THE

BANARAS LAW JOURNAL

OBITUARY

A meeting of teachers, students and staff of the Faculty of Law was held on August 22, 2005 at 10.30 AM to condole the sad and sudden demise of Prof. Anandjee, the Principal Architect of Modern Legal Education in India and the functional founder of the Law School, BHU in its present form and structure. Prof. Anandjee was born on September 1, 1922 at Kali Mahal, Banaras in a family of legal professionals. He passed Admission Examination of the Banaras Hindu University with Distinction in Mathematics. He did his Intermediate from the College of Science, Banaras Hindu University in 1944. He Graduated in Science from College of Science, Banaras Hindu University in 1944. He completed two years LL.B. Degree Course and was awarded with Law College Old Boy's Gold Medal for standing First in order of merit at the 1946 Law Examination. After Graduating in Law, he underwent Advocate's training for one year and enrolled as an Advocate, Allahabad High Court in September 1947 and practiced for one year. He left practice and joined University of Delhi as Lecturer in Law in October 1948. He went United States and did LL.M. in 1956 from Yale Law School. He completed J.S.D. from Yale Law School in the area of Labour Management Relationship. In 1959 he joined as Professor and Principal in the Faculty of Law, Banaras Hindu University. Till 1959, Law School was housed in half portion of a room in the Humanities Building with four permanent teachers only. The separate Law School building was his cherished desire and he realized his dream by constructing this building with adequate number of excellent faculty. He was instrumental in implementing the Three Years LL.B. Degree Course first in the Law School, BHU which was followed by the entire country later on.

He was interested throughout his life in Legal Education reform. He was the Member of Committees like Bhagwati Committee, Chief Justice Sinha Committee, Chief Justice Mahajan Committee, Chief Justice Gajendragadkar Committee etc. constituted for the Reorganization and Improvement of Legal Education in India. He was also appointed as the Director and Panel Member, National Academy of Labour Arbitrators, New Delhi.

He was a widely traveled man. He visited countries like England, United States of America, France, Burma, Thailand, Singapore, Australia, New-Zealand. He took voluntary retirement on 27.8.1981. In 1993 the Banaras Hindu University appointed him Emeritus Professor and he continued till death. He is survived by four daughters and five sons and grand-sons and daughters.

In his death the Faculty of Law, BHU has lost a legendry figure and the country has lost a doyen of legal academia. We all pray Almighty to provide courage to his family members to face this great loss and may his soul rest in peace.

(1922-2005)

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In exchange for Banaras Law Journal, the Law School, Banaras Hindu University would appreciate receiving Journals, Books and monographs, etc., which can be of interest to Indian specialists and readers.

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LEGAL EDUCATION IN INDIA[+]

Justice A.R. Lakshmanan[++]

It is a historically accepted fact that even as back as during the Vedic times India had an intricate and comprehensive legal system. In India, a step was taken in the direction of imparting formal legal education in the country in the year 1857. Three Universities set up in the cities of Calcutta, Madras and Bombay formally introduced legal education as a subject for teaching. This was the beginning of legal education in India. Initially, the study of the law was not exclusive and could be coupled with the study of arts. The system of legal education which was introduced was simple in nature and hardly any standards or test of aptitude. The importance of the study of law as a discipline came to be recognized soon after the British re-affirmed their sovereignty after the revolt of 1857, and India began enacting statutes. Except in the field of personal laws pertaining to varied religious denominations, the British introduced laws along the pattern of laws in the United Kingdom. These laws were in English and the proceedings of all the courts right from the lowest to the highest were also in English. Since more than 80% of Indian people lived in villages and were largely illiterate they came across certain difficulties in responding to the law courts. Even people living in urban areas could not grasp the confusing work of the law and the courts with the result that besides the system becoming expensive, a need was felt to equip a class of individuals with the knowledge of law who could in turn facilitate the access of the public to the courts. Thus simply speaking, the need to have advocates was felt and along with it came the responsibility to have specific institutions to impart requisite professional skill. The gap between the people who were unacquainted with legal proceedings and the justice delivery system could be bridged by engaging a person qualified to practice law as the advocate.

With the march of time, new demands emerge which sometimes make the existing system outdated or non functional, requiring it to be replaced by a new one. Law, should also respond to the demands of the society. In India, a change in the legal climate has never been so desired as it has been for the last few years. This may be due to worldwide demands of gender justice, expedient administration of justice, respect for human rights and in coming of the era of e-Courts proposed by the then chief Justice of India - Hon'ble Sri B.N. Kirpal.

We are a nation of Constitutional governance ruled by law. We believe in the saying "Be you ever so high, the law is above you". In the modern era ours is a welfare democratic State, which has adhered to the principles of equality of

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[+] Based on address given by Justice A.R. Lakshmanan at Law School Banaras Hindu University on 5.11.2004

[++] Judge, Supreme Court of India

opportunity and equality of justice. Perhaps that is the reason why our Constitution gives primacy to the common man. Karl Marx said that "Men make Constitutions and Constitutions do not make men". Our Constitution therefore rightly recognizes the man as the component in the great wheel of progress towards prosperity.

We may take it as part of Indian jurisprudence, that effective mechanism of legal services is part of rule of law and every citizen has a right for services of a trained legal counsel at the stage of arrest, investigation, interrogation and trial, and in every civil litigation involving vindication of common law right.

Equality of law and equal protection of law guaranteed under the Constitution cannot achieve the purpose unless protection by the Courts is afforded to the poorest among the poor. The Courts of law are temples of justice where justice is to be dispensed without any fear or favour without any distinction between the rich and the poor the advanced and down trodden, protected and unprotected. The idea of providing justice to every person in need cannot be realized fully until such time as legal assistance is made available to the more indigent section of our society.

The right of true legal aid and speedy trial are guaranteed rights under Art. 21. Art. 39-A mandates that the State shall provide free legal aid by suitable legislation or scheme or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. In Law Colleges where no legal aid clinics are functioning, students may be involved in the work of the local legal aid committee. The task of ensuring good practical training to law student is to be greatly shared by the law teacher as the law teacher is the model point of all education.

Legal Education of highest standard revitalizes administration of justice which at present is passing through a unique phase of being faced with peculiar challenges. Docket explosion, falling standards in professional excellence, inadequate funds are but a few such challenges. The almost successful efforts by Foreign Legal firms to set up their Offices are sure to send signals which cannot be ignored. Already there is a rumour that international arbitrations are dominated by Foreign lawyers and in such cases, Indian Lawyers play secondary role. The situation can be avoided, and can be prevented by changing and concentrating on policy options in all legal fields. But the beginning should be made here at Law Colleges from where all of us came from.

To promote the advocacy skills and love for the profession among the new entrants, the Moot Court competitions are very essential for the law students. At these competitions, the students get benefit greatly in the development of their skills of study, research, analysis of presentation. the trial conducted in the moot courts offer immense opportunities to a law student to expand his knowledge and develop the power of articulation, analysis and legal reasoning. In the practice of legal profession, 55% work is oral. Hence fluency in language and power of argumentation are very important aspects. In the words of Glanrille Williams :

"Mooting not only gives practice in court procedure but also helps to develop the aplomb (self confidence) that every advocate should posses".

