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Editorial

Future empires are empires of mind. A prosperous country is one which has more intellectual property than material property; number of patents are more meaningful than number of missiles. Innovation, excellence and inclusion are prime concerns of every society and in particular for any profession.

Legal profession in particular demands new ideas, interpretation and great intellect. Law changes with the change in the society. Law is not an antique to be taken down, dusted, admired and put back on the shelf. It is a dynamic instrument for bringing about development; the development which is not confined to economic growth, but reaches out to every human being in the country. The focus of law must be human beings. Law is not abstract; it is not a set of mechanical rules. It has a social purpose and an economic mission. Therefore, in a developing country like India, law must be dynamic and not static. Law must not be inhibited by the past; it must look out into the future, and satisfy the hopes, aspirations of the people. As observed by Cardozo: "The inn that shelters for the night is not the journey's end, law like the travelers must be ready for tomorrow."

The intellectuals of the society owe a moral duty to review and redesign the law as per the demands of the society. Researchers are true parents of modern legislation. One idea, one innovation and one new interpretation can change the lives of millions. Justice for all is justice for me.

Through Bharati Law Review every effort has been taken by us to inspire the young researchers to pen down their thoughts of innovations to promote quality in the content of law. Laws are not dead letters; they must breathe for the society.

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BHARATI LAW REVIEW

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LEGAL EDUCATION: SUCCESS OR FAILURE*

Justice Devi Prasad Singh**

A recent newspaper report reveals that 41,000 citizens displaced and left their parental house to the refugee camp on account of the Muzaffarnagar riots. The video displayed on television remind the days of partition of India in 1947. The sad part is that persons staying in the relief camp (38,000 in number) are not ready to return to their native place.[1]

The first riot took place in the year 1969 in Gujarat. Justice Jagmohan Reddy's Commission indicted biased role of the police. Again in 1970 riots took place in Bhiwandi, Jalgaon and Madad. The vicious 1984 anti-Sikh riot which is splotch on Indian democracy still not healed up. The Bombay riot of 1992 was investigated by Justice Srikrishna. Justice Ranganath Mishra's Commission submitted its report with regard to 1984 anti-Sikh riot. The 2002 Gujarat riot still hunting the nation. The Human Rights Commission of India indicted the "police role". The commission after commission questions the prejudiced role of police or the people's representatives. It continues even today in the form of Muzaffarnagar riots.

According to a report there is 11.64% in the cases of kidnapping and abduction. Rape has been increased manifold to the extent of 55% than previous years. Increase of theft, robbery and other cases under the Indian Penal Code, 1860 are 33.46%, 37.39% and 37.36% respectively than previous years. Attempt to murder has been increased by 11.46%.[2]

Billions of rupees have been stashed away abroad without any punitive action and punishment. Scam after scam exposed only because of judicial intervention.

The 10% poorest in urban area has been assessed at expenditure at the rate of Rs. 23.4 per day whereas, the expenditure of 10% or richest urban people has been assessed at the rate of Rs. 255 per day. According to a report the expenditure of top 10% of urban

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* Circulted in the meeting of Legal Education Committee of Bar Council of India presided by Hon'ble Mr. (Dr.) Justice B.S. Chauhan on Sept. 21, 2013.

** Judge, Allahabad High Court, Lucknow Bench, Lucknow.

1 *Indian Express*, Sept. 13, 2013.

2 *Hindustan Times,* Sept. 15, 2013.

population is 10.11 times more than the bottom 10% of population in 2011-12; though in 2004-05 it was 8.41 times. This shows the increasing gap between rich and poor. According to National Sample Survey Organization (NSSO) disparity in expenditure between the richest and poorest has increased more in urban area than in rural area.[3]

The reason which may be inferred is because of corrupt practices among the people who matters for the society. Because of disparity in income there shall be conflict between haves and have-nots in due course of time; that too under the increasing population growth of the country. Crimes committed by poor are in the form of theft or robbery whereas, crime committed by the rich are in the form of tax evasion, environmental crime and financial crime or misappropriation of government fund by corrupt practices. Among the intellectuals a thinking have been developed, which seems to more dangerous, that sometimes laws are framed to save the persons in power.

A recent editorial of *Hindu*[4] voiced:

> "Large sections of India's political class live a life of ill-gotten wealth and undeserved privilege, whether they are in power or not. In the unlikely event of their getting convicted for corruption, they carry their VIP status with them to prison."

According to recent survey young are despondent and fade up with democracy. They prefer dictatorial regime to tap corruption and ethnic violence.[5]

In an article, an eminent Professor and Chairperson of the Centre for Criminology and Justice at the Tata Institute of Social Sciences, Mr. Vijay Raghwan, has observed:

> "There is also a theory that "relative deprivation" coupled with processes of marginalization can lead to anti-system feelings, which in turn can pull one into crime. On the other hand "rational choice theories" state that human beings have an ability to think rationally and choose options and life courses based on cost-benefit analyses. These theories emphasize that while extenuating for criminogenic behavior individuals act on the basis of benefits that would accrue to them-money, status, power, sexual pleasure, excitement; and the costs they would have to pay in terms of social

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[3] *Id.*
[4] Sept. 17, 2013.
[5] *See supra* note 4.

> or legal sanctions-arrest and imprisonment and loss of livelihood or self-image."[6]

The learned author further writes:

> "[B]ut the larger emerging picture is that crime is increasing in both rural and urban areas. In the latter, property and profit-oriented crimes are on the rise due to the greater influence of a consumerist society. The acquisition of more wealth is an inspirational goal for most, and we celebrate the idea of getting rich. But the means to achieve the same are limited."[7]

It is the matter of deep concern for the Bench and the Bar, both to ponder over the alarming situation of the country. We have been failed to provide effective administration of justice because of blind pursuit of western jurisprudence. It requires all-encompassing discussion.

We are living in a global village. A thing happened at the distance of thousands of kilometer affects the society globally. There is cultural invasion, diffusion and overlapping. With the expansion of Articles 14 and 21 of the Constitution if India by catena of judgments of the Supreme Court of India, now almost every state-action is subject to judicial review. Complicated questions involving science and related development, environment, forestry, banking, social problems often come to courts.

Democracy works when citizens and the most marginalized people have the capacity to ask questions, seek accountability from the state, and participate in the process of governance. Democracy becomes meaningful when people can shape the state and the state in turn, creates enabling social, political, economic and legal conditions wherein people can exercise their rights and achieve freedom from fear and want. Democracy is not merely elections or universal adult franchise. Democracy involves dignity, diversity, dissent and development. Unless the last person can celebrate his or her sense of dignity, exercise democratic dissent and involve themselves in the process of governance and development, democracy becomes an empty rhetoric.

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[6] *See supra* note 4.
[7] *See supra* note 4.

The eminent scholar Jill I. Goldenziel, a lecturer of Boston University School of Law, at Harvard College observed:[8]

> "Where autocracy reigns or its specter still looms, elections cannot serve as a true check by the people on either executive or legislative power, as they are likely to be manipulated in favor of the regime, and are thus unlikely to serve as an accurate mirror or public opinion. Elections may also be infrequent, since the executive often has the power to dissolve parliament at will and control the timing of elections. Moreover, legislatures are too weak to delegate authority over issue areas to courts. Interactions between interest groups, the judiciary, and the legislature in these regimes thus cannot follow the structural models proposed in the literature based on democracies."

These words of Mr. Goldenziel, remind us to be vigilant; make consistent research/effort to meet the challenges by innovating and evolving new arena in the field of law.

With the tremendous pressure on the courts with tremendous responsibilities wherein citizenry view the court as last resort for oppressed and bewildered, we have to innovate law keeping in view our own ground realities.

In this fast growing society where bottom change has taken place, the Bench and the Bar both have to cope up with the different situation where mixed question of science, history, geography, psychology and sociology are cropped up. I remind what Justice V.R. Krishna Iyer said:

> "What mutations in the law can be achieved by a socially sensitive and creative judge while interpreting the laws is born but mode Society is so complex and changes so rapid that lawyers and judges have to keep abreast of the expanding frontier of law since all of life unravels in court in knotty tangles. Instead of leaving the law functionaries to cope with the inevitable gap between their mental kit and the new knowledge and technology, and to avoid the social and economic costs of professional ignorance an American writer has argued the case for judicial education. His plea for imparting to know the working of the judiciary through seminars, collegiate courses, workshops and other programmes applies to our country as well."

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[8] *The American Journal of Comparative Law,* [2013] 61 The American Society of Comparative Law, Winder 7, 8.

Not only the law students but lawyers and judges are also required regular upgrading of their knowledge in the changing scenario. Judge Jerome Frank[9] wrote:

> "I suggest that we should at once set about contriving methods of avoiding the avoidable tragedies cause by lack of systematic training of trial judges ….. Such a man should be specially educated for that job…..[H]e should be taught not only what a law student now learns–that is much about upper courts, the legal rules, the values, the policies and ideals which are or should be expressed in those rules-but also what no law school now teaches. He should be shown, in great detail, the problems, relating to the facts, which confront a trial judge, as they do not confront a higher court judge. He should learn all that is now known about psychological devices for testing the trustworthiness of witnesses as to their individual capacities for observation, memory and accuracy in narrating what they remember. He should be taught to be alert to the possibilities of using such devices, as they become improved, in trials….."

All efforts made in imparting education to law students are to imbibe multi-facet knowledge to the students, who in due course of time may reach to the Bench, comes through the Bar. Learned and scholarly Bar when join the Bench they become asset for the country. The assistance provided by the Bar during the course of hearing improves the quality of judgment; but it appears that the era of justices-Seervai, Palkhiwala, Setalvad or Khanna almost has gone. Innovative argument followed by innovative judgment seems to be at receding end. With the bulk of work and backlog judges are hard-pressed to indulge into research work. Bar has been commercialized. Similar situation was noted by Benjamin N. Cardozo in 1925 while delivering a series of lectures in Yale University, America (*The nature of the judicial process*). He tried to develop academic and research oriented atmosphere in the law colleges like Haward and Yale Universities. The effort made by the Supreme Court Judges of United States of America right from Benjamin N. Cardozo is giving fruit. We are far behind them. Every good judgment is opposed as the instrument of intrusion to legislative action under the garb of separation of power.

I wish to quote a passage from *Spirit of Law* written by Montesquieu which seems to be foundation of principle of separation of power. In case separation of power is considered in terms of Montesquieu

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9 [1889-1957], Federal Appellate Judge, the United State Court of Appeals, 2d. Fed. Cir.

doctrine, then it should be considered keeping in view the historical and ground realities of India and not the western principle mechanically. Montesquieu himself has said:

> "Law in general is human reason, in as much as it governs all the inhabitants of the earth; the political and civil laws of each nation ought to be only the particular cases in which human reason is applied. They should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another. They should be in relation to the nature and principle of each government; whether they support it, as in the case of civil institutions. They should be in relation to the nature and principle of each government; whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions. They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principle occupation of the natives, whether men, huntsmen, or shepherds; they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manner and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered."

We seem to have been failed to understand the doctrine of separation of power. Montesquieu spent almost 20 years in writing one treatise (*supra*). Every word and line of his book matters, and should be given meaning while preparing the curriculum of law students and writing judgments in the related matters.

While emphasizing to inculcate ethical, historical and cultural knowledge in the persons working in field of law, Benjamin N. Cardozo said:

> "The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. "Ethical considerations can no more be excluded from the administration of justice which is the end and purpose of all civil laws than one can exclude the vital air from his room and live." Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all. This is an old legend that on one occasion God prayed, and his prayer was: "Be it may will that my justice be ruled by my mercy." That is a prayer which we all need

to utter at times when the demon of formalism tempts the intellect with the lure of scientific order."

Let us learn from the observation made by giants of law while formulating our own destiny in the field of law based on our own ethics, culture, morality, history and ground reality. We should take lesson from our historical and cultural background while evolving law to meet the requirement of our country. The curriculum of law students should contain a broader historical background of the country and lesson which may be learnt from the mistake of our forefathers. Side by side a broader knowledge should be inculcated in the law students through curriculum with regard to science, geology, forestry, politics, psychology, sociology etc. Curriculum must be set so that in case in due course of time if an advocate adorns the seat of judgeship he may deal with varieties of the cases without any problem or assist the court as its officer. We should not forget that the role of judiciary is not only in making of constitution but also the democracy itself. The constitution and the law are being organic body unless students are educated with regard to different facet of society they can neither be a good advocate nor a good judge.

A nation where judiciary operates as the agent of government, and does not distinguish itself different than the other two wings of the government because of its knowledge, ability, good logic and integrity, not only democracy is compromised to large extent but judiciary in turn loses its legitimacy with due course of time, resulting in frequent street protest by the people for small causes, public lynching of 'crime committers' etc. The Bar and Bench becomes an eyesore in public eyes in case their integrity, ability and knowledge become doubtful in public eye.

India should take lesson from Arab spring and neighbouring countries where democracy is failing because of weak and fragile judiciary lacking in integrity, knowledge, ability and firmness to defend their constitution and innovate new law to meet the challenges.

The experience shows that standard of education of law colleges is not up to mark. More than 80% of lawyers appear in our court lacks merit, ability and knowledge to advance their argument up to mark. It is sorry state of affair. The Bar Council of India must look into it, to tone up the curriculum as well as the standards of education in the law colleges.

Ground situation of the country prima facie reveals that equality of law or equal protection of law is far away from satisfaction in

governance. Citizens are treated differently keeping in view their status, might and rights.

By the passing of day situation deteriorated because of stagnation in evolving law which may suits to our country to establish the rule of law. Things must start by inculcating knowledge in pursuance to curriculum, from the class room of the law colleges to the Bar Council followed by innovative judgments of country with the assistance of eminent and learned advocates.

DIGITAL REVOLUTION AND ARTIFICIAL INTELLIGENCE: CHALLENGES TO LEGAL EDUCATION AND LEGAL RESEARCH

Prof. Dr. A. Lakshminath*
Prof. Dr. Mukund Sarda**

Introduction

The quest for innovation marks the growth of human civilization. Ingenuity manifests itself in numerous ways, sometimes leading to spectacular revolutions. The transition from the era of the "idiot box" to that of the "thinking machine" as a consequence of the digital revolution is an instance of such a phenomenon. Unfortunately, there exists a dichotomy between the use of technology and even its access to different categories of people with the consequence that the advantages of information technology are not equally availed by all. This has led to a situation which is popularly known as the "digital divide", the implications of which are too obvious to be ignored. This concern is particularly relevant because the application of the software technology to serve the ends of justice can present an effective alternative to the beleaguered justice-delivery system and may be of significant assistance in achieving the merits of an ideal adjudication mechanism, which include, inter alia, timeliness, affordability and transparency of the judicial procedure.

The paper proposes a model legal counseling/judgment prediction system designed in such a manner so as to predict with considerable precision, the ends of a judgment. The model so designed, uses a system of scientific classification and a comprehensive catalogue of case details as its basic inputs and an inbuilt artificial intelligence-based programming to process the same. The paper further illustrates the idea and procedure underlying the same through schematic diagrams and sample cases.

The prospects are bright both for teaching and research in the application of computers. Inter-disciplinary studies in the area of the law and computers would provide a meaningful interaction between the legal academicians and technologists. Computers can be best used in two ways to assist the legal profession. One is the information

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retrieval system which can be developed with the help of law faculty and the computer science department. The second area in which computers can very usefully be employed is artificial intelligence system with which several types of stereotype cases can be decided with the help of computer programs to arrive at more objective and quicker decisions. The law faculty should actively engage in collaborative research with the computer science department. This needs to be pursued vigorously to design meaningful computerized programs as alternative dispute settlement mechanism.

Access to Justice

Access to justice, includes the meaningful opportunity, directly or through other persons:

1. to assert or defend a claim and to create, enforce, modify, or discharge a legal obligation in any forum;
2. to acquire the procedural or other information necessary:
   - **i.** to assert or defend a claim, or
   - **ii.** to create, enforce, modify, or discharge an obligation in any forum, or
   - **iii.** to otherwise improve the likelihood of a just result;
3. to participate in the conduct of proceedings as witness or juror; and
4. to acquire information about the activities of courts or other dispute resolution bodies.

Further, access to justice requires of courts or other dispute resolution bodies. Further, access to justice requires a just process, which includes, among other things, timeliness and affordability. A just process also has "transparency", which means that the system allows the public to see not just the outside but through to the inside of the justice system, its rules and standards, procedures and processes, and its other operational characteristics and patterns so as to evaluate all aspects of its operations, particularly its fairness, effectiveness, and efficiency.

Cornerstones for access to justice include lawyers, free dissemination of law and the judiciary. Now, lawyers are not practically accessible to all individuals in the society owing to structural failure of the legal system. Law develops its complexity with the society; nonetheless, dissemination technology of law is not as developed as sufficiently to satisfy demands of the society. The court is in a limbo in which impartiality and fairness to all parties constrain its role to assist unrepresented litigants.

Disruptive legal information technology and emerging Electronic Legal Information (ELI) may arise as the 4th cornerstone in face of the challenges; the other three being are lawyer, dissemination of law and judiciary. ELI refers to:

1. an integrated Electronic Law governing civil procedures and other areas of substantive law,
2. electronic legal document filings and evidence and
3. electronic court case status information.

ELI is transforming the existing cornerstones to their virtual existences, which take on new capability to face the challenges of high costs, delay and complexity.

To promote access to civil justice, disruptive legal information technology should be adopted and a positive right to access ELI be established. For unrepresented litigants, the use of ELI will put them in a better position to assess if legal assistance should be sought or it would be better to remain unrepresented. Should they choose to be unrepresented, ELI provides ease of reference of law and integrates law from their perspective. For represented litigants, they will have a greater access to information concerning activity of court proceedings and they will be in a better position to push progress with the availability of case status information and electronic court document filings.

Digital Revolution

The digital revolution offers significant opportunities to those who provide legal assistance and education to low-income people and communities. New technologies enable us to create higher quality work product, conduct better research, work more collaboratively, learn more readily, and–most important–serve clients more effectively. Clients and advocates alike can find relevant information on the Internet; programs can use a variety of new management and evaluation tools, and everyone can communicate more easily.

In the past ten years, our society has experienced a "digital revolution", the implications of which are as stunning as those of the industrial revolution, yet are even more remarkable because these changes are happening in a fraction of time.

Beginning with the affordable personal computer and taking a giant leap forward with the creation of the Internet and the web browser, this revolution has changed how we work, play, communicate, learn, and obtain goods and services.

Yet, the pace of change has not been the same in all sectors of society. Use of technology by the middle and upper class and by the West is significantly ahead of use by poorer people and people of colour, a gap that some observers have termed the "digital divide". On a corporate level, this gap looms equally large between the private sector and the non-profit sector. These technological advances have:

1. Enabled greatly expanded access to legal information for both advocates and clients through internet and e-mail technologies
2. Expanded access for clients by using telephones for screening, obtaining basic client information, referrals, and providing brief advice and services, and also by posting information on the Internet
3. Enabled better case management and data collection, along with automated templates for document creation
4. Improved communication between lawyers and clients through new telephone technologies, cell phones, and video conferencing
5. Facilitated staff and volunteer recruitment through e-mail and the Internet
6. Provided new avenues for outreach to clients and the public
7. Increased training opportunities for advocates
8. Created a greater sense of community through e-mail and the Internet

The uses of new technologies by the equal justice community in three functional categories can be discussed as follows:

1. Improving program and office management
2. Increasing access to assistance and information for advocates
3. Improving client education, preventing legal problems, and assisting prospective litigants

In addition to educating clients and communities about resources, the Internet can also provide people with information about their legal rights and about how to solve legal problems on their own when they are unable or unwilling to obtain an attorney. At the most basic level, brochures and manuals can be posted on websites, which is an efficient distribution and production mechanism.

Moreover, the potential of web technology exceeds simply improving access to what otherwise might be available in print. Computer can help *pro se* litigants[1] create attractive, properly formatted and

[1] Courts in American states on the East Coast, the Midwest, and the South generally refer to SRLs (self-represented litigants) as *pro se* litigants, from Latin meaning for oneself, or on one's own behalf. BLACK'S LAW DICTIONARY 1236 (7th ed. 1999).

persuasive court forms and pleadings. Computerized templates can use branching logic to take clients through the process of analyzing their case and providing the appropriate information to the court. Video screens can be used to show clients how to navigate through the courthouse, or even how to present their case. Audio files can present information in spoken form for clients who can't read (due to illiteracy or disability). These programs can be made available at courthouse kiosks, libraries, and anywhere a client can obtain access to the Internet. A multifaceted effort, including education, scholarship, resource development, and collaboration, can serve as a powerful catalyst for change, even when the total amount of resources available is relatively small.

Digital Revolution and Artificial Legal Intelligence

The gizmos of the digital age owe a part of their numeric souls to Dennis Ritchie (1941-2011) and John McCarthy (1927-2011), the machine whisperers. When Mr. McCarthy and Mr. Ritchie first developed an urge to talk to machines, people still regarded the word "digital" as part of the jargon of anatomy. If they no longer do, that is because of the new vernaculars invented to cajole automatons into doing man's bidding. In 1958, Mr. McCarthy came up with the list-processing language, or LISP. It is the second-oldest high-level programming language still in use today–one whose grammar and vocabulary were more perspicuous and versatile than the machine code early programmers had to use. A little over a decade later Mr. Ritchie created C.C. fundamentally changed the way computer programs were written; for the first time it enabled the same programs to work, without too much tweaking, on different machines; before, they had to be tailored to particular models.

Much of modern software is written using one of C's more evolved dialects. These include objective C (which Apple favours), C# (espoused by rival Microsoft) and Java (the choice for a host of internet applications). Mr. Ritchie and his life-long collaborator, Ken Thompson then used C to write UNIX, an operating system whose powerful simplicity endeared it to the operators of the mini-computers which were starting to proliferate in universities and companies in the 1970s. Nowadays, its iterations undergird the entire internet and breathe life into most mobile devices, whether based on Google's Android or Apple's iOS.

UNIX spurred the development of mini and later micro-computers. Mr. McCarthy always argued that the future lay in simple terminals hooked up remotely to a powerful mainframe which would both store and process data–a notion vindicated only recently, as "cloud

computing" has spread.

As for LISP, Mr. McCarthy created it with an altogether different goal in mind–one that was to talk back. Intelligently, LISP was designed to spark this conversation, and with it "artificial intelligence", a term Mr. McCarthy coined hoping it would attract money for the 1st conference on the subject at Dartmouth in 1956.

In 1962, he set himself the goal of building a thinking machine in ten years. He would later admit this was hubristic. Not that technology wasn't up to it, the problem lay elsewhere–in the fact that: "we understand human mental processes only slightly better than a fish understands swimming." An intelligent computer, he quipped, would require '1.8 Einsteins and one-tenth of the resources of the Manhattan Project' to construct.

Neither was forthcoming. Mr. McCarthy continued to tinker away at a truly thinking machine at Stanford. He never quite saw his dream realized. Mr. Ritchie had more luck. "It's not the actual programming that's interesting," he once remarked. "It's what you can accomplish with the end results."

Artificial Legal Intelligence

Legal reasoning involves case analysis in statutory as well as real world perspectives. The impact of real world perspective on case analysis poses serious challenges to knowledge engineers for building legal expert systems. A legal expert system intends to provide intelligent support to legal professionals. The proposed legal predictive system is an attempt to predict the most probable outcome of a case according to statutory as well as real world knowledge of the legal domain.[2] The system accepts the current fact situation of a case and analyses it interactively with legal personnel. This work introduces a frame-like knowledge structure, "lattice", with two-dimensional attributes. This paper contains a detailed discussion on "artificial intelligence-based" case analysis of theft cases in a real world perspective.

One of the basic principles of justice is that 'justice delayed is justice denied'. It is from this that the Supreme Court of India has carved out the fundamental right to speedier trial from Article 21 of the Constitution of India, 1950. The present adjudication process requires transformation in view of the high cost of legal services, baffling complication in existing procedures and frustrating delays in

[2] Brown v. Board of Education of Topeka, 347 U.S. 483 (1953).

securing justice. Formal adjudication should be more of a last resort than it has been in the past. In recent times, efforts have been made to develop alternate adjudication models in the form of *Lok Adalats*, *Nyaya Panchayats* etc. In this context, it is felt that alternate adjudication machinery can be augmented with modern computers for a greater extent of openness and accessibility thus lending credibility to the dependence of both government and people on these modes of alternate adjudication machinery.

Automation in the legal world was first proposed[3] at an International Symposium on Mechanisation of Thought Processes held at the National Physical Laboratory in Teddington, London. Law machines were classified by him into two types–documentary machines and consultation machines. Documentary machines are meant for legal information retrieval operations such as storing/retrieving legal provisions and supporting as well as opposing precedents relevant to the given case. A program FLITE (Finding Legal Information Through Electronics) was developed in 1964 as the earliest full text retrieval system for the U.S. Air Force. LEXIS and WESTLAW[4] are some of the recent commercial systems offering interactive retrieval through terminals at the customer's office. Intelligent support cannot be provided for the user while retrieving the precedents owing to the text matching (keyword search) technique followed in these systems. Hafner[5] proposed an AI-based conceptual retrieval system using individual case frames so that search for relevancy can be made based on a concept of the case rather than text matching of certain keywords. Considerable research work has thus been carried out and significant developments have taken place in the area of documentary machines.

However, no such significant progress can be claimed to have been made in the area of consultation machines which are meant for giving legal advice. The HYPO system developed by Rissland and Ashley[6] during the 1980s aims at helping an attorney to analyse a new case in the light of relevant precedents and accordingly generate outlines of arguments for both plaintiff and defendant. The JUDGE system,

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[3] L. Mehi, *Automation in the Legal World,* Proceedings of Symposium on Mechanization of Thought Processes at National Physics Lab, Teddington, London (1958).

[4] C.D. Hafner, *Conceptual Organization of Case Law Knowledge Bases, in* Proceedings of the 1st International Conference on AI and Law, New York: ACM, 35-42 (1987).

[5] *Id.*

[6] K.D. Ashley & E.L. Rissland, *Dynamic Assessment of Relevancy in a Case Based Resasoner,* Proceedings of the 4th Conference on Artificial Intellgience Applications, California, 208-214; K.D. Ashley, *Reasoning with Cases and Hypotheticals, in* HYPO. INT. J. MAN MACHINE STUDIES 34, 753-796.

developed in the late 80s by Bain[7] proposed modeling the sentencing ability of judges. This system identifies a binding precedent according to a set of salient features and suggests a commensurate sentence for being awarded in the case in hand. These two systems have been the most widely accepted legal consultation systems to date. But these and similar other consultation systems are oriented towards precedents and are based on a case-based reasoning paradigm.

A precedent can either suggest judgment appropriate to cases with similar current fact situation or it can point to an apt case-law to solve a particular technical ambiguity. These two aspects of the precedent are to be dealt with separately since the first aspect provides only the guidelines whereas the second provides the case-law that is binding on lower courts. The first aspect is emphasized in systems like HYPO whereas the second aspect is considered in system like JURIX[8] and Gardner's legal reasoning system.[9] Gardner's approach suggests that the case be analyzed keeping in view statute as well as relevant case-law. This system aims at giving decisions for "easy" cases, while the "hard" cases, cases which can be argued in either way by a competent lawyer, are left undecided. McCarthy's TAXMAN project[10] models deductive legal reasoning based on statute. The control strategy of legal systems determines the applicability of those systems to various fields of legal domain–HYPO suits trade secret misappropriation. TAXMAN models the taxation of corporate reorganization. Gardner's system deals with formation of contracts by offer and acceptance. However, for certain other legal fields, legal reasoning involves analyzing the case through a real world perspective. Along with the statutory rules, various heuristics imposed by culture, region, conventions and the experience of judges are also to be considered while making the decision. Given the case proceedings/current fact situation, a highly structured legal reasoning system to analyze the case thereby predict the most probable judgment based on the statue and discretion of the judge is proposed in this paper. It is hoped that the proposed legal counseling system will be of use to our society in the following ways:

1. The system, by its ability to predict in advance the most probable outcome in a given case, will enable individual clients to decide about the advisability or otherwise of entering

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7 S.K. Srivastava, *Case-based Systems in Law: A Survey*, Project Report, Department of Electronics, New Delhi.

8 *Id.*

9 A.L. GARDNER, AN ARTIFICIAL INTELLIGENCE APPROACH TO LEGAL REASONING (Brandford Book ed., Cambridge, MA: The MIT Press 1987).

10 T. McCarthy, *The Taxman Project: Towards a Cognitive Theory of Legal Argument in Computer Science and Law: An Advanced Course* (B. Niblett ed., New York: Cambridge University Press 1980).

into a legal dispute in a given situation. This is turn will lead to reduced workload on the considerably over-bounded courts (e.g., Ayodhya case).

2. The system, through its ability to estimate the effect of each individual fact on the judicial decision (by simulating the judgment with altered current fact situation) can aid legal practitioners and criminal investigators in discharging their professional duties more effectively and efficiently.
3. The system, by providing an integrated view of the case through the highly structured representation of the current fact situation of the case, can be helpful to judges in taking faster decision thereby mitigating the hardship caused to the litigant public by delayed justice, the bane of the present judicial system (e.g., Ayodhya case).
4. The system can resolve petty litigations among people who cannot afford the money and the time required in the regular court proceedings, thus providing a computerized alternate adjudication system.
5. Based on the model proposed, a generalized system can be developed by drawing on the expertise of several meritorious judges, which in turn can be used to check the correctness of a specific judgment, so that the case may be reconsidered if necessary.

Proposed Legal System

The proposed system depicted in Figure 1 (APPENDIX 1) is a legal counseling system that accepts the current fact situation of the case from a legal practitioner and interactively proceeds to analyze the case based on statute and real world information. Processing of a case in a real world perspective demands interactive case analyze. This system aims at predicting the most probable judgment. It has to process the following three types of legal information regarding a case:

1. Technical information consists of particulars of sections of the relevant Act invoked in dealing with the case, i.e., the ingredients and evidence level at which each of the ingredients has been established. This information regarding a specific case can be represented as an instance of the section's decision lattice (D-lattice).
2. Non-technical information or the real world information of the case, such as the details of how and why the crime was committed can be represented as instances of the corresponding common sense lattices (C-lattice).
3. Formal general information regarding the sentential details of each section is represented as a sentencing lattice (S-lattice)

and it is of static nature.

When the user interacts with the system, the "shell" uses the C-lattice instances to accommodate the details of the real world information of the present case. "Evidence estimator" and D-lattice filler gets technical information of the present case from the "shell", and prepares the D-lattice instance representing the case in view of the relevant section. "Case strength evaluator" evaluates the corresponding D-lattice instance to measure the strength of a given case in accordance with the statute. The "discretion module" accommodates the experience-based real world knowledge of legal professionals as non-technical heuristics. "Credibility evaluator" applies these heuristics on the C-lattice instances of the cases to determine the credibility of the case. "Decision maker" suggests a decision on whether the accused has to be convicted or not based on the combined effect of strength and credibility of the case.

The judgment of a case includes the decision whether to convict or not as well as the sentence to be undergone by the accused, if necessary. If a decision to convict the accused is taken, the decision-maker enables the sentencing module. Severity evaluator processes the C-lattice instances of the present case to get a severity measure of the crime committed. Based on this measure, punishment will be meted out to the accused in accordance with the sentential norms contained in the relevant S-lattice. According to the norms provided by the S-lattice and the severity of the present case, sentencing will be made by the sentencing module.

Since human reasoning is being simulated in a specific domain, the system becomes an expert system[11] as its decision-prediction performance tends to that of a intelligent professional assistance to legal professionals and offers intelligent support to busy legal professionals while applying the regular domain specific techniques in case analysis so that they can concentrate better on critical aspects of cases. It this paper, the processing of non-technical knowledge to estimate the credibility of a case is dealt with in detail.

