for a criminal justice system and a solution to this problem needs to be found at the earliest.The case under comment is an outstanding example of "disorder"in sentencing rapists in the country. It shows the lack ofuniformityon the part of the Indian judiciary in dealing with the offence of gang rape. The decision has been delivered at a time when the incidence of rape cases is rising at an alarming rate.

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[1] A.I.R. 2011 S.C. 1231

The factual matrix of the case is as follows. The prosecutrix was coming to her house after answering the call of nature at about 6.30 A.M. in 1997.The three appellants caught her and took her into a house and committed rape. The Sessions Court convictedthe appellants and sentenced them to 10 years of rigorous imprisonment (hereinafter referred as "R.I.") and to pay a fine of Rs. 1,000/- each. The sentence wasupheld by the High Court. On appeal a Division Bench of the Supreme Court comprising of MarkandeyKatju and GyanSudhaMisra JJ.reduced the sentence to the period already undergone which is 3 and a half months.However each of the appellants was directed to pay a sum of Rs 50,000 each to the victim by way of enhancement of fine to the victim envisaged under Section 376 of the IPC itself. The court wrote a very short and puzzling judgment.

In the case under comment the court relied on the following facts in awarding the subminimum sentence:

> "*The incident is 14 years old. The appellants and the prosecutrix are married (not to each other). The prosecutrix has alsotwo children. An application and affidavit has been filed before us stating that the parties want to finish thedispute, have entered into a compromise on 01.09.2007, and that the accused may be acquitted and now thereis no misunderstanding between them. Section 376 is a non compoundable offence. However the fact that theincident is an old one, is a circumstance for invoking the proviso to Section 376 (2) (g) and awarding asentence less than 10 years which is ordinarily the minimum sentence under that provision, as we think that there are adequate and special reasons for doing so*".[2]

The Indian Penal Code, 1860, provides that whoever commits rape shall be punished with imprisonment of either description for a term which shall not

[2] *Baldev Singh & Ors.* v. *State of Punjab,* A.I.R. 2011 S.C. 1231, 1232.

be less than 7 years but which may be for life or for a term which may extend to 10 years and shall also be liable to fine.[3] For the special category of cases covered under Section 376 (2), the sentence cannot be less than 10 years but which may be for life and shall also be liable to fine. Enhanced sentences for gang rape were introduced by way of an amendment in 1983.[4]

If we take the facts relied on by the court one by one, none of them seems to be special or adequate. The benefit of the long pendency of the case has been given to the convict. The case took 14 long years to be finally decided and settled by the Supreme Court. Our criminal justice administration system alone is to be blamed for the long pendency of the cases. Delay in proceedings is very common in the Indian judicial process. Hence it should not be considered as a mitigating factor in reducing the sentence. The convict should never be allowed to enjoy the benefit arising out of delay in proceedings because this may in turngive an incentive to the accused in delaying proceedings.

The compromise entered into by the parties is another factor based on which lesser punishment has been awarded. The court relies on the fact that "now there is no misunderstanding between the parties". The court ought not to have considered this factor. Rape is a non-compoundable offence. A crime is an offence against the society and is not a matter to be left for the parties to compromise and settle. Whether the consent given by the victim in compromising the case is a real consent is yet another question to be looked into. She might have been pressurised by the convicts or the trauma undergone by her all the years might have compelled her to opt for a compromise. The court has indirectly compounded the offence by using the discretionary power in awarding sub-minimum sentence. In effect the court has entertained plea bargaining between the accused and he victim. This goes against the legislative mandate because even though the legislature had

[3] PEN. CODE § 376(1) (1860).
[4] The Criminal Law (Amendment) Act, 1983, No. 43, Acts of Parliament, 1983.

introduced plea bargaining into the criminal justice system, it had clearly exempted crimes against women from being subject to a plea bargaining[5]. The judgment would be a blessing in disguise for the rapists. They can negotiate and bargain with the victim and the case can be settled for a pretty sum.

The third reason quoted by the court is that the victim is married and has two children. The facts are silent as to whether she got married prior to the incident or not. The fact that the victim was married ought not to have been considered as a relevant factor in mitigating the sentence. The court seems to have proceeded on the wrong assumption that married women's chastity has no value at all. It may be true that in the case of unmarried girls, being subjected to rape affects their prospects for marriage. Equally relevant is the fact that in the case of married women their husband and children are also specially affected and mentally wounded. Any rape incident affects the family and social prestige of the woman. The right not to be raped is a fundamental right of every woman, irrespective of whether she is a virgin or a married person.

In *Bhupinder Sharma* v.*State of Himachal Pradesh*[6], the Supreme Court reiterated that in order to exercise the discretion of reducing the sentence provided in I.P.C. for rape, the Court has to record "adequate and special reasons" in the judgment. Subminimum sentence cannot be awarded on the ground of fanciful reasons. The reason recorded by the sentencing court has not only to be adequate but also special. The Supreme Court observed that what is adequate and special would depend upon several factors and no strait-jacket formula can be imposed.[7]

In *State of M.P.* v.*Bala*[8],the trial court convicted the accused and awarded a sentence of 10 years R.I. and a fine of Rs. 3,000/-and in default to undergo

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[5] CODE CRIM. PROC. § 265 A (1973).
[6] *Bhupinder Sharma* v. *State of Himachal Pradesh*, A.I.R. 2003 S.C. 4684.
[7] *Id.* at 4688.