As a part of the legal curriculam, there should be regular conduct of moot Courts and mock trials. The observations of the Gajendra Gadkar Committeee on the Reorganisation of Legal Education in the University of Delhi are very relevant in this context. According to the Committee "the aims of Legal Education would be to make the students of law good lawyers who have absorbed and mastered the theory of law, its philosophy, its functions and its role in a democratic society"

Many of you may join the Bar after enrolling yourselves as Members of this legal profession. there has been a wide spread talk that of late the standards of lawyers both in respect of efficiency as well as the ideas have deteriorated.

Advocates are as much devoted to Justice and fair-play as the Judges. I say this because the Advocate today is the Judge of tomorrow and if a lawyer is not devoted to Justice and fair-play, it is impossible to make good the same by crossing over from Bar to the Bench. Judges dispense Justice in Courts with the help and assistance of advocates. If there is decline in the efficiency of the Bar, it will be reflected in the caliber of the Bench. The Bar should be fearless in order to serve the end. While confidence in the administration of justice is unshaken and is increasing day by day as could be seen from the increasing number of litigants who approach the portals of Courts seeking Justice.

The difference between law as taught and law as practiced is familiar. If I may be excused I would say that in law as taught, the facts are clear and the law uncertain; whereas in law as practiced, the law is clear and the facts uncertain.

Every law student is primarily concerned in acquiring legal knowledge and skill needed for his career and therefore he is selfish. On the other hand, a legal practitioner is essentially selfless, for, all his endeavours, are bent towards doing the best he can for his client. An advocate shall fearlessly uphold the interest of his client and he must comfort himself in a manner benefiting his status as an Officer of the Court, a privileged member of the community and gentleman. The standards of professional conduct and etiquette are not set out by the Bar Council of India in the rule framed in exercise of its powers under Advocates' Act.

An Advocate owes a duty to the Court, duty to the client, duty to the opponent and duty to the colleagues. An Advocate should conduct himself with dignity and self-respect. The dignity which an Advocate commands from his client depends upon the dignity and respect which he shows to the Court. An Advocate should discourage unjustified litigation.

Many a lawyers have taken a leading part in the Freedom Movement and many have contributed of the development of religion and various Indian languages. Many had undergone incarceration during Independent Movement and many have played a vital role in Trade Union Movement. An Advocate should be soft spoken and gentle in manners. Advocates have also been the

leaders of public opinion as also fighters of freedom. Democracy can have no better champions than Advocates who know precisely what the citizen's rights are in respect of his person, property, faith and freedom of action. An Advocate knows how far a free man may go and how far a free man may achieve the objects of national life by constitutional methods. Some of the lawyers of yester years were makers of modern India - they were statesmen, great scholars, philosophers and above all great humanists.

In England the bodies concerned with professional conduct are Inns of Courts, General Council of the Bar and the Circuit Mess of each of the several Circuits. It will be interesting to note in England that it is not possible for a Barrister to have a seat in Solicitor's Office and a Barrister should not accept a brief for a Company of which he is a Director nor advice or settle documents preferably for the company and a Barrister may not have the words "Barrister at Law" outside the place where he resides or has the chamber and a Barrister shall not describe himself as a Barrister on his visiting cards. Though the professional conduct and etiquette at the Bar of England and Wales may not strictly apply to the Indian Bar, yet, the standards laid down are worthy of being emulated by at least Senior Advocates.

Justice Frankfurter said, "It is the quality of justice which will establish the Court in the confidence of people and it is the confidence of the people which is the ultimate reliance of the Court". I am sure, that the Indian judiciary is trying to live up to the speech made by Justice Frank Further.

A good judgment reflects the assistance which a Judge received from the Bar on either side. A great Bar endowed with ability, integrity and independence is necessary to keep the stream of Justice - pure and unsullied.

I would also appeal to the authorities concerned to publish a Law College Magazine containing the text of lectures delivered by academicians and also important and mile-stone judgments, which would be of immense help to the students.

Judiciary has a very vital role to play in protecting and preserving human rights and fundamental rights. Law School and Law teachers are the backbone of law. I wish every one of you a bright future in the legal profession. I can assure, my dear students, that notwithstanding severe competition in the legal profession, lot of room is lying vacant at the top layer. I am sure, many of you by your hard and sincere work will strive to occupy the vacant space at the top layer.

A model law school, on the lines of American Law Schools, i.e., the National Law School at Bangalore was constituted, which became operative in 1988. A decade later, two other law schools, modeled on the National Law School, have been set up at Bhopal and Hyderabad.

When I was the Chief Justice of the Rajasthan High Court, I started a National Law School of Rajasthan with the help of the then Rajathan Government.

With their limited intake of students and ample resources, they are catering to the needs of a section of the society. Nevertheless, it is easy to experiment and implement any new change desired to be introduced in the legal education at these institutes because they are not the part of University system, which with its manifold problems, does afflict the legal education as well.

If legal education has to be salvaged, a fundamental change is required in pedagogy. It is generally stated that your efforts are only as good as the workers who operate a system. It means that no amount of attempts to transform the curriculum to be futuristic and challenge based will go too far without pedagogic transformation. All this requires all-out innovation and committed teachers, who should be willing to modernize their curriculum, experimenting with new methods of teaching, creating the spirit of innovation and inculcating analytical approach towards the problems among the students according to the need of the time and making it socially relevant. The basic responsibility remains that of the BCI which continues to be bound by the statutes for taking meaningful steps in making legal education worth facing the new challenges. The UGC and the Universities must, however, not shirk their responsibilities just by shifting the whole burden to the BCI.

I once again thank the organizers for having given me this opportunity to be with you and spend some time with you all and share some of my thoughts with you.

GM SEEDS, INTELLECTUAL PROPERTY AND THE CORPORATIZATION OF FOOD+

- Joel J. D'Silva[1]

I. INTRODUCTION

People have always felt passionate about the environment, rain, seeds and their food in particular. This has been symbolized in prayers for centuries, and is tied up with feelings of security, personal satisfaction and cultural or ethnic identity.[2] But, this is all changing with the introduction of biotechnology in agriculture. The introduction of 'Genetically Modified'[3] technologies were hyped as the solution to increased food production, reduction in environmental degradation and promotion of sustainable development. However, besides raising various environmental, ethical and social concerns, today, GM technologies are being promoted by a handful of multinational businesses. Only four corporations control most of the GM seed market, effectively privatising the world's food chain and protecting their investments by using intellectual property rights. There is also the contentious issue of the pilfering of indigenous knowledges.

GM technology is slowly and effectively undermining farmer's rights particularly in developing countries. Instead of promoting food security as supposed to, it is making developing countries increasingly dependant on GM technology and slowly but surely destroying traditional agriculture. The debate about GM seeds is vocal and passionate. This is probably the consequence of the diverging views on the actual or potential risks and benefits of GM seeds as well as the discrepancies surrounding their regulation. Such is the background against which this study reviews the promise, prospects and challenges associated with agricultural biotechnology. This dissertation is limited in its approach; to GM seed technology. Secondly, it does not focus on scientific aspects rather revolving around farmer's rights, Intellectual property, Biosafety and food security all in the context of developing countries. This study has not focused on a particular country or region, considering the wider implications these new technologies have both on developed and developing. This wider approach has however been substantiated by illustrations from various countries and regions.