Knowledge Structuring

Non-technical knowledge of a case involves information regarding the details of the crime. This knowledge should be organized as a hierarchical system so that the details of higher level objects can be elaborated at lower levels. A highly accepted knowledge structure that

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[11] R. KELLER, EXPERT, SYSTEM TECHNOLOGY: DEVELOPMENT AND APPLICATION (Engelewood Cliffs, NJ: London: Yourdon, Prentice-Hall 1987).

can represent a complex object as a hierarchical system is "frame".[12]

1. Frames

Frames are one of the highly accepted knowledge representational formalisms in the field of artificial intelligence, in particular in computer vision and natural language understanding. A frame represents a complex stereotypical object/occurrence and its slots represent the stereotypical aspects of the object. A slot can contain another frame or an atom as its value at any of its various associated facets the facets act as directives to the inference mechanism. An instance of a frame represents a specific object/occurrence and each of its slots can accommodate the particulars of the associated aspect of the specific object. In case of the absence of an absence of an aspect in a class frame, it can inherit that aspect from its nearest ancestor. This value inheritance[13] property allows frames to avoid redundancy and to be concise. The value inheritance property makes the frames suitable for natural language understanding etc., where implicit knowledge retrieval is essential. The proposed legal system does not need the value inheritance since all individual facts of the case should be established explicitly. At the stage of predicting/making judgment the legal domain is a closed world and no attempts to establish the missing facts are allowed. Hence, the procedural attachment feature of frames in terms of domain etc., is also not necessary. Rather, the hierarchical knowledge structuring aspects of the frame suggest a new knowledge structure called "lattice" to represent the informal knowledge of legal domain.

2. Lattice

A class of objects/occurrences with a predefined set of attributes can be represented as a lattice. The specific information regarding a particular object/occurrence can be represented as an instance of the class lattice. The values of an attribute of the instance lattice can be filled, if and only if the corresponding class lattice supports that attribute (e.g., if it is a relevant attribute). Instead of unidimensional attributes, the lattice has two-dimensional attributes for the following benefits:

i. Two-dimensional attributes make the lattice more expressive and nearer to the natural way of representing legal information.

ii. Due to the modularly derived by the two-dimensional attribute lattice, it is preferred by domain/legal experts. Hence,

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12 E. RICH & K. KNIGHT, ARTIFICIAL INTELLIGENCE (2d ed., New Delhi: Tata McGraw-Hill 1991).

13 W.F. Tichy, 20(11) IEEE COMPUTER 43-54 (1987).

knowledge acquisition is convenient.

iii. Firstly, conversion of the domain expert's knowledge into internal knowledge structures is simpler for the knowledge engineer; secondly, checks for completeness and making modifications to the existing knowledge are more convenient due to the modularity.

The value of an attribute of an instance lattice can either be an atomic value or an instance of another lattice as dictated by the nature of the attribute.

3. Knowledge Representation

Non-technical information of a case involves details of the case in layman's view. This knowledge can be represented using various C-lattices. The set of C-lattices to represent theft cases are as follows:

i. **Case-Ref**: This lattice is at the topmost level in the lattice system. This has to be accessed by the reference number of the case.
ii. **Accused-name**: This lattice gives the details of the accused in this case. All relevant known information of the accused should be filled into various attributes of this lattice.
iii. **Execution-Ref**: This lattice accommodates the details of the commitment of the crime. These details are in turn structured into the three lattices-event-no, abettor's name, item-name.
iv. **Event-no.**: This lattice represents the details of a particular event such as when and where the event happened.
v. **Abettor-name**: This represents the relevant capabilities of the abettors of the case.
vi. **Item-name**: It represents the characteristics of a particular item of interest.

The C-lattices are shown in Figure 2 (APPENDICES 2a-2f).

4. C-lattice Operators

C-lattices provide the structure for organizing the real world/non-technical knowledge of a particular case. Each of these provides a general structure for a chunk of relevant non-technical knowledge. Several functions were developed in Common-LISP to operate with these lattices. The operations needed to store and retrieve the details of a case are as follows:

i. **(Intro-instance <ref-no> case-ref)**: This function generates an instance of case-ref lattice and identifies it with <ref-no>.
ii. **(Ct-put <lattice-id> <attribute-path) <value))**: This function is called while storing the details of a case. The value of the detail is stored in the identified lattice at the location according to the <attribute-path>. While storing, the function checks the

relevancy of the attribute-path. Automatic introduction of the value as an instance of its compatible lattice is done through this function.

iii. **(Ct-update <lattice-id> <attribute-path> <value>)**: This function can be used if a particular value of an attribute is found to be wrong and has to be deleted. The value will be deleted from the list of values of the attribute of the identified lattice.

iv. **(Ct-update <lattice-id> <attribute-path> <value>)**: This function can be used to overwrite the previous value of an attribute with a new value of <attribute-path> of the <lattice-id).

v. **(Ct-get <lattice-id) <attribute-path))**: This function will be used to fetch/retrieve the list of values of <attribute-path) of lattice identified.

vi. **(Ct-removelatt <lattice-id>)**: This function can be used to delete lattices that were introduced as sub-structures to the lattice-id in a cascaded way. This function will be of use in cases of withdrawal of a case or cases that are finalized.

5. Discretion Module

C-lattice instances associated with a case can be processed with the discretion module to evaluate the credibility of the case. The discretion module consists of heuristic knowledge of judges. This heuristic knowledge is represented procedurally over the C-lattice operators. Various chunks of heuristic knowledge are represented as individual "rules" and a rule either supports or opposes the guilt of the accused. Some of the heuristics useful for dealing with theft cases have been implemented in our legal system. They are as follows:

RULE 1

If	the belongings of the accused are found at the scene of occurrence of the crime
Unless	all of them are explained reasonably
Conclude	to increase the credibility of the charge/commission of the offence of theft.

RULE 2

If	the accused takes away less valuable items apparently leaving high valued items
Unless	there is a threat of being captured on the spot or the portability of the stolen item is more than that of

items untouched
or
the untouched items are easily traceable

Conclude to reduce the credibility of the case.

RULE 3

If the accused who is old/child/female forced stronger victims

Unless the accused is supported by a strong weapon or a chemical or an abettor

Conclude to reduce the credibility of the case.

RULE 4

If the presence of the accused is recorded at a place other than the scene of occurrence at reasonably the same time that the crime was committed (alibi)

Unless journey by any viable fast transport makes it possible to reach the destination within the stipulated time
and
the accused is healthy and capable of doing such a journey

Conclude to make the credibility of the case zero.

RULE 5

If the accused is not sound physically/mentally at the time of commission of the crime

Unless the experts certify his capability to perform all the required skills to commit the crime
or
abettor can help him with those skills

Conclude to reduce credibility of the case to a greater extent.

RULE 6

If time elapsed between entry and exit of the accused into the crime scene is less than the minimum expected duration of crime

Unless with the support of a familiar abettor or the accused himself is familier with the scene of crime

Conclude to make the credibility of the case zero.

RULE 7

If	the accused acquired/prepared a rare tool or vehicle that was used/suspected to be used while executing the crime
Unless	he lost it well before the occurrence of crime
Conclude	to increase the credibility of the case to a greater extent.

RULE 8

If	the accused did not acquire the required special skills
Unless	the skilled abettors helped him or an effective preparation to take care of the situation is recorded
Conclude	to reduce the credibility of the case.

RULE 9

While comparing the recovered items with the stolen items

1. If	some recovered items were found identical in all aspects to the stolen items
Unless	the accused proves his right of possession/ownership on all those items
Conclude	to increase the credibility of the case.
2. If	all recovered items differed from the stolen items in one way or the other
Conclude	to reduce the credibility of the case.

Credibility Evaluator

Credibility is a positive real number associated with each case to represent the "believability" of the case. For the sake of unbiased evaluation, the credibility of the case should be initialized to unity which neither supports nor opposes the guilt of the accused prior to evaluation. Then "credibility evaluator" selects the applicable discretion rules and executes them in an order dictated by the offence involved. In this process, the credibility of a case may increase/decrease in accordance with the execution of rules that support/oppose the guilt of the accused. The resultant credibility will be returned as a real number. If the resultant credibility is more than unity, the accused is more likely to be convicted and if it is less than unity, he may be acquitted. Credibility suggests the judgment in view

of non-technical information of the case. A sample session with credibility evaluator is given in APPENDIX 3.

Conclusion

Computer-based legal systems have to progress a long way to aid legal reasoning rather than legal information retrieval. The existing legal consultation systems are aimed at certain specific civil cases and a few of these systems attempt criminal cases. The distinctive feature of criminal cases as against civil cases is the increased effectiveness of non-technical matters in reaching the judgment. In this paper, a model of a judgment prediction system has been proposed. This model aims at analyzing a specific criminal case through technical as well as non-technical perspectives and accordingly, suggests the judgment. Co-accused cases are not considered in the present model. The components of the model to analyze the case through non-technical perspectives are implements in Common-LISP on the APPOLLO, NEXUS 3500. Though the sub-system developed is limited to handling theft cases, it can be extended to most other criminal cases.

APPENDIX 1

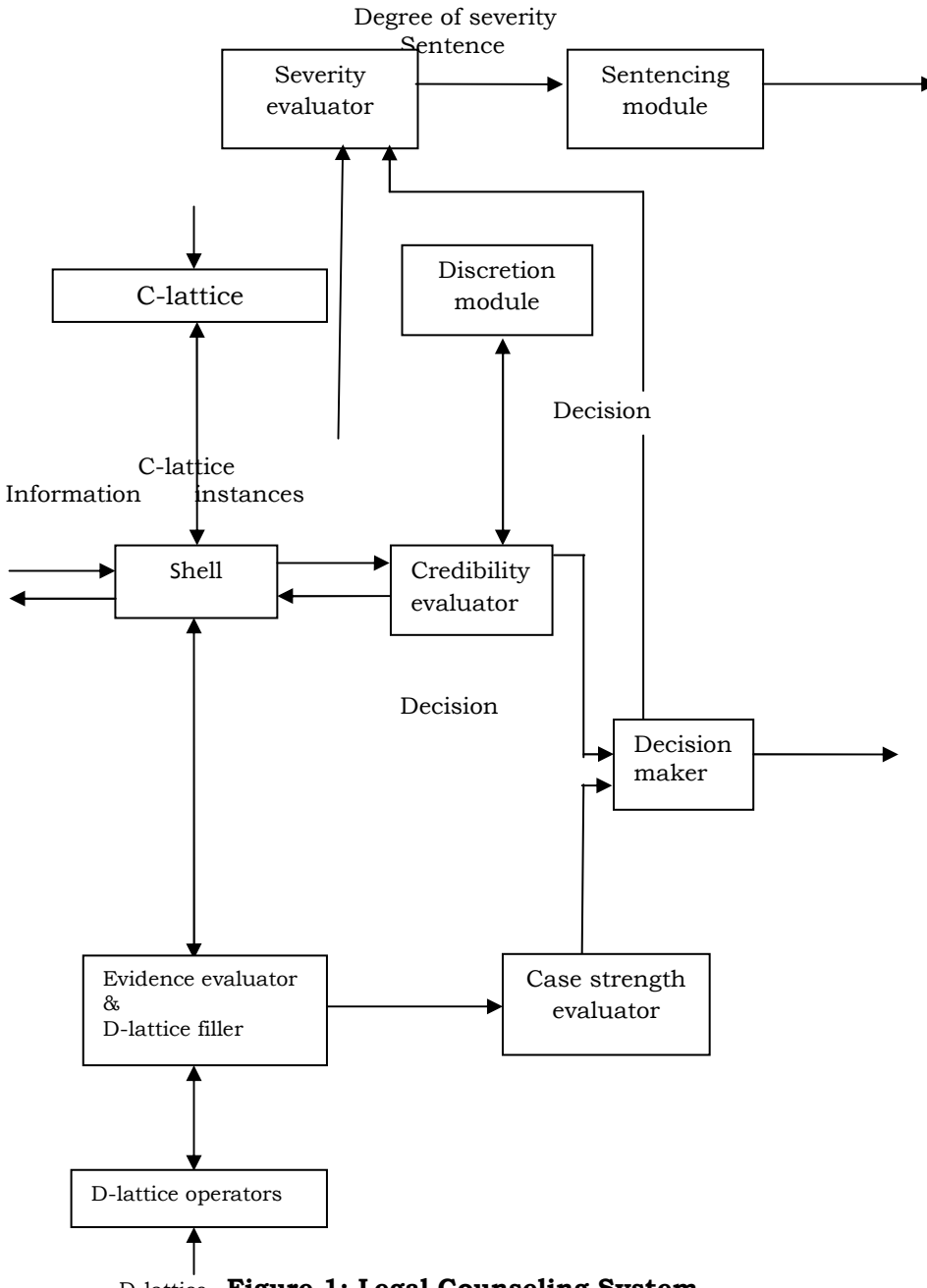

Figure 1: Legal Counseling System

APPENDICES 2a-2f

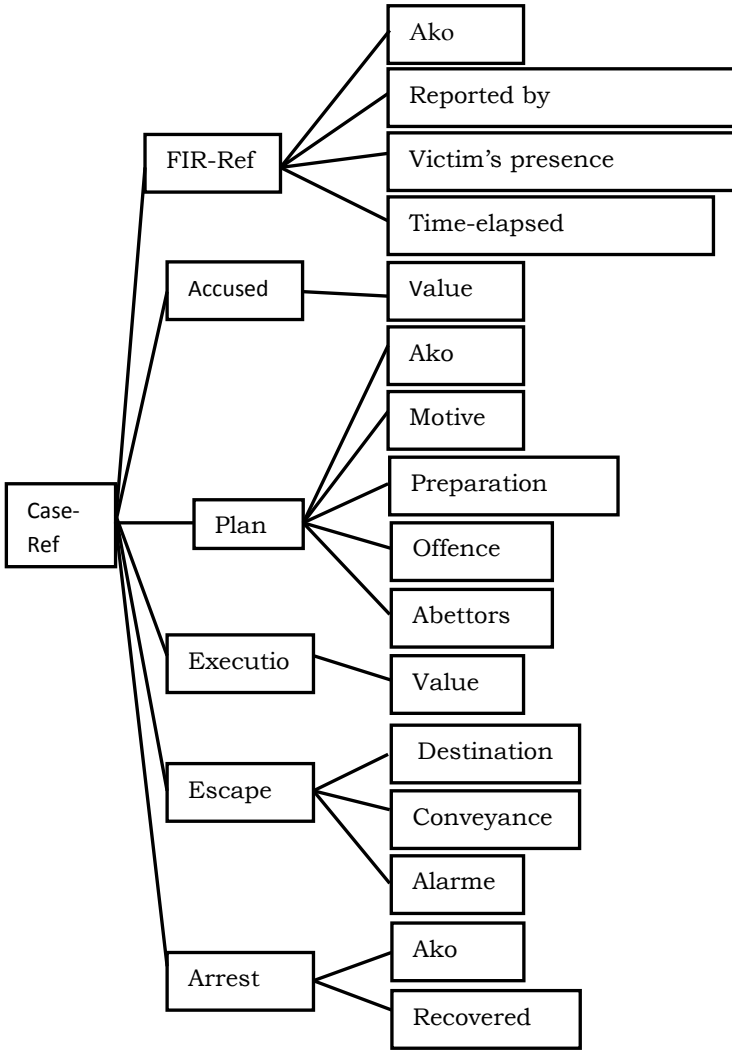

Figure 2a: Case Reference Lattice

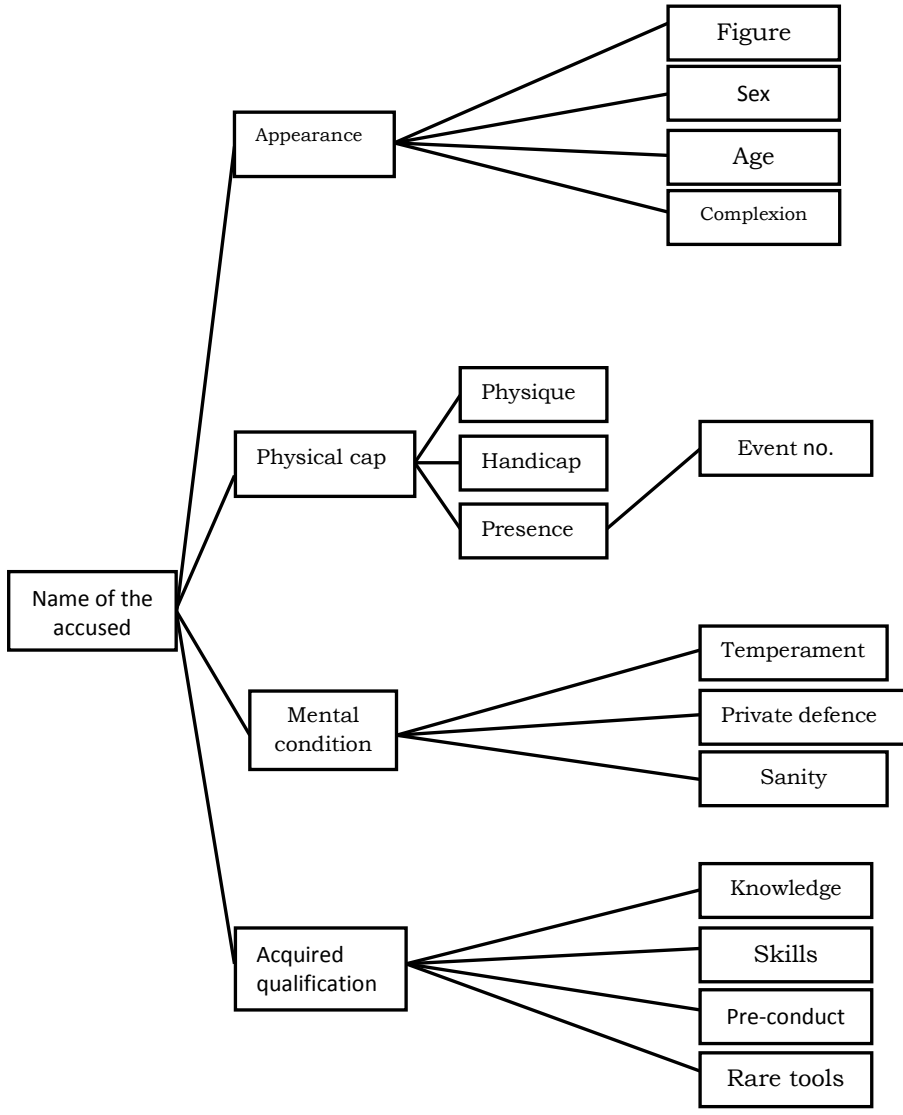

Figure 2b: Accused Name Lattice

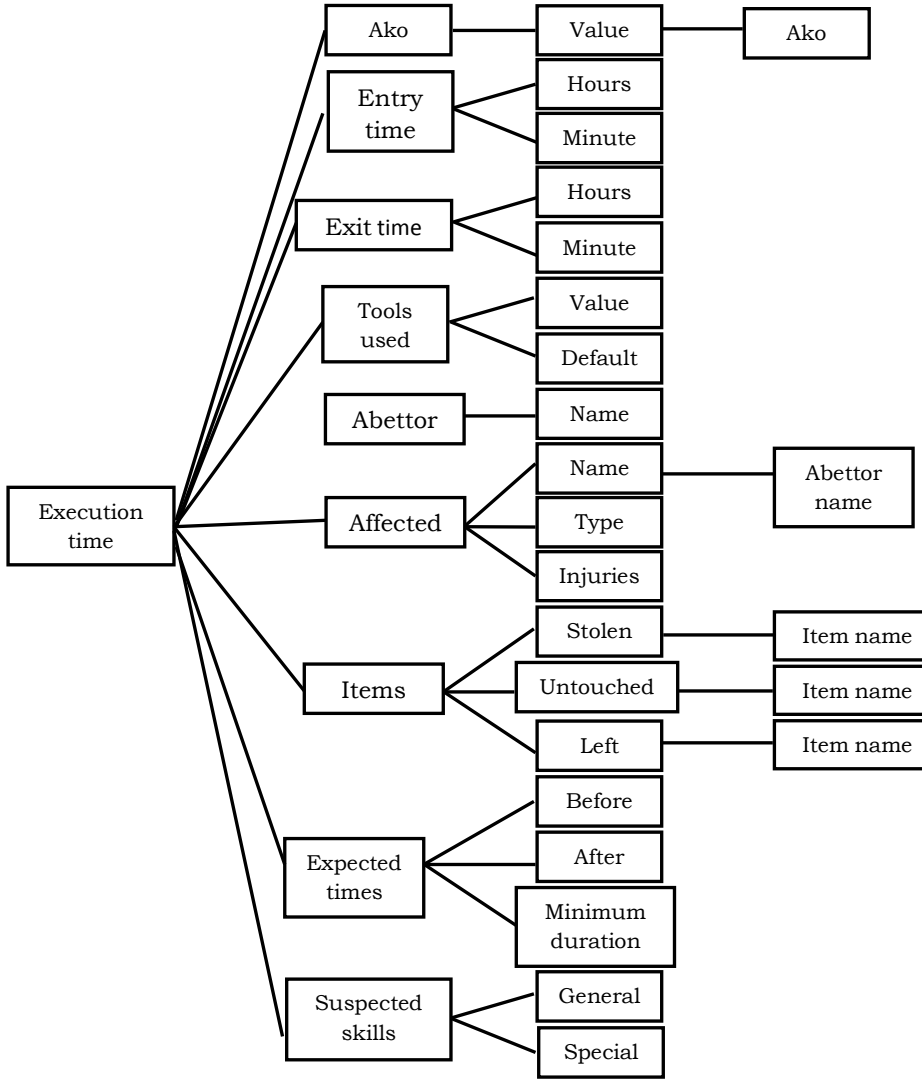

Figure 2c: Execution Time Lattice

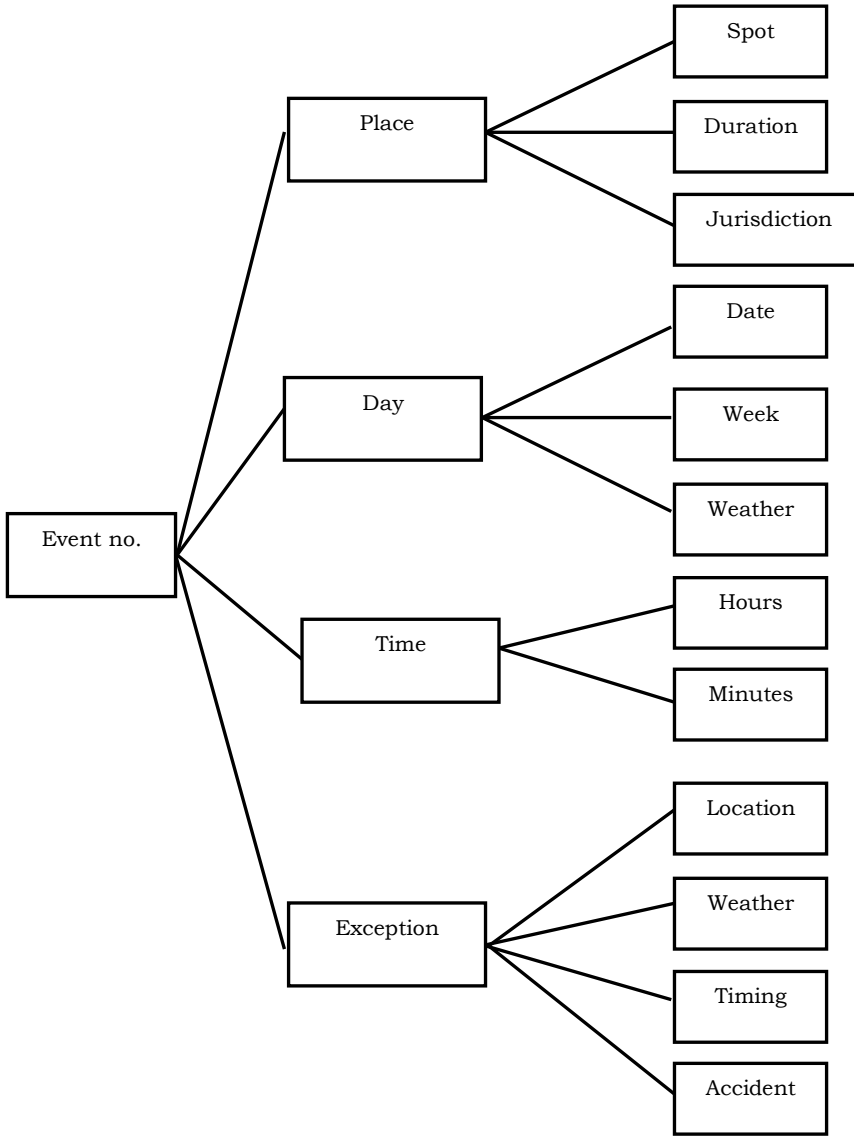

Figure 2d: Event Number Lattice

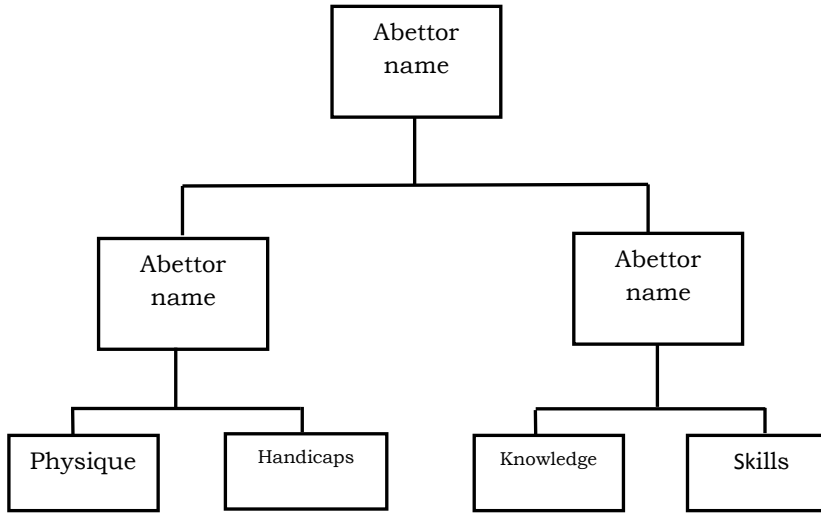

Figure 2e: Abettor Name Lattice

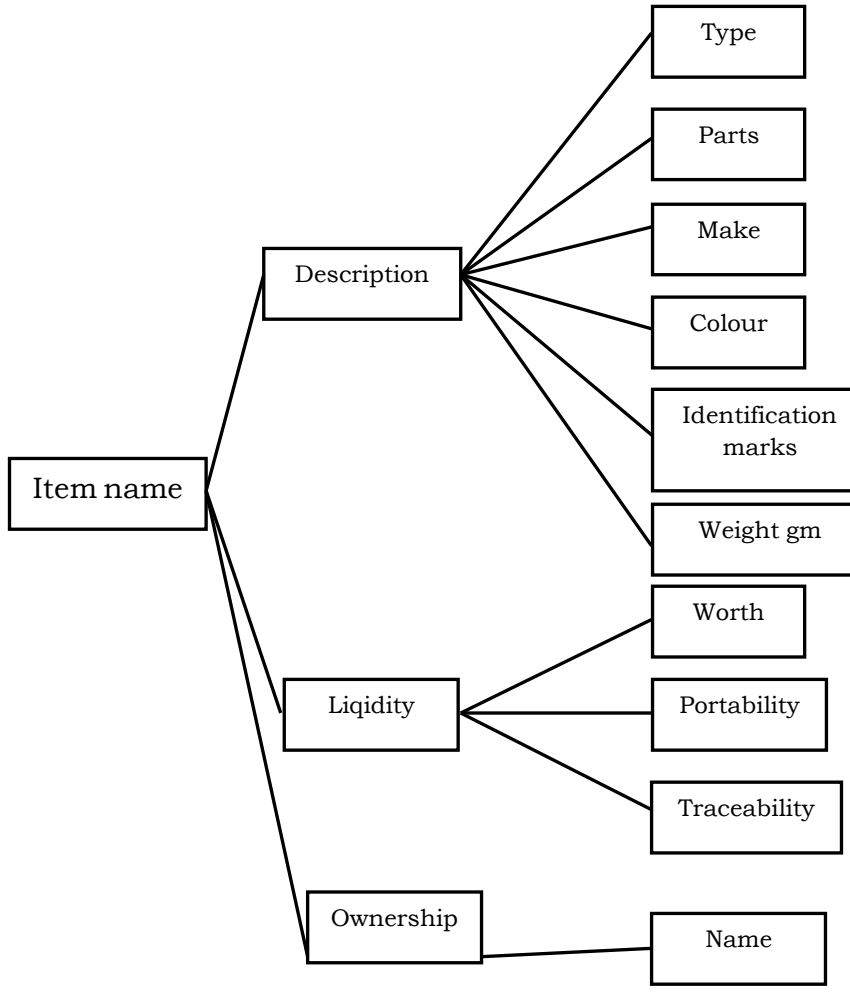

Figure 2f: Item Name Lattice

APPENDIX 3

Sample Cases

Non-technical information processing to estimate the credibility of theft cases is illustrated through the following sample cases with system.

CASE 1

Description of Case-1

On June 29, 1992, Monday, at around 2.30am, a theft happened in the house of Sri Ramesh, situated at Kankarbagh, Patna. While the inmates were sleeping, the accused entered the house through a ventilator with a rope, an abettor waited outside the house. The accused threatened the inmates with a sharp knife and stole a gold chain worth Rs. 10,000/- weighing 30gm a gold ring worth Rs. 3,000/- weighing 10gm bearing the identification mark 'Th' on it, and cash equal to Rs. 5,000/- when the watchman (*gorkha*) approached the house, the abettor heard him, signaled to the accused through a window and both of them escaped. Four silver plates worth Rs. 16,000/- weighing 2000gm were they were trying to sell a gold chain (weighing 29gm) and a ring (weighing 10gm) which were similar to the stolen articles. The victims of the offence recognized Pal, the offender. It was found that the rope left at the scene of the crime was bought by Pal two days prior to the day of the crime. The accused Pal (30) is a strong man. Though he is dumb and deaf, he is skilled in climbing heights with a rope. The abettor Raheem is skilled in liquidating gold articles.