R.I. for a further period of six months under Section 376(2)(g) I.P.C. The High Court partly allowed the appeal and while upholding the conviction of the accused on various counts reduced the sentence to the period already undergone which is nearly 9-1/2 months. On appeal the Supreme Court set aside the order of the High Court and remanded it back to the High Court for a fresh hearing.

The Honorable Supreme Court also said that

> "*The crime here is rape. It is a particularly heinous crime, a crime against society, a crime against human dignity, one that reduces a man to an animal. The penal statute has prescribed a maximum and a minimum punishment for an offence under Section 376 I.P.C. To view such an offence once it is proved, lightly, is itself an affront to society. Though the award of maximum punishment may depend on the circumstances of the case, the award of the minimum punishment, generally, is imperative. The provisos to Section 376(1) and 376(2) I.P.C. give the power to the court to award a sentence lesser than the minimum for adequate and special reasons. The power under the proviso is not to be used indiscriminately or routinely. It is to be used sparingly and only in cases where special facts and circumstances justify a reduction. The reasons must be relevant to the exercise of such discretion vested in the court. The reasons must be set out clearly and cogently. The mere existence of a discretion by itself does not justify its exercise. The long pendency of the criminal trial or the offer of the rapist to marry the victim are not relevant reasons. Nor is the age of the offender by itself an adequate reason*".[9]

The I.P.C.does not lay down the sentencing policy to be followed with respect to the offences, but leaves it to the discretion of the judge. Discretion

[8] A.I.R. 2005 S.C. 3567
[9] *Id.* at 3569.

oriented sentencing is idealistic in spirit as it enables the court to individualise the penal measures in its proper sense. Individualisation of punishment should not degrade into liberalization of punishment. The Apex Court, while awarding the punishment for rape should not forget the unimaginable trauma, degradation and humiliation suffered by the victims of rape. The legislative history of the amendment points the need for strictly interpreting the term "adequate and special" reasons. If a compromise is taken as "special and adequate reason" we would be going back to the pre-1983 situation which saw many *defacto* rapists escaping the clutches of law. The author strongly feels that a compromise entered into between the rape victim and the offender shall not be taken as a valid ground for awarding subminimum sentence. Rape is a crime against the entire women folk and the society at large. In the present case under comment, the Honourable Supreme Court has acted against the legislative mandate. Entertaining the compromise made by the rape victim and the accused is a clear case of abuse of judicial discretion. The Supreme Court went wrong in allowing the parties to settle the issue by themselves. The Apex Court must realize that "loss" suffered by the victim of rape cannot be restored by directing the offender to pay a hefty sum. Issuing such directions would only reflect the insensitivity of thejudiciary to the immeasurable agony of the rape victims. Rape is not a fit case to apply the restorative principles of justice. If at all some compensation is awarded to the victim, it can only be in addition to the minimum sentence provided and not a substitute for it.

The Supreme Court in *KamalKishore* v. *State of Himachal Pradesh*[10] observed:

> "*The expression "adequate and special reasons" indicates that it was not enough to have special reasons, nor adequate reasons disjunctively. There should be a conjunction of both for enabling*

[10] *Kamal Kishore* v. *State of Himachal Pradesh*, (2000) 4 S.C.C. 502.

> *the court to invoke the discretion. Reasons which are general or common in many cases cannot be regarded as special reasons. What the Division Bench of the High Court mentioned (i.e. occurrence took place 10 years ago and the accused might have settled in life) are not special to the accused in this case or to the situations in this case. Such reasons can be noticed in many other cases and hence they could be regarded as special reasons. No catalogue can be prescribed for adequacy of reasons nor can any instance be cited regarding special reasons, as they may differ from case to case*".[11]

The judiciary when dealing with an offence involving mainly social concern should absorb the legislative spirit and award due punishment considering the gravity of the concerned offence and its consequences on the society. Imposition of sentence regardless of its result on the social order will turn out to be counter productive.Offences such as gang rape require exemplary treatment. Any liberal attitude towards such heinous offenders will go against societal interest.In dealing with heinous crimes, deterrence and prevention should be the prime objective of punishment. Punishment should be commensurate with the gravity of the offence and its impact on society.The observation of the Supreme Court in an earlier case is worth quoting.In *Earabhadrappa* v. *State of Karnataka*[12], the Court observed,

> "*A sentence or pattern of sentence which fails to take due account of the gravity of the offence can seriously undermine respect for law. It is the duty of the court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment as a measure of social necessity as a means of deterring other potential offenders*".[13]

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[11] *Kamal Kishore* v. *State of Himachal Pradesh*, (2000) 4 S.C.C. 507
[12] *Earabhadrappa* v. *State of Karnataka*, A.I.R. 1983 S.C. 446.
[13] *Id.* at 452.

Though we can be proud of our past culture, the epoch of worshipping and respecting womanhood, cases of molestation and rape are gradually increasing and respect for womanhood in our country is on the decline.decorum and morality in public and social life can be protected only if Courts deals strictly with those who violate the social and legal norms.The judgment in case of *Baldev Singh &Ors.* v. *State of Punjab*[14]needs to be reviewed in this context.

[14] *Supra* note 1.