+ This article is a modified version of LLM dissertation submitted by the author to the University of Warwick Law School, United Kingdom (UK), under the supervision of Prof. Upendra Baxi

1 BGL, LLB (Hons); LLM (Warwick).

2 *Id at* p. 74

3 Hereinafter referred to as GM.

II. THE PROMISE OF GM AGRICULTURE

a. Agricultural and Food Biotechnology

Biotechnology is indeed a revolutionary technology.[4] "It offers humanity the power to change the characteristics of living organisms by transferring genetic information from one organism, across species boundaries, into another organism".[5] The use of biotechnology in sectors such as agriculture and medicine has produced a growing number of genetically modified organisms (GMOs) and products derived from them. According to proponents of biotechnologies, many countries particularly in the developing and poor developing world have limited human resources, institutional capacity, and legal and regulatory regimes to actively pursue research in agri-biotechnology. However, the economies of many of these developing countries are still largely dependant on agriculture. Their farmers are facing various challenges to increase their productivity and competitiveness, protect environmental and biological diversity, and to diversify agri-food production so as to meet the changing needs of consumers and the food industry. Advanced agri-biotechnology is claimed to hold the key to meeting these challenges.

The biotechnology industry is estimated to have generated at least $34.8 billion in revenues and the area of farmland planted with transgenic crops or GMOs has also increased - from about 1.7 hectares in 1996 to about 60 million hectares in 2002. Besides pest resistant crops, biofertilizers and biopesticides - biotechnology has also been used in a process called bioremidification to reclaim waste land through the use of micro-organisms and plants that remove and/or degrade toxic compounds. Some firms have incorporated biotechnology techniques to decrease energy and water consumption, improve productivity and reduce the number of processing steps. All these actions could lead to an improved environment, sustainable use of resources and increased productivity. Biotechnology-related applications and products have penetrated all sectors of the economy.[6]

Despite these developments, biotechnology does not seem to have taken root in many countries and many goals have not been attained. It has faced enormous resistance from farmers, environmentalists and scientists alike. Many have raised serious questions on the unpredictability of biotechnology and the

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4 The Convention on Biological Diversity defines biotechnology as "any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use".

5 Simonetta Zarrilli, *International Trade in GMOs: Legal Frameworks and Developing Country Concerns*, (2004), UNCTAD publication, p. 1-2. Available at: < http://www.unctad.org/en/docs/ditctncd20041_en.pdf> Accessed on 23 July 2005.

6 *The Biotechnology Promise – Capacity building for participation of developing countries in the Bioeconomy*, (2004), UNCTAD Publication, p. 2. Available at: http://www.unctad.org/Templates/webflyer.asp?docid=5458&intItemID=2095&lang=1>. Accessed on 21 June 2005.

attempts to play God with food and agricultural systems.[7] As Michael Antoniou asserts: "the artificial nature of GM modification does not make it dangerous. It is the imprecise way in which genes are combined and the unpredictability in how the foreign gene will behave in its new host that results in uncertainty".[8] Similarly, the wider applications of agricultural biotechnology are buried in the debate surrounding GM seeds and crops. It is however possible that biotechnology may be gaining wider usage in other fields which would however fall beyond the scope of this work.

b. The Promise of a Golden Harvest: GM Seeds in Risk Society.

"Some of the most interesting studies of socio-cultural evolution relate to human efforts to domesticate plants including seed collection and breeding".[9] Seed collection is as old as human civilization.[10] Colonialization also had exploitation of genetic resources as one of its central goals and has undoubtedly laid the foundation for the commercialization of agriculture. Today's seed industry has varied origins governed largely by social and economic factors influencing agricultural production. The rise of the modern seed industry is closely associated with plant breeding, an activity that has a long history. Major advances in plant breeding, however, were made after the rediscovery of Mendel's work on genetics.[11] Knowledge of genetics made it possible to embark on more controlled seed and plant breeding programmes. It is through these breeders realized the importance and value of germplasm. This eventually has evolved into the GM revolution consisting of GM seeds and crops.

While GM seeds and crops so derived may offer great benefits to agriculture, farmers and potentially to consumers, biotechnology does not come without the prospective risks and uncertainty. According to Santos, "boosted by the fast conversion of science into a force of production, the scientific criteria of efficacy and efficiency soon became hegemonic and gradually colonized the rational

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7 Controversies like the Star Link Corn Fiasco, where GM fragments were found in Taco Bell shells sold in grocery stores have only fueled the 'frankenfood' debate.

8 Michael Antoniou, "GM Foods – Current Tests are Inadequate Protection", London Sunday Independent 21 February 1999; *from* Martin Teitel & Kimberly Wilson, *Genetically Engineered Food: Changing the Nature of Nature*, Park Street Press, Vermont, (1999) p. 10. *See also*, J. S. Fincham & J. R. Ravetz, *Genetically Engineered Organisms – Benefits and Risks*, (1991) Open University Press, Milton Keynes, pp. 2-6.

9 Calestous Juma, *The Gene Hunters – Biotechnology and the Scramble for Seeds*, (1989), Princeton University Press, New Jersey, p.37

10 One of the earliest recorded plant and seed collection expeditions took place in 1495 BC when Queen Hatshepsut of Egypt sent a team to the Land of Punt (Somalia/Ethiopia) to obtain specimens. *See* Calestous Juma. , *The Gene Hunters – Biotechnology and the Scramble for Seeds*, (1989) Princeton University Press, New Jersey, pp.38- 50.

11 *Id.*, at p. 80.

criteria of its other emancipatory logics".[12] Thus the emancipatory aspects of science are lost in this circle of wealth and risk production. Although it is claimed that there is no definite scientific evidence to show harm to human beings, animals or the environment[13], the public in developing countries are apprehensive because of a history of revelations of health and environmental dangers in other fields, like in the chemical and pesticidal sector[14].

New technologies such as GM technologies have brought the ominous question of risks, 'who takes them and who benefits from them' to the frontline. According to Ulrich Beck, "the social production of wealth was once the main goal of development. However there has been a shift to what he calls 'production of risks'".[15] According to the old paradigm of the industrial society wealth was distributed unevenly but legitimately. The "new paradigm of the risk society" is how risks can be "prevented, made harmless, dramatized and directed and channeled away"[16]. "Risk has become an everyday term in modern society, having lost most of its specific meaning. In its everyday use, for instance, there is hardly any difference between risk, danger and expected damage".[17] Risks from these new technologies can be given legitimacy by the fact that no one saw them or perceived them possible. Therefore such 'threats posed by risk are at once seen both as an opportunity and a threat for dominant interests, who strive to control them. For these interests, risk is always to be controlled, and never removed."[18]

Beck's contention is that it is becoming increasingly obvious that many hazards are a by-product of the same "techno-scientific rationality that initially promised progress, development, and safety"[19] - like in the case of GM seeds and crops the promise of a cleaner environment, sturdier plants and claims of eradication of world hunger. 'The old canard about feeding the Third World is trotted out each time a risky technique needs ethical justification for its

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12 Boaventura de Sousa Santos, *Towards a New Legal Common Sense*, (2002) 2nd Ed., Butterworths LexisNexis, p 5.

13 There have been reported cases of crop Genetic transfers, emergence of 'super weeds' as well as reports that rats tested with GM corn diets developed blood and organ abnormalities.

14 The Bhopal Gas Tragedy in India can be used as an example of Great Promises of an Agricultural Revolution but a consequent destructive outcome.

15 Ulrich Beck, *On the Logic of Wealth Distribution and Risk Distribution- Risk Society*, (1992) Sage London pp. 19- 50. *See also*, Beck, Ulrich, "From Industrial Society to the Risk Society: Questions of Survival, Social Structure and Ecological Enlightenment", *Theory, Culture & Society 9*: 1992 pp. 97- 123.