C-Latticles Referenting the Case-1

```
(CIS-380      IS-A (VALUE (CASE-REF)))
              (ACCUSED (VALUE (PAL)))
              (EXECUTION.(VALUE (EX-I)))
              (ARREST (RECOVERED (RlNG2) (CHAIN2))
                      (AKO(Ev-2))
              (ESCAPE ALARMED(GORKHA))))
(PAL (IS-A (VALUE (ACCUSED-NAME)))
(APPEARANCE (AGE (30))
                      (SEX MALE)))
                      (PHYSICAL-CAP )
                      (PHYSIQUE (STRONG))
                      (HANDICAPS (DUMB-AND-DEAF)))
                  (ACQUIRED-QUAL (SKILLS (CLIMBING-WITH-ROPE))))
            (EX-l (IS-A (VALUE (EXECUTION-REF)))
```

```
            (AKO (VALUE (EV-l)))
            (ABETTORS (NAME (RAHEEM)))
            (TOOLS-USED (VALUE
            (ROPEl)(KNIFE)))
 (SUSPECTED-SKILLS (GENERAL (RUNNING))
                          (SPECIAL (CLIMBING-WITH-ROPE)
                          (LIQUIDATING-GOLD)))
(AFFECTED (TYPE (MALE) (FEMALE)))
 (ITEMS (STOLEN (CHAINl)
                              (RING 1)
                              (CASHl))
               (UNTOUCHED (SILVER-PLATES))
              (LEFT (ROPE1))))
 (EV-l(IS-A (VALUE (EVENT-
 NO)))
            (PLACE (SPOT (DWELLI NG- HOUSE))
                       (LOCATION (KANKARBAGH))
                       (JURISDICTION (PATNA)))
                       (DAY (DATE (29-6-92))
                      (WEEK (MONDAY)))
            (TIME (HOURS (2))
            (MINUTES (30))))
 (CHAIN 1 (IS-A (VALUE (ITEM-NAME)))
                (DESCRIPTION (TYPE (ORNAMENT))
                      (MAKE (GOLD-90))
                      (WEIGHT -GMS «30 0.95))))
                      (LIQUIDITY (WORTH (10000))
                     (PORTABILITY (VERY HIGH))))
 (RING 1 (IS-A (VALUE (ITEM -NAME)))
 (DESCRIPTION (TYPE (ORNAMENT))
                                  (MAKE (GOLD-90))
                                (WEIGHT -GMS «(10)))
                                  (ITEN- MARKS (TH)))
            (LIQUIDITY (WORTH (3000))
                       (PORTABILITY (VERY HIGH))))
 (CASH 1 (IS-A (VALUE (ITEM-NAME)))
            (LIQUIDITY (WORTH 5000))
                          (PORTABILITY (HIGH)))
 (DESCRIPTION (TYPE (MONEY))))
 (SILVER-PLATES (IS-A (VALUE (ITEM NAME)))
                               (LIQUIDITY (PORTABILITY (MEDIUM))
                               (WORTH (16000)))
```

(DESRIPTION (WEIGHT-GMS (2000))))
(ROPE (IS-A (VALUE (ITEM-NAME)))
(OWNERSHIP (NAME (PAL))))
(RAHEEM (IS-A (VALUE (ABETTER-NAME)))
(ACQUIRED-QUAL (SKILLS (LIQUIDATING-GOLD))))
(EV-2 (IS-A (VALUE (EVENT-NO)))
(DAY (DATE (OJ -7-92)))
(PLACE (JURISDICTION (DARBHANGA))))
(CHAIN 2 (IS-A (VALUE (ITEM-NAME)))
(DESCRIPTION (TYPE (ORNAMENT))
(MAKE (GOLD-90))
(WEIGHT-GMS (29))))
(RING2 (IS-a (VALUE (ITEM-NAME)))
(DESCRIPTION (TYPE (ORNAMENT))
(MAKE (GOLD-90))
(WEIGHT-GMS (10))
(IDEN-MARKS (TH))))

CASE 1. Evaluation follows in context 1.
> (evaluate' C1S-280)
ROPE 1 belonging to accused was found at the scene of occurrence.
Is this reasonably explained?
Indicate y/n. n

Does the deformity (DUMB-AND-DEAF) allow the accused to perform EACH and
EVERY ONE of the following tasks (even with the help of RAHEEM)?
(RUNNING, CLIMBING-WITH-ROPE)
Consult the experts and accordingly indicate y/n. n
It is assumed that the weight of RING 1 is exact.
Did the accused prove his ownership/right of possession regarding each of the following items?
(CHAIN2, RING 2)
Please indicate y/n. n

1.5625 is the value of credibility for the present case CIS-380.
THANK YOU!

CASE 1. Evaluation follows in context 2.

> (evaluate' CIS -380)
Rope I belonging to accused was found at the scene of occurrence.

Is this reasonably explained?
Indicate *y/n.* y
Does the deformity (DUM-AND-DEAF) allow the accused to perform EACH and
EVERY ONE of the following tasks (even with the help of RAHEEM)?
(RUNNING, CLIMBING-WITH-ROPE)
Consult the experts and accordingly indicate *y/n.* y

It is assumed that the weight of RING 1 is exact.
Did the accused prove his ownershiplright of possession regarding each of the following items?
(CHAIN 2, RING2)
Please indicate *y/n.* y

I is the value of credibility for the present case CIS 380.

THANK YOU!

CASE 2

Description of Case-2

On 2nd August, 1992, Sunday, at 8.15 p.m., a theft occurred in the house of Reddy, situated at Banjara Hills, Hyderabad. Reddy returned from his office with a briefcase containing one lakh rupees in his blue Maruti-92 car. After he relaxed for 5 minutes, he found that a man of 25 years of age was driving away in his car and immediately noticed that the briefcase containing the cash was missing. Through investigation, it was found that Geetha, the maid servant in the house, had dropped the briefcase and the car keys to help the accused. Three days later,one Rao was arrested with a similar red Maruti car in Warangal. The accused produced an alibi showing evidence that he was consulting a doctor in Tata Hospital, Bombay, on the day of the theft at 5.30 p.m.

C-Lattices Representing Case-2

(C2S-380 (IS-A (VALUE (CASE –REF)))
(ACCUSED (VALUE (RAO)))
(EXECUTION (VALUE (EX-2)))
(ARREST (AKO (EV-22))

```
                (RECOVERED (CAR2l))))
              (EX-2(IS-A (VALUE (EXECUTION-REF)))
              (ENTRY-TIME (HOURS (8))
                                (MINUTES (13)))
            (EXIT-TIME (MINUTES (15))
                                (HOURS (8))
            (AKO (VALUE (EV-20)))
            (ITEMS (STOLEN (CASH20) (CAR20)))
            (AFFECTED (NAME (REDDY))
                                (TYPE (MALE)))
            (ABETTERS (NAME (GEETHA)))
            (SUSPECTED -SKILLS (GENERAL (VISION))
                                                (SPECIAL (CAR-DRIVING)))
            (EXPECTED- TIME (MIN-DURATION(5))))
(EV-20 (IS-A (VALUE (EVENT-NO)))
              (PLACE (SPOT (HOUSE))
                            (LOCATION (BANJARA-HILLS))
                            (JURISDICTION (HYDERABAD)))
                            (DAY (DATE (2-8-92))
                                    (WEEK (SUNDAY)))
                             (TIME (HOURS (8)))
                                  (MINUTES (15))))
(CASH20 (IS-A (VALUE (ITEM-NAME)))
(LIQUIDITY (WORTH (100000))
                                (TRACEBILITY (LOW))))
(CAR20 (IS-A (VALUE (ITEM-NAME)))
              (DESCRIPTION (TYPE (VEHICLE)).
                                        (MAKE (MARUTI -92)
                                        (IDEN-MARKS (701284))
                                        (COLOUR (BLUE)))
              (LIQUIDITY (WORTH (120000))
                                    (TRACEBILITY (HIGH)))
               (OWNERSHIP (NAME (REDDY))))
(GEETHA (IS-A (VALUE (ABETTER-NAME)))
(ACQUIRED-QUAL (KNOWLEDGE (INMATE))))
(RAO (IS-A (VALUE (ACCUSED-NAME)))
            (APPEARANCE (AGE (125))
                                    (SEX (MALE)))
            (PHYSICAL-CAP (PRESENCE (EV-21)))

(ACQUIRED-QUAL (SKILLS (CAR-DRIVING))
(EV-21 (IS-A (VALUE (EVENT-NO)))
(PLACE (SPOT (TATA-MEMORIAL-HOSPITAL))
                                        (LOCA TION (DADAR))
                                        (JURISDICTION (BOMBAY)))
                                        (DAY (DATE (2-8-92)))
                                    (TIME (HOURS (5))
                                (MINUTES (30))))
  (CAR21 (IS-A (VALUE (ITEM-NAME)))
                        (DESCRIPTION (TYPE (VEHICLE)) .
                                    (MAKE (MARUTI-92))
```

(IDEN-MARKS (701284))
(COLOUR (RED))))
(EV-22(IS-A (VALUE (EVENT-NO)))
(PLACE (JURISDICTION (WARANGAL)))
(DAY (DATE (5-8-92))))
CASE 2. Evaluation follows in
context 3.
(> evaluate 'C2S-380)

what is the distance in kilometers between HYDERABAD AND BOMBAY? 750
Can the accused fly between HYDERABAD AND BOMBAY?
Indicate y/n. n

Check whether a flight took off at BOMBAY on 2-8-92 after 6'0 clock and reached HYDERABAD BEFORE 8.
Please indicate y/n. n
C2S-381 INVALID
The court believes the alibi is reasonable.
0 is the value of credibility for the present case C2S-380.
THANK YOU!
.
CASE 2. Evaluation follows in context 4.
> (evaluate 'C2S-280)

What is the distance in kilometres between HYDERABAD AND BOMBAY?750
Can the accused fly between HYDERABAD AND BOMBAY?
Indicate y/n. y

Check whether a flight took off at Bombay on 2-8-92 after 6'0 clock and reached HYDERABAD before 8.
Please indicate y/n

Is there is possibility to change the colour of CAR 21?
Indicate y/n. y

Did the accused prove his ownership/right of possession regarding each of the following items?
(CAR 21)

Please indicate y/n n
1-25 is the value of creditability for the presence case c28-380

THANK YOU!

JUSTICE AND ACCESS TO JUSTICE

Mr. Girish A. Deshpande*

Introduction

Both, justice and access to justice in India are regarded as important and sacred rights of an individual. India is rightly acclaimed for having achieved a sound constitutional order, and a vibrant and activist judicial wing. Yet, there remain some unresolved issues that need to be reconsidered, and raises questions time and again on the validity and effectiveness of right of access to justice.

This paper aims to focus on the idea of justice enshrined in the Constitution of India by examining background of the right of access to justice which seems to have its roots in common law. The paper also intends to point out chief hurdles and obstacles in its way to achieve justice. As a net resultant it emphasizes that mere right of access to justice would not help the poor litigants but there must be a new right called right to incessant, unimpeded and inexorable access to justice that needs to be emerged on the crimson canvas of the justice delivery system.

The Constitutional Saga and Holy Idea of Justice

Justice is a divine, blessed and wide notion the attainment of which is the ultimate goal of every legal system. The conscience of the Constitution of India, 1950 speaks through its preamble and the vital insights of the directive principles of a welfare state set out under Article 38 as well as Article 39A. In this context, it would be appropriate to explore and distil the possibilities of these constitutional provisions in order to generate an insightful understanding of the issue.

Preamble of the Constitution of India is endowed with a place of pride and is a solemn determination by the people of India to constitute a sovereign, secular, socialist republic, as well to secure certain cherished human rights to "all its citizens". It principally demands justice-social, economic and political. Thus, the term "justice" in the preamble has three aspects in the sense that it must be political, economic as well as social. Justice is the harmonious

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blending of selfish nature of man and the good of the society.[1] Every word in this pious pledge of preamble has a profound commitment towards the people of India, and reflects the great social, economic and political ideologies, and other manifestations of justice.[2]

Apart from these triple facets of justice, Article 38 firmly sets out the following goal:

> "The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social economic and political, shall inform all the institutions of the national life."[3]

The words of Article 38 reincarnate the pledge taken by people of India and reasserts whatever has already been said in the preamble.

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[1] J.N. PANDEY, THE CONSTITUTIONAL LAW OF INDIA 31 (46th ed., Central Law Agency 2009).

[2] The constitutional ideologies of justice enshrined in the preamble can be well determined by the following observation made by Dr. Ambedkar, addressing the concluding stages of the Constituent Assembly:

> We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in trinity……We must begin by acknowledging the fact that there is complete absence of two things in Indian society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which means elevation of some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th January, 1950, we are going to enter into a life of contradictions. In politics we will be recognizing the principle of "one man one vote and one vote one value". In our social and economic life we shall, by reason of our social and economic structure continues to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must resolve this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up.

Krishna Iyer, J., *The Judicial System-Has it a Functional Future in Our Constitutional Order,* (1979) 3 S.C.C. (Jour.) 1. *Also See* KEER, DR. AMBEDKAR: LIFE AND MISSION 143 (2nd ed., Popular Prakashan, Bombay).

[3] The Constitutional (44th Amendment) Act, 1978. This amendment had inserted a new directive principle in art. 38 of the Constitution which provides that the state shall, in particular, strive to minimize inequalities in income and endeavor to eliminate inequalities in status, facilities and opportunities, not only against individuals but also amongst groups of people residing in different area or engaged in different vocations. The new clause aims at equality in all spheres of life.

Recently a three judges bench of the apex court has explained the concept of social justice in Article 38 as follows:

> "The concept of social justice consists of diverse principles essential for the orderly growth and development of personality of every citizen. Social justice is then an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species. Social justice is a dynamic device to mitigate the sufferings of the poor, weak, *dalit*, tribals and deprived sections of the society, and so elevate them to the level of equality to live a life with dignity of person. Social justice is not simple or single idea of a society but is an essential part of complex social change to relieve the poor etc., from handicaps, penury, to ward of distress and to make their life livable, for the greater good of the society at large. The aim of social justice is to attain substantial degree of social, economical and political equality which is the legitimate expectation and constitutional goal."[4]

Thus, social revolution seems to be the eventual aspiration of the founding philosophers of the Constitution. Judicial justice is the means whereas social justice is the end says Justice Krishna Iyer.[5]

In much similar appearance, one also needs to pore over yet another complementary, in a sense, but important article of the Constitution of India which is the outcome of newly wedded policy of the government to give legal aid to economically backward classes of people. Article 39A vibrantly declares:

> "The state shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."[6]

Energetically, the terms like "legal aid" and "speedy trial" have now been considered as sacred rights protected under the sunshade of fundamental rights under Article 21 of the Constitution available to

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[4] Air India Statutory Corporation v. United Labour Union, A.I.R. 1997 S.C. 645. The three Judges Bench in this case further elaborated the concept of "social justice" and held that in a developing society like ours, where there is vast gap of inequality in status and of opportunity, law is a catalyst, rubicon to the poor etc., to reach the ladder of social justice.

[5] *See supra* note 2.

[6] *Added by* the Constitutional (42nd Amendment) Act, 1976.

all prisoners and also enforceable in the temple of justice.[7] The legal aid programme which is meant to bring social justice to the people cannot remain in its traditional limits but its pace must be accelerated by adopting more ignited approach towards it keeping in mind the socio-economic conditions prevailing in the country. The apex court which is the supreme apostle of justice in the country has held that in order to achieve the objectives in Article 39A, the state must encourage and support the participation of voluntary organizations or social action groups in operating the legal aid programme.[8] Again in a landmark judgment in *State of Maharashtra v. Manubhai Bagaji Vashi* [9], the Supreme Court has held that Article 21 read with Article 39A casts a duty on the state to afford grants-in-aid to recognized private law colleges, similar to other faculties, which qualify for receipt of the grant. The state shall ensure the effective functioning of the legal system to promote justice and to prop up access to justice. The central words of Article 39A are to provide free legal aid "by suitable legislation or by schemes" or in any other way.

Legal aid has multiple facets and is required in many forms and at various stages. It is said that the need for a continuing and well organized legal education is essential in order to meet the various challenges and for this purpose a vast number of persons trained in different branches of law are needed every year. However, this can be made possible through the participation of the adequate number of law colleges/schools where required infrastructure including expertise law teachers and staff are well-established. Now the tragedy with these law colleges brings out yet another sad story. The entire legal education system is poisoned with the elements of commercialization. In most of these law colleges legal aid programmes are scheduled annually without any provision for re-visit of the legal aid delegation, if required. Further, there is no scope for any follow up programme. Poor villagers in these free legal aid camps come to these law college delegations with fresh rays of hope and tell their own stories of injustice, their hard and struggling times in the temple of justice; but due to absence of the follow up system their hopes are scattered and also remaining courage is destroyed. Who cares! Unless and until, there comes some serious commitments from within, the concept of "free legal aid" will only be a farce and therefore, managerial and intellectual renovation in these legal aid programmes

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7 The state is under a duty to provide a lawyer to the poor person and it must pay to the lawyer his fee as fixed by the court. *See* H.M. Haskot v. State of Maharashtra, A.I.R. 1978 S.C. 1548; *also see* Hussainara Khatoon v. Home Secretary, State of Bihar, A.I.R. 1979 S.C. 1322.

8 Centre of Legal Research v. State of Kerala, A.I.R. 1986 S.C. 1322.

9 (1995) 5 S.C.C. 730.

and camps is the need of hour. "Renovate or innovate" is the burning slogan in this context.

Access to Justice: A Call for Reconsideration

The inquisitive theme of access to justice is of great contemporary significance. The term "access to justice" brings to our mind the notion that everyone who seeks justice must be blessed with his right or means to approach the court of justice.

As per *Webster's New World Dictionary*, the term "access" means the act of coming forward or near to approach.[10] Thus, access to justice in strict sense deals with an individual's right to approach the court. However, it does include an array of paired rights intended to protect an individual in his journey toward the destination of justice. They also refer to different kind of rights, various kinds of courts, the quality of justice, independence of judges, legal help and social action litigation etc.

Justice is a generic notion, and includes both substantive and procedural justice. The wheels of justice starts rolling right from the moment we set the law in motion.[11] Mere filing a First Information Report (FIR) gives mild vibrations and ignites an individual's right of access to justice. After filing an FIR, the procedural law requires the parties to approach the court of law for pursuing a normal trial in consequences of the series of acts that violated an individual's various rights. At the trial, the court of law manned by the professional judges conducts the proceedings and delivers a final verdict. After the court delivers the judgments there comes the enforcement part whereby efforts are made to give effect to the judgment of the court. During each and every stage of the abovementioned procedure an individual's right of access to justice remains in great hazard. While climbing each step of justice the litigants has to suffer many time which results into his never before frustration.

Background of the Right of Access to Justice

It is widely accepted and believed that the earlier notions of the common man's right of "access to justice" and "rule of law" took roots when the king in England, during the reign of Henry II, agreed for

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10 AGNES MICHAEL, WEBSTER'S NEW WORLD-COLLEGE DICTIONARY 8 (4th ed., Wiley-Dreamtech India Pvt. Ltd., New Millennium, reprint 2004). It also further defines access as "a way or means of approaching, getting, using etc."

11 In the civil and criminal law jurisprudence in India, it is said that we set the law in motion when we lodge a FIR in the nearest police station regarding the alleged crime.

setting up a system of writs by virtue of which all litigants could avail themselves of the king's justice. However, the abuses of "king's justice" by King John resulted into the rebellion that led to the adoption of *Magna Carta.*[12]

In more than 500 years following the adoption of *Magna Carta*[13], courts resolved disputes, invented new principles by virtue of precedents and laid down different principles which came to be known as common law. The adoption of various constitutions, legislations, research works done by renowned intellectuals and commentaries by experts resulted into emergence of new doctrine called *ubi jus ibi remedium* that says every right when breached must be provided with a right to remedy.

The traces of this right in the common law traditions are evident from a number of verdicts from great judges like Lord Diplock[14] and Steyn, LJ.

Steyn, LJ., held in one of the celebrated case as follows:

> "It is a principle of our law that every citizen has a right of unimpeded access to court. In *Raymond v. Honey*, 1983 AC 1 (1982 (1) All ER 756) Lord Wilberforce described it as a "basic right". Even in our unwritten Constitution, it ranks as a constitutional right."[15]

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[12] M. Jagannadha Rao, J., *Access to Justice*, http://www.lawcom.govt.nz/sites/default/files/speeches/2004/04/India%20Law%20Commission%20paper.pdf.

[13] *Id. Magna Carta* became the initial source of British constitutionalism. It is also said that what it represented then and now is a social commitment to the rule of law and a promise that even a king is not above the law. It would be worthwhile to note some of the words of the great document which says:

> "No freeman shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land. To no one will we sell, to no one will we deny or delay right to justice."

Also see the inscription in *Magna Carta* ¶ 40.

[14] Bremen Vulkan Schiffban and Maschinenfabrik v. South India Shipping Corp., 1981 AC 909–1981 (1) All ER 289. Lord Diplock effervescently observes:

> "The High Court's power to dismiss a pending action for want of prosecution is but an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. Every civilized system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights."

[15] R. v. Secretary of State for the Home Dept., ex p Leech (1993) 4 All ER 539 (CA).

Similarly, references can also be taken from the international human rights law in this perspective. The Universal Declaration of Human Rights (UDHR) is one of the important document which sets out the right of access to justice by virtue of some of its puissant articles.[16] It vibrantly stresses down that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law. Article 10 further says that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations, and of any criminal charge against him.

Besides this, there are also other similar provisions in International Covenant on Civil and Political Rights (ICCPR), the European Convention and other regional conventions.

Right of Access to Justice: Indian Panorama

It is said that in India citizens always had access to the king for seeking justice since time immemorial. In later period, the Indian courts inherited the common law of England, and the right of access to justice became part of our formal law. Thus, this particular right existed even prior to the emergence of Constitution.[17] After the adoption of the Constitution, due recognition was given to the right of access to justice to courts by resort to the High Courts and the Supreme Court.[18] In the Constitution of India there are express articles that secure the right of access to justice. Article 39A was introduced by the Constitution (42nd Amendment) Act, 1976 and is the essential component of the right of access to justice. It also includes within its ambit the right to legal aid and to engage a counsel.

The jurisprudence of Article 39A has further been developed through the renowned judgments of the apex court manned by the courageous judges. In M.H. Haskot's case Justice Krishna Iyer declared:

> "If a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal inclusive of special leave to appeal for want of legal assistance, there is implicit in the court under Article 142 read with Articles 21 and

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16 UDHR arts. 8-9.

17 For the cases decided by Indian court in pre-independence era, *see re* Llewellyn Evans, A.I.R. 1926 BOM. 551; P.K. Tare v. Emperor, A.I.R. 1943 Nagpur 26.

18 *See* INDIA CONST. arts. 32, 226.

39A of the Constitution, power to assign counsel for such imprisoned individual "for doing complete justice"."[19]

Now right to legal aid in India is fervently protected and provided by the Legal Services Authorities Act, 1987. There is a wide network of legal aid committees at *taluka*, districts and state levels. Furthermore, the Supreme Court and High Courts have their own legal services committees.

Hurdles in Path of Access to Justice

There are many obstacles in way to achieve justice for the litigants and especially for the disadvantaged and poor litigants. Due to their ignorance and illiteracy many poor litigants are unaware of their rights, and are often exploited by the expensive and time-consuming procedures in the temples of justice.

Court fees is one of the neglected area wherein there remains a need to re-consider the provisions that provide for the court fees. The poor litigants sell their houses, properties, even their jewelries to seek justice in the court of law. Some litigants even avoid medicines necessary for their health to continue the litigation proceedings. The situation becomes worst when it comes to women litigants. The Law Commission Reports time and again have strongly opposed the current system of court fees and rejected the contention that the heavy court fees would drive away vexatious litigants.[20]

Unfortunately no steps were taken in this regard. Generally, the state government has legislative competence on the issue of court fees and the few state governments have taken efforts to relax court fees for women litigants.[21]

Abnormal delay in justice is yet another paradox which needs to be considered. There seems to be a huge backlog of cases pending in the court. It seems that as on March 31, 2009 there are 50,163 cases pending in the Supreme Court, 38.7 *lakh* cases pending in 21 High Courts and 2.64 *crore* cases pending in 13,556 trial courts in the country.[22] One must remember the fact that justice delayed is justice

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[19] *See supra* note 7.

[20] *See supra* note 12. It is said that Lord Macaulay, who headed the Law of Commission of India 150 years ago declared that the preamble to the Bengal Regulation of 1975 was "absurd" when it stated that High Court fees was intended to drive away vexatious litigants.

[21] The State of Maharashtra is one such state government which has relaxed the court fees for women litigants.

[22] K.C. JAISINGHANI, LOOP HOLES IN LAW (Hind Law House, Pune 2009).

denied. There remains a need to solve the problem of pendency of cases.

The shortage of courts in India is also a matter of concern. With over 2.5 *crore* cases pending, the then Chief Justice of India, K.G. Balakrishnan demanded 10,000 more courts and as many judicial officers, to erase the ever mounting backlog of litigations. There are 15,000 sub-ordinate courts, but only 13,800 have working strength. The worry is large number of increasing number of cases and less number of courts in India.[23]

Conclusion

In this context it is expeditious to confer a far liberal approach towards the right of access to justice. We must realize that the mere right of access to justice would not help the poor, ignorant and illiterate litigants, but a new right called incessant, unimpeded and undisturbed right of access to justice must be invented. During all pre-litigation, during litigation and post-litigation stages this right must be recognized. The wheels of justice must be allowed to roll smoothly in order to be more effective.

More efforts are desired to be made for preventing undesired and unnecessary delay in justice. There should be more courts of law for effective and speedy functioning of the judiciary. Something must be invented and applied immediately in order to restore the faith and confidence of people over the judiciary. The darkness of injustice must be abandon by lighting up the bright lamp of truth and justice.

Taking solace from the ringing words of Justice Brennan of the U.S. Supreme Court who said:

> "Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with, but injustice makes us want to pull things down. When only rich can enjoy the law, as a doubtful luxury, and the poor who need it most, cannot have it because its expense puts it beyond their reach, the threat to the existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in the benefit of impartiality and fairness."[24]

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[23] DNA, Jan. 19, 2009.
[24] *See supra* note 12, at 27.

The dark clouds of injustice must be cleared as rapidly as possible and fresh rays of hope must come for the help of justice. I am reminded of an Urdu phrase of the classic Urdu poet Mirza Ghalib who put this situation in his following lovely diction: *Khak ho jayenge hum tumko khabar hone tak* (we will be destroyed by the time you will realize our pain).

CONSTITUTIONAL CONSTRAINTS VERSUS CONSTITUTIONAL CANONS: A JUDICIAL *PERESTROIKA* IN INDIA

Prof. Dr. Dilip Ukay*

Introduction

The Constitution of India, 1950 contains aspirations, demands, needs and wants of its millions of people, and promises them justice, liberty, equality and fraternity since its inception. It being an organic document, it not only tries to set up the governance machinery but also seeks to reorganize and restructure the social, political, economic fabric and life of the whole society. The makers of the Constitution were well equipped to draft a document for establishment of an egalitarian, liberal democratic social-legal order. They were aware about the nature of politico-legal system to be set up, and the nature and character of the government and its machinery to be established in India. The democracy being the nascent one and the parliamentary form of governance, a novice to Indian society, they took an abundant care to balance the rights of people and the powers of the executive and the legislatures.

The Constitution of India in its Part III guarantees basic fundamental rights to its citizens as well as other people/persons. These rights are nothing but the limitations or stipulations imposed upon the conferment and exercise of legislative and executive powers by the state. Fundamental rights operate as a check upon the abuse or misuse of these powers by these two organs of the government. The Constitution also confers a power of judicial review upon the judiciary in India.[1] However, there appears to be the changing phases of the exercise of this power by the judiciary over the period of times. The judicial paradigms hinges upon political, social and other such relevant factors in India, as they have been elsewhere too. The power of judicial review itself has witnessed a dynamic change in the Indian judicial history and particularly in post emergency period. The constitutional interpretations resorted to by the higher judiciary in last few decades underlie the core value of constitutional canons, being substituted with constitutional constraints. This has acquired a brand name in the form of judicial activism or judicial creativity in

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1 INDIA CONST. art. 13(2).

Indian judicial system. Hence in view of this, the paper aims at analyzing the constraints imposed by the Constitution upon the exercise of judicial review power and its interface with constitutional canons and judicial activism adopted by the judiciary in India. The first part would deal with the power of judicial review in India and other countries; the second part shall contain the emergence of public interest litigation (PIL) and right to compensation in India; and in its third part the doctrine of political question and its relevance in today's scenario would be conceptualized.

Doctrine of Judicial Review and its Nature

The basic fundamental and natural rights are meant for individual's growth, development and his welfare. Since most of the time these rights are provided to individuals and to be exercised against the state, it became imperative to confer the power upon the judiciary to secure the guarantee and protection/enforcement of these rights. The power of judicial review is the product of natural law and natural rights theory. The Constitution of United Kingdom (U.K.) being an unwritten one and more importantly the presence of parliamentary sovereignty inter alia, as one of the basic principle of the Constitution of U.K., the House of Lords as a highest court of the country was constrained to exercise the power of judicial review to safeguard the rights of individuals. In the year 1610, Chief Justice Coke in Dr. Bonham's case held that, any Act enacted by the British Parliament, if found to be violative to basic fundamental rights of people; then despite of the doctrine of parliamentary sovereignty, it could be declared as an unconstitutional.

Similarly the Constitution of United States of America (U.S.A./U.S.) is erected upon the doctrine of separation of powers along with fundamental rights contained there under. Separation of powers imposes a limitation upon the judiciary to review and declare law as an invalid. Nevertheless, Chief Justice Marshall of the Supreme Court of U.S. in *Marubary v. Madison* in 1803 held that any congressional legislation, which abridges or takes away fundamental rights of people, would be declared as an unconstitutional. Chief Justice Marshall said that this court has a power and authority to review such a legislation despite of a separation of powers theory and if found violative to the basic rights of people then could be declared as an invalid also. This judgment delivered by the Supreme Court of U.S. was criticized then as bad due to the exercise of a power not vested in it by the Constitution. Though the constitutional constraints were imposed upon the judicial power, yet Chief Justice Marshall found the power of judicial review in constitutional canons, which prevailed

upon the constraints. In view of this it was acclaimed as a victory of natural law and the beginning of the judicial activism.

In India as well, judicial constraints were prevailed in the initial phase of the judicial history of the Indian Supreme Court. In *A.K. Gopalan v. State of Madras*[2] the Supreme Court interpreted Article 21 in a literal manner and had refused to read "due process clause" of Fifth Amendment of the U.S. Constitution under Article 21 of the Constitution of India. Article 21 guarantees right to life and personal liberty to all persons.[3] The majority judges held that when the word "due" is missing from the text of Article 21 and which was deleted from the draft of Article 19 of the Constitution, how come it would be proper and possible for them to read the same there. This textual interpretation had occurred due to the constraints of the words used in the said provision.

However the same Supreme Court in *Maneka Gandhi v. Union of India*[4] has refashioned itself and accorded the dynamic interpretation to Article 21. The judges held that "procedure established by law" under Article 21 would essentially meant a due procedure including principles of natural justice. This decision of the Supreme Court of India has opened the gates of constitutional canons to be read and invoked in judicial decision-making process. It is not the text but the context in which the due process clause is to be resorted to, have become imperative and significant. *Maneka* has paved the way for judicial *perestroika* in India vis-à-vis interpretation of constitutional law matters.

It is pertinent to note that, in India it is not *Maneka* wherein constitutional canon had outplayed the constitutional constraint, but prior to it, in *India v. J.P. Mitter*[5] the Supreme Court of India displayed the wisdom laying down the foundation of futuristic activist zeal and zest holding that, though according to Article 217(3) of the Constitution President's decision is final on the question of the age of a High Court judge; but notwithstanding such finality of the order of the President, the court has a jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the rules of natural justice were not observed by the President. It further said that, or the President's judgment was coloured by the advice or representation made by the executive or was founded on no evidence, then also despite of such finality

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[2] A.I.R. 1950 S.C. 27.
[3] INDIA CONST. art. 21: No person shall be deprived of his life or personal liberty except according to procedure established by law.
[4] A.I.R. 1978 S.C. 597.
[5] A.I.R. 1971 S.C. 1093.

accorded by the Constitution, such order could be declared as an unconstitutional.

This decision of the Supreme Court signifies the overcoming of constitutional constraints and substitution of constitutional canons with them, by the higher judiciary in India. The judicial acumen and pragmatic understanding in interpretation of the constitutional provisions, shown by the Supreme Court represents not only the power of judicial review but also the concern of the governance in accordance with rule of law. It assumes more value, since it was decided earlier than *Kesavananda Bharati v. State of Kerala*[6] where in judicial review was held as a basic feature of the Constitution. Finality Clause under Article 217(3) did not accord a finality to President's decision and judiciary was constrained to overcome the constraint of judicial review imposed by the Constitution and substituted it, with that of the constitutional canon.