16 *Ibid.*

17 Roel Pieterman, "Culture in the Risk Society", *Zeitschrift fur Rechtssoziologie*, 22, heft 2, (2001) p.147.

18 Simon Carter, *Risk and the New Modernity*, (1993) Review of Beck, Ulrich, Risk Society: Towards a New Modernity, London: Sage, 1992. Available at: <http://muse.jhu.edu/journals/postmodern_culture/v003/3.3r_carter.html> Accessed 11 April 2005.

19 *Supra* n. 15.

implementation."[20] On the other hand, new international inequalities are established by the industrialized states attempting to export their risks to the third world. [21] However, Beck also propagates a "boomerang effect"[22] and advocates that risks will strike back and even the rich and powerful will be unable to escape the fallout in the future. Consequently, the effects or disaffects of GM seeds and crops will just not effect developing but also the developed in the long run. Globalization has led to the "commercialization of these risks as money is there to be made".[23] Thus, the poor often pay the price for the risks taken, while developed countries and MNC's profit.

III. TRADING BIODIVERSITY AND BIOSAFETY

Peoples and States have recognized for millennia, the importance of utilizing and regulating access to biodiversity for their economic development. But the plethora of seeds, plants, animals and micro-organisms is disappearing at an alarming rate, threatening future seed and food supplies and the making of new drugs. More recently Colonial rulers used their Navies to expropriate genetic materials from around the world, and worse may be to come, as rich countries and large corporations exploit what is essentially a southern resource.

As Kathleen McAffee comments "this *environmental-economic paradigm*[24] reduces organisms and ecosystems to their allegedly fungible components and assigns monetary prices, calculated with reference to actual or hypothetical markets, to those components".[25] This has led to the call for the preservation of biodiversity and the propagation of biosafety by ensuring an adequate level of protection and safety in the field of biotechnology. The call for legal regulation whether national or international has received great emphasis particularly due to developing country concerns but this legal regulation in the form of Conventions and protocols has only highlighted the duplicity in the way market interests supersede people's interests.

This leads us to the regulation and emancipation paradigm. According to Santos, "the reduction of modern emancipation to the cognitive instrumental rationality of science and the reduction of modern regulation to the principle of market, fueled by the conversion of science into the primordial productive force, are the key conditions of the process by which modern emancipation has collapsed into modern regulation. In other words global contingency and conventionality undermine regulation without promise of emancipation. The

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20 Teresa Brennan, *Globalization and its Terrors*, (2003), Routledge, NY. p 59.

21 *See also* Brent K. Marshall, "Globalization, Environmental Degradation and Ulrich Beck's Risk Society", *University of Tennessee- Journal on Environmental Values* 8: (1999) pp. 253–275

22 Ulrich Beck, *On the logic of Wealth Distribution and Risk Distribution - Risk Society*, (1992) Sage London p. 37.

23 *Ibid.*

24 Emphasis mine.

25 K. McAffee, "Selling Nature to Save it? Biodiversity and Green Developmentalism", *Environment and Planning: Society and Space*, 17 (1999) pp. 133- 154.

former becomes impossible as the latter becomes unthinkable."[26] This has thus become the 'paradigmatic crisis of law'[27] which rather than being emancipatory, and a force for good has become a market oriented force for regulation. Hence the 'duplicity and ambiguity'[28] may be observed as law rather that protect and emancipate becomes a market synchronized force of regulation and serves the interests of those who push for the 'scientification of society'[29].

a. The CBD , Biosafety Protocol and Precautionary Boundaries

The 1992 Convention on Biological Diversity (CBD) has been called "the most important initiative ever taken to set the world on a course towards environmentally sustainable development".[30] The CBD came into force on December 29th 1993, 90 days after its 30th ratification[31] and is a framework agreement that leaves parties free to implement it through their own legislation. Amongst others, it expressly reaffirmed the sovereignty of states over their genetic materials. It requires countries to ensure the conservation of biodiversity, protect indigenous knowledge, and guarantee fair and equitable sharing of benefits arising from the utilization of genetic resources. It also made access to these subject to prior informed consent of the State rather than the community.[32] Several developing countries felt that the CBD actually undervalued wild biodiversity which is of great use to biodiversity poor developed countries.[33]

To truly understand the CBD and its conception it is necessary to view it not merely as an environmental agreement but rather more of an international trade agreement. The CBD facilitates trade in genetic resources while at the same laying measures to provide a framework to regulate it. The value placed on biodiversity within the CBD is ultimately an economic one.[34] From a developing country perspective the CBD is part of a broader agenda of "restructuring global

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26 Boaventura de Sousa Santos, *Towards a New Legal Common Sense*, (2002) 2nd Ed., Butterworths LexisNexis, pp. 9-12.

27 *Ibid* at 10.

28 *Ibid* at 12.

29 *Id.*, at 10.

30 The Crucible Group, *People, Plants and Patents -The Impact of Intellectual Property on Trade, Plant Biodiversity, and Rural Society*, IDRC, Canada, p.31.

31 Despite Article 37 preventing reservations the US, UK, France, and Italy all attached statements of interpretation when signing the convention.

32 CBD Articles 8 (j), Art. 15.5 and Art. 15.7

33 Geoff Tansey, *Food Security, Biotechnology and IPRs – Unpacking Some Issues Around TRIPs*, (2002) Quaker United Nations Office, Geneva, p.9.

34 The works of Russian Nicolai Vavilov carried out in 1920s and 30s in particular his philosophy and approach to agricultural research can be argued to be an influencing theme on which the CBD is built. In order to improve crops in the USSR, Vavilov with 20,000 staff conducted expeditions all over the world to collect plants and seeds of economic interest. Thus he looked at plants and seeds as enormous untouched economic resources. Sixty years later the CGIAR stressed the same opinion in justifying the need for a biodiversity convention. *See also* Vavilov (translated by Doris Love), *Origin and Geography of Cultivated Plants*, (1992) Cambridge University Press, p. 307.

economic relations to obtain required resources, technology and access to markets".[35] It can be said that the CBD is intended to be based on the notion of common heritage with provisions pertaining to access, exchange and other non financial benefits. However, there also seems to be a tragedy of sorts (often referred to as the, Tragedy of the Commons[36]), as the CBD through Article 3 recognizes States sovereign rights and then in Art. 16 ensures that CBD is supportive of IPRs thus creating a paradox.

"Governments of developing countries can now control, and charge outside interests like MNC's for seeds, plants, genetic information etc. within their borders. A country can negotiate rent or royalties if a plant originating in its territory is used in the development of a commercial crop variety."[37] But this is a new field, and there are few guidelines. For some countries it could mean a sizeable increase in foreign earnings. Ethiopian barley, for example is worth $150 million in the United States each year. Pau D'Arco, a medicinal plant from Latin America, which has long been used to combat malaria and cancers, has a market value in the North of $200 million a year.[38] However, with Governments having such a prominent role corrupt administration and officials can accumulate millions while still leaving the indigenous peoples in the dark who may be the true trustees of the seeds, plants or knowledge. This clearly defeats the concept of 'the commons'.

Thus the CBD despite its many-sided provisions promulgating biodiversity and respect for traditional knowledges is considered an opportunity lost as it only served in reinforcing the legitimacy of plants, seeds and germplasm as property. This only leads to further commercialization of the economic potentials of genetic resources by "restricting access to genetic material in fact makes it available for manipulation and to the MNC's for exploitation".[39]

As part of the requirements to minimize the environmental impact of biological innovations a separate Biosafety Protocol,[40] to the CBD was negotiated with great difficulty and finally agreed upon in Montréal in 2000. The

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35 Paul Street, "Trading in Risk: The Biosafety Protocol, Genetically Modified Organisms and the World Trade Organisation" *Environmental Law Review*, 3 (2001) pp.234-263, *See also*, Boyle A. in Redgwell C, and Bowman, M (eds), *International Law and the Conservation of Biological Diversity*, (1995) Kluwer Law International London, p. 12.