Kesavananda itself has displayed a keenness of judiciary to exercise its review power in constitutional interpretations and validity of amendments. The evolution of the basic features doctrine by the Supreme Court of India was an attempt on its part to reassert its power and authority in the area of judicial review. The apex court said that though the parliament has a power to amend the Constitution and fundamental rights, yet its basic features ought not to be destroyed. Any constitutional amendment found to be violative of any of the basic feature; the court in exercise of its review power could strike it down as an unconstitutional. Moreover, since the text of the constitution is silent about the basic features, it was left to the discretion of the Supreme Court and constitutional canons, to lay down which features could be considered as basic.

The basic features doctrine has become a touchstone to determine the scope and ambit of judicial review despite of a constitutional constraint placed by the constitutional provision. In *Wamanrao v. Union of India*[7], the Supreme Court held that all amendments to the Constitution made before April 24, 1973, and by which the Ninth Schedule was amended from time to time by the inclusion of various laws and regulations therein were valid and constitutional. But amendments made on or after the *Kesavanda*'s decision delivered on the aforesaid date, and were amended the Ninth Schedule by including various acts or regulations therein were open to challenge on the ground that they, or any one or more of them, are beyond the

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6 A.I.R. 1973 S.C. 1461.
7 A.I.R. 1981 S.C. 271.

constituent power of the parliament since they damage the basic and essential features of the Constitution or its basic structure.

This view and principle again was strengthened by the Supreme Court of India overcoming the constitutional constraint on the basis of constitutional canons in *I.R. Coelho v. State of Tamilnadu*[8]. It was held that:

> "The power to grant absolute immunity at will, is not compatible with the basic structure doctrine and thus laws included in the Ninth Schedule [Article 31B] in the post period of April 1973 [after *Kesavananda*'s decision] do not have an absolute immunity. The prime object of Article 31B is to remove difficulties and not to obliterate Part III in its entirety. Amenability in the period stipulated is to be tested in the backdrop of basic or essential features of the Constitution in view of Article 21 along with Articles 14 and 19. Legislatures cannot grant fictional immunity upon amendments and laws, and exclude them from the judicial review simply placing them in the Ninth Schedule after the enunciation of basic structure doctrine."[9]

Coelho's decision displays the re-augmentation of review power by the Supreme Court despite the constitutional provision of Article 31B, which confers immunity to laws from judicial review if placed under the Ninth Schedule.[10] The Bench headed by Sabharwal, CJ. (as he then was) fashioned itself to overcome the constitutional constraint stipulated by the said provision and replaced the same with that of constitutional canon. Since the Supreme Court held judicial review as one of the basic feature, it was imperative for it to reassert its authority and power invested in it by the constitutional philosophy. The dialectical dichotomy, which I may call, is a new constitutional *mantra* and became a constitutional *dharma* (not in a literal sense) of the higher judiciary and the judge "priest". Assumption of this constituent power by the Supreme Court, heralds a new era of

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8 A.I.R. 2007 S.C. 861.

9 *Id.*

10 INDIA CONST. art. 31B.Validation of certain Acts and Regulations.—
Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or Tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

constitutionalism in India.[11] Though the text of the Constitution remains the same, impeding even the power of judiciary to review constitutional amendments, laws, rules etc., and thus judiciary otherwise becomes constrained, yet it devises (as it did) the means and ways and mechanisms invoking canons of the Constitution or rather evolving the canons to re-establish itself as a final arbiter and custodian of the Constitution. These canons are not otherwise expressly provided in the text of the Constitution, but they are the creation of the apex court of India in its attempt to safeguard the rule of law, the Constitution and justice contained in it. These instances are multiple, however, the sagacity and creativity of the highest court has transformed the notion and nature of doctrine of judicial review in India, which could be seen from different perspective in the following part.

Judicial Activism and Public Interest Litigations

The doctrine of fundamental rights has a value and significance due to the constitutional remedies provided under Articles 32 and 226 of the Constitution of India[12]. Mere incorporation of rights and guaranteeing them is not enough unless they are coupled with certain remedies required for their enforcement. Right to approach to the court is conferred upon an individual to enforce his right or rights whenever it/they are violated. Right to go to the court for enforcement of fundamental rights is itself a fundamental right under Article 32 of the Constitution. The locus is accorded to an individual by the said provision. However, in a unique manner the Supreme Court of India in Asiad Worker's case[13] conferred the right to approach to the Supreme Court, upon an organization for the enforcement of rights of workers. Article 32(1) though confers a right upon a person to go to the court, whose right is violated, yet the judges held that due to the poverty, illiteracy and their oppression they are unable to approach the court, and hence that right was conferred upon a public spirited person or organizations. The constraint imposed by the constitutional provision was substituted with that of the constitutional canons ingrained in the Preamble of the Constitution. The dilution of locus standi has marked the beginning of the emergence of public interest litigations (PILs) in India.[14]

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11 It is worth to note that Prof. Upendra Baxi had observed earlier that the Supreme Court shares a constituent power along with the parliament.

12 INDIA CONST. art. 32: Remedies for enforcement of rights conferred by this Part; INDIA CONST. art. 226: Power of High courts to issue certain writs.

13 Peoples' Union of Democratic Rights v. Union of India, A.I.R. 1982 S.C. 1479.

14 *See* Bandhua Mukti Morcha, M.C. Mehata, Neeraja Choudhari, and several other cases.

The emergence of PIL has paved the way to take recourse to judicial process for restoration and enforcement of collective rights in India. Collective rights, wherein public interest or benefit contains, is sought to be safeguarded and furthered by the judicial process. The impediment in the form of locus was removed by the Court and has opened the doors of the judiciary to poor, indigent illiterate etc. The phenomenon of PIL has crossed a millions of miles in India covering a territory of water, heath, education, environment, prisoners' rights, personal liberty etc. M.C. Mehta[15] has become a brand ambassador of the cause of public interests in the area of environment/water pollution. In plethora of cases/decisions the Court has applied the canons of the Constitution to do justice. Those constraints did not remain constraints due to judicial activism displayed by the higher judiciary.

This has also heralded the era of emerging trends of the judicial activism and creativity in India. The higher judiciary (the Supreme Court and the High Courts) have a power to restore the right if found to be abridged illegally or without due procedure. The Constitution has fore walled the judiciary and has confined its role as an interpreter of the constitutional and other legal provisions. Nevertheless, the Supreme Court of India overcame this constitutional constraint and went on to award the compensation to victims for a violation of their fundamental rights in the writ petition itself.[16] This activism or creativity demonstrated by the Supreme Court of India is unique in its nature, and has restructured the human rights jurisprudence in India. The constitutional canons like justice in reality, freedom and liberty etc., were given a human value by the judiciary. Right to compensation for deprivation of right to life and the Supreme Court viewed personal liberty as a fundamental right.[17] The Court has held that right to life guaranteed under Article 21 is not confined to the citizens alone or the right to compensation, but would be available even to foreign nationals under similar circumstances.[18] These and other decisions depict the nature of constitutional constraints imposed upon the exercise of power by the judiciary and the dynamism shown by the higher judiciary resorting to constitutional canons and philosophy.

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15 Mahesh Chandra Mehta is a public interest attorney from India. He was awarded the Goldman Environmental Prize in 1996 for his continuous fights in Indian courts against pollution-causing industries. He received the Ramon Magsaysay Award for Asia for Public Service in 1997.

16 Bhagalpur Blinding Care, (1981) 1 S.C.C. 627, Rudul Shah v. State of Bihar, A.I.R.1983 S.C. 1086 *etc.*

17 Nilabati Behera v. State of Orissa, A.I.R. 1993 S.C. 1960.

18 Chandrima Das v. Chairman Railway Board, A.I.R. 2000 S.C. 403.

Doctrine of Political Question and Judicial Review

India, though a federal country, yet it has certain unitary features and hence being branded as a quasi-federal state. Even the notion of competitive federalism was substituted with that of co-operative federalism. The Constitution casts a duty upon the center to protect a state from external aggression, internal rebellion and also to ensure that the administration is to be carried on in accordance with the provisions of the Constitution.[19] If it is found that the state administration cannot be carried on in accordance with the Constitution then it empowers the President to impose a state emergency and acquire legislative/executive powers to be exercised by the center.[20] The exercise of this power by the President was immune from judicial review on the ground of the question is a political in nature.[21] The doctrine of political question was an exception to the doctrine of judicial review in India, which has limited the review power of the judiciary. The Supreme Court held that it could not interfere with the center's exercise of power under Article 356 merely on the ground that it embraced political and executive policy and expediency unless some constitutional provision was being infringed. Article 74(2) disables the court from inquiring into the very existence or nature or contents of ministerial advice to the President. Article 356 makes it impossible for the court to question the President's satisfaction on any ground unless and until resort to Article 356 in specific circumstances is shown to be so grossly perverse and unreasonable as to constitute parent misuse of this provision or as excess of power on admitted facts.

However, the judicial review in this area was reactivated the Supreme Court of India in *S.R. Bommai v. Union of India*[22] and rejected the doctrine of political question. The instant case had negated the power of the President to impose the state emergency even without the report of the Governor. The apex court said that the exercise of the power by the President if found to be irrational, arbitrary, or with malafide intentions, then the court has power to declare it as an invalid and unconstitutional. The judicial paradigms in the area has strengthened the power of judicial review overcoming the constitutional constraints and substituting them with that of constitutional canons and principles or features which are to be basic for the governance of the country and the society.

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19 INDIA CONST. art. 355.
20 INDIA CONST. art. 356.
21 Rajasthan v. Union of India, A.I.R. 1977 S.C. 1361.
22 A.I.R. 1994 S.C. 1918.

Conclusion

The judicial paradigms in India have refashioned the doctrine of judicial review and restructured the whole gamut of the constitutional mechanism of the governance. Albeit it may be true to some extent and in some cases that the judicial activism/creativity displayed and adhered by the Indian higher judiciary has made it stronger than the parliament/legislatures. However there is no denial of the fact that the democracy is not only survived but is strengthened in India because of the strong and independent judiciary.

The emergence of the Supreme Court of India as a custodian of people's rights and a democratic, functional institution is the most significant and important development in the judicial history of independent India. It is being envisaged not as a redressal forum of elite class in the society or pre-occupied with rendering merely lip services to people. Instead, it is seen and perceived as a forum for raising, redressing and articulating the problems of the have-nots/deprived, oppressed, downtrodden women, children, environmental groups and abuse of powers and positions by persons holding high public offices. It has become a forum for the representation, articulation and protection of the basic human rights of the people vis-à-vis society.[23]

The evolution of basic structure doctrine by the Supreme Court of India[24] has played a very significant role in the field of constitutionalism in India. An abject surrender by the judiciary to the legislature/executive is an alien to the Constitution of India, its philosophy and canons. These values have prevailed and upheld higher/superior to the provisions of the Constitution by the judiciary. It is indeed a judicial *perestroika*, which has enabled the rule of law, democracy, freedoms to rule over/upon the constraints of the Constitution in India.

[23] Dilip Ukey, *Human Rights and Judicial Activism in India,* 12 CULR, 432, 455 (1997).
[24] Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1469.

DIGITAL REVOLUTION AND GOOD GOVERNANCE: A NEW STATE IN MAKING

Dr. Durgambini Patel*

Introduction

Science, technology and law share unique relation. Technological advancement has tendency to alter human relations and social ethos, posing new challenges to the existing laws in the context of society. As the function of law is to regulate social conflicts and deliver justice, law must be restructured to meet the exigencies, and suit itself to cater to the new issues that have science and technological derivatives. The passing of the Indian law titled, the Information Technology Act, 2000 is one such example that was implemented to give legal recognition to electronic revolution that created novel mean of legal transactions and also opened new forms of human interactions that needed to be recognized and regulated if lead to conflicts. The science and technological innovations have twin implications. On one hand, ethical use may bring unprecedented benefits to the society, and on the other hand, they may be a very cause of destruction. Hence, the law must promote the boon and eliminated the bane caused by science and technological revolutions by means of social engineering and balancing of conflicting interests.

Information Communication Technology (ICT) resulting from computer and internet systems has opened up new vistas and created a form of cyber space that is borderless and virtual in nature. To govern is the function of a government. It is responsible to run the machinery of the state. The ICT revolution has altered the modus operandi of governmental functions. Digitalization is a boon for government to reach the masses and receive feedback from them. However, as any other technology also has their adverse repercussion. Massive digitalization in governmental functioning is a device to achieve good governance. However, at the same time it creates a digital divide, especially in developing countries with large populations of poor, illiterate and the eliminated. They are in a disadvantaged situation to avail the benefits of digital revolution and unable to ameliorate their conditions. Therefore, the government must attempt to reach the most disadvantaged category to use the technology to do distributive justice and establish an egalitarian

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society. These factor and trends are indeed a march towards creating a new concept of state that uses electronic medium for governance.

Good Governance

Good governance means governance based on certain principles. Parameters of good governance include transparency, accountability, participation, decentralization and fairness. As per the World Bank good governance is in two forms:

1. Economic role for the state to set up policy reforms.
2. Non-economic aspects, e.g., transparency, accountability, participation and responsiveness to be followed in the process of governance and functioning of state organs leading to administration of justice.[1]

There is a general feeling among the citizens, even in democratic polities, that the governments take decisions unilaterally, and this is further compounded by the secrecy involved in making/taking decisions. The citizens normally feel that the government and its officers are never held accountable for their decisions and actions. Society always feels that the government is never efficient when it performs its tasks. There is always a perception that the government officers function with lethargy. When contrasted with private employees it is believed that the government officers are corrupt and inefficient. Corruption, unaccountability, non-transparency, unfair and arbitrary means of functioning are the major shortcomings that have created a massive unrest in the minds of the masses. Loss of trust and faith in the government is a sign of unhealthy democratic process. Due to this, it is always felt that there is need to decentralize power, eliminate absolutism and create element of responsiveness among the elected government who is accountable for its deeds and actions.

ICT technologies can create far-reaching and sweeping transformation and miraculous achievements with regard to improving the image of a government resulting in increasing its efficiency. The Government of India has embraced the ICT system in governance to bring its services close to the people and meet their expectations. ICT advances have touched almost all aspects of life of the people and therefore the government service delivery could not be left out. In fact extending ICT to governing functions is a device to

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[1] Atul Lalsaheb, An Appraisal of the Judicial System in India: A Critical Study of Judicial Independence vis-a-vis Judicial Accountability 79-80 (Jan. 2013) (Ph.D. thesis, University of Pune), (on file with author).

achieve a more efficient and highly desired governmental system that can stand up to the expectations of the people. Due to pressures of technological inputs like internet that mobilizes information with faster speed and accuracy the concept of e-government was brought to fruition.

E-government and its Impact on Good Governance

Citizens expect good governance from their government and e-government helps in furthering the goals of good governance, viz.:

1. To increase transparency

Citizens expect a transparent government and e-government brings transparency by disseminating government rules, procedures and its performance data to a wider audience. It helps to make public the decisions of civil servant/officers of the government. Transparency is further entrenched as public assets disclosure is made; procurement information is given i.e., not kept hidden/under wraps.[2]

2. Reducing corruption

E-government helps to reduce corruption by ensuring that financial transactions are monitored, and this is done by putting the information of the procedures online. This helps more people keep an eye which reduces chances of corruption. By removing and eliminating intermediaries corruption avenues get reduced. By resort to e-government there are less discretionary powers on the civil servants. Further, role of civil servants being gate keepers is curbed hence reducing their chance of being corruptible.[3] The consequences of administrative corruption are quite severe for developing societies as corruption in any system has a tendency to hit the poor the hardest. In the liberalized economy of 21st century corruption creates impediments for the flow of Foreign Direct Investment (FDI). It causes loss of revenue to the government and encourages dishonesty and inefficiency among the employees/citizens.

3. Improved service delivery

Since processes and functions are automated, time taken to complete transactions is considerably reduced. This reduction in time, counts as improved service delivery to the service seeker. Due to the ICT revolution citizens even in remote and far flung areas have access to internet facilities. This accessibility of internet has enabled the government to deliver services to a great number of

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[2] SUBHASH BHATNAGAR, E-GOVERNMENT FROM VISION TO IMPLEMENTATION: A PRACTICAL GUIDE WITH CASE STUDIES 37 (Sage Publications, New Delhi 2004).

[3] *Id.*

people/population. Since ICT processes are automated and interactive this has reduced the cost and need of citizens to go directly to governmental offices for seeking services.[4]

4. Improving civil service performance

Due to automation, tedious repetitive work gets eliminated hence furthering efficiency, which boosts the performance of civil servants. As processes become automated the redundant staff gets eliminated. As bandwidth speed increases, data exchange both intra and inter department wise is increased, with it comes increase in speed and efficiency of workflow. As all work and functions get increasingly done by computers the task completion rates can easily be monitored by senior staff. Because of the above mentioned factors the performance of the civil servants in the eyes of the service seeker improves.

5. Empowerment

Without ICT i.e., in the traditional mode, there used to be many intermediaries who acted as brokers for government services. They know how the system works, all rules, people, and could manage to solve any situation. This is the breeding ground for corruption and malpractices. However, because of ICT many intermediaries have now been eliminated as services are brought closer to the people. This has empowered people to complete their transactions with the government at a speedier and cheaper cost. Far flung communities and villages which had no access to governmental services are now able to access the same services at the touch of a button. Hence, such communities will be empowered especially after the E-governance National Plan is executed whereby all parts of India will be connected digitally.[5]

6. Improved finances for the government

Due to advances in ICT there are more automated services. As automation increases, cost of transactions for government processes gets reduced substantially. With this reduction citizens save as well as the government. There is improvement of audit functions which leads to increased finances for the government. As all processes are computerized, all expenditures can be checked. With this checking, expenditure can be monitored and hence better control and management of the expenditure which further improves government finances.[6]

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[4] *See supra* note 2, at 38.
[5] *Id.*
[6] *Id.*

Therefore, introduction of ICT in governance results in less corruption, increased transparency, greater convenience, revenue growth and or cost reductions.[7] The Government of India has focused on e-governance as a critical area in the larger context of improving governance.[8] Due to computerization of local governing bodies that has been and is taking place, e-governance in India is becoming a reality. Through e-governance citizens can get services such as birth and death certificates, tax payments, e-mail etc. In the rural areas once connected[9] they can get the same services at the *Gram Panchayat* office itself.[10]

Conceptual Analysis

The term "e-governance" is a process of enabling transactions between concerned groups and the government through multiple channels by linking all transactions points, decision points, enforcing/implementation points and repository of data using information and communication technologies to improve the efficiency, transparency, accountability and effectiveness of a government.[11] In other words as stated by World Bank in 1992, governance is defined as the manner in which power is exercised in the management of a country's economic and social resources for development. According to the United Nations Development Programme (UNDP):

> "Good governance is, among other things, participatory, transparent and accountable. It is also effective, equitable and promotes the rule of law."[12]

"E-government" is a process of reform in the way governments work, share information and deliver services to external and internal clients. E-government harnesses information technologies to transform relation with citizens, business and industry; citizen

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[7] *See supra* note 2, at 21-22.

[8] R. Chandrashekhar, *NeGP and Urban Local Bodies*, http://indiagovernance.gov.in/files/NeGP.pdf.

[9] The Government of India under the National E-governance Plan intends to computerize 250,000 *panchayats* at cost of Rs.5,400 *crore*.

[10] *Taking E-governance to Rural Areas*, http://southasia.oneworld.net/archive/Article/taking-e-governance-to-rural-areas#.UQjGAiLKPYM (last visited Jan. 29, 2013).

[11] Anil Srivastava, *E-governance or Development What Comes First: Issues and Correlations* (The Maxwell School of Citizenship and Public Affairs, Syracuse University) *referred in supra* note 2, at 21.

[12] *What is Governance?*, http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/EXTMNAREGTOPGOVERNANCE/0,,contentMDK:20513159~pagePK:34004173~piPK:34003707~theSitePK:497024,00.html. (last visited Jan. 12, 2013).

empowerment through access to information or more efficient government management. As per the World Bank, "e-government" refers to the use by government agencies of information technologies (such as wide area networks (WANs), the internet, and mobile computing) that have the ability to transform relations with citizens, businesses, and other arms of government. These technologies can serve a variety of different ends, viz., better delivery of government services to citizens, improved interactions with business and industry, citizen empowerment through access to information, or more efficient government management. The resulting benefits can lessen corruption, increased transparency, greater convenience, revenue growth, and/or cost reductions.

"Governance" is a broader concept that encompasses the state's institutional arrangements, decision making processes, implementation capacity, and the relationship between government officials and the public. E-governance is the use of ICT by the government, civil society and political institutions to engage citizens through dialogue and feedback to promote their greater participation in the process of governance of these institutions. E-governance consists of two distinct but intimately intertwined dimensions, viz., one political and the other technical, relating to issues of efficiency and public management.[13]

Technical Transitions Outputs

Traditionally, the interaction between a citizen or business, and a government agency used to take place in a government office. With emerging information and communication technologies it is possible to locate service centers closer to the clients. Such centers may consist of an unattended kiosk in the government agency, a service kiosk located close to the client, or the use of a personal computer in the home or office.

Analogous to e-commerce, which allows businesses to transact with each other more efficiently (B2B) and brings customers closer to businesses (B2C), e-government aims to make the interaction between government and citizens (G2C), government and business enterprises (G2B), and inter-agency relationships (G2G) more friendly, convenient, transparent, and inexpensive.[14]

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[13] *See supra* note 2, at 21, 22.

[14] *Definition of E-government*, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTINFORMATIONANDCOMMUNICATIONANDTECHNOLOGIES/EXTEGOVERNMENT/0,,contentMDK:20507153~menuPK:702592~pagePK:148956~piPK:216618~theSitePK:702586,00.html, (last visited Jan. 12, 2013).

E-government applications normally evolve through a four stage process:

1. The first stage (web presence) includes the publication of information on a website for citizens to seek knowledge about procedures governing the delivery of different services.
2. The second stage (limited interaction) allows for interactivity online. Client can download applications for receiving services.
3. The third stage (transaction) involves electronic delivery of documents.
4. And the fourth stage (transformation in nature of single window service) joined up government i.e., interlink between different sections of government departments which results in electronic delivery of services where more than one department maybe involved in processing a request or a service. This new model of service is based on public private partnership (PPP).[15]

E-governance in Rural Areas: Indian Experiences

1. Gujarat

The e-*Gram* Project, collaboration between Adobe and the *Panchayat* Rural Housing and Rural Development Department, Government of Gujarat (GoG). Its main goals were to deliver transformational solutions to its citizens through Common Service Centers (CSCs) offering a range of services to villages including the electronic issue of certificates of birth, death, income, caste, domicile, property, residence proof, agriculture, tax collection, marriage, family information and land ownership. These documents are electronically issued, managed and stored thereby empowering the citizens as they provide for ease, speed[16] and security which was lacking earlier.

Due to adoption of Adobe Systems Incorporated, over 18,000 *Gram Panchayats* across Gujarat installed Adobe Acrobat for the electronic issue of vital citizen certificates and other official documents under the e-*Gram* Project. For the digital transition from paper based system, Adobe provided training (live sessions and video-on-demand) to the stakeholders in rural areas. This helped bridge the digital divide between urban and rural Gujarat by providing citizens access to digital information for all government documentation.

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[15] *See supra* note 2, at 20.

[16] The e-*Gram* Project has reduced time for delivery of services from days to minutes for millions of villagers in India.

The e-governance project backed by the GoG has helped in the effective and quick redressal of grievances that previously took a long time to resolve. This is because it provides for immediate access to necessary documents and information. E-governance enables governance at every level, e.g., the e-*Gram* initiative provides all the basic amenities available in big cities to villages. This reduces need of the citizens to migrate to urban centers for service delivery especially delivery of documents as the same can be done at the *Gram Panchayat* level making life simpler.[17]

2. Rajasthan

E-SANCHAR (e-**S**peech **A**pplication through **N**etwork for **A**utomated **C**ommunication, **H**elp and **R**esponse), is an innovative e-governance application by the Government of Rajasthan (GoR) and OneWorld Foundation-India that brings real benefits of social sector programmes to the poor segments of society. E-SANCHAR integrates mobile/telephony with information technology for generating voice calls for the timely transfer of information to rural citizens. Specific target groups include the elderly, physically challenged and widowed persons. The application integrates data migration, text to speech in Hindi, automatic dialing and communication of citizen centric government advice, and information in the form of fixed as well as variable voice messages to beneficiaries. The project facilitates a reality check whilst doing away with intermediaries between the government and the target groups. It further harnesses and synergizes individual expertise and partner organizations to facilitate citizen centric information and knowledge. This therefore provides governance delivery at the grassroots through ICT innovation and outreach.[18]

Its main advantages are:

- Timely communication to citizens about their pension payment orders (PPOs)/payment/releases.
- Brings information delivery at the doorstep of target beneficiaries.
- System removes intermediaries.
- Removal of confusions/anxiety of payment/transaction cost.

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[17] *Adobe Project in India to Deliver Timely Government Services*, http://southasia.oneworld.net/news/adobe-project-in-india-to-deliver-timely-govt-services#.UQjATyLKPYM (last visited Jan. 29, 2013).

[18] Kalyan Singh Kothari, *Indian State Rolls Out E-sanchar for Better Governance*, http://southasia.oneworld.net/news/indian-state-rolls-out-esanchar-for-better-governance#.UQjW_SLKPYM (last visited Jan. 29, 2013).

- Information flows over a telephone/mobile network which has a much larger penetration in rural areas as compared to Information Technology (IT).
- Information flow also presents the humane face of administration and helps build trust and faith in government.
- Voice call does away with the problem of illiteracy which is quite common in this age group and gives a personalized touch of administration.
- Greater transparency, responsiveness and accessibility.
- No substantive extra burden on treasury offices or existing process.
- Due to the above stated reasons, citizens feel that government is concerned about their welfare and cares for them and enhances the dignity of the target group in the eyes of the local community.[19]

Legal Dimension of E-governance/E-government

E-government initiative is dream come true in the Indian scenario because of the Public Private Partnership (PPP) model that acts as a back bone. At the initial stages e-governance was resorted to only for providing facilities but did not have any regulatory dimension. The regulatory mechanism took time to be established and now it exists in many spheres of governmental activities. Regulatory means creates rule of law and legal norms for regulation of a system. E.g., RFP request for proposal (RFP) documents that acts as inviting offer for creating contractual obligations and would work as having a binding, and legally admissible documentary evidence.

Regulatory means creating rule of law/legal norms and policies, viz.:
- RFP documents.
- E-governance applications.
- Inter and intra governmental e-governance policies.

Institutes/bodies/personnel involved in e-governance must follow established principles of law while creating, hosting and disseminating e-government records, viz., protecting right to privacy, enabling citizens to exercise right to know, right to be heard and similar natural justice principles which are fundamental and inalienable in administrative processes.

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[19] *E-speech Application through Network for Automated Communication Help and Response Integration of IT with Mobile Telephony*, http://www.nisg.org/knowledgecenter_docs/A03060023.pdf.

RFP documents are used in administration for parties to participate in bidding process and other administrative actions and decisions that require people to submit proposals. The problem with RFP is that many times it lacks legal clarity regarding commercial risks and practices for which it is essential to have legal coverage to deal with the risks. Therefore, RFP must have functional and technical specifications, commercial terms and bid formats and finally legal specifications for legal coverage. Legal coverage and specifications means definitions, scope and terms of agreement, right and responsibilities with respect to digital and physical assets, terms of payment and invoice procedure, tax liabilities, confidentiality and non-disclosure of data, governance structure, change and control procedure.

E-government is a step towards better administration by facilitating transparent, speedier and non-hierarchical system of governance. Better administration leads to better management of delivery of government services.

With respect to statutory provisions in India, Chapter 3 of Information Technology Act, 2000 (hereinafter the IT Act) gives a legal recognition to e-governance. Sections 4-10 including 6A highlight the extent of e-governance and rights conferred by the IT Act to:

- the government,
- e-governance service provider,
- the individual.

These provisions give legal recognition to e-records, electronic signature, electronic delivery of services, retention of e-records, and dissemination of information regarding electronic form, rules, regulation, order, bye law, notification etc. in electronic gazette.

Professional Bodies for E-government Initiatives

1. Computer Society of India (CSI)

Certain initiatives for e-governance by use of ICT have been by establishing professional bodies such as CSI who have recommended various modules for ICT for rural India. CSI considers e-government to be an inescapable need for the upliftment and benefit of the rural population. It has also acknowledged the fact that as compared to the urban masses the rural masses are eliminated from the benefits of ICT technology.

2. National Knowledge Commission (NKC)

The NKC gave several recommendations with respect to e-governance. Prominent among them are reengineering of

government processes in 21st century, replacing of old controlled and mistrusted regime of British *Raj* with decentralized and devolutionary powers towards the rural masses and at the grassroots levels.

According to the NKC, e-governance by the government will provide for traceable records, improved enforcement and individual performance, increase accountability, efficiency productivity as well as transparency of policies and process.

3. Administrative Reform Commission (ARC)

ARC in its 4th report, on fighting corruption, stated that the introduction of information communication technologies, e-governance initiatives and automation of corruption prone processes in administration have succeeded in reducing corruption. E-governance is the logical next step in the use of ICT in systems of governance in order to ensure wider participation and deeper involvement of citizens, institutions, civil society groups and the private sector in the decision making process of governance. There have been several successes in introduction of e-governance. But the greatest challenge has been their replicability and up-scaling. There are very few examples of e-governance with a nationwide impact (e.g., the railway reservation system).

Hurdles in e-governance include the lack of good infrastructure and the inadequate capability of the personnel which have proved to be major bottlenecks in the spread of e-governance. Another hurdle is non-familiarization of departmental officials with the relevant processes and their capabilities.[20]

4. National e-Governance Plan (NeGP)

NeGP's vision is to make all governmental services accessible to the common man in his locality through common delivery outlets, and ensure efficiency, transparency and reliability of such services at affordable costs to realize the basic needs of the common man.

Gender Focus of E-government Projects

Deliveries of health services in remote villages and rural areas through ICT are some of the special programmes geared to women's needs. ICT mechanism can be used to generate greater awareness among women and child, and health care by improving the mobility of

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[20] *Second Administrative Reforms Commission Fourth Report*, http://arc.gov.in/4threport.pdf.

medical and extension services to poor women. In fact e-government initiatives view women as special category of service recipients with unique needs and preferences.

ICT with reference to Auxiliary Nurse Midwife (ANMs): The ANMs can use personal digital assistants (PDAs) to record service data on mother-child health care and family planning for the purpose of increasing efficiency in data collection and storage by streamlining the actual delivery of service to the recipients.

Gyandoot is a project to help widows from small towns to receive pension payments.

However, electronic delivery of services by governments is largely confined to regulatory agencies such as issue of certificate and licenses, and tax collection and very few examples of e-government with reference to health and educational services are being delivered through the use of ICT.

Therefore, there is scope to improve on this front by conscious incorporation of women friendly policies and practices in government. Even if there are few such schemes/projects, the number is almost negligible. E-government projects, meant to benefit women, can succeed provided women are consulted and involved both at the design and implementation stage. Their concerns and requirements should be addressed through well designed projects and schemes. At the same time it is essential on part of government to create awareness of these initiatives through use of IT. The role of the nongovernmental organizations (NGOs) and political leaders/representatives is most essential at this juncture so that the empowered are in position to exercise their rights.

National Rural Employment Guarantee Act, 2005 (NREGA): Possible Areas of ICT Interventions

1. Need and importance of ICT in the implementation of NREGA

ICT intervention in the implementation of NREGA[21] is important because:

i. ICT ensures transparency and helps in information dissemination.

ii. ICTs tool(s) is/are required as the size of the programme is very large-geographically, financially and in terms of the beneficiaries.