36 Hardin G. *The Tragedy of the Commons*. Science 162 (1968) pp. 1242- 1244. Hardin's Tragedy of the Commons is based on the notion that ruin is the destination toward which men head, in a society that believes in the freedom of the commons.

37 *Supra n.* 34, p. 11.

38 *Ibid.*

39 Usha Menon, Indian National Institute of Science Technology and Development Studies. See, Menon U, "Access to and Transfer of Genetic Resources", *Int. J. Technology Management* Vol. 10, (1995) p. 323.

40 Hereafter referred to as the Protocol. For a critical analysis of the Protocol. See B.C. Nirmal 'An Overview of Biosafety Protocol', *Journal of Indian Law Institute*, 46(2004), 373-392.

Protocol by means of 40 Articles and 3 annexes provides an international mechanism for harmonizing minimum standards of regulation as it relates to the transboundary movement of any 'living modified organisms' resulting from modern biotechnology. An in-depth discussion of the protocol would fall out of the scope of this work. However an aspect to be considered is the fact that the 'precautionary principle' as contained in Article 15 of the CBD is incorporated in the risk assessment, risk management, transparency and import measures.

The Principle is intended to provide a legal means of dealing with risk, managing uncertainty and diverging scientific views on the potential consequences of those risks. The principle is to be applied to all GMOs whether used as food or as seeds for environmental release. Despite being a concept that has existed for a while[41] as well as being deliberated upon in recent disputes like the 1998 *Shrimp Turtle Case*[42] and the 1999 *Southern Bluefin Tuna* Case,[43] uncertainties in its interpretation and ambit have remained. This has made the principle one of the most contentious aspects of the Biosafety Protocol.

However, the social, economic and political disparities that existed between the negotiating parties have, with the adoption of the protocol neither ceased nor been settled. "The protocol further governs the international trade of GMOs without clearly defining its relationship to the WTO Agreements."[44] The Protocol is called by critics as resembling the 'emperor's new clothes' and the differences between the parties are now firmly embedded in the protocol itself. It is of course of not much help that differences on technologies and GMOs and their labelling has escalated, the USA one of the biggest producer and exporter of LMOs has

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41 It is a principle based on common sense aphorisms such as "An ounce of prevention is worth a pound of cure," "Better safe than sorry," and "Look before you leap." *See*, Michael Mehta, 'From Biotechnology to Nanotechnology', *Science, Technology & Society*, Vol. 24, No. 1, (2004) pp. 34-39. *Also*, John Applegate, "The Taming of the Precautionary Principle", *WM & Mary Envtl. L & Pol'y Review*, Vol. 27, (2003) pp. 13 – 18.

42 Reiterated that biological diversity is exhaustible and has to be protected. [*US – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, 15 May 1998, WT/DS58/R, 98 -1710 (Shrimp/Turtle Case)]. *See also*, Mitsuo Matsushita, Thomas J. Schoenbaum & Petros C. Mavroidis, *The World Trade Organization – Law, Practice and Policy*, (2004) OUP, pp. 457-460.

43 Judge Laing's opinion that the Precautionary Principle was not yet part of customary international law though States can be seen to have accepted a precautionary approach to the environment. *See*, Mcintyre O & Mosedale M, "The Precautionary Principle as a Norm of Customary International law", *Journal of Env. Law*, 9 (1997) pp. 221- 241. [Southern Bluefin Tuna Cases (*New Zealand* v. *Japan; Australia* v. *Japan*), Provisional Measures [1999] ITLOS 2 (27 August 1999)]. For an interesting discussion on the precautionary principle from international and national perspectives See, B.C. Nirmal, From Vellore to Nayadu : The Customary Law States of the Precautionary Principle', *Banaras Law Journal* 30 (2001).

44 Laurence Boisson de Chazournes & Makane Moise Mbengue (2004), "GMOs and Trade: Issues at Stake in the EC Biotech Dispute", *REICEL* 13 (3) 2004, p. 298. *See also*, Olivette Rivera – Torres, "The Biosafety Protocol and the WTO", *B. C. Intl & Comp. Law Review 26* (2003) 263.

not ratified the Protocol[45] and that questions on liabilities and redress are yet to be decided upon[46].

b. The ITPGR (International Seed Treaty)

After seven years of negotiations, the FAO Conference adopted the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR), in November 2001.[47] This legally-binding Treaty is to be in harmony with the CBD.

Through the ITPGR, countries agree to establish an efficient, effective and transparent multilateral system to facilitate access to plant genetic resources like seeds and to share the benefits in a fair and equitable way. The multilateral system applies to over 64 major crops and forages.[48] The governing body of the Treaty will lay out the terms for access and benefit-sharing in a 'Material Transfer Agreement'. Resources may be obtained from the multilateral system for utilization and conservation in research, breeding and training. When a commercial product is developed using these resources, the Treaty provides that a payment of an equitable share be made from the resulting monetary benefits, if this product is to be restricted from further research and breeding. If others may use it, payment is voluntary.

Thus the Treaty provides for sharing the benefits of plant genetic resources through cooperation, access, transfer of technology and capacity-building. It also envisages a strategy to mobilize funds for small farmers in developing countries. The Treaty recognizes that should any germplasm be taken out of the general pool available for further breeding using a patent, it would create a loss to society as a whole that should be compensated by some payment into a fund created to promote the use of plant genetic resources for food and agriculture. This ambiguity has been severely criticized by NGO's and environmentalists who pronounce that "the multilateral system itself would be threatened if its

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45 *See*, Michael P. Healy, "Information based Regulation and International Trade in GM Agricultural Products: An evaluation of the Cartagena Protocol on Biosafety", *Wash. U. J. L & Pol'y*, 9 (2002) pp.205 -243.

46 Developing countries want biotech companies legally liable for any damage to biodiversity or human health -- another provision opposed by the United States.

47 The Treaty came into force on 29 June 2004; ninety days after forty governments had ratified it. The Resolution 3/2001 can be found at <ftp://ext-ftp.fao.org/ag/cgrfa/res/c3-01e.pdf>. Accessed on 12 July 2005.

48 In essence, the multilateral system is a communal seed treasury composed of 35 food and 29 feed crops now held by governments (both *in situ* on public lands and *ex situ* in national seed banks) and by the Consultative Group on International Agriculture Research (CGIAR) in its extensive *ex situ* seed collections. These crops though limited in number, provide about 80% of the worlds food calories from plants.

component parts could be privatized through the grant of intellectual property rights (IPRs)".[49]

The Treaty recognizes the fact that farmers and their communities have had a central role over centuries in the conservation and development of plant genetic resources. This is the basis for Farmers' Rights, which include the protection of farmer's rights to seeds, traditional knowledge, and the right to participate equitably in benefit-sharing and in national decision-making. Each country that ratifies the ITPGR will then have to develop legislation it needs to implement the Treaty. There has been some criticism that the Treaty does not go far enough to protect farmers' rights and leaves much to individual countries. But it could be argued that there is flexibility in the Treaty and the underlying spirit of the Treaty allows and actually encourages signatories to introduce their own legislation on farmers' rights that may be more appropriate and suitable to a particular country.