[21] *ICT in NREGA Implementation*, http://www.nisg.org/knowledgecenter_docs/D08010003.pdf.

iii. ICT facilitates online monitoring and evaluation of the programme. The timely feedback will help in timely corrective actions.

iv. ICT tools help in social audits whereby the local bodies and citizens may actually audit the programme at their end. ICT can play a definite role in every phase of the implementation of the NREGA.

The following could be the major areas for interventions.

2. Communication and mobilization

i. Some of the ICT interventions that can be possibly used for communication and mobilization include community radio, television, public address systems, *panchayat* websites and the internet to publicize the ICT based initiatives.

ii. Information kiosks that have been set up in some villages and the 100,000 Common Service Centers being implemented by the Department of IT can be used as focal points to disseminate information on the scheme.

3. Planning phase

To create a database of durable, productive, labour-intensive works at the *panchayat* level it requires mapping out of socially productive and durable assets/infrastructure which can be created in the respective zones/clusters. Issuing of job cards, digitization of muster rolls, persons employed, their output, wage rates, working hours etc. can also be available for verification by the *panchayats*, peers and the community through the use of ICTs. The use of Smart Cards/Biometric Cards can be introduced to identify and track every beneficiary in the region.

4. Execution of works

i. Works Management System with authentic records of the attendance at the worksites with simultaneous updating of the employment records is necessary. Works identified in a particular block to be taken up under the scheme must be available for viewing and measurement by all *panchayats* within that block.

ii. Work Flow Automation System may be introduced since the approval of works, allocation of works to an implementing agency etc., must be sanctioned by the Programme Officer or such local authority (including the *panchayats* at the district, intermediate or village level).

iii. Disbursement of wages and unemployment allowance.

5. Monitoring

i. ICTs provide for ensuring that the members of the designated rural household are only availing the guarantee of 100 days of employment, and their wage employment rights are not being misused by others.

ii. Biometric systems like fingerprint recognition may be used as potential solutions to address this issue. A fingerprint recognition based time and attendance system at the frontend backed by a comprehensive Computerized Management Information Systems (CMIS) at the back-end may be able to address the issue.

iii. The NREGA makes it compulsory for the daily wages to be disbursed within a specified time limit. It therefore becomes necessary that this information is captured and available for public viewing through the CMIS.

iv. Information such as data pertaining to households, number of days of employment provided, reports on the assets created, financial information like allotment of funds by Ministry of Rural Development (MoRD) to the states, and eventually to the implementing agencies, tracking wages paid to the workers and all other aspects of implementation must be captured and made available to view for people in the hierarchy and the public at large. This is also required by the Right to Information Act, 2005.

v. Geographical Information System (GIS): The use of GIS can greatly enhance the monitoring of the NREGA. Digital maps can be made available for viewing to show the assets that have been created under the scheme and provide for the assessment of the quality of assets created.

6. Grievance redressal system

i. Citizens can register grievances at all *panchayat* levels and in offices of the Programme Officer and the District Programme Coordinator. This information must be made available online.

ii. Citizens must be able to track their grievances online. The list of issues above is indicative and not exhaustive in nature. Other issues require policy, legislative or administrative initiatives.

7. Software for project implementation

The Government of Andhra Pradesh is a forerunner in deploying ICT in the implementation of NREGA. In collaboration with Tata Consultancy Services (TCS) a software package has been developed which integrates various processes viz., enrolment of wage seeker, monitoring of work execution, management of wage and material payments, etc., into a single framework. Computers with this

software are installed in all the 656 *mandals* across 13 districts of Andhra Pradesh. Simplified input data sheets which can be filled by a non-technical person are designed for all these types of works. Estimates are generated by the computer immediately after information in the input data sheet is fed. Thus this process demystifies the conventional estimate preparation, and enables any common person to understand the process of estimate preparation.

The website, *www.nrega.ap.gov.in*, enables any user to view the following:

- job cards issued relating to any *panchayat*,
- the shelf of works,
- progress of works,
- estimates of the works in progress,
- wages paid to the workers,
- paid muster rolls.

To supplement the efforts of various states software has been developed by National Informatics Centre (NIC) which is being used in different states. The website has 7 sections:

- for citizen,
- for panchayats (at all three levels),
- for worker,
- for other implementing agencies,
- for Programme Officer/District Project Coordinators,
- for states under MoRD.

Many other solutions have been proposed by various agencies but unfortunately they have not yet reached the implementation stage.

Some of the unachieved on paper agendas are as follows:

i. Short message service (SMS) based fund transfer

To enable speeding up the process of fund transfers an innovative solution using mobile phones has been suggested. It works as follows:

- Site Assistant Engineer sends the day's muster roll of NREGS benificiaries by SMS.
- Village Payment Agent receives the SMS.
- Village Payment Agent makes payment to NREGS beneficiaries based on muster roll received.
- A second SMS about payments made is sent to Panchayati Raj Department's Banker.

- On receiving the SMS the Panchayati Raj Department's Banker transfers funds to Village Payment Agent's bank account.
- SMS database will be integrated with NREGS web portal to generate weekly payment details.

ii. Using rural automated teller machine (ATMs)

The low-cost rural ATM (*Gram* teller), being developed by Vortex Technologies can be implemented if the bank account transfer mechanism is put in place. The ATM works with both used and new notes and has a fingerprint based authentication system. It works on very low power with a built-in battery back-up, and does not require air conditioning.

iii. Using biometrics

An interesting pilot in using biometrics for authentication of workers was carried out on April 27, 2006, at Jakulla Kutha Palli (J.K. Palli, a remote hamlet of about 200 families, under the Amaduguru Mandal, about 95kms from Ananthpur District Headquarters). Reportedly the biometric tracking was 100% successful, with no failures, using a standalone biometric device and a 12V car battery, as there was no power supply for the whole day in the entire *mandal*. The biometric authentication, was not without its own attendant problems, as some of the women, come directly from work, with cement/lime mortar coating on their fingers. Some fingers were very rough and a second finger print registration had to be taken. But 100% success rate was achieved, out of which, 80% in the very first attempt and 20% in the second attempt. Around 50% of the beneficiaries are women. The minutes of the meeting of the local committee for payment disbursement in J.K. Palli elaborates the details of biometric tracking and payment.

iv. Synergetic approach[22]

There are other projects like Common Service Centres, e-*panchayats*, etc., which are planned to be implemented in the coming months and years. In almost every state computers are slowly but surely percolating down to the *panchayat* level and it is only a matter of time before the state-Wide Area Networks are also available at the *panchayats*' doorsteps. The use of ICT in NREGA implementation should be seen in synergy and complementary to all these initiatives that are contemplated or in progress. Then only can the full potential of ICT be harnessed for empowering the common citizen.

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[22] *ICT in NREGA Implementation*, http://www.nisg.org/knowledgecenter_docs/D08010003.pdf.

Various Initiatives with reference to E-governance in India

- Aarogyasri Health Insurance Scheme,
- Gyan Vinimay (e-classroom),
- Online filing of RTI complaints,
- Implementation of the Indian National Tsunami Early Warning System,
- Old Age Pension Payment Monitoring System, etc.

Indian Development Gateway (IDG) website *www.indg.in* covers six projects with reference to e-governance which are: agriculture, primary education, health, social welfare, rural energy and governance.

Concluding Remarks

For implementing any e-governance project successfully certain guidelines in nature of citizen/beneficiary centric delivery mechanism, reengineering process initiative for shifting from manual to automatic system and capacity to adjust according to variations and needs are the essential requirements. Good governance is attainable only if there are participation of the stakeholders i.e., citizens in political process. Digitalization is an active agent for democratization of information. With optimum use of ICT by the government to carry out its functions and responsibilities, there would be transparency in their governance, connectivity and accessibility of the beneficiaries would increase and would remove middlemen who were mostly responsible for corruption and illegally diverting the funds from reaching the needy and deserved.

A country would be ready to incorporate e-government when it acquires certain degree of e-readiness or in other words techno savvy behavioral pattern. There must be training and awareness programme so that technology is made user friendly and also that there is enabling legal framework to encourage and support e-governance by the government. E-governance projects must be provided in local languages and in a format easy to understand by an average common man. To facilitate greater use of ICT it is essential that the government records are computerized. The legal frame work must promote the boon of ICT for betterment of human beings so that life and liberties are attained to the fullest extent for good cause and to preserve peace and harmony in society. Development must reach the lowest strata of the society and digital divide must be the target for elimination by use of legal machinery.

Last but not the least in the wake of 21st century with globalized character of the world order, it is most essential that science and technological advances do not undermine human rights and ethical norms (right to privacy and security of data, legal sanction of new forms of storage and archiving and laws that accept paperless transactions, right to live with dignity, right to life and liberty, right to know and various shades of cardinal rights in the context of practical situations) of the least affluent and underprivileged, in fact everybody must get his/her due as per his/her needs for building an egalitarian democratic society.

EXAMINING THE INTRICATE RELATIONSHIP BETWEEN LAW AND BIOETHICS

Dr. Rohini Honap*

"Occasionally science makes procedures possible that are so radical, that those at the interface between science and society are called on to define moral standards for society."[1]

Introduction

Imagine a world where we could sit in the cozy comfort of our homes, and have a clone to go out and work hard, while you reap the benefits. Yes, this may not be a distant dream, but a near reality, when human cloning would be possible and permitted. The first successful cloning was that of "Dolly the sheep" in 1997. Dolly, an ewe, was the first mammal to have been successfully cloned from an adult cell, by a biologist Ian Wilmut. She was cloned at the Roslin Institute in Edinburgh, Scotland.[2]

After that a series of animals like Afghan Hound,[3] a cow, a Holstein heifer named "Daisy" was cloned by Dr. Xiangzhong (Jerry) Yang using ear skin cells from a high-merit cow named Aspen at the University of Connecticut on June 10, 1999; also a pig, and even a rhesus monkey,[4] and the day is not far behind when a human baby would be cloned. We are living in a world driven by technology, and have ushered in a new era of embryonics, cryonics, genetics, stem cell cropping and right up to human cloning.

Science and its development have reaped unimagined benefits on mankind, on context of healthcare. The ideal of scientific freedom is definitely restricted and may fail to achieve its fullest potential when fettered with constrained imposed by society and law. However the balancing of these competing entities with sometimes conflicting

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1 M. Warnock, *The Ethical Regulation of Science,* 450 (20) Nature 615 (2007).

2 http://www.sciencedaily.com/articles/d/dolly_the_sheep.htm (last visited Oct. 17, 2013).

3 http://news.nationalgeographic.co.in/news/2005/08/photogalleries/dogclone/ (last visited Oct. 19, 2013).

4 http://en.wikipedia.org/wiki/List_of_animals_that_have_been_cloned (last visited Oct. 17, 2013).

interests has to be done for extending justice and protection of human rights, by imposing scientific responsibility. Scientists are the gatekeepers of new knowledge and as such they have a special responsibility to the rest of the society.[5]

Law is a tool, or instrument to regulate human conduct. Since times immemorial laws have been developed by man for civilized societies. The role of law thus, in the life of every man is an indispensable and omnipresent one. Every single sphere of human lives today is regulated by a plethora of laws, right from birth to death.

In this scenario the rapidly changing and highly advanced field of biotechnology, has further widened the scope and ambit of the arm of law to stretch out and encompass an area that immediately affects our human bodies. As the relationship between humans and the power of biotechnology to affect the human body becomes very real and so entwined, there arises the need for definitive codes for conduct, termed as bioethics to protect the basic human rights of every individual that may be affected by the role of biotechnology in his life. These may be many a time controversial in nature, as scientific research conflicts with invasion into the basic rights of people.

It is certain thus, that medical research and bioethics are uneasy, but inevitable bedfellows with the law.

Definition of Bioethics

Bioethics is a discipline dealing with the ethical implications of biological research and applications especially in medicine.[6]

Bioethics can be termed as a moral perception relating to ethical biological research, medical practices followed, and are further entwined with contemporary political policies, law and even religious and philosophical beliefs.

The term "bioethics" was coined by Fritz Jahr in 1927, and stems from the combination of two Greek words, *bios* or life and *ethos* or behavior. However he restricted the application of the term to biological research involving animals and plants.[7]

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[5] International Council for Science, *Freedom, Responsibility and Universality of Science,* ICSU Paris13 (2008).

[6] www.merriam-webster.com/dictionary/bioethics (last visited Oct. 22, 2013).

[7] F. Lolas, *Bioethics and Animal Research: A Personal Perspective and a Note on the Contribution of Fritz Jahr,* 41(1) Biol. Res.19-23 (2008).

It was much later that the term "bioethics" was extended to include global ethics, when in the year 1970, the American biochemist Van Rensselaer Potter, developed a discipline to represent a link between biology, ecology, medicine, and human values, in order to attain the survival of both human beings and other animal species.[8]

Background

The post Second World War (1939-45) period brought forth the horrifying and gruesome clandestine medical practices that had been carried out on humans especially the Jews, without their consent, during the Nazi regime. These humans experiments, rampant bio-piracy, and organ transplants led to the death, permanent health issues and disfigurement, of millions of humans, disclosure of which took place at the post war Nuremburg trials. This led to the first ever International Statement on the ethics of medical research using human subjects, and particularly laying down the fundamental principle of voluntariness of consent, in the form of the Nuremburg Code formulated in 1947.[9]

Further when the United Nations General Assembly adopted the Declaration of Human Rights, 1948, specific mention of rights of human beings subjected to involuntary maltreatment was included in the declaration.[10]

In 1966, the International Covenant on Civil and Political Rights categorically stated, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific treatment.'[11]

However for the first time the fundamental principles and specific guidelines in respect of human participants in scientific research, were laid down, in the form of the Helsinki Declaration[12] in 1964, which prompted the Indian Council of Medical Research to lay down a policy statement in the form of "Ethical Considerations Involved in Research on Human Subjects," to regulate clinical research in India.

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[8] Goldim, Jr., *Revisiting the Beginning of Bioethics: The Contributions of Fritz Jahr (1927),* Perspect Biol. Med., Sum, 377-80 (2009).

[9] The Nuremburg Code, Trials of War Criminals before the Nuremburg Military Tribunals under Control Council Law No. 10, 181-82, Washington D.C., U.S. Government Printing Office (1949).

[10] Universal Declaration of Human Rights, 1948 art. 5.

[11] International Covenant on Civil and Political Rights, 1966 art. 7.

[12] World Medical Association Declaration of Helsinki, Helsinki, 1964.

The Belmont Report 1979, that was published by the National Commission for the Protection of Human subjects of Biomedical Research , in respect of Ethical Principles and Guidelines for Protection of Human subjects and expounded the cardinal principles of respect for persons, beneficence and justice, as inherent to any bioethics code.

The Report states the basic ethical principles include:

1. **Respect for Persons:** Individuals should be treated as autonomous agents, and second that persons with diminished autonomy are entitled to protection**.** Respect for persons demands that subjects enter into research voluntarily and with adequate information.
2. **Beneficence:** The Hippocratic maxim "do no harm" is the foundation of this principle. It means that scientific research must (a) do no harm, (b) maximize benefits. The obligations of beneficence affect both individual and society at large.
3. **Justice:** Fairness in distribution of benefits or what is deserved.[13]

Since then, a number of nations have developed their Bio-ethic Codes, the most recent International documents being the UNESCO's The Universal Declaration on Human Genome and Human Rights, (1997), The International Declaration on Human Gene Data, (2003), and Universal Declaration on Bioethics and Human Rights, (2005).

The tremendous grass root revolution advances in the field of genetics, genomics and molecular biology have necessitated their regulation to provide adequate safeguards, to protect the rights and welfare of human entities who become the most vital partakers in biotechnological research. Human life has been touched and altered in several ways due to advanced technology used in key areas of social and individual lives of humans.

Few of the areas in which important ethical and legal issues are closely related to each other are:

- Abortion
- ART's (Artificial Reproductive Techniques), Embryonics
- Sperm and Egg Donation and Surrogacy
- Contraception and population control

[13] www.hhs.gov/ohrp/humansubjects/guidance/belmont.html (last visited Oct. 20, 2013).

- Euthanasia and issues regarding use and continuation of Life support machines.
- Organ Donation and Transplantation, Bio-harvesting, and Xeno transplantation
- Blood Transfusion
- Genomics and Eugenics
- Recombinant DNA Technology
- Human Cloning and Cryonics
- Genetically modified food
- Nano-medicine
- Transexuality
- Brain Mapping
- Bio-piracy.
- Stem Cell Research

In view of the expanse of the field of biotechnology, and measures taken all over the world to develop Bioethical codes and norms, In India too, the process of regulation was required, taking into consideration the number of these technologies introduced in India and the ongoing research in this field.

Development of Bioethics in India

Considering the enormity of biomedical research undertaken globally and for being in consonance with the requirements of the W.H.O. (World Health organization),[14]The Indian Council of Medical Research, New Delhi, brought out the 'Policy Statement on Ethical Considerations involved in Research on Human Subjects' in 1980. They were revised in 2000 as the 'Ethical guidelines for Biomedical Research on Human Subjects.' The third revised guidelines published in 2006, take note of these changes, in national policies, Indian culture, addresses ethical issues in specific situations to the extent possible.[15]

The numbers of legal, moral, social, and religious issues that arise out of Bio-medical Research have sought to be regulated through 12 General Principles:

1. **Principle of Essentiality:** Wherein the research must be of advantage and benefit to the human species an ecological environment and well being of the planet.

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[14] World Health Organization, Operational Guidelines for Ethics Committees That Review Biomedical Research, Geneva (WHO 2000).

[15] www.icmr.nic.in/ethical_guidelines (last visited Oct. 22, 2013).

2. **Principle of Voluntariness, Informed Consent and Community Agreement:** An informed and free consent is the most rudimentary of the ethics required to be followed by scientific researchers. Consent of the legal guardian in case of incapability to give consent.
3. **Principle of Non-Exploitation:** In absence of the above principle, likelihood of exploitation due to ignorance or illiteracy of participants would exist.
4. **Principle of Precaution and Risk Management:** Protocols for minimum risks or measures to prevent disasters.
5. **Principle of Professional Competence:** Qualified persons to perform experiments or research and personal integrity of scientists.
6. **Principle of Accountability and Transparency:** Experiments should not be carried on under a veil of secrecy, and measures for checks and balances to ensure accountability of every procedure. Monitoring through keeping of detailed notes and preservation of data.
7. **Principle of Risk Management:** Disaster management in event of any sudden fallacy or error of judgment.
8. **Principle of Maximization of Public Interest and of Distributive Justice to Least Advantaged:** Based on the principles, of autonomy, beneficence, and justice as laid down in the Belmont Report
9. **Principle of Institutional Arrangements:** Duty imposed on the institution for proper recording and preserving of data.
10. **Principle of Public Domain:** Research must be made public through publication.
11. **Principle of Totality of Responsibility:** Professional and moral responsibility.
12. **Principle of Compliance:** General and positive duty, to ensure letter and spirit of the guidelines, and to see that they are scrupulously observed and duly complied with.

As a part of Ethical Review Procedures, it is mandatory that all proposals on biomedical research involving human participants should be cleared by an appropriately constituted Institutional Ethics Committee (IEC), also referred to as Institutional Review Board (IRB).

Religious and Cultural Issues

Consider a case where a orthodox religious man of Jewish or Islamic faith, that does not permit the eating of the meat of pigs, if told that he been transplanted with a heart valve made of pig genetic material., may actually go into a shock if he feels his religious beliefs have been vilified. Pigs are currently the animals of choice as studies have

shown that porcine islet cells and genetic material can be engineered to create human organs. Research in this arena is being carried out extensively.

A religious restriction on the consumption of pork exists in Jewish dietary laws (Kashrut) and in Islamic dietary laws (Halal). Such restrictions originate from the laws of the Hebrew Bible, and from the laws of the Muslim Quran respectively. Among Christians, Seventh – day Adventists consider pork taboo, along with other foods forbidden by Jewish law. The Ethiopian Orthodox Church and Coptic Orthodox church of Alexandria also discourage pork consumption. [16]

A new trend of *Cadaver Donor Transplants***,** through the modality of making "Living Wills," is currently in vogue in many countries, for certain organs like eyes that can be harvested from a human corpse, stored scientifically and successfully implanted in a done. The recipient of such donor organs may however some religious or cultural inhibitions in respect of the deceased donor.

Religious and Cultural dilemmas arise out of certain areas of biotechnology, particularly, in cases of contraception, abortion, Assisted Reproductive Technology, (ART), surrogacy, cloning, transplantation of organs and xeno-transplantation.

According to the Indian Council for Medical Research, the fast developing science in the area of cloning, stem cell research, and eugenics or selective breeding, and the ensuing misuse of the same, in the name of racial or ethnic purification, is a grim reminder to the radically racial undercurrents during the Nazi period. The concern has become even more serious in recent years due to the possibility of commercial eugenics. With the breakthrough in DNA Recombinant Technology, that can untangle the mysteries of the human genome sequencing in 2000, further gene therapies for curing genetic diseases, genetic engineering or selection of embryos for sex selection or even designer babies, or to avert genetic abnormalities, *in vitro* fertilization, organ transplantation, nuclear transfer for regenerative therapy has become possible, and has come under the scanner. These issues create conflicts in particularly vulnerable human population. The Human Genome Project (HGP) creates legal issues, about patenting and others in respect of dignity, autonomy and justice and public debate.[17]

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16 http://en.wikipedia.org/wiki/Religious_restrictions_on_the_consumption_of_pork (last visited Oct. 17, 2013).

17 *Id.*

Furthermore, psycho-sociological problems of identity, impact on religious beliefs, family and society bring forth a dearth of problems associated with research

In this arena the role of a strong Code of Bioethics could address these problems. The researcher must be very clear and transparent to the participant in any biotechnological procedure where the religious sentiments arising out of such transplantation of organs from persons of different faith are concerned.

With regard to the early embryonic stage of human life, the Catholic Church for example has raised a loud voice against the artificial termination of pregnancy. Various religious cultures have showed and underpinned the value of life, and the direction that science and technology should take in this regard. It is argued that the global competition in science and technology makes it necessary to transcend the views concerning the value of life propagated by particular religious culture.[18]

The socio-legal, and even moral issues in respect of surrogacy, are very complex, and in fact need to be addressed with a comprehensive legislation. Surrogacy involves a conflict of human interests and has inscrutable impact on the primary unit of a family.[19]

The moratorium on human germ-line therapy is an example of the recognition that there must be ethical restraints on the use of what is technically feasible. Part of the reason for this restriction is uncertainty about the long-term effects of such interventions. There is also considerable uncertainty about the environmental consequences of the genetic manipulation of plants. These issues are scientific questions that need to be answered before we have an adequate basis of knowledge for reaching final ethical decisions. The use of biotechnology in relation to human beings is governed by the Hippocratic principle that interventions must be for the benefit of the individual person concerned.[20]

Xeno-transplantation carries with it a host of moral, religious and ethical issues. It means the transplantation of cells, tissues or organs, from one species to another[21]and more often in context of transplant from animals to humans. The dearth of human led to the search of other resources like animals, most nearest to the Homo

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[18] http://csi.sagepub.com/content/59/2/160.abstract (last visited Oct. 23, 2013).
[19] 228th REPORT OF THE LAW COMMISSION OF INDIA.
[20] John C. Polkinghorne, *Ethical Issues in Biotechnology* (Oct. 21, 2013), http://www.genethik.de/ethical.htm.
[21] CHAMBERS DICTIONARY (10th ed. 2006).

sapiens like apes, simians, and monkeys. However, in additions to the rejection of the animal tissue, more serious concerns regarding transfer of zoonoses or animal diseases, and trans-genesis or the introduction of foreign genes, of animals into humans, would multiply the health issues arising out of xeno-transplantation. Moreover, particularly in some religions like Hinduism, or the Jewish or Muslim religion, the very basic issues of religious sanctions would pose a serious threat to the recipient. Some religious sects advocate practicing vegetarianism, and may oppose the very ideology of xeno-transplantation, and genetically modified foods.

Prohibited Areas of Research

There are certain areas of research, which are universally prohibited:[22]

1. Any research related to germ line genetic engineering or reproductive cloning.
2. Any *in vitro* culture of intact human embryo, regardless of the method of its derivation, beyond 14 days or formation of primitive streak, whichever is earlier,
3. Transfer of human blastocysts generated by parthenogenic or androgenic techniques into a human or non-human uterus.
4. Any research involving implantation of human embryo into uterus after *in vitro* manipulation at any stage of development, in humans or primates.
5. Animals in which human stem cells have been introduced at any stage should not be allowed to breed.

Conclusion

Different fields of biotechnology research and development have inspired different reactions and decisions in the last decade. For each innovation, there are clearly more than one public opinion, ethical committee advice and national policy framework. Conversely, in each country, social mobilizations and political regulations do not only depend on general attitudes towards biotechnology, but in great part also on the specific matter of each innovation as it connects with proper national, local or individual issues. In this context, each biotechnological innovation is much more than one item of health, agricultural, and industrial biotechnologies, whose ethical and social

[22] *See supra* note 15.

issues would have been addressed once and for all.[23]

It has become that law in this field, is required to be developed in the light of social sciences. As law has been defined as an instrument of social change, it will have to spread its wings to encompass every aspect of the pure sciences like biotechnology, to safeguard the interests of the society.

A strong Bioethical commitment giving due respect to the human race, and its beneficial needs must be the foremost of every research program. Even in the race of keeping up with the global scientific developments, we cannot overlook the peculiar needs, characteristics, and diversity of the Indian population. Man should not be made a guinea pig, for experimentation by the elitist classes for their own selfish purposes.

The sustainable development aspect also requires a pragmatic approach, and the Biotechnological Revolution must maintain equilibrium to reduce the experimentation on humanity, without hindering scientific freedom. Precautions must be taken to analyze, whether it is merely greed that spurs our inventions.

Though various nations undertaking vast quantum of biotechnological research, and formulate their own ethical codes, there is a need for common international norms, to have uniform ethical codes, and avoid circumvention of national policies or legislation, that may forbid the application of certain new techniques, due to certain social and demographic reasons. For example when the Pre-Conception & Pre-Natal Diagnostics Techniques Act, (Prohibition of Sex Selection) Act, 1994, makes the sex determination test an offence in India, due to the high rate of female feticide, then Indians may go to other countries where such tests are not prohibited by law.

Such incidents are just representative of the different ethics followed in application of bio-research applications that result in the indirect violation of National Policies, on different, in the absence of common and uniform Bioethics for all countries.

Yes, we can invent and discover, but how far should we? Should man pursue his intellectual and creative pursuits to the extent of destroying beliefs, faiths, human values, humanity and altering

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[23] Nicolas Rigaud, *OCED International Futures Project on "The Biotechnology to 2030: Designing a Policy Agenda"* (Feb. 2008), http://www.biotechnologie.de/BIO/Redaktion/PDF/de/laenderfokus/indien-oecd-vollbericht-mit-anhang,property=pdf,bereich=bio,sprache=de,rwb=true.

family dynamics? The pertinent question is that, undoubtedly man has always like to experiment, but when given a chance should he play God?

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CYBERSTALKING AND ONLINE HARASSMENT: A NEW CHALLENGE FOR LAW ENFORCEMENT

Dr. Sapna Sukrut Deo*

Introduction

The Internet has become a medium for people to communicate globally in the course of business, education and their social lives. The Internet has made it easy for people to communicate, meet a companion, or compete with people on the other side of the world with click of a mouse.

In 2013, according to the *Internet World Stats Report*, 137,000,000 people used Internet, and 56,698,300 people used *Facebook* in India, as a result there arises a concern for Internet safety. The increased use of the Internet has created an impact on the number of online harassing/cyberstalking cases.

Cyberstalking is a new form of computer related crime, occurring in our society. Cyberstalking means when a person is followed and pursued online, invading his/her privacy as his/her every move watched. It is a form of harassment that can disrupt the life of the victim and leave him/her feeling very afraid and threatened. Cyberstalking usually occurs with women, who are stalked or harassed by men, or with children who are stalked by adult predators or pedophiles. Cyberstalkers need not have to leave their home to find, or harass their targets, and has no fear of physical violence since they believe that they cannot be physically touched in cyberspace. They use Internet, e-mail, and other electronic communication devices to stalk persons.

This paper addresses the issue of cyberstalking and online harassment, and what legal remedies an Internet user may have when confronted with this form of behavior. Firstly, the paper will examine what constitutes cyberstalking and harassment, and will discuss the way in which the Internet may facilitate such behavior.

The nature of the behavior is effects-based one upon the victim wherein the stalker is anonymous, although the harasser may not be

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so. Online harassment is similar to real world stalking in the way that it can be disturbing to the victim. At the same time the unique environment of the Internet creates "remoteness" on the part of the stalker, and provides a false sense of security arising from the apparent anonymity that is present on the Internet.

Secondly, this paper will review the current harassment legislation in India, and examine how this legislation has been applied by the Indian courts. In addition it will provide remedies for an Internet user confronted with this behavior.

Finally, the paper will consider "self prevention/protection" measures that individuals may adopt in dealing with online harassment and cyberstalking.

Definitions of Online Harassment and Cyberstalking

Cyberstalking involves using the Internet, cell phone, and/or any other electronic communication device to stalk another person. It may involve threats, identity theft and damage to data or equipment, solicitation of minors for sexual purposes, and any other form of repeated offensive behavior.

Online harassment can involve sexual harassment which is unwanted contact of a personal nature, or other conduct based on sex affecting the dignity of men and women at work.[1] This may include unwelcome physical, verbal or non-verbal conduct. It is unwanted if such conduct is unacceptable, unreasonable and offensive to the recipient. Sexual attention becomes sexual harassment if it is persistent and once rejected by the recipient. However, a single act, if sufficiently serious, can also constitute harassment.[2]

Online harassment can be divided into direct and indirect harassment. "Direct" harassment includes the use of pagers, cell phones and the email to send messages of hate, obscenities and threats, to intimidate a victim. E.g., the majority of offline stalkers will attempt to contact their victim, and most contact is restricted to mail and/or telephone communications. On the other hand "indirect" harassment includes the use of the Internet to display messages of hate, threats or used to spread false rumours about a victim. Messages can be posted on web pages, within chat groups or bulletin boards. This form of harassment is the electronic equivalent of

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1 http:www.mindspring.com\~techomom\harassed\ (last visited May 1, 2013).
2 British Telecommunications PLC v. Williams, (1997) IRLR 668.

placing pinups on a factory wall, and if the display of such material from the victim's perspective causes offence it will amount to harassment.[3]

Thus generally speaking, online harassment becomes cyberstalking when repeated unwanted communications, whether direct or indirect, takes place over a period of time, via one or more mediums of Internet or electronic communications. The messages themselves must be unwanted, and the content can be-but is not limited to-threatening, sexually harassing, emotionally harassing or bullying, or general misinformation. Provided the messages create reasonable fear in the victim, they fit the definition for cyberstalking.[4]

There are a number of definitions of stalking that exist, each differing slightly. Stalking as "a course of conduct directed at a specific person that involves repeated (two or more occasions) visual or physical proximity, nonconsensual communication, or verbal, written, or implied threats, or a combination thereof, that would cause a reasonable person fear". It is interesting that the definition excludes most electronic forms of stalking as there is often a lack of visual or physical proximity in such cases.[5]

The definition used in the *British Crime Survey*[6] is that stalking is "two or more incidents causing distress, fear or alarm of obscene/threatening unwanted letters or phone calls, waiting or loitering around home or workplace, following or watching, or interfering with, or damaging personal property carried out by any person". In parallel, the psychiatric literature has defined stalking as a course of conduct by which one person repeatedly inflicts on another unwanted intrusions to such an extent that the recipient fears for his or her safety.[7] Whilst each source offers its own interpretation, repetition leading to fear is a recurring theme in any definition.[8]

Stalking and harassment are distinctive in law since the offending behavior is said to occur only when the victim reports him/her self to be distressed as a result of the behavior of another to whom they

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3 J. ANGEL, COMPUTER LAW 17 (4th ed. Blackstone Press Ltd, London, U.K. 2000).