Article 12.3(d) of the ITPGR[50] states that facilitated access to the plant genetic resources contained in the multilateral system will only be provided on condition that:

> Recipients shall not claim any intellectual property or other rights that limit the facilitated access to plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the multilateral system.

There are two potential areas of conflict between the ITPGR and TRIPs – Article 12.3(d) and the ITPGR's benefit sharing clause.[51] A conflict with Article 12.3(d) is likely in the case of industrialized countries that award patents to inventors and MNC's who have isolated plant genes from nature. The ITPGR would impose a responsibility on these countries to desist from granting patents on seeds or genes isolated from germplasm received from the multilateral system. This will compel states to amend their national patent laws to deny protection to genes isolated from such materials.

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49 Helfer, L.R., , "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking", *Yale Journal of International Law* 29 (2004), 1 pp. 40-41.

50 The United States and Japan opposed any interpretation that would bar the patenting of isolated and purified genes extracted from Germplasm placed in the common seed pool. The entire treaty was then adopted by a vote of 116 in favour, zero against and two abstentions by Japan and the United States.

51 GRAIN, TRIPs-plus Through the Back Door: How Bilateral Treaties Impose Much Stronger Rules for IPRs on Life than the WTO (2001). Available at : <http://www.grain.org/briefings/?id=6> Accessed on 21 July 2005. *See also* Laurence Helfer, International Property Rights in Plant Varieties – International Legal Regimes and Policy Options for National Governments, (2004) FAO Legislative Study, pp. 90-92. Available at: <ftp://ftp.fao.org/docrep/fao/007/y5714e/y5714e00.pdf> Accessed on 3 July 2005

The conflict with the ITPGR's benefit sharing provisions arises from the fact that those who commercialize a product developed from genetic resources obtained from the multilateral system must pay "an equitable share of the benefits arising from the commercialization of that product."[52] This imposes an obligation in connection with biotechnology patents that is not imposed by other types of patents. For that reason, it may conflict with TRIPs Article 27.1, which requires members to make "patents... available and patent rights enjoyable without discrimination as to... the field of technology...."[53]

It will have to be seen if harmonization between the ITPGR and TRIPs will ever be achieved and is extremely difficult to predict considering the amount at stake for both developed and developing countries. Despite these apparent flaws and conflicts the ITPGR can be considered a right step forward in recognizing farmer's rights and a significant step towards a worldwide pledge to responsible governance of germplasm. "It may thus prove to be a platform off which subsequent more detailed and specific protocols and agreements will emerge".[54]

c. The African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources.[55]

In June 1998, at the 68th Ordinary Session of the Organisation for African Unity (OAU) held in Ouagadougou Burkina Faso, the Council of Ministers, adopted the Model Law and expressed concern that the western patent system was threatening the biological diversity, knowledge and technologies of local and indigenous people of the South, including Africa and made various recommendations.[56] It is a model law for protecting farmers' and breeders' rights and community rights, as well as for regulating access to biological material. The model law has incorporated the Convention on Biological Diversity (CBD), TRIPs as well as the then non-binding International Undertaking on Plant Genetic Resources (IUPGR). As such, the model law is an appropriate embodiment of the interests of developing countries, and appropriately takes their concerns into account. It contains explicit provisions on farmer's rights to seeds.

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52 *Ibid.*

53 *Ibid.*

54 Gloria Lam, "No Small Potatoes: Intellectual Property Rights and Genetically Modified Organisms", Eco-Lomic Policy and Law, *Journal of Trade and Env. Studies*, 6(2004) p.10.

55 The Model Law of the OAU on Community Rights and on the Control of Access to Biological Resources available at <http://www.twnside.org.sg/title/oau-cn.htm>. See text at <http://www.grain.org/brl_files/oau-model-law-en.doc> Accessed on 21 June 2005.

56 The status of the model law is that Africa's Heads of State and Government have endorsed it and it is available as a model in the preparation and adoption of domestic laws.

According to the model law, farmers' rights are recognized "stemming from the enormous contributions that local farming communities, especially their women members, have made in the conservation, development and sustainable use of plant and animal genetic resources that constitute the basis of breeding for food and agriculture production".[57] Several rights are set out under the Model Law pertaining to farmers rights to seeds.

1. Recognizes Farmer's rights, as a counterbalance to breeders rights and lays out the farmers traditional right to use, save, multiply and exchange seeds and where necessary produce farmer certified seed. [58]

2. The law finds its basis on the principle that traditional knowledge, technologies and biological resources of local communities are a result of the tried and tested practices of several past generations. Community rights are inalienable.[59] It also explicitly states that the State has a responsibility to protect such rights and establish a common gene fund.[60]

3. Community rights are important since local communities are the custodian of their biological resources, innovations, practices, knowledge and technologies which are governed completely or partially by their own customary laws.[61]

4. The Model strives to ensure that the communities have an effective participatory role in the regulation, access and sharing of benefits accruing from the utilization of their plants, seeds, traditional knowledge and practices.

An analysis of the African Model Law indicates an attempt to reach a balance, in protecting the rights of farmers without at the same time discriminating plant breeder's rights. It lays down guidelines for governments to play a role in ensuring the good of society. The Model also enlists the rights of farmers and breeders, and provides user-friendly text that may be used in preparing and adopting domestic laws on plant and seed protection in compliance with relevant international obligations. The Model Law embraced the precautionary principle by laying out the essential elements for a liability and redress regime and recognized the sovereign right of every country to require a rigorous risk assessment of any GM crop before any decision on it is made.[62]

"It is through the model law that African countries intend to demonstrate to their own citizens and the international community their commitment to protecting Africa's people, environment and biodiversity. The Model Law is therefore a piece of legislation drafted by Africans, for Africa, taking into account

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57 Article 24 of the Model Law
58 Articles 25 and 26 read together with Articles 31 and 33.
59 Articles 21, 22 and 23.
60 Articles 57, 59, 62, 64 and 66.
61 Articles 16 and 17.
62 Art. 67 & 68.

the unique circumstances of the continent."[63] It is thus considered one of the first serious regional attempts to protect farmer's rights to plant materials and seeds while incorporating a precautionary approach.

IV. INTELLECTUAL PROPERTY, BIOPIRACY AND THE SEED INDUSTRY

Phillips and Firth portray Intellectual Property Rights (IPRs) as the "legal right which may be asserted in respect to products of human intellect".[64] Without patents it is argued, that there would be no GM industry, in particular due to the R&D costs involved. It cannot be denied that IPRs do provide an incentive for extensive research and innovation and are required to protect this and subsequent products. However, the question of drawing a line between individual entitlement and public interest forms the fundamental issue around which much debate is centered.

The debate on the meaning of IPRs today revolves around the roots of modern knowledge. 'This has resulted in the transformation of worldviews into a global hegemonic view on one side, and remaining forms of wisdom on the other. Thus in this two sided paradigm knowledge and technology become things that are valued and traded. And to be able to do so they must be regarded as forms of property, and orthodox intellectual property rights are the rules for the ownership of this form of property'.[65] Thus this is the new battleground between the North and the South.

IPRs have become one of the most important assets of knowledge-based economies.[66] It was the US Patent Office in 1873 that granted to Louis Pasteur what is widely regarded as the world's first patent on a micro-organism for yeast.[67] Much later, in the famous case of *Diamond vs. Chakrabarty*[68], the majority of the US Supreme Court took the view that it was for Congress to determine whether or not restrictions in the name of morality should be placed on

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63 Mariam Mayet, "Why Africa Should adopt the African Model Law on Safety in Biotechnology", p. 18. Available at <http://www.biosafetyafrica.net/_DOCS/AdoptionAUModell aw.pdf > Accessed on 21 August 2005.

64 Phillips J & Firth A, *Introduction to Intellectual Property*, (1995) 3rd Ed, Butterworths, London, pp. 2 -3.

65 *Idea incorporated from*; Boaventura de Sousa Santos, *Towards a New Legal Common Sense*, (2002) 2nd Ed., Butterworths LexisNexis, p.477.

66 This is in direct contrast with the past: in 1947, IP comprised less than 10% of all US exports, in 1986, 37% and in 1994, it was over 50%. *See also* Vandana Shiva, *Protect or Plunder? Understanding Intellectual Property Rights*, (2001) Zed Books. London and New York. p. 19.

67 Beier, Crespi, Straus, *Biotechnology and Patent Protection - An International Review*, (1985) OECD, Paris, p. 25.

68 *Diamond v. Chakrabarty* 447 U.S. 303 (1980), *See* Haley Stein, "Intellectual Property and GM Seeds: The United States, Trade and the Developing World", *NW. J. of Tech & Intell. Prop.* 3(2005) 160 at <http://www.law.northwestern.edu/journals/njtip/v3/n2/4> Accessed on 20 July 2005. *See also*, Edmund Sease, "From Microbes, to Corn Seeds, to Oysters, to Mice: Patentability of New Life Forms", 38(1989) *Drake L. Review* pp. 551 – 565.

the patentability of organisms. The debate acquired fresh momentum owing to the advent of biotechnology and the grant of the first industrial patent to plants in the *ex-parte Hibberd case*[69] in 1985; followed by *Asgrow Seed v. Winterboer*[70] in 1995, where seeds were effectively considered licensed commodities. In *J.E.M. Ag Supply Inc. v. Pioneer Hi-Bred International Inc.* (2001) the United States Supreme Court reiterated utility patents on plants.[71]

a. Tripping over TRIPS – IPRs in the Seed Industry

The Agreement on Trade Related Aspects of Intellectual Property rights (TRIPs)[72] has implications on about two thirds of the worlds economic and social policies, particularly in relation to public health, access to medicines and production. However, pertaining to biodiversity and GM crops Article 27 is of utmost importance, which was one of the most politically and economically controversial issues in the entire TRIPs negotiations.

Article 27 of TRIPs provides that members must allow product and process patents for a period of 20 years – provided that they are new, involve an inventive step and are capable of industrial application (Article 27.1). Members may exclude patents where 'necessary to protect *ordre public*[73] or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment' (Article 27.2) and although they may specifically exclude patents on plants and animals they must provide protection for 'micro-organisms and essentially biological processes for the production of plants or animals' (Article 27.3.b). In addition members shall provide for the protection of plant varieties either by patents or by effective *sui generis*[74] systems or by any combination thereof' (Article 27.3.b)

The key terms used in Article 27(3) (b) are not defined in TRIPs i.e. plants, animals, microorganisms, essentially biological processes, non-biological, microbiological, plant varieties, effective and *sui generis* system. Before TRIPs, most countries in their domestic laws had excluded the patenting of life forms, such as plants, seeds or plant varieties because as products of nature they are not new but actually discoveries. Article 27(3) (b) of TRIPs has changed all this as the distinction between 'discovery' and 'invention' has been blurred.

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69 Allowed patent rights to be issued for plant varieties regardless of whether the plant is obtained through asexual or sexual reproduction. *Ex Parte Hibberd*, 227 U.S.P.Q (BNA) 443 (1985).

70 *Asgrow Seed v. Winterboer*, 513 U.S. 179 (1995). *See also*, Keith Aoki, "Weeds, Seeds and Deeds", *Cardozo J. Int'l & Comp. L*, 11(2003- 2004) pp. 247 – 331.

71 *J.E.M. Ag Supply Inc. v. Pioneer Hi-Bred International Inc.* 534 U.S. 124 (2001).

72 TRIPs was an initiative of an international business coalition consisting of European, Japanese and US multinationals. Essentially US business saw the intellectual property issue as an investment issue. *See*, Peter Drahos, *Global Property Rights in Information: The Story of TRIPS at the GATT*, Prometheus, (1995) pp. 6-19.

73 *Ordre public* concerns the fundamentals from which one cannot derogate without endangering the institutions of a given society.

74 *Sui generis* is a Latin term meaning "one of its kind."

IPRs have an extremely influential role in the seed industry. IPRs affect the degree of competition a seed Patent holder faces, which in turn determines the prices at which the seeds will be sold to farmers. A study conducted in the USA by Lesser and Masson[75], showed that increase in the prices of seeds coincided with the enactment of patent protection. This rise in price in some cases was over 150 percent. "Available evidence clearly indicates that seed prices tend to increase as IPRs are introduced in agriculture. In exercise of the monopoly afforded by IPRs, seed companies seem to develop a tendency to exploit the market by charging higher prices".[76] The increase is sufficiently high for farmers even in industrialized countries to resort to using farm saved seeds. So also GM seeds are made to respond only to particular fertilizers and pesticides. Farmers are thus forced to go back to the company for these, thus sucking them into a vicious circle of dependence. For e.g. 'Roundup Ready' soya bean of Monsanto, are made resistant to – 'Roundup herbicide' - so as to ensure a guaranteed market for that herbicide.

Patents on seeds also have major effects on biodiversity. Since money is there to be made in seeds, seed companies tend to focus their research on commonly used high value crops and develop varieties that can be grown widely. This discourages agro ecological research on local breeding tailored to local conditions and leads to the spread of a monoculture and destruction of biodiversity.[77]

b. UPOV and *sui generic* Plant Variety Protection (PVP)

"Prior to TRIPs, countries could decide whether or not to provide any form of patent protection in agriculture. Most developing countries did not. Those that are members of the WTO now have to provide a *sui generis* form of PVP or allow the use of patents or both under Art. 27.3(b) of TRIPs. Members are free to design their own system or could choose to implement the UPOV system."[78] The 1978 and 1991 UPOV Acts set out a minimum scope of protection and offer member states the possibility of taking national circumstances into account. The 1991 Act contains stronger provisions. UPOV basically lays the ground for PVP and the recognition of Plant breeder's rights (PBR's).

UPOV' 91 extends breeders rights to 'parts of the plant intended for the production of new plants e.g. seeds, and certain parts of the plants that may be used for consumption or sowing. It leaves virtually no possibility of farmers reusing seeds without the authority of the breeder, and puts the burden of proof on the users of planting materials to prove their innocence that they have not used a protected variety of plant or seed. Thus breeders are given rights over the

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75 William Lesser and Robert Masson, *An Economic Analysis of the Plant Varieties Protection Act*, American Seed Trade Association, Washington DC, (1983) p.65

76 Biswajit Dhar, *Sui Generis Systems for PVP – Options Under TRIPs*, (2002) Quaker United Nations Office, Geneva, p.24

77 Elaborated further in Chapter 4. of the Dissertation

78 Geoff Tansey, *Food Security, Biotechnology and IPRs – Unpacking some issues around TRIPs*. (2002) Quaker United Nations Office, Geneva, p. 11.

harvested materials if they can establish their rights to the planting materials consequently destroying the farmer's control over his own harvest. The exceptions to PBR's were basically two of which the second is of importance. It sets conditions for what is called 'the farmers privilege'. This basically allows farmers to re-use protected materials only if the breeder interests have been taken care of – payment of royalty. The recognition and strengthening of PBR's has been highly controversial and has been seen as yet another disguised attempt to take over the traditional farmers agricultural and seed supply systems.