4 Randy McCall, *Online Harassment and Cyberstalking: Victim Access to Crisis, Referral and Support Services in Canada-Concepts and Recommendations*, www.vaonline.org (last visited May 15, 2013).

5 Patricia Tjaden & Nancy Thoennes, *Stalking in America: Findings from the National Violence against Women Survey* (1998), http://www.ncjrs.gov/pdffiles/169592.pdf.

6 K. Smith, K. Coleman, S. Eder & H. Hall, *Homicides, Firearm Offences and Intimate Violence*, 2 CRIME IN ENGLAND AND WALES 1-97 (2009/10.)

7 *Id.*

8 http://www.beds.ac.uk/research/irac/nccr (last visited May 6, 2013).

believe to be threatening. The victim's perception of the offending behavior and its effects are therefore pivotal in providing criteria on which to make a charge.

Online Harassment and Cyberstalking in India: Legislative Remedies

Since the 1990s, stalking and harassing has become a common occurrence due to Internet.

In 2001, India's first cyberstalking case was reported. Manish Kathuria was stalking an Indian lady, Ms. Ritu Kohli by illegally chatting on the web site, *www.mirc.com* using her name; and used obscene and obnoxious language, and distributed her residence telephone number, invited people to chat with her on the phone. As a result, Ms. Ritu Kohli was getting obscene calls from various states of India and abroad, and people were talking dirty with her. In a state of shock, she called the Delhi police and reported the matter. The police registered her case under Section 509 of the Indian Penal Code, 1860 for outraging the modesty of Ritu Kohli. But Section 509 refers only to a word, a gesture or an act intended to insult modesty of a woman. But when same things are done on Internet, then there is no mention about it in the said section. This case caused alarm to the Indian government, for the need to amend laws regarding the aforesaid crime and regarding protection of victims under the same.

1. The Information Technology (Amendment) Act, 2008

As a result, **Section 66A** of the Information Technology (Amendment) Act, 2008 (hereinafter the IT Act, 2008) states:

> **Punishment for sending offensive messages through communication service, etc.-** Any person who sends, by means of a computer resource or a communication device,-
> (a) any information that is grossly offensive or has menacing character; or
> (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will, persistently makes by making use of such computer resource or a communication device;
> (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages

shall be punishable with imprisonment for a term which may extend to 3 years and with fine.

The IT Act, 2008 does not directly address stalking. But the problem is dealt more as an 'intrusion on to the privacy of individual' than as regular cyber offences which are discussed in the IT Act, 2008. Hence the most used provision for regulating cyberstalking in India is Section 72 of the IT Act, 2008 which runs as follows:

Section 72: Breach of confidentiality and privacy.- Save as otherwise provided in this Act or any other law for the time being in force, any person who, in pursuant of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to 2 years, or with fine which may extend to 1 Lakh rupees, or with both.

Section 72A: Punishment for disclosure of information in breach of lawful contract.- Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person shall be punished with imprisonment for a term which may extend to 3 years, or with a fine which may extend to 5 lakh rupees, or with both.

In practice, these provisions can be read with **Section 441 of the Indian Penal Code, 1860** which deals with offences related to criminal trespass and runs as follows:

Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any

such person, or with an intent to commit an offence, is said to commit criminal trespass.

2. The Criminal Law (Amendment) Act, 2013

Prior to February 2013, there were no laws that directly regulate cyberstalking in India. In 2013, Indian parliament made amendments to the Indian Penal Code, 1860 introducing cyberstalking as a criminal offence.[9]

After 'the December 2012 Delhi gang rape incidence', the Indian government has taken several initiatives to review the existing criminal laws. A special committee under Justice Verma was formed for this purpose and basing upon the report of the committee, several new laws were introduced. In this course, anti-stalking law was also introduced. The Criminal Law (Amendment) Act, 2013 added **Section 354D** in **the Indian Penal Code, 1860** to define and punish the act of stalking. This section is as follows:

(1) Whoever follows a person and contacts, or attempts to contact such person to foster personal interaction repeatedly, despite a clear indication of disinterest by such person, or whoever monitors the use by a person of the Internet, email or any other form of electronic communication, or watches or spies on a person in a manner that results in a fear of violence or serious alarm or distress in the mind of such person, or interferes with the mental peace of such person, commits the offence of stalking:

Provided that the course of conduct will not amount to stalking if the person who pursued it shows-

(i) that it was pursued for the purpose of preventing or detecting crime, and the person accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the state; or

(ii) that it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or

(iii) that in the particular circumstances the pursuit of the course of conduct was reasonable.

(2) Whoever commits the offence of stalking shall be punished with imprisonment of either description for a term which shall not be less than 1 year but which may extend to 3 years, and shall also be liable to fine.

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9 The Criminal Law (Amendment) Act, No. 13 of 2013, INDIA CODE (2013).

Stalking has been defined as a man who follows or contacts a woman, despite clear indication of disinterest to such contact by the woman, or monitoring of use of Internet or electronic communication of a woman. A man committing the offence of stalking would be liable for imprisonment up to 3 years for the first offence, and shall also be liable to fine and for any subsequent conviction would be liable for imprisonment up to 5 years and with fine.[10]

The term "cyberstalking" can be used interchangeably with online harassment. Cyberstalker does not present a direct threat to a victim, but follows the victim's online activity to collect information and make threats or other forms of verbal intimidation. A potential stalker may not want to confront and threaten a person offline, but may have no problem threatening or harassing a victim through the Internet or other forms of electronic communications.

Enforcement Problems

"Even with the most carefully crafted legislation, enforcing a law in a virtual community creates unique problems never before faced by law enforcement agencies."[11]

These problems pertain mainly to international aspects of the Internet. It is a medium that can be accessed by anyone throughout the globe with a computer and modem. This means, as explained below, that a potential offender may not be within the jurisdiction where an offence is committed. Anonymous use of the Internet, though beneficial in many instances, also promises to create challenges for law enforcement authorities.[12]

The Internet is a global medium regardless of frontiers, and this creates new possibilities for the so-called cyberstalker. Cheap and easy access to the Internet means that distance is no obstacle to the cyberstalker.[13] Anyone can become a target for a cyberstalker through the use of the Internet in many forms. The victim can be

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10 http://en.wikipedia.org/wiki/Criminal_Law_%28Amendment%29_Act,_2013(last visited May 1, 2013).

11 B. Jensen, *Cyberstalking: Crime, Enforcement and Personal Responsibility in the Online World*, http://www.law.ucla.edu/Classes/Archive/S96/340/cyberlaw.htm (last visited May 1, 2013).

12 L. Ellison & Y. Akdeniz, *Cyberstalking: The Regulation of Harassment on the Internet*, CRIMINAL LAW REVIEW-*CRIME, CRIMINAL JUSTICE AND THE INTERNET* 7 (Special ed. Dec. 1998).

13 *Id.*

contacted by e-mail, instant messaging (IM) programs, via chat rooms, social network sites, or the stalker attempting to take over the victim's computer by monitoring what he is doing while online. The Internet is not a "lawless place"[14], and there are difficulties in applying laws that are made for specific nation states and this would be also true of applying national harassment and stalking laws to the Internet.

Self-help Approaches

After researching on various aspects of cyber talking, the problem came to know is that the limitations of legal regulation of online harassment in cases which involve anonymous cyberstalkers. These limitations in legal regulation are, to some extent, compensated for by the availability of non-legal solutions to online harassment. A number of more suitable ways in which users can protect themselves from online harassment are discussed below.

- Do not share personal information in public spaces anywhere online, nor give it to strangers, including e-mail or chat rooms.
- Do not ever reply to offensive, defamatory, provocative e-mails if you get them.
- Do not respond to flaming, or get provoked online.
- You can use online segregating tools such as blocking of the email ID, reporting of spams, and are also advised to use strong encryption programmes such as the Pretty Good Privacy (PGP) which ensure complete private communications.
- If you are being stalked, you don't have to be a victim. Report the incident to your Internet Service Provider, police station in your city, or an online help agency and also take advice from your techno-savvy friends.
- Keep evidence of possible harassment by saving messages, or copying and pasting them to self e-mails. Prevention is always better than cure.

[14] *See* J.R. Reidenberg, *Governing Networks and Cyberspace Rule-Making*, 45 EMORY LAW JOURNAL 911 (1996).

ANALYTICAL STUDY OF POLLUTION CONTROL BOARDS IN IMPLEMENTING THE AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1981

Mr. P.M. Joshi*

Introduction

In India consciousness to protect the environment and measures needed to restore it exists since the early days of civilization. The Vedic history bears testimony to this; however in the modern days, especially in post-independent era because of the high priority given to economic growth which resulted into industrialization, urbanization, modernization, less emphasis has been given to conserve the environment. Till 1970, prior to organization of the Habitat Conference at Stockholm no specific steps were taken to protect and preserve the environment quality in India. It is only in 1972 the steps were taken with the formation of the National Committee on Environmental Planning and Coordination (NCEPC) that gradually evolved as a separate department for environment, and gradually reached the full-fledged state of Ministry of Environment and Forests.[1]

The decisions were taken at the United Nations Conference at Stockholm in 1972 (the Stockholm Conference) in which India also participated to take appropriate steps for the preservation of the natural resources of the earth including preservation of quality of air. To implement the aforesaid decisions relating to preservation of the quality of air and control of air pollution, the Parliament of India enacted the Air (Prevention and Control of Pollution) Act, 1981[2], which gave birth to Central Pollution Control Board (CPCB) and State Pollution Control Boards (SPCBs)[3].

This paper attempts to explore the evolution of environmental governance in India. In consonance with this exercise, the study in regard to Pollution Control Boards under the Air (Prevention and

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1 Mrutyunjaya Mishra & Nirmal Chandra Sahu, 2009, *Environmental Governance and State Pollution Control Boards* (2009), http://www.ecoinsee.org/fbconf/Sub%20Theme%20B/Mishra%20and%20Sahu.pdf.

2 14 of 1981, received the assent of the President of India on Mar.29,1981 and published in the Gazette *of India* (Ext.), Pt. II, dated Mar. 30, 1981.

3 The Air (Prevention and Control of Pollution) Act, 1981 § § 3, 5.

Control of Pollution) Act, 1981 has highlighted the contributing factors for the emergence of environmental governance in India. The study also seeks to address the roles of CPCB and SPCBs in environmental governance in India with reference to prevention of air pollution.

Historical Perspective

In the Stockholm Conference in which India participated, decisions were taken to take steps to ensure to protect environment through preservation of natural resources of the earth including preservation of air and control of air pollution. The Government of India decided to implement these decisions of the said conference. It was felt that there should be integrated approach for tackling the environmental problems related to pollution. It was therefore proposed that the Central Board for the Prevention and Control of Water Pollution, constituted under the Water (Prevention and Control of Pollution) Act, 1974 will also perform the functions of the Central Board for the Prevention and Control of Air Pollution (the Central Board) in the Union Territories. It was also proposed that SPCBs constituted under the said Act will also perform the functions of the said Board in respect of prevention, control and abatement of air pollution. However, in those states in which the State Boards for the Prevention and Control of Water Pollution have not being constituted under the said Act, separate State Boards for the Prevention and Control of Air Pollution (the State Boards) are proposed to be constituted. The state government may establish one or more State Air Laboratories to carry out the functions entrusted to the State Air Laboratories under the Air Act.

Aim, Object and Amendment

The Air (Prevention and Control of Pollution) Act, 1981 (the Air Act) was enacted under Article 253 of the Constitution of India to implement the decisions taken in the Stockholm Conference. The Air Act is implemented by the central and state governments, and Central and State Boards.

Over past few years, the implementing agencies experienced some administrative and practical difficulties in effectively implementing the provisions of the Air Act. Accordingly the Act was amended in 1987 to remove such difficulties.

Following are some notable amendments made in the Air Act:

1. **Widened the powers and functions of the Central Board**: In a specific situation, particularly when a State Board fails to act and comply with the directions issued by the Central Board, the Central Board is to be empowered to exercise the powers and functions of the State Board.
2. **Obligation to obtain consent**: It is made obligatory on the part of a person to obtain consent of the relevant Board even while establishing an industrial plant.
3. **Power of Board to monitor the outside area:** Empowers the Board to obtain information regarding discharge of pollution in access of specified standards by the industries operating even outside the air pollution control areas.
4. **Strict punishment**: In order to prevent air pollution effectively, the punishments provided in the Air Act are made to be stricter.
5. **Public participation**: In order to elicit public co-operation, it is amended that any person should be able to do complaint to the courts regarding violation of the provisions of the Air Act after giving a notice of 60 days to the Board or the officer authorized in this regards.
6. **Widen the scope of the Air Act:** Omits the Schedule to the Air Act so as to make the Act applicable to all the industries causing air pollution.
7. **Power to give directions:** Empowers the Boards to give directions to any person, officer or authority including the powers to direct closure or regulation of offending establishment or stoppage or regulation of supply of services such as water and electricity.
8. **To seek prohibitory orders from the court:** Empowers the Boards to approach courts to pass orders restraining any person from causing air pollution.
9. **Financial powers:** For increasing the financial resources of the Boards, the amended Air Act empowers them to raise money by means of obtaining loans and issue of debentures.

Functions of CPCB[4]

- Advise the central government on matters relating to pollution.
- Co-ordinate the activities of the State Boards.
- Provide technical assistance to the State Boards; carry out and sponsor investigations and research relating to control of pollution.
- Plan and organize training of personnel.

[4] The Air (Prevention and Control of Pollution) Act, 1981 § 16.

- Collect sample, and publish technical and statistical data programme manual and code of conduct.
- To lay down standards.
- To plan nationwide programme for pollution control.

Functions of the SPCBs[5]

- To advise the state government on matter relating to pollution and on sitting of industries.
- To plan programme for pollution control.
- To collect and disseminate information.
- To carry out inspection.
- To lay down effluent and emission standards.
- To issue consent to industries and other activities for compliance of prescribed emission and effluent standards.

Sources of Air Pollution

- Uncontrolled growth of vehicular population.
- Type of vehicles on road (predominant old vehicles, Bharat Stage-II vehicles, 2 W/3W vehicles).
- Fuel quality issues.
- Fuel adulteration issues.
- Air pollution from SSI units/brick kiln, stone crusher, hot mix plants.
- Large number of D.G. Sets/small power generating sets run on liquid fuel.
- Coal based power station.
- Air pollution in mining areas.
- Toxic pollutant emission from chemical industries.

Methods for Air Pollution Control

- Ambient air quality standards (to set targets).
- Emission limit (with certification test).
- Emission control requirements (reasonably available, best available, lowest achievable emission technologies).
- Product design specifications.
- Emission fees and fines.
- Forced shut downs under the Air Act, 1981 and the Environment (Protection) Act, 1986.
- Emission caps and trading.
- Fuel specifications (with certification tests).
- Vehicle inspection and maintenance programmes.
- Congestion pricing.

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[5] The Air (Prevention and Control of Pollution) Act, 1981 § 17.

- Energy efficiency requirements.
- Demonstrated reasonable programmes.
- BS (III) norms for fuel and vehicles implemented all over India.
- BS (IV) norms for vehicles and fuels implemented in 12 cities.
- Thrust on large of clear transporter fuel (CNG) in few cities.

Conclusion

The study reveals that the role of the Central and State Boards is of immense importance in preventing, controlling, monitoring and abating air pollution control in the country. The Pollution Control Boards however have proven ineffective in internalization of air pollution concern in the process of economic development. This is mainly because of the responsibilities are manifold; inadequate technical and scientific staff; prevalence of uncertainty over resource base; presence of influence of interested groups; existence of jurisdictional problems; absence of punitive measures; non-existence of minimum sampling tests manual; lack of effective and efficient working culture, etc. The Air Act empowers Pollution Control Boards to impose fine against rough industries, incentive mechanisms for the personnel, increase the revenue generation, and to get financial assistance directly from Ministry of Finance.

Above considering, the study emphasis the necessity of improving functioning of the regulatory system by making necessary changes not only in substance of law but also in the working conditions of the Pollution Control Boards so as to improve air quality in the country, thus environment.

A CRITICAL ANALYSIS OF ECOSYSTEM SERVICES WITH SPECIAL REFERENCE TO INDIA

Mr. T.M. Prashanth*

Introduction

Individual tree provides some service value to the humans, viz., it provides economic utility other than its commodity values as cut timber. Likewise, natural systems such as wetlands, sea marshes, free-flowing rivers, forests, and grasslands provide services such as water purification, coastal storm and flood protection, and air pollution mitigation that benefit human communities. Ecosystem services provide a means for people to understand the link between their choices and the natural world. Yet the connection between ecosystems and these services is sometimes neither readily apparent nor easy to measure and translate into market investments. As a result, these ecosystem services are often not taken into account in decisions about land, water, and resource management and use. This neglect has resulted in underinvestment in environmental protection and corresponding losses of natural system functions and their benefits to human communities. The premise is that appreciation of economic values of ecosystem services at local, regional and global scales will lead to better governance and sustainable use of ecosystem services. In practice, however, existing markets do not factor values of ecosystem services in transactions, besides which, our understanding of the complex socio-ecological, and economic and political dimensions of ecosystem services with their implications for equity and environmental justice is poor.

The human population is expected to reach 9 billion people by 2050, and with that increase will come a greater demand for many natural resources. E.g., look at freshwater needs. Research has estimated per person per day dietary needs of 2,000–5,000 liters of water, and this does not include water needed for cleaning and other activities.[1] Hand in hand with this growing demand for resources is the conversion of native ecosystems to meet growing needs; this is where a trade-off assessment in terms of ecosystem services might be

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1 *Comprehensive Assessment of Water Management in Agriculture*, WATER FOR FOOD, WATER FOR LIFE: A COMPREHENSIVE ASSESSMENT OF WATER MANAGEMENT IN AGRICULTURE (London: Earthscan, & Colombo: International Water Management Institute 2007).

useful. Our national system of property rights, competitive markets, and public regulation enables a vast economy in manufactured goods, human services, natural resource commodities, and natural resource uses such as recreation. But our economy does not adequately account for the economic value natural resources provide in the form of services such as storm surge control from coastal dunes and flood mitigation from wetlands. This paper addresses that gap, focusing on the formulation of law and policy to manage ecosystem services sustainably.

Ecosystems

The term "ecosystems" is simply a human invention like the term "biodiversity" used to represent what we perceive to be happening in nature. "Eco" means ecology; "systems" are assemblages of parts forming a complex or utility whole. An ecosystem is a community of animals and plants interacting with one another and with their physical environment. Ecosystems include physical and chemical components, such as soils, water, and nutrients that support the organisms living within them. These organisms may range from human beings to large animals to plants to microscopic bacteria. Ecosystems include the interactions among all organisms in a given habitat. The health and wellbeing of human population depends upon the services provided by ecosystems and their components-organisms, soil, water, and nutrients. Natural ecosystems and the plants and animals within them provide humans with services that would be very difficult to duplicate.

An ecosystem can also be described in simple terms as a biological community (all of the organisms in given area) plus its abiotic (non living) environment. In fact the word "ecosystem" was first used by Tansley to describe natural system in a way that encompassed all of the living organisms occurring in a given area and the physical environment with which they interact. In this sense, the ecosystem is the first level in the traditional hierarchical arrangement of biological system.[2] It explicitly includes both living organism and the abiotic environment as integral parts of a single system. This is one reason that ecosystem studies often focus on quantifying transfer of energy and materials between living organisms and the physical environment.

[2] JOHN COPELAND NAGLE, THE LAW OF BIODIVERSITY AND MANAGEMENT (Foundation Press, New York 2002).

Ecosystem Service

The term "ecosystem services" refer to the many conditions and processes associated with natural ecosystems that confer some benefit to humanity. The ecosystems are valuable; they directly or indirectly support human life. Human activities historically have led to economic development; they also have created environmental problems and threatened the health of ecosystems. Natural landscapes such as forests, grasslands, mangroves and wetlands as well as managed ecosystems provide a range of 'services' to sustain human welfare. These include 'provisioning' services such as food, water, timber, fiber and genetic resources, 'regulating' services such as regulation of climate, floods, drought, land degradation, water quality and disease prevention, 'supporting' services such as soil formation, pollination and nutrient cycling and 'cultural' services such as recreational, spiritual, religious and other non-material benefits. These negative impacts include species extinction, exhaustible resource depletion, global warming, ozone layer destruction, acid rain, water and air pollution, soil erosion, and deforestation.

The appeal of ecosystem services for conservation is the connection to people and people's well-being and how that appeal translates into new and increased interest in conservation across a wide range of resource management issues. Ecosystem services can provide a means to value people's well-being in conservation projects and can help advance a set of on-the-ground actions that are equitable, just, and moral. Ecosystem services can be a basis for sustainable development by providing a means to think through how to retain our natural resources for people and for nature with a growing population and therefore an ever-increasing demand for them.

Some of the key services include:

- Moderation of weather extremes
- Seeds dispersal
- Drought and floods mitigation
- Protection of people from the sun's harmful ultraviolet rays
- Nutrients cycling and movement
- Protection of streams, river channels and coastal shores from erosion
- Detoxification and decomposition of wastes
- Controlling agricultural pests
- Maintaining biodiversity
- Generating and preserving soils and renewing their fertility
- Contribution to climate stability

- Purification of air and water
- Regulating disease carrying organisms
- Pollination of crops and natural vegetation

Ecosystem functions are the physical, chemical, and biological processes or attributes that contribute to the self-maintenance of an ecosystem; in other words, what the ecosystem does. Some examples of ecosystem functions are provision of wildlife habitat, carbon cycling, or the trapping of nutrients. Thus, ecosystems, such as wetlands, forests, or estuaries, can be characterized by the processes, or functions, that occur within them. Ecosystem services are the beneficial outcomes, for the natural environment or people that result from ecosystem functions. Some examples of ecosystem services are support of the food chain, harvesting of animals or plants, and the provision of clean water or scenic views. In order for an ecosystem to provide services to humans, some interaction with, or at least some appreciation by, humans is required. Thus, functions of ecosystems are value-neutral, while their services have value to society.

Ecosystem assessment groups[3] divide ecosystem services into four categories: provisioning services (e.g., providing food and water), regulating services (e.g., disease regulation), cultural services (e.g., recreation opportunities), and supporting services (e.g., services necessary for the production of other service types). An inventory of just some of the functions typically associated with different ecosystem processes, and which we should expect to observe in different forms and magnitudes across ecosystems would include the following:[4]

1. **Provisioning services (supply of products/goods)**
   - Fresh water (for drinking, irrigation, cooling, etc.)
   - Food (from wildlife)
   - Raw materials (fibre (e.g., wood, wool), skins, etc.)
   - Energy resources (fuel wood, dung, etc.)
   - Fodder and fertilizer (e.g., krill, leaves, guano, organic matter)
   - Genetic resources (genes and genetic information used for animal and plant breeding and biotechnology)
   - Natural medicines and pharmaceuticals (e.g., drugs, models, tools, essay org.)

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[3] The Millennium Ecosystem Assessment was launched in June 2001 to help meet the needs of decision-makers and the public for scientific information concerning the consequences of ecosystem change for human well being and options for responding to such.

[4] *The Millennium Ecosystem Assessment, 2005.*

- Biochemical (non-medicinal) (e.g., for dies, biocides, food-additives, etc.)
- Ornamental resources: Animal and plant products (e.g., skins, shells, flowers) used in fashion, handicraft, jewellery, worship, decoration and souvenirs, and whole plants and animals (e.g., fish, plants) used as pets and in landscaping
- Cultivation (of food, raw materials and biochemical) (e.g., plantations, crops etc.)
- Energy conversion (use of wind, water, geo-thermal heat, etc.)
- Mining (of minerals, sand, oil, gold, etc.)
- Waste disposal (solid waste dumps)
- Transportation and habitation
- Tourism and recreational facilities (infrastructure for outdoor sports, beach tourism, etc.)

2. Regulating services (benefits like air purification, water regulation etc.)

- Air quality regulation (e.g., capturing dust particles, NOx fixation, etc.)
- Climate regulation (maintenance of a favourable climate (especially temperature, precipitation) for human health, habitation, cultivation, recreation)
- Waste treatment (maintenance of water and soil quality) including noise abatement)
- Water regulation (buffering of extremes in runoff and river discharge)
- Natural hazard regulation (reduction of storm and flood damage)
- Erosion prevention (soil retention and prevention of landslides/siltation)
- Biological control (reduction of human diseases/crop and livestock diseases)
- Regulating services (regulation functions)
- Pollination (of crop species and wild plants)

3. Cultural services (spiritual enrichment and recreations)

- Aesthetic information (non-recreational enjoyment of scenery)
- Recreation and nature-based tourism
- Cultural heritage and identity (many people value a 'sense of place' which is often associated with ecosystems)
- Inspiration (e.g., for art, folklore, national symbols, architecture, design, advertising)
- Spiritual and religious information (many individuals and religions attach spiritual values to ecosystems and/or species

- Educational information (both formal and informal education in nature)
- Science (ecosystems influence the type of knowledge systems developed by different cultures)

4. **Supporting services (ecological processes which underlie the functioning of the ecosystem)**
   - Refugium (for resident plants and animals and migratory species)-maintenance of biodiversity and evolutionary processes
   - Nursery (breeding area for species that spend their adult life elsewhere)
   - Primary production (conversion of solar energy in biomass)
   - Nutrient cycling (maintenance of bio-geochemical "balance")
   - Soil formation (maintenance of fertile topsoil in natural and cultivated systems)
   - Water cycling (maintenance of the hydrological cycle) etc.

Value of Ecosystem Service

Most importantly, while some services of ecosystems, like fish or lumber, are bought and sold in markets, many ecosystem services, like a day of wildlife viewing or a view of the ocean, are not traded in markets. Thus, people do not pay directly for many ecosystem services. Additionally, because people are not familiar with purchasing such goods, their willingness to pay may not be clearly defined. However, this does not mean that ecosystems or their services have no value, or cannot be valued in dollar terms. It is not necessary for ecosystem services to be bought and sold in markets in order to measure their value in dollars. What is required is a measure of how much purchasing power (dollars) people are willing to give up to get the service of the ecosystem, or how much people would need to be paid in order to give it up, if they were asked to make a choice similar to one they would make in a market.

Ecosystem valuation can help resource manager's deal with the effects of market failures, by measuring their costs to society, in terms of lost economic benefits. The costs to society can then be imposed, in various ways, on those who are responsible, or can be used to determine the value of actions to reduce or eliminate environmental impacts. E.g., in the case of the crowded public recreation area, benefits to the public could be increased by reducing the crowding. This might be done by expanding the area or by limiting the number of visitors. The costs of implementing different options can be compared to the increased economic benefits of

reduced crowding. Economic value is one of many possible ways to define and measure value. Although other types of value are often important, economic values are useful to consider when making economic choices–choices that involve trade-offs in allocating resources. Measures of economic value are based on what people want–their preferences. Economists generally assume that individuals, not the government, are the best judges of what they want. Thus, the theory of economic valuation is based on individual preferences and choices. People express their preferences through the choices and trade-offs that they make, given certain constraints, such as those on income or available time. Economists classify ecosystem values into several types. The two main categories are use values and non-use, or "passive use" values. Whereas use values are based on actual use of the environment, non-use values are values that are not associated with actual use, or even an option to use, an ecosystem or its services. Thus, use value is defined as the value derived from the actual use of a good or service, such as hunting, fishing, bird watching, or hiking. Use values may also include indirect uses. E.g., an Alaskan wilderness area provides direct use values to the people who visit the area. Other people might enjoy watching a television show about the area and its wildlife, thus receiving indirect use values. People may also receive indirect use values from an input that helps to produce something else that people use directly. E.g., the lower organisms on the aquatic food chain provide indirect use values to recreational anglers who catch the fish that eat them.

In 2006 a study by the Indian Institute of Forest Management (IIFM), Bhopal pinned the numbers on Himachal Pradesh and Madhya Pradesh's forest wealth. It puts the money value of Himachal's forests at 1, 323, 000 *crore* including the value of services they provide. Our watershed services alone are valued at 106, 000 *crore* annually, it is difficult for the central government to allocate such funds to states and therefore the PES model adopted at the state level would really be beneficial if the funds generated are kept by the state. The 12th Finance Commission (2005-10) for the first time recognized the need to invest in resources and earmarked Rs. 1000 *crores* for 5 years to be given to states for preserving forests. Himachal Pradesh's annual share was Rs. 20 *crores*, a pittance compared to the standing value of its forests. Given the money they can earn by selling forest resources, this is obviously not enough incentive to preserve forests. This is one of the ways valuation of resources can be counter-productive. If those who provide eco-system services are not paid, they can argue they have no incentive to continue providing a service that in the past they provided without even thinking about. The state government therefore took steps towards realizing the value of these services by trading them through

the World Bank as carbon credits. Himachal Pradesh government is upbeat about the development. It aims to preserve our forests and the over 20 year-old green felling ban in Himachal is a testimony to that, and with increasing demands for resources and to provide people with livelihoods, it became important to look for alternatives to government funds and the World Bank provides one. The project, Mid Himalayan Watershed Development, awaits validation. The Bank will invest in the preservation of 20,000 ha of land as forests.

Payment for Ecosystem Services (PES)

Payment for ecosystem services is a voluntary agreement to enter into a legally-binding contract under which one or more buyers purchase a well-defined ecosystem service by providing financial or other incentives to one or more sellers who undertake to carry out a particular land use on a continuous basis, which will generate the agreed ecosystem service at specified levels. Ecosystem services, since they are the benefits from nature, are often discussed in the context of conservation, but in our daily lives we make choices that depend on and affect flows of services from nature, since all goods and products we use today originate from nature and its services. Each choice we make-drive or ride a bus, buy organic or buy regular vegetables, turn on the heat or put on an extra sweatshirt-has trade-offs. Conserving nature or converting nature does too, but trade-offs associated with nature's values are often harder to assess. Not understanding nature's role in the products we use means we won't conserve nature sufficiently; this in turn will compromise our ability to access products we need, or we will have to find sometimes costly alternatives for what nature could otherwise provide to us. Incorporating the full suite of costs and benefits into decision-making means evaluating all costs and benefits associated with nature, too. Economists refer to this full valuation as shadow pricing, but even an informal, "back-of-the envelope" calculation of all values can help to illustrate the importance of ecosystem services in our daily lives.

What do the blue jeans you wear, the hamburger you have for lunch, and the sheet you make your bed with have in common? They all take copious amounts of water to produce. One pair of blue jeans takes 2,900 gallons or about 78 bathtubs of water. Even your morning cup of coffee takes 37 gallons (about one bathtub) of water-not just the one cup you consume.[1] But we don't pay for all the water that goes into our morning cup of coffee. The price of the coffee is based on production and transportation costs (among other costs), but it's much more difficult to value where all the water in one cup of coffee comes from. This difficulty arises from the fact that natural ecosystems are responsible for the retention, release, and regulation

of water, but how does a person value a natural ecosystem and the services it provides and put that into the cost of a cup of coffee?

Most ecosystem services have no market price. Although many people benefit and profit from ecosystem services, they do not pay for them. This also means that the people who use and manage ecosystems (such as both government conservation agencies, and private and community landholders) do not have the opportunity to gain from conservation practices which generate such services for others. While they can earn substantial income and revenues from environmentally-degrading activities, and from the harvest of other natural resources, there is no mechanism for them to gain from the production of ecosystem services-even though land and resource conservation for ecosystem services incurs real costs on them.

Law and Policies of Ecosystem Service

For payment for ecosystem services approaches to be successful in practice, and for them to be acceptable to decision makers, it is essential that the institutional, legal and policy structures required to support their implementation are identified and clearly articulated. This legal and policy review therefore aims to document and analyze the policies and laws that regulate and govern biodiversity conservation and the application of financial mechanisms, with a view to identifying current opportunities and gaps relating to payments for ecosystem services. It should be noted that many laws, decrees, decisions and circulars have some relevance to payments for ecosystem services. This article reviews some of the major legal and policy instruments which refer to, enable or directly mention the use of financial and economic instruments for environmental conservation. Although the term "environmental services" is commonly used, in many parts of the world, this report uses the term "ecosystem services".

Before designing and implementing a PES scheme, take careful stock of the context in which it will take place. Make sure that laws, practices and institutions in a potential PES deal site support, or at least do not obstruct, the development of these payment schemes. If government policies or even agencies are engaged in ecosystem service issues (most likely related to greenhouse gases or water), these may serve as important sources of information and expertise as you develop a PES deal. Where legal and policy frameworks are lacking, contract law becomes the framework within which PES develops. Either way, people engaged in developing PES deals must familiarize themselves with the overall legal, policy and land tenure context as it relates to the deal. In many countries, there are still

significant gaps in government policy and regulation around transactions for ecosystem service payments. Getting feedback from other organizations and entities in your region that have gone through the process themselves and learned the permitting and legal requirements are a good source of guidance. After assessing the legal and policy context at national, regional, and municipal levels of government, it is time to assess local land tenure and use rights.

The idea behind 'the Law and Policy of Ecosystem Services' is that courts, legislatures, regulators, and other policy makers have traditionally been without the tools to value, or otherwise have taken too little account of the value of, ecosystem services as environmental policy is developed. And, they argue, as a result, we risk this 'tragedy of ecosystem services'. Environmental law and public policy arise out of traditional conflicts between different parties interested in the use of air, light, water, and the peaceful surround for competing purposes. The law of nuisance has long provided remedy for neighbours who are caused to suffer noxious effluent arising from nearby agricultural or industrial uses.

Current policy or Laws across the World on Ecosystem Service

In Vietnam, Decision 380 sets up a pilot policy for payments for Forest Environmental Services, collecting money from entities that benefit from ecosystem services provided by healthy forests.

In United States, the Food, Conservation, and Energy Act of 2008, establishes technical guidelines that measure the environmental services benefits from conservation and land management activities. The Oregon Senate Bill 513, creates an Ecosystem Services Markets Working Group to advance policy recommendations for creating a framework of integrated ecosystem services markets in Oregon that produce positive ecological.

In Brazil, the Acre State Legislature establishes the System of Incentives for Environmental Services, the institutional and legal framework for Acre to measure and value its environmental services. And the State of Amazonas drafts a policy on environmental services would implement PES programs in the state. EU 2020 biodiversity strategy includes an initiative on 'no-net-loss of ecosystems and their services'.

Indian Context

In India we do not have specific law or policy on this, but we too have some related policy and law on ecosystem service, e.g., the Wetland

rules 2010, the Forest act, EPA, land laws, the Water Act, the Biological Diversity Act, 2002, the Protection of Plant Varieties and the Farmer's Rights Act, 2001, the Forest Rights Act, 2006 etc., and constituted High Level Working Group to study the preservation of the ecology, environmental integrity and holistic development of the Western *ghat*s in view of their rich and unique biodiversity. Green India Mission has been launched, where 10 million hectares of land are targeted for improving qualitatively and quantitatively through village level institutions.

Ecologically sensitive areas and biodiversity heritage sites, as defined by national legislations, as well as variety of community conservation efforts in form of community forests and sacred forests form the main source of enhancement of carbon stocks. Over the period, a variety of policy measures has been developed. Many of these measures provide opportunities for strengthening documentation and data collection; empowering local communities by recognizing responsibilities, ownerships, rights, and concessions; and creating suitable institutions. The mandates of the National Forest Policy, 1988 and the National Environment Policy, 2006 recognize the need to address the conservation of areas of biodiversity importance, increasing forest productivity, and restoring degraded areas, which are also anticipated as part of REDD+ policy regime.[5] The legislative provisions developed as a follow-up to such national policies are listed below for cognizance to develop a policy environment conducive for REDD+.

- The Indian Forest Act, 1927 (defined concessions, village forests, protected forests, transit of forest produce)
- The Wildlife (Protection) Act, 1972 (management of national parks and wildlife sanctuaries, protection to scheduled species, community and conservation reserves)
- The Environment Protection Act, 1986 (restoration of degraded lands, management of watersheds, wetland management, and identification of ecologically sensitive areas)
- The Biological Diversity Act, 2002 (guidance on sustainable use of biodiversity, access and benefit sharing of biodiversity for commercial use, identification of species of conservation importance, documentation of people's biodiversity registers (PBRs), declaration of biodiversity heritage sites, local institutional mechanism in form of biodiversity management

[5] The United Nations Programme on Reducing Emissions from Deforestation and Forest Degradation (UN-REDD Programme) is a collaborative initiative in developing countries, created in response to the UNFCCC decision on REDD at COP 13 and the Bali Action Plan.

committees, and financial mechanism in form of National-State-Local Biodiversity Fund)

- The Protection of Plant Varieties and Farmer's Rights Act, 2001 (mandate of conservation of plant genetic resources, financial mechanism in form of National-State-Local Gene Fund)
- The Scheduled Tribes and Other Traditional Forest Dwellers Act, also referred as the Forest Rights Act (FRA), 2006 (defines community forest resources, critical wildlife habitats, provides ownership of minor forest produce to the local communities, and provides tenure security for forest dwelling communities). The functioning of the provisions is also linked with performance of the ecosystems in terms of delivering the ecosystem services for livelihoods.
- State-level legislations pertaining to various aspects of biodiversity conservation and ecosystem services are important in understanding the local mechanisms and their efficacy. Legislations such as the United Khasi-Jaintia Hills Autonomous District (Management and Control of Forests) Act, 1958 and the Garo Hills Autonomous District (Management and Control of Forests) Act, 1961 recognize the traditional forest land use systems such as *law lyngdoh, law kyntang,* and *law niam*.
- The guidelines and orders issued by the Ministry of Environment and Forests, and other central ministries, on aspects such as Joint Forest Management and Best Practices for Extraction of Medicinal Plants are important for understanding the sustainability of implementation at the local level.

India has a comprehensive set of environmental laws in these regions. They are the Wildlife Protection Act of 1972, the Water (Prevention and Control of Pollution) Act of 1974, the Water Cess Act of 1977, the Forest Conservation Act in 1980, the Air (Prevention and Control of Pollution) Act in 1981, the Environment (Protection) Act of 1986, the Public Liability Insurance Act of 1991 and the Bio-diversity Conservation Act, 2002. These laws constitute foundations of domestic environmental regulation. In the context of conservation of ecosystems of water resources and atmosphere, they provide for the setting up of pollution control boards at the central and the state levels, empowered to prevent, control and abate air and water pollution, and to advise governments on matters pertaining to such pollution. The Central Pollution Control Board is to co-ordinate the activities of the state boards. These Acts also specify that industrial units have to provide on demand all information regarding their effluent and treatment methods. They also provide the rules to be

followed by government for the conservation of forests, wild life, and coastal ecosystems. These laws with the necessary future amendments empower government and provide opportunities to local communities and civic society to participate in the conservation of ecological resources.

The current legal framework allows for taxes, charges and fees for ecosystem services. The current legal framework in India allows for a range of price-and market-based instruments that may be applied to tax, charge for, or set fees for ecosystem goods and services. These instruments could be applied to enable payments for ecosystem services under the provisions of existing laws. However regardless of whether a specific PES law is developed or existing environmental legislative is amended to integrated certain PES provisions, an efficient and effective legal frame work for PES also requires compatibility with so-called indirectly relevant laws. Indirectly relevant laws are those related to natural resources management in general or financial issues, such as land laws, agriculture laws, planning and development laws, fiscal laws, etc.

Fiscal laws have a clear potential to introduce perverse incentives, for example, by exempting certain activities with a negative impact on ecosystem service from tax payments or providing outright subsidies for destructive activities. However, they can also include certain provisions that can support PES incentives. In Colombia, e.g., Law 99 of 1993 requires the incentives of a certain amount of money coming from water use projects, the energy sector or irrigation districts into watershed conservation activates. Such mandatory investments thus provide a potential source of funding for PES projects. Agriculture laws, e.g., offer tend to create perverse incentives which clash with the objectives of watershed PES initiative, certain country where the agriculture legislations aims at redistributing and clarifying land right while at the same time creating incentives for deforestation. India is already using most of the economic and financial instruments that are needed to implement payments for ecosystem services. The additional measures that need to be taken to fully enable payments for ecosystem services in the country are relatively few, although each is important. The process of developing and implementing the biodiversity law provides a unique opportunity to address these issues comprehensively and begin to use payments for ecosystem services to achieve a double goal-reducing poverty while conserving the nation's natural infrastructure.

Conclusion and Suggestions

Finally, it has to be remembered that the introduction of PES related provisions can lead to conflicts with existing legislations. Therefore PES regulations should include a provision that determines which law prevails in cases of conflict or inconsistency between legal texts. Efficient and effective legal frameworks for PES demand compatibility with indirectly relevant laws in order to avoid further barriers foe watershed PES initiatives. At the same time, such laws may need to be assured either to use their full potential to promote PES or remove perverse incentives that abstract PES. Regarding the level of governance, it should be noted that legal provisions at all level-from local to national and international-can play an important role and have an added value in the further promotion and implementation of PES. Policy maker should have visions like, constitutions recognizing of the right to a healthy environment and acknowledging the value of ecosystem service for human well-being. And also they should have vision on specific PES law like, introducing a national PES vision, recognizing PES as a legitimate policy instrument, defining the general concept of ecosystem service as well as recognizing ecosystem service, creating specialized institutions, promoting of ecosystem service and establishing ecosystem service inventories. There is a need to determine whether payments for ecosystem services are treated as taxes, fees, charges or market prices. There is also need to list ecosystem services in the schedules of relevant laws. And additionally we needs to be addressed in the regulatory framework law and policy have traditionally lagged behind economics and ecology as fields addressing the value and protection of ecosystem services. Environmental lawyers and policymakers need to work to close the gap in ecologist and economist dominated discourse on these vital services.

INDEPENDENT JUDICIARY: A STUDY IN INDIAN PERSPECTIVE

Mr. Mukesh Kumar Malviya*

Introduction

Science, technology and law share unique relation. Technological advancement has a tendency to alter human relations and social ethos, posing new challenges to the existing laws.

Liberty, democracy and rule of law are most important indices of a free and civilized society. They can well be described to be the three faces of Holy Trinity which presides over the destiny of all free societies. Each one of them gives strength and substance to the other. Destroy one of them and you can take it that the other two would not be able to survive for long. Rule of law in its turn depends upon the existence of independent courts. It is difficult to visualize a truly democratic state which does not provide for independence of judiciary for it. It is the presence of an independent judiciary which guarantees rule of law and ensures that the rights of minorities and those in opposition guaranteed by the constitution shall not be trampled upon by the majority and those in source of power. Independence of judiciary can well be described to be the very matrix of the system, the one indispensable conation for the continued existence and survival of liberal democratic institutions and state of rule of law. Without such independence the courts would not enjoy or deserve to enjoy the confidence and faith of the people. This is the concept of justice which succeeding generations of mankind have cherished and nourished in all civilized societies. Justice according to this concept should be administered by judges who are independent and not effected in any way by the personality of the litigants or other extraneous considerations. The expectation is that judges would see to it that the scales of justice are kept even, and not allowed to tilt or get loaded on one side or the other and that justice is administered without fear or favour.

The ultimate goal of any legal system has been to secure justice for its people. The quest for justice has been as challenging as the quest for ultimate truth. Though it has been difficult to define and determine the scope of justice, but it is a dynamic concept and being an ideal it provides legitimacy of law and judicial administration. It has been rightly said that justice is not something which can be

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captured in a formula once and for all. It is a process; a complex and shifting balance between many factors. According to Dias, the task of justice is the just allocation of advantages and disadvantages preventing the abuse of power, preventing the abuse of liberty, the just decision of dispute and adopting to change. Since these components of justice have become the pious objective of civilized nation that is why like other progressive constitutions of world, the Constitution of India also solemnly resolved to secure to all the citizens justice-social, economic and political along with liberty, equality and fraternity as enshrined in our Constitution. We have accepted democracy as our form of government. Democracy is not merely an external set up. In a democratic faith, power of word or speech has great importance. This fundamental faith is the foundation of the democracy. The capacity of a human soul cannot be measured on capacity-more or less-of the human being. All human beings are endowed with the same capacity. In democracy, therefore the power of word or speech has greater value than the power of army and money.

In democratic processes of which judicial process is one, it is necessary that issues or controversies should be decided by discussion and exchange of views and not by resorting to the use of police or the army. The elected bodies in a democracy adopt the process of debate or discussion on public issues of importance for making laws and solving problems of the people. This power of speech and discussion should be nurtured and continued unabated. To strengthen the democracy, we have to increase the power of words and speech. In other words, this requires increase in power of mutual trust. The judiciary is one organ in which we can find non-violent democratic process in action. Constitutional democracy is one where the constitution is supreme and no organ of the government-the legislature, the executive or the judiciary is above the constitution. All these organs have to function to achieve the aims of the constitution and in doing so not to infringe the constitutional rights of the people. When we say in constitutional democracy, the constitution is supreme; indirectly we are accepting the supremacy and sovereignty of the people who have taken part in framing the constitution and accepting the same as the highest law governing them. In a constitutional democracy, the judiciary is a touchstone to ascertain the genuineness and the truthfulness of the actions of other organs and authorities. The judiciary when approached confirms whether the action of the other wings of the government is in accordance with law and the constitution or not. The judiciary is a body of legal and constitutional experts. They are called upon to decide contentious issues between the parties strictly in accordance with law and the

constitution. It is a natural force between the government and the governed.

The judiciary has no other power except the power given to them by the people by reposing faith and trust in its independence and impartiality. The people have given the judiciary that responsibility because it is thought that exercise of power has to be controlled so that in the hands of any organ of the state, there should not be destruction of the very values which it intends to promote. The judiciary ensures that the executive is more loyal to the existing constitution and to the constitutional arrangements. The judiciary thus, is meant to uphold the constitutional values and protect the citizens against encroachment on their constitutional rights. Sometime a tension between the executive and judiciary comes to the surface but such tensions arising out of each being watchful if encroachment into the province of other is the best guarantee that the citizens can have against the abuse of power.

In this judicial process, in a constitutional democracy, the judges have a great responsibility and obligation towards the people. Being a judge is a difficult and responsible job making intellectual and moral demands unlike most others. The judges are unelected elite of professional experts. They exercise the authority of state in public, in issues of intense importance of the policies and to the community at large. They decide these issues according to law, it is not the same thing as their personal preferences on current public opinion. Indeed, they have to set public opinion aside and when the case requires, protect minorities against it. They do not and should not seek popularity. They do their work in a formal environment within a framework of procedure which is designed to secure justice. This sometimes makes the judges vulnerable to charges of being remote and out of touch. It goes with its territories. The judicial branch, therefore, does not represent any sections of the society as to do the legislature and the executive. There are great expectations of the common man from the courts. Judicial process which is a part of democratic process, therefore, is the struggle of the small man against the overpowering influence of the big, politically as well as financially. The people, therefore, expect from the courts disinterested application of law to the parties before them regardless of their station, occupation and financial or political power. In this judicial process, judges are the kind of men who do not seriously question the law and its effect because they have to serve the law and not its masters. The function of judiciary therefore is to derive its conclusions from issues before it in accordance with law and with impartiality. The function of judiciary as Jeffery puts it is the disinterested application of the known law. The judiciary, therefore,

has to act impartially, and impartiality means not merely an absence of personal bias or prejudice in the judging but even his own political or religious views. A judge in order to be true to his office cannot worship simultaneously at two shrines-shrine of justice and the shrine of his favourite political ideology and economic theory.

There is no agreed definition of law, but there is no disagreement as to its necessity and existence. Who makes or who should make law as well as what is the basis of obligation of law remains a moot point. The three main views as to the sources and criterion of validity of legal rules are:

1. Natural law doctrine
2. Historical jurisprudence, and
3. Legal positivism.

The proponents of these schools generally agree that the law is a coherent and complete body of rules and judicial process is essentially deductive application of existing rules of law. Under the sociological school, rule of law was compared to that of an architect and that of a lawyer as an engineer. The function of law is satisfaction of maximum of wants with minimum of friction. The left wing is occupied by the realists. They define law as a collection of decisions and not as a body of rules. In this approach, the role of judge becomes important. In the modern state, the law is created normally either by formal act of legislation or a decision of the court. In judicial process, we examine the role of the judge. Justice Holmes[1] of the Supreme Court of United States of America (U.S./U.S.A.) has termed law as the prophecies of what the courts will do in fact. Frank J.,[2] of the same court considers law as the verdict of the courts on particular facts. This approach, thus considers law as a process against particular commands. The U.S. Supreme Court has since 1787 functioned in such a manner that the doctrine of separation of powers entrenched in the Constitution has become questionable. The basic controversy veers round the role of the court. The very premise of the separation of power is that the courts do not create law but merely declare fresh applications of the ancient rule. It means that judiciary is only "a priest of law". Modern jurisprudence contradicts this and there is ample evidence to the effect that judiciary creates

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[1] THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. (Richard A. Posner ed., University of Chicago Press 1992).

[2] JEROME NEW FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (Princeton University Press 1949).

new rules of law albeit under the guise of declaring the law. Hart[3] observes that it is only the tradition that the judges declares and do not make law.[4]

The validity of judge made law has been accepted. Salmond[5] says that judicial decisions having the force of law are legally ultimate and underived. These ultimate principals are the ground norms or basic rules of recognition of legal system. Hart also accept this validity through his rule of recognition. That the judges make law is a fact, but how far they are free to make a rule is not clear. It is assumed that judicial law making must be according to established rules. But is the judge really free in the creation of a rule? Judicial process is not a one man show. Lawyers, litigants and their advisors play an important role in this process. Judicial process is a set of inter related procedures and roles for deciding disputes by an authoritative person or persons whose decisions are regularly obeyed. The disputes are to be decided according to a previously agreed upon set of procedures and in conformity with prescribed rules. As an incident, or consequence of their dispute deciding function, those who decide make authoritative statements of how the rules are to be applied, and these statements have a prospective generalized impact on the behaviour of many besides the immediate parties to the dispute. Hence the judicial process is both a means of resolving disputes between identifiable and specified persons and a process for making public policies.

For centuries hundreds of writers in thousands of articles and books have tried to determine what is the essence of judicial or adjudicatory process, what distinguishes it from legislative and administrative processes. For under the doctrine of separation of power it became improper for legislature to engage in the judicial process or for the judges to assume functions that are thought to be within the scope of legislative process. The classic doctrine of separation of powers divided the world of political activity into the three familiar divisions based both on what was thought to be the requirements for the maintenance of liberty. The judiciary was assigned the functions of applying the laws that the constitution makers and the legislatures

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[3] Herbert Lionel Adolphus Hart, *Uncertain Justice: Politics and America's Courts: The Reports of the Task Forces of Citizens for Independent Courts* (The Century Foundation Press 2000).

[4] Herbert Lionel Adolphus Hart, THE CONCEPT OF LAW 12 (2nd ed., Oxford University Press 1997).

[5] Report of Sir John Salmond, Delegate for the Dominion of New Zealand. Appendix to the Journals of the House of Representatives, 1922 Session I, A-05 at Conference on the Limitation of Armaments held at Washington from November 12, 1921 to February 6, 1922.

had created and that the administrators enforced. Today political analysts have abandoned these categories in favour of a continuum. At one pole is the legislative process for making law and at the other the administrative and judicial processes for administrative or applying the law. In order to appreciate the changes that have occurred in the nature of judicial process in our country, it would be helpful if a brief reference is made to the experiences of the British U.S., Swiss and German judiciaries in this regard.

Justice is the soul of the society which should be rendered without any fear or favour, and independence of the judiciary is the only possible remedy which makes it possible. A judge has to be fearless and unfettered, having the freedom to make a fair and impartial decision based solely on the facts presented and the applicable laws, without yielding to political pressure or intimidation. Judicial independence is critical to the functioning of any democracy and upholding the rule of law; it protects the weak from the powerful; the minority from the majority; the poor from the rich; even the citizens from excesses of government. The following paper is an attempt to deal at length with the notion of independence of judiciary, its meaning and its various facets, its existence in different nations with special reference to India, focusing on its significance and identifying the threats which tend to jeopardize the same so that effective steps could be initiated for safeguarding it, as without an independent, impartial, honest and upright judiciary social justice would remain a futile dream.

Position in Britain

In Britain, the governing rule for the nature of judicial process, for a long time, was, as expressed by Francis Bacon[6] in early 17th century: "Judges ought to remember that their office is to interpret law and not to make law". This judicial tradition, established by Jeremy Bentham[7] who had a deep distrust of judge-made law stated that it is undemocratic for the non-elect judiciary to act as law makers; this function should be the prerogative of the Queen's Ministers and elected members in Parliament.

Being steeped in this tradition, English judges developed an excessive liking for their constitutionally imposed chains. However, since the early sixties, a new generation of English judges,

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[6] THEODORE PLUNKETT, A CONCISE HISTORY OF THE COMMON LAW 158 (5th ed. 1956).

[7] Hellman, *Justice O'Connor and the Threat to Judicial Independence: The Cowgirl Who Cried Wolf?* 39 ARIZ. ST. L.J. 845 at 859 (2007).

spearheaded by that likes of Lord Reid, Lord Denning[8] and Lord Wilberforce[9], with their doctrine of purposive interpretation breathed new life into English administrative law, reviving and extending ancient principles of natural justice and fairness, applying them to public authorities and to private bodies that exercise public power and rejecting claims of unfettered administrative discretion. Lord Reid observed that when judges act as law makers they should have regard to common sense, legal principal and public policy in that order. They need "[t]o know how ordinary people think and live… You must have mixed with all kinds of people and got to know them… If we are to remain a democratic people those who try to be guided by public opinion must go to the grass roots." However in the absence of a written constitution and Bill of Rights, the scope of powers of judicial review of English courts remains limited.

U.S. Experience

The Supreme Court of U.S. is the oldest constitutional court in the world, having first assembled on February 1, 1790. At a very early stage of his existence in 1803, it bestowed upon itself the power of judicial review through the epoch-making decision delivered by it in case of *Marbury v. Madison*[10]. In what is now considered a classic exposition of law, Chief Justice Marshall[11] held:

> "It is emphatically the province and duty of judicial department to say what the law is. Those who apply the rule in particular cases, must of necessity expound and interpret that rule…… A law repugnant to the Constitution is void……, courts as well as other departments are bound by that instrument."

Judicial review has come to be defined as the power of a court to hold unconstitutional and hence unenforceable any law, official action based on a law, that it deems to be in conflict with the basic law, that is, the constitution. Several Jurists including former Chief Justice Warren Burger believe that without the power of judicial review and a Bill of Rights, the Constitution of U.S. could not have survived. It is the concept of judicial review that has contributed in a large measure to the dynamic attitude of American judges. Since its inception, charges have been leveled at the U.S. Supreme Court that

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8 ALFRED THOMPSON DENNING, *THE CLOSING CHAPTER* 54 (Butterworths, de Burgh, Hugo, ed. ISBN 0-406-17612-4).

9 LORD WILBERFORCE, GOVERNMENT AND JUDICIARY 247 (Cambridge University Press).

10 5 U.S. (1 Cranch) 137 (1803).

11 JOHN MARSHALL, CONSERVATIVE NATIONALIST IN THE AGE OF JACKSON 395 (ULS Press).

its judges continuously indulge in judicial legislation. In its classical text, *The Nature of the Judicial Process*, Benjamin Cardozo[12], who later served on the Supreme Court, accepted the fact that judges do make law. However he stated that:

> "He (the judge) legislates only between gaps. He fills the open spaces in the law. How far he may go without travelling beyond the walls of the interstices cannot be staked out for him on a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the performance of an art."

In practice, however, U.S. judges do far more than legislate intestinally. The U.S. Supreme Court has played a prominent role in shaping American society. At times it has not refrained from interpreting the provisions of the Constitution to lead governmental policy in a manner which was diametrically opposite to the majority public opinion of the time. In so upholding the Constitution, the court has withstood the stiffest of oppositions. An analysis will reveal that, in practice, the U.S. Supreme Court has oscillated between periods of judicial self-restraint and activism. However, in recent past, the decisions of U.S. Supreme Court have been characterized by the exercise of self restraint. Under the leadership of Chief Justice Rehnquist, the court has sought to impose limits on its wide jurisdiction and, in doing so; it has paid heed to Justice Frankfurter's wise counsel:

> "It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's strongly held view of what is wise in the conduct of affairs. But it is not the business of court to pronounce policy… That self restraint is of the essence in the observation of the judicial oath, for the Constitution has not authorized the justices to sit in judgment on the wisdom of what Congress and the executive branch do…"

In the language of present generation of commentators of the U.S. judicial process, judicial self restrain is the term of praise, and judicial activism a term of criticism.

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12 PETER H. RUSSELL & DAVID M. O'BRIEN, JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND (CONSTITUTIONALISM AND DEMOCRACY SERIES) 19 (University of Virginia Press 2001).

Swiss and German Experience

This view that the judges do not usurp the function of legislators is supported by Swiss experience. The Swiss Code (civil) explicitly authorizes the judge to decide according to the existing customary laws, and failing which according to the rules which he would lay down if he had himself act as legislator.[13] It is said that Swiss judges always prefer to develop a new rule by interpretation of well established legal norms and rarely assume the role of legislator. However the German experience is said to be different. There the judge has used the provision which give enormous scope for judicial participation.

The process of judicial law making is restricted by its very nature and hence cannot be parallel to legislative process. Even within its restricted arena the scope of judicial law making is subjected to two conditions:

1. Whether the courts are endeavouring consciously to develop law relatively freely to meet new social and economic condition, and
2. The judge may prefer to dwell in the existing domain of precisely enunciated principles of law.

This again will, to a large extend, depend upon the philosophy of the judge. The opinion of K. Subba Rao, C.J.,[14] on one hand and those of P.N. Bhagwati, C.J., and Krishna Iyer, J., on the other testify this.

Indian Position

The initial years of the Supreme Court of India saw the adoption of an approach characterized by caution and circumspection. Being steeped in British tradition of limited judicial review, the court generally adopted a pro-legislature stance. This is evident from its ruling in case of *A.K. Gopalan v. State of Madras*[15]. However the judges of apex court did not take long to make their presence felt, and began to actively pursue the function assigned to them by the Constitution, as perceived by them. This led to a series of decisions on the right to property where the apex court and the parliament were often at loggerheads. The nation was then witness to a series of events where a decision of the Supreme Court was followed by a legislation nullifying its effect, followed by another decision

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13 SWITZERLAND CONST. art. 1.

14 ANWARUL HAQUE HAQQI, INDIAN DEMOCRACY AT THE CROSSROADS (Mittal Publications, New Delhi 1986).

15 A.I.R. 1950 S.C. 27.

reaffirming its earlier position and so on. The struggle between the two wings continued on other issues such as power of amending the Constitution. During this era, the legislature sought to bring forth people-oriented socialist measures which when in conflict with fundamental rights were frustrated on the upholding of the fundamental rights of individuals by the Supreme Court. At the time, an effort was made to project the Supreme Court as being concerned only with the interest of propertied classes and being insensitive to the needs of the masses.

Between 1950 and 1975, the Supreme Court of India has held more than 100 union and state laws in whole or in part, to be unconstitutional. When contrasted with the U.S. Supreme Court, which had, between 1790 and 1985, held 135 federal and 970 state laws, in whole or in part, to be unconstitutional, it would seem that the apex court of India had made liberal use of power of judicial review.[16] The imposition of emergency in 1975 had a profound enduring effect on almost every aspect of Indian life. The apex court too was affected and was on the receiving end of brickbats for having delivered a series of judgments which were perceived by many as being violative of basic human rights of Indian citizens. In post emergency era, the apex court sensitized by the perpetration of large scale atrocities during the emergency donned an activist mantle. In a series of decisions starting with *Maneka Gandhi v. Union of India*[17], the court widened the ambit of constitutional provisions to enforce the human rights of citizens and sought to bring the Indian law in conformity with the global trends in human rights jurisprudence. Simultaneously, it introduced various innovations with a view to making itself more accessible to disadvantaged sections of society giving rise to phenomenon of social action litigation/public interest litigation (PIL). During the 80's and first half of 90's, the court has moved beyond being a mere legal institution; its decisions have tremendous social, political and economic ramifications. Time and again, it has sought to interpret constitutional provisions and the objectives sought to be achieved by it and directed the executive to comply with its orders.

The new role of the Supreme Court has been criticized in some quarters as being violative of the doctrine of separation of power; it is claimed that the apex court has, by formulating policies and issuing directions in various aspects of country's administration, transgressed into domain of executive and the legislature. The

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16 HENRY J. ABRAHAM, THE JUDICIAL PROCESS 291-93 (5th ed., Oxford University Press 1986).

17 (1978) 1 S.C.C. 248.

framers of our Constitution adopted the parliamentary form of government as it obtains in England. But the union parliament and state legislature unlike the English parliament owe their origin to the Constitution and derive their powers from its provision and therefore functions within limitations prescribed in the Constitution. This follows that the Constitution confers on the courts the power to scrutinize a law made by legislature and to declare void if it is found to be inconsistent with the provisions of the Constitution. Further the judiciary stands between the citizen and the state as a bulwark against executive excesses and misuse or abuse of power by the executive. For these reasons it is absolutely essential that the judiciary must be free from executive pressures or influence. In a state professing rule of law, the aim should be to provide for a system which secures to its citizens adequate procedure for the redress of the grievances against the state before forum which are to administer justice in an impartial manner without fear or favour.[18] In the said case opinions expressed by judges suggest that the concentration of executive legislative and judicial powers in the same hand was not intended by the Constitution.[19]

Meaning and Importance of Independence of Judiciary in the Indian Scenario

The dictionaries define "independence" as freedom from bias or influence, self direction, freedom in action or opinion. However "judicial independence" has not been specifically defined as such in the context of the judiciary. The concept has to be appreciated from the constitutional and social point of view. The Constitution of India has decreed the separation of the judiciary from the executive in the public services of the state (Article 50). The structure of the Constitution provides separately and distinctly for 3 limbs of the legislature, the executive and the judiciary (Part V). The preamble of the Constitution promises first justice-social, economic and political. On the foundation of 'justice' alone one builds true meaning into the consequential promises of liberty, equality and fraternity.

In the context of the Constitution of India "judicial independence" would mean complete and unrestrained freedom to do justice-social, economic and political which would guarantee to every citizen of India liberty, equality and fraternity is all their defined aspects. In the social context, judicial independence has been understood to mean freedom to decide matters in accordance with the judge's own

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[18] Indira Nehru Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2299.

[19] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 2654 (3rd ed., Universal Law Publishing Co. Pvt. Ltd., Delhi 1984).

appreciation of facts and understanding of the law without any improper inducement or influence.[20]

The classic statement as to what the layman understands as judicial independence is found in the judgment of Denning, L.J., in *Jones v. National Coal Board*[21] on the functions of an English trial judge:

> "The judge's part in all this is to hearken to the evidence.....to see that the advocates behave themselves seemly and keep to the rules laid by law to exclude irrelevances and discourage repetition; to make sure by wise interventions that he follows the points the advocates are making and can access their worth and at the end to make up his mind where the truth lies."