According to Rangnekar, "private breeding does not focus on developing country needs. It appears unlikely that crop and agronomic needs of wider farming populations are consistent with this private research priority".[79] Thus breeders from developed countries and MNC's could use genetic information and seeds from poorer countries without paying any fee, register them under UPOV; and then sell them at a high price back to farmers. This has revealed the serious hypocrisy involved. Rich countries and MNC's insist that germplasm and seeds from poor countries are the common heritage of mankind, access to which should be open and free. But at the same time they insist on PVP and Breeders Rights and sell at a high price plant varieties and products they produce (and patent) from those countries.

'These experiences have provided the impetus for developing countries to approach various forms of sui generis PVP protection that would be balanced as per their requirements'[80]. India has taken a step in this direction providing for farmers' rights as well as PBR's.[80a] Namibia has also taken a similar step. However, several poor countries are being pressurized by developed countries to accept UPOV to safeguard the commercial interests of the biotechnology industry.

c. The New Pirates – Biopiracy of Traditional/ Indigenous Knowledge

"The Portuguese had anchored off the Malabar Coast and were received with warmth by the Zamorin. After a few days, the palace guards rush breathless into the court, lit with alarm. "Your Majesty, the foreigners are on the hill slopes," they report. "Uprooting pepper vines and carrying them away to the ships. If they begin to grow these in their lands we will lose our trade." The Zamorin is

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79 D. Rangnekar, "Access to Genetic Resources, Gene Based inventions and Agriculture", (2002) Commission on IPRs, p.7; in Geoff Tansey (2002), *Food Security, Biotechnology and IPRs – Unpacking Some Issues Around TRIPs*, Quaker United Nations Office, Geneva, p. 18.

80 Biswajit Dhar, *Sui Generis Systems for PVP – Options under TRIPs*, (2002) Quaker United Nations Office, Geneva, p.27.

80a For further details see, B.C. Nirmal, 'Formers' Rights : International and National Perspectives', *J.T.R.I. Journal* 21 (2004), 58-85.

unperturbed: "Don't worry too much. They may take the vines but how can they take our monsoons."[81]

Unfortunately things are not as simple as the Zamorin perceived it to be. As science and technology advance adversely affecting biodiversity, there is an ever increasing interest in appropriating Traditional and Indigenous Knowledge (TK & IK) for scientific and commercial purposes. Institutions and TNCs in the life sciences industry based in developed countries engage in 'bioprospecting' and 'biopiracy' activities which normally go hand in hand.[82] The reason is simple, the world's poorest countries account for around 95.7 percent of the world's genetic resources.[83] Bioprospecting is the exploration, extraction and screening of biodiversity and indigenous knowledges; while Biopiracy is the "use of IPRs to legitimize the exclusive ownership and control over these biological resources and products; that have been used over centuries in non-industrialized cultures"[84]

Thus in these times of *information feudalism* there is a redistribution of "knowledge assets from the intellectual commons into private hands".[85] In almost all cases the local or indigenous peoples do not give their consent or get benefits for these genetic resources or their knowledge. The TK appropriated is usually reduced to or isolated to specific genes, and this isolation is treated as an 'invention' warranting legal protection i.e. a patent.

According to Vandana Shiva, "biopiracy occurs because of the inadequacy of western patent systems and the inherent western bias against other cultures. Western patent systems were designed for import monopolies not for screening all knowledge systems".[86] This creates the *'commodity paradigm'*[87] which supports the appropriation of others knowledge. The immediate impact of bioprospecting and biopiracy is that it directly affects the local and indigenous peoples' ability to meet their food and health needs. They then have to pay high

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81 Goodnewsindia.com, 'Abduction of Tumeric Provokes India's Wrath', available at: <http://www.goodnewsindia.com/Pages/content/traditions/turmeric.html> Accessed on 23 July 2005

82 Colonization would have been meaningless without access to genetic and agricultural resources like plants and seeds. This historical legacy still dominates economic and agricultural growth and has received renewed impetus from new technologies in the capacity to modify plant and animal life.

83 Stephen Nottingham, *Eat your Genes – How Genetically Modified Food is Entering Our Diet*, (1998) Zed Books, London, p.117.

84 Vandana Shiva, *Protect or Plunder? Understanding Intellectual Property Rights*, (2001) Zed Books London, p.49. *See also*, Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge*, (1997) South End Press, Cambridge, Massachusetts, pp. 65-85.

85 P. Drahos with Braithwaite, J *Information Feudalism Who Owns the Knowledge Economy?*, (2003) New Delhi: Oxford University Press, p. 2.

86 *Supra*, at 85.

87 *Id.*, p. 68. (emphasis mine)

prices or royalties for products developed as a result of their own resources and knowledge. This leads to the impoverishment of rural communities.

Thus, under TRIPs the contributions of indigenous peoples to plant breeding, genetic enhancement and biodiversity conservation, is not recognized or protected. Indeed, it is their long acquired knowledge of their biodiversity that is valuable to the biotech companies today, using this knowledge in the seed industry, pharmaceutical industry and others. Some of the starkest assaults on TK have been the attempts to patent 'Amla' a medicinal plant from India, 'Neem' often referred to as nature's pesticide used widely in India, 'Tumeric' known for its wound healing and anti-inflammatory properties and that of 'Basmati Rice'.[88] Patents have also been granted on *Brazzein Sweetener* from berries found in the West African State of Gabon, the anti-inflammatory agent pseudopterosin - a compound found in sea whips in the Caribbean, patent on the toxin SNX-111 - produced by the Philippine sea snail *Conus magnus*, used to manufacture a pain-killing drug etc. (to name a few). Even more disturbing is the attempts by TNC's and Western Governments to poach germplasm held by the CGIAR.[89] In the 1950-60's, indigenous peoples gave germplasm and seeds now held by CGIAR for research use, introducing the green revolution. This managed to achieve food security and greatly reduced hunger for many countries in Asia and Latin America. This was possible because the hybrid seeds were freely available, CGIAR did not have IPRs over them and developing countries were able to buy the seeds at very low prices.[90]

However, there have been attempts to ensure benefit-sharing from the utilization of indigenous knowledges. The most well known example of benefit sharing being in Costa Rica between Merck and INBio[91] in 1991. It ensured that INBio received $ 1 million up front with laboratory equipment, while providing Merck access to 10,000 samples. The exact amount of royalties is however not known. Never the less, benefit sharing projects have been fraught with difficulties as many issues like defining the community, who has a say and how the benefits are to be shared are still un-addressed. The issues of IPRs, biodiversity and benefit sharing are inextricably linked and not easily resolved.

"It is hence very important that respect, preservation and maintenance of TK not be justified solely by its relevance to biodiversity conservation and sustainability, even less because some of it has industrial application. The disappearance of TK may be a tragedy for the world, but above all it is a tragedy

88 Biopiracy of Amla, Neem and Basmati. *See*, Vandana Shiva, *Protect or Plunder? Understanding Intellectual Property Rights*, (2001) Zed Books London, pp. 53-61.

89 CGIAR – Consultative Group on International Agriculture Research < http://www.cgiar.org/>

90 Michael Blakeney, "Intellectual