It means that every judge is free to decide matters before him in accordance with his own assessment of facts and his understanding of the law without any improper influences, inducements or pressures, direct or indirect from any quarter or for whatever reason. There is no doubt that independence of judiciary is a sine qua non to achieve a higher standard of justice in any legal system. That is why any progressive constitution ensures the independence of judiciary by several means. In this respect power and procedure of appointment of judges is considered to be one of most important factors which may affect the independence of judiciary. It is because if the selective bears a particular stamp for the purpose of changing or affecting the judicial attitude or decision than the independence of judiciary cannot be secured notwithstanding the guaranteed tenure of office, rights and privileges, safeguards, condition of service and immunity.

The independence of judiciary necessarily implies that the judiciary has to remain non-political in character. In a democratic country members of political parties have the control of government and consequently their tendency will be to appoint members of the ruling party to the judiciary as far as possible. Therefore there always remains likelihood of superior courts being packed by party men which will be destructive of judicial independence. In many countries where the power of appointment of judges vests with the executive or legislature, the need for reform was felt and gradually suitable changes have been brought in these countries i.e., America, England, Australia and Canada exclusively by executive. The Constitution of India had adopted a middle course by providing for prior consultation

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[20] CIJL Bulletin no. 8 of Oct. 1981, International Commission of Jurists, Draft Principles of Independence of Judiciary art. 2 (Geneva 1981).

[21] (1957) 2 Q.B. 55.

with the judiciary before the President, that is, the executive makes the appointment to the Supreme Court or High Courts.

However the Supreme Court in *Supreme Court Advocates on Record Association v. UOI*[22] popularly known as the Second Judge case has held that no appointment of any judge to the Supreme Court or any High Court can be made unless it is in conformity with the opinion of chief justice of India (C.J.I.).

Again the Supreme Court in *Re Presidential Reference*[23] popularly known as the Third Judges case while upholding its decision in the Second Judges case has further added that the C.J.I. of India must make a recommendation to appoint a judge of the Supreme Court in consultation with the four senior most puisne judges of the Supreme Court. Thus, in the appointment of judges to the higher judiciary the opinion of the judiciary alone has to prevail over the opinion of executive. This position has been severely criticized from many quarters.

1. Brief History

History owes a debt of gratitude to Lord Chief Justice Coke, who set the tread asserting the independence of judiciary by refusing to succumb to the royal orders of King James I, not to proceed to judgment, until he has spoken with the King, in the famous case of Commendams in 1616. Parliament on the other hand, did not confine its efforts question and impeach judges who decided in favour of the Crown.

Much of the controversy regarding independence of the judiciary started with the debate between Coke and Bacon. Coke asserted that judges must impartially expound and apply the supreme law which governs the royal prerogatives, the parliamentary privilege and the rights of an individual. Bacon believed, on the other hand that a judge's function was not merely to declare the law but to support the government. According to Bacon:

> "It was a happy thing in the state when kings and states do consult with the judges, and again when judges do often consult with the judges and kings and state."

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[22] (1993) 4 S.C.C. 441.
[23] A.I.R. 1999 S.C. 1.

Thus according to Bacon:

> "[T]hough judges were lions, they were lions under the throne, being circumspect that they do not check or oppose any points of sovereignty."

Ultimately, the battle between the upholders of royal prerogative and the supporters of parliamentary privileges resolved into legislation. (E.g.: 2 Edward-III-c 8, I statutes at large 425). Though in passing such legislation, parliament was motivated not by commitment to judicial independence, but for political considerations of curbing the royal powers, such legislation brought in to existence, the concept of independence of judiciary.

2. Indian History

As distinguished from the accident of history in England, judicial independence in India was a conscious gift of the Constitution of India-which promised to the people of India, justice (social, economic and political), liberty, equality and fraternity. In the Constitution of India, Articles 121 and 211 prohibit any discussion in the parliament or state legislatures on the conduct of a judge of the Supreme Court or High Court in the discharge of their respective duties. The High Courts and the Supreme Court are courts of record and have power to punish for contempt. Under Article 144 of the Constitution of India, all authorities, civil and judicial, in the territory of India will act in the aid of Supreme Court. Judges are also immune under various laws like the Judges (Protection) Act, 1985 from civil or criminal action for their acts, speech etc., in the course of or while acting or purporting to act in the discharge of their official or judicial duties or functions.

However, judges have to abide by the oath they have taken namely; that they will bear true faith and allegiance to the Constitution of India as by law established.

3. Constituent Assembly Debates[24]

Prof. K.T. Shah[25] proposed that Draft Article 102-A be added to Draft Constitution:

> "Subject to this Constitution, the judiciary in India shall be completely separated from and wholly independent of the executive and legislature."

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[24] 8 CONSTITUENT ASSEMBLY DEBATES (July 28-29, 1947).

[25] *See* CONSTITUENT ASSEMBLY DEBATES (Nov. 29, 1948) *available at* indiakanoon.org.

However, there was difference of opinion as it was already included in the Directive Principles of State Policy. Dr. B.R. Ambedkar in his speech in the Constituent Assembly on June 7, 1949[26] observed as under:

> "I do not think there is any dispute that there should be separation between executive and judiciary and, in fact all the articles relating to High Courts as well as Supreme Court have prominently kept that object in mind."

Having regard to the importance of this concept of the framers of the Constitution of India having before them, the views of the Federal Court and of High Court, have said in a memorandum:

> "We have assumed that it is recognized on all hands that the independence and integrity of the judiciary in a democratic system of government is of highest importance and interest not only to the judges but to the citizens at large who may have to seek redress in the last resort in courts of law against any illegal acts or the high handed exercise of power by the executive. In making the following proposals and suggestions the paramount importance of securing the fearless functioning of an independent and efficient judiciary has been steadily kept in view."

Justice Krishna Iyer characterizes this concept as "constitutional religion". It is obvious that the concepts of justice and judicial independence both of which are parallel and synonymous-are at once both objective and subjective. They are objective, in the sense that justice and the freedom to do justice are not wholly unrestrained. It is justice according to law and freedom to do justice to the extent and in the manner permissible by law. The concepts are subjective in that justices what the judge understands from its own point of view, based upon his own assessment and appreciation of facts and the law and freedom to do justice is freedom to make his mind as to 'where the truth lies'.

According to Mr. P.B. Mukherjee[27]: "The independence of judiciary has become a corner stone in the theories of justice." An independent judiciary is the very heart of the republic. The foundation of democracy, the source of its perennial vitality, the condition for its growth and the hope for its welfare-all lie in that great institution, an

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[26] CONSTITUENT ASSEMBLY DEBATES (June 7, 1949).

[27] P.B. MUKHERJEE, THE NEW JURISPRUDENCE 421 (Culcutta Eastern Law House 1970).

independent judiciary.[28] The independence of judiciary is doubtless a basic structure of our Constitution but confined within the four corners of the Constitution and cannot go beyond the Constitution. P.N. Bhagwati, J., has observed:

> "The principle of independence of judiciary is not an abstract conception but it is living faith which must derive its inspiration from the constitutional character, and its nourishment and sustenance from the constitutional values…."

It is therefore absolutely essential that the judiciary must be totally free from executive pressure or influence and must be fiercely independent. Independence of course, is a quality which is a part of the very fabric of judge's existence, but even so, judges must not be exposed to executive threats, inducement or blandishments and must remain absolutely independent and fearless. It is for this reason that in almost all countries which have adopted democratic form of government great importance is attached to the independence of judiciary. It is comprised of two fundamental and indispensable elements viz.,

1. Independence of judges as an organ and as one of three functionaries of the state.
2. Independence of an individual judge.

I. Collective independence of judiciary

The United Nations (U.N.) Basic Principles on the Independence of the Judiciary and the Singhvi Declaration[29] outline several principles which provide for the collective independence of the judiciary. This includes the following principles:

i. **Concept of non-interference:** An important safeguard for judicial independence guaranteed by the Basic Principles in the requirement of constitutional guarantee of non interference with judicial proceedings. The Basic Principles stipulates that: "It is the duty of governmental and other institutions to respect and observe the independence of the judiciary (Article 1) and that there shall not be any inappropriate or unwarranted interference with the judicial process."
ii. **Jurisdictional monopoly:** Article 3 of the Basic Principles provides that the judiciary shall have jurisdiction over all issues of a judicial nature. In practice, however many countries creates

[28] Nani A. Palkiwala, *Aspects of Judges Case I*, THE INDIAN EXPRESS, Feb. 3, 1982.
[29] L.M. Singhvi, *UN Draft Declaration on Independence of Justice-Basic Principles,* INDEPENDENCE OF JUSTICE AND LEGAL PROFESSION (1989).

special tribunals to decide certain categories of cases which particularly interest the executive power. The most common of these are special tribunals empowered to deal with cases involving "security". The establishment of such exceptional courts or tribunals can undermine judicial independence and undercut judicial authority.

iii. **Transfer of jurisdiction:** This is a related matter which also jeopardizes judicial independence. It is normally exercised by transferring the jurisdiction of regular courts to specially created ad hoc tribunals. Responding to these problems, Article 5 of the Basic Principles states that: "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duty established procedures of legal process shall not be created to displace the jurisdiction belonging to ordinary courts or judicial tribunals." The most advanced constitutions provide for unity and exclusivity of judiciary's jurisdiction. More common are provisions specifying that only the judiciary may decide disputes of a litigious nature or that only tribunals established by law may decide criminal or civil cases.

iv. **Control over judicial administration:** Judicial independence requires as well that the judiciary control its own administration. The Singhvi Declaration provides that the main responsibility for court administration including supervision and disciplinary control of administrative personnel and support staff should vest in the judiciary or in the body in which the judiciary is represented and has an effective role.

II. Personal independence

As regards personal independence, the Basic Principles provide generally that judges: "[S]hall decide matters…. impartially on the basis of facts and in accordance with the law, without any restriction, improper influences, inducements, pressures, threats or interferences, direct or indirect from any quarter for any reasons." Mechanism to protest judges' personal independence should particularly include:

i. **Security of tenure**: The most important measure to protect the personal independence of judges is the guarantee of tenure in office. Tenure insulates judges from the need to worry about political reaction to their decisions. The Basic Principles provide that judges: "[S]hall have guaranteed tenure until a mandatory retirement age on the expiry of their office, where such exits."

ii. **Protection from arbitrary removal from office**: Article 18 of Basic Principles provides that judges shall be subject to

suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties: "Removal of a judge for one these causes is best entrusted to other members of the judiciary often in the form of an appellate court or council of magistrate."

iii. **Guarantee of adequate salaries:** Proper salaries reduce personal dependency and corruption and help attract those best professionally qualified to the bench. The Basic Principles provide that a judge's compensation is to be secured by law. (Art II-The Singhvi Declaration). The Singhvi Declaration further recommends that judge's salary should not be diminished during their term of office and that they should be periodically reviewed to remove, overcome or minimize the effort of inflation. In addition, judges should receive pensions after their retirement.

iv. **Impartial selection process**: The selection process is critical to ensure an independent judiciary. If selection is entrusted to the executive (or legislature) without adequate safeguards against abuse, the risk of appointment made on the basis of political or personal loyalty is high. The Basic Principles warn against "improper motives" and mandate a selection process based on the principles of meritocracy and non-discrimination. The same principles also apply to promotion of judges.

v. **Prohibition of punitive transfer of judges**: In many countries judges have been transferred from one location to a less desirable one in order to punish them. Since an involuntary transfer can be punitive and is often tantamount to an invitation to resign the lack of constraints on transfer can seriously compromise personal judicial independence. The Singhvi Declaration states in this regard that: "[N]o promotion shall be made from an improper motive and that except pursuant to a system regular rotation or promotion, judges shall not be transferred….without their consent."

While the gap still exists between the vision informing these standards, the need of the hour is that this acceptance must be put into practice through active commitment of those who are directly concerned, that is, judges as well as through solidarity of lawyers and the public awareness of the importance of an independent judiciary. It would be appropriate here to also discuss the international traditions on judicial independence and accountability and efforts of U.N. to get the respective national governments to respect them and account them into account within the framework of their national legislation and practice.

International Traditions on Judicial Independence

1. Seven Principles

As far back as 1959, the International Commission of Jurists (I.C.J.) described the conditions which must govern the existence of an independent and impartial judiciary. During January 5-10, 1959, I.C.J. sponsored the International Congress of Jurists in New Delhi. 185 jurists from 53 countries participated in Congress 4 Committees. Since then, it has continued to elaborate such norms at both the domestic and international levels. According to the definition drawn up by the International Court of Justice in 1981:

> "Independence of the judiciary means that every judge is free to decide matters before him in accordance with his assessments of the facts and his understanding of the law without any improper influences, inducements, or pressures direct or indirect of any quarter or for whatever reason."

This principle was incorporated into the Basic Principles of Independence of Judiciary which were adopted by U.N. in 1985.[30] The Basic Principles are contained in the resolution of the U.N. Assembly dated November 29, 1985. The U.N. General Assembly adopted the Basic Principles by consensus. As regards independence of the judiciary, the following "Seven Principles" were laid down:

1] The independence of judiciary will be guaranteed by the state and enshrined in the constitution or the laws of the country. It is the duty of all governmental and other institution to respect and observe the independence of judiciary.

2] The judiciary will decide matters before it impartially, on the basis of facts and in accordance with the law, without any restriction, improper influence, inducement, pressures, threats or interference, direct or indirect for any quarter or for any reason.

3] The judiciary will have jurisdiction over all issues of a judicial nature and will have exclusive authorities to decide whether an issue submitted for its decision is within its competence as defined by law.

4] There will not be any inappropriate or unwanted interference with the judicial process, nor will judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or communication by

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[30] CIJL BULLETIN §§ 25-26 (April-Oct. 1990).

competent authorities of sentences imposed by the judiciary, in accordance with the law.

5] Everyone will have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals which do not use the duly established procedures of legal process will not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6] The principle of independence of judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7] It is the duty of each member state to provide adequate resources to enable the judiciary to properly perform its functions.

2. Siracusa Principles[31]

The Siracusa Principles contain standards necessary for the independence of judges and the judiciary. These principles also refer to the judicial independence, qualification, selection, posting, transfer, promotion etc.

3. I.B.A. Minimum Standards of Judicial Independence[32]

The International Bar Association (I.B.A.) laid down minimum standards of judicial independence. These were adopted by the 19th Biennial Conference held in October 1982 in New Delhi. They deal with judicial independence, the term and nature of judicial appointment. So far as the subject of discipline and removal of judges is concerned, these are contained in Paragraphs 27 to 32.

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[31] The Siracusa Principles were prepared by a committee of experts organized by the International Association of Penal Law, the International Commission of Jurists and the Centre for the Independence of Judges and Lawyers, and hosted by the International Institute of Higher Studies in Criminal Sciences met at the Institute in Siracusa, Sicily, on 25-29 May 1981 to formulate draft principles on the Independence of the Judiciary. The participants comprised distinguished judges and other jurists representing different regions and legal systems. They came from Africa, Asia, America and Eastern and Western Europe. The main purpose of the meeting was to seek to exchange information and formulate principles which might be of assistance to Dr. L.M. Singhvi, Special Rapporteur on the Study on the Independence of the Judiciary of the UN Sub-Commission on the Protection of Minorities and the Prevention of Discrimination. Dr. Singhvi was present at the meeting, and submitted the Draft Principles to the Sub-Commission at its August 1981 meeting as an annex to his progress report (UN Doc. E/CN.4/Sub.2/48I/ Add/). *Available at* http://cristidanilet.ro/docs/Siracusa%20Principles.pdf.

[32] The Minimum Standards of Judicial Independence of the IBA had its origin in a decision by the Committee on Administration of Justice at the 18th Biennial Conference of the IBA in Berlin in 1980. Dr Shimon Shetreet had the position of General Rapporteur. The Minimum Standards were adopted at the 19th Biennial Conference of the IBA in New Delhi in 1982.

4. World Conference of Independence of Judiciary[33]

The resolution is related to the Universal Declaration on the Independence of Judges. After dealing with the independence and accountability of international judges, it dealt with the national judges separately. Paragraph 2 of Part II after referring to independence of the judiciary, Paragraph 3 refers to the qualifications, selection and training. Paragraph 4 relates to posting, promotion and transfer, and Paragraph 5 to the tenure. Paragraph 6 deals with immunities and privileges, and Paragraph 7 with disqualification. Paragraph 8 deals with discipline and removal.

5. Caracas Conference[34]

A conference on independence of judges and lawyers was organized at Caracas, Venezuela during January 16-18, 1999 by the I.C.J. The conference passed a plan of action upholding the principles of rule of law, independence of judiciary and human rights.

6. Bangalore Principles[35]

It after referring to the U.N. Basic Principles of Independence of the Judiciary the Bangalore conference set out earlier formulated various principles relating to the independence of judiciary.

Judicial Pronouncements

In India there was a tussle between the parliament and the judiciary to assert their supremacy. *Golaknath*[36] asserted that parliament had no power to amend the fundamental rights. Thus it affirmed the supremacy of the Constitution. But the 24th amendment abrogated this power by empowering parliament to abridge the fundamental rights. The validity of this amendment was questioned in *Keshvananda Bharathi*[37].

The parliament was given the power to amend the fundamental rights, but it was powerless to alter the "basic structure" of the

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[33] The Universal Declaration on the Independence of Justice was unanimously adopted in June 1983 by the First World Conference on the Independence of Justice held in Montreal, Canada. The purpose of the Montreal Declaration is to secure and guarantee to international judges, national judges, lawyers, jurors, and assessors judicial independence. It is divided into five parts; each dealing with the issue of independence with regard to the different categories of practitioners.

[34] *See* www.icj.org.

[35] *Commentary on the Bangalore Principles of Judicial Conduct,* www.unodc.org.

[36] A.I.R. 1967 S.C. 1643.

[37] A.I.R. 1973 S.C. 1461.

Constitution. One of the basic structures is judicial review. If the courts are given the power to review the enactment of legislature, this power may safeguard the independence of judiciary and unable the citizen to assert their liberty. The 42nd amendment again tried to nullify the power of judiciary, which was stuck down in *Minerva Mill*[38]. "Liberty" is the heart and "rule of law" is the brain of Indian democracy. The existence of an independent judiciary and an enlightened public opinion are imperative for the prevalence of rule of law. The finally balanced division of power among the legislature, the executive and the judiciary has been so far altered in favour of executive to make the original provisions of the Constitution unrecognizable. Regarding to the significance of this principle in *UOI v. Sankalchand Hiralalseth*[39] Chandrachud, C.J., said that the independence of judiciary is the "cardinal feature" and observed that the judiciary which is to act as a Bastion of rights and freedom of people is given certain constitutional guarantees to safeguard the independence of judiciary. In this case Justice Bhagwati who led the minority expressed the similar views by saying:

> "The Independence of judiciary is a fighting faith of our Constitution. Fearless justice is cardinal creed of our founding documents…."

In *Shamsher Singh v. State of Punjab*[40], the Supreme Court held that judiciary may be fearless and free only if institutional immunity and autonomy are guaranteed.

The concept of independence of judiciary was central issue in the First Judge case[41] (*S.P. Gupta v. UOI*) where this concept was elaborately dealt by the banned judges of the constitutional bench. In the case Justice Bhagwati explained the concept by saying:

> "The concept of independence of judges is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of rule of law and under the Constitution it is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of law and thereby making the rule of law meaningful and effective…"

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[38] A.I.R. 1980 S.C. 635.
[39] A.I.R. 1977 S.C. 2328.
[40] A.I.R. 1974 S.C. 2192.
[41] A.I.R. 1982 S.C. 149.

Justice Fazal Ali, in his judgment in the same case however contained that:

> "….[I]ndependence of judiciary is doubtless a basic structure of the Constitution but the said concept of independence has to be confined within the four corners of the Constitution and cannot go beyond the Constitution."

In *Subhas Sharma*[42] it has been rightly observed:

> "[F]or rule of law to prevail judicial independence is of prime necessity."

Checks and Balances

Justice Beg in *Indira Nehru Gandhi v. Raj Narain*[43] observed that will of people is represented through the organ of judiciary. No organ can exceed the limit assigned to it. Again in *Chandra Mohan v. State of U.P.*[44], importance was attached to judiciary's independence. Of late, however, our entire judicial system is under heavy strains and stresses and at times, it is not so much that the accused is on trial, as it is the judiciary which is on trial. Thus it requires an immediate life saving dose. If justice is what justice does, injustice is writ large in judicial proceedings. Several loose ends have to be tied to understand this malady and the time has emphatically come to understand this. The scenario has to be examined in the light of both "external" and "internal" threats to judicial independence.

1. External Threats-arise from factors open to view and discernible which tend to threaten or interfere with the doing of justice according to law. Selective judicial transfers, holding out prospects of promotions, some acts indicating lucrative inducements like after retirement appointments, if one conforms or falls in line etc., are instances of some external threats.

Such threats by their nature are less frequent and cause a public outcry. They do not need an honest or unmotivated press or local bar to be detected and exposed. Since they can be so identified at a relatively early stage, external threats are not quite as potent or menacing as the internal threats.

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42 (1991) A.I.R. S.C.W. 128.
43 A.I.R. 1975 S.C. 2299.
44 A.I.R. 1969 All. 230.

2. Internal Threats-are threats which arise from indiscernible or subtle factors and often their existence cannot be detected at the early stages. They emanate from within and pollute the very source of justice. Such threats arise from various forms of judicial misbehaviour; they are matters of daily occurrence. Such threats are more potent and far more menacing then the external threats because they come to be helplessly tolerated and silently borne for various reason hereinafter. Three distinguished judges of the Supreme Court (Khanna, Krishna Iyer and Gupta, JJ.) who shared a platform to discuss the topic of judicial independence described internal threats as more ominous than the external threats and one of them, Krishna Iyer, J., went so far as to call it "death wish among the judiciary" and warned his brother judges against the tendency to "commit suicide".

Various kinds of internal threats are as follows:

I. Appointments: Appointments are made from the bar and promotions and appointments to the highest judiciary are made from both bar and bench. As such judges are contemporary reflection of the society, bar and bench itself, the quality of justice necessarily varies with the quality of judges and the quality of judges varies with the methods of their appointment and standard employed by the appointing authorities by the process of their selection. Some aspects are:

i. **Quality of judges**: The functions of a judge are to adjudicate, i.e., to find the correct facts, appreciate and apply the law and thus determine on which side lays the truth. Since a great deal of personal qualities and discretion is involved in the process of adjudication, the judge himself goes to trial in each case. An ideal judge, it follows should be a good human being, a right thinking citizen, having a sturdy character, reasonable intellect and qualities of firmness, patience, temperance, resilience and rectitude.

ii. **Method of appointment**: Each legal system provides its own method of appointment. In England, the Queen appoints the judges on the advice of the Lord Chancellor and the latter by convention consults senior members of the bench before making the selection. In India, judges of the High Court and Supreme Court are appointed in the manner prescribed by Articles 217 and 124 of Constitution of India. In the case of appointment to the High Court there is required to be tripartite consultation between the C.J.I., chief justice of High Court concerned and the governor of the state. In the case of appointment to the

Supreme Court, there is required to be bipartite consultation between such of the judges of Supreme Court including the C.J.I. and the President. After *In Re Presidential Reference* (the Third Judge case) the collegiums' approval is necessary. It is therefore particularly important that the chief justice should consult all his colleagues and not a small section of them. Although, there is bound to be some confidentiality in the nature of the process of recommendation, selection and appointment, it must never be allowed to degenerate into an unfair and oppressive exercise, where any cowardly assault on the character of candidate unleashed by oral, one sided vengeful whispering campaigns, anonymous letters is allowed to succeed in secretiveness with safety.

II. Judicial misconduct: Judicial misconduct which has, of late, raised its ugly head though it is unheard of in the glorious part. Judicial misconduct is not provable because there are no eye witnesses to testify nor there is safe outlet provided by law against judicial misbehaviour but it threatens to erode the public faith and adversely affects the independence of judiciary.

III. Corruption: Corruption pollutes the very air that we breathe. In order to create public confidence in court the persons of the higher judiciary must come forward voluntarily to submit to investigation, at least in respect of act or acts under suspicion. Participation of judges in public reception and parties should be minimized and as such should not attend such parties. Corruption also works in more insidious way. Favouring the firm of lawyers which sends briefs to the judge's relatives, favouring the juniors or other associates of judge's kith and kin are equally damaging modes of corruption. Retired Supreme Court judges are doing chamber practice, drawing and settling pleadings, giving opinion and advice and accepting arbitration work. Though judges cannot be expected to live in isolation or ivory towers-aloofness is nonetheless a desirable social prescription of a judge.

IV. Contempt power: Similarly the judges should use the weapon of contempt of court cautiously and should not abuse it and it is no answer to justify criticism to the court.

V. Press and bar: Press is the reflection of society and it can play its role effectively, if it indulges liberally in selective criticism of the judges. It should not allow it to be captured by handful of motivated professionals, acting more out of reason of personal displeasure against a particular judge than bona fide criticism of his judgment. Bar is as important as press and it can play a vital role in improving

the administration of justice, inter alia, by watching the performance and conduct of judges and acting by indicating censure and disapproval through bar resolutions. If the bar and press are in clutches of a small group of self serving advocates, bar resolutions and the press comments on judicial misconduct are likely to be selective and trained by favouritism. To this extent the bar and the press become directly responsible for promoting judicial misconduct.

VI. Paucity of adequate fund: Paucity of adequate fund is one of the main impediments to resolving the crisis of administration of justice. The apex court in *All India Judge Association v. Union of India*[45] has observed that minimum service condition will have to be ensured irrespective of the capacity to fund them, because the judges who are in want cannot be free. Of what use is a judge if he fails to discharge his duties according to the law? The society is at stake in ensuring the judicial independence and no price is too heavy to secure it.

Suggestions of Law Commission[46]

In the context of independence of judiciary the appointment of judges of the Supreme Court merits special consideration. In view of special role which has been assigned to this court under scheme of the Constitution, it is essential that only persons of the highest caliber are appointed judges of the court and that no other factor except that of merit alone should weigh in the matter of appointment. Every effort should therefore be made to ensure that the cream of judicial talent is represented on the bench on the highest courts of the land. According to some Constitutional experts there is hardly any political question which does not ultimately resolve into a legal or constitutional question. Quite a number of cases coming up before the Supreme Court have political overtones.

As regard this and some other factors the suggestion of law commission is noteworthy:

1. Law commissions has suggested that no one should be appointed to the Supreme Court as a judge unless for a period of not less than 7 years he has snapped all affiliations with political parties and unless during the preceding period of 7 years he has distinguished himself for his independent and dispassionate approach and freedom from political prejudice, bias or learning.

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[45] A.I.R. 1993 S.C. 2493.

[46] The 18th Law Commission was constituted for a period of 3 yrs. from Sept. 1, 2006 by Order No. A.45012/1/2006 Admn.III (LA) dated the Oct. 16, 2006, issued by the Government of India, Ministry of Law and Justice, Department of Legal Affairs, New Delhi.

2. The appointment of chief justice of the Supreme Court has on occasion become the subject matter of considerable debate particularly when we have departed from convention of appointing senior most judges as chief justice of the Supreme Court. The Law Commission has expressed the opinion that the vesting of unbridled powers in the executive to depart from the principle of seniority in the matter of appointment of chief justice is liable to be abused and is likely to make inroads into the independence of judiciary and affect the approach of some of the judges. It has accordingly suggested that whenever the government considers it proper to depart from the principle of seniority for appointment to the post of chief justice, in such an event the matter should be referred to a panel consisting of all the sitting Supreme Court judges. This principle should be departed from, only if the above panel finds sufficient cause for such a course. The above suggestion deserves serious consideration at the hands of all concerned.

3. The Law Commission while recommending that one-third of judges in each High Court should be from outside the state has at the same time emphasized that it should normally be by initial appointment and not by transfer. As regards the transfer of judges, the Law Commission has recommended that normally a judge should continue in the High Court in which he is appointed except where he is appointed chief justice of another High Court. According to the Commission, no judge should be transferred without his consent from one High Court to another unless a panel consisting of C.J.I. and his four senior most colleagues find sufficient cause for such a course.

4. The efforts of the present government to set up National Judicial Commission and also the passing of the Judges (Inquiry) Bill, 2005 is also a right step to ensure accountability and also necessary to bring about transparency in the working of the higher judiciary. It will also be helpful to judges to work without fear and independently. However a great deal of caution is required in its implementation and it should not be allowed to become a tool for the politicians exercising control over the working of judiciary. Besides these suggestions some reforms in the area of process like curbing multiple appeals, limit to adjournments, proper training of judges, alternative dispute resolution (ADR) mechanisms and computerization of courts will also speed up judicial process as a whole and ensure better efficiency of judges.

Conclusion

In my opinion to successfully refute the change of undemocratic conduct and to uphold the legitimacy of judicial review the judiciary must strive to maintain the respect in commands against this masses for its independence and integrity. 'Justice must not only be done, it must also seem to be done' is more a truism than a legal adage. In a democracy, especially in one where the judiciary adopts an activist approach, the citizens have the right to examine the integrity of judicial process, I would like to stress that whatever may be norms we lay down for ensuring independence of judiciary whatever may be the safeguards we may provide therefore, and whatever may be the hazards to which individual judges may be exposed because of their independence, the devotions and adherence to the principle of independence and impartiality in the final analysis would depend upon the personality of individual judges.

In judicial process, the role of the judges is more important than the written words of a statute. Krishna Iyer, J., has rightly observed:[47]

> "A socially sensitized judge is better statutory armour against gender outrage than long clauses of a complex section with all protection writs into it."

The above discussion shows that "judging" has become an "act of will", and the judge has not only some degree of choice but unlimited power of creating law. Judicial activism is desirable but within defined limits. In a democracy judicial process by its very nature cannot supervene the legislative mandate or executive authority. Judicial process must function within the prevailing social, economic and political atmospheres. Judicial process can only give direction to the spirit of law. Basic reforms whether social or political do not fall within the jurisdiction of the courts.[48] Judicial process has emerged as an important part of the administration of justice. The concept of separation of power has lost its validity. The ancient question 'whether judges find or invent law' is no more the ruling deity of modern jurisprudence. The judges are neither deputies to legislators nor mere interpreters of law.

The history of constitutional amendments resulting from the decisions of the court starting from *Kameshwar Singh v. State of*

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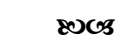
47 Krishna Lal v. State of Haryana, A.I.R. 1980 S.C. 1252.

48 LORD DENNING, JUDGES AND THE JUDICIAL POWER 1, 4 (Rajeev Dhawan, R. Sudarshan & Salman Khurshid eds., 1985).

Bihar[49] and culminating in Fundamental Rights case[50] testifies the emergence of the courts as the courts as "the capitals of laws umpire" and the judges as their "princes". The most disturbing feature of the judicial process however is the free for outlook of the judges of the superior courts in India. The emergence of PIL had made a good beginning but this issue has been quickly oversubscribed. It has also created a "tug of war" between the judiciary and the two other limbs of the state–legislature and executive. Thus the over activism of the courts in PIL[51] cases has reduced the effectiveness of its ruling. In the prevailing atmosphere of lawlessness in the executive and legislative constituencies, the judiciary should not follow the suit but it must maintain restraint as was recently observed by Justice Markandey Katju. To define the limits of judicial creativity is neither possible nor desirable but the difference between legislation and adjudication must be maintained. To conclude it is essential to consider the ailments of the system not because there is so much wrong with it but because there is so much that provides an opportunity to do wrong. It is wrong to misdirect one's attention external threats alone, when there is so much within that needs to be repaired. Since on the independence of the judiciary rests justice, liberty, equality and fraternity guaranteed to us by the Constitution. We alone can be the guard of our guardians.



[49] 1959 A.I.R. 1303, 1960 S.C.R. (1) 332.
[50] A.I.R. 1973 S.C. 1461.
[51] LAW AND POVERTY: CRITICAL ESSAYS 387 (Upendra Baxi ed. 1988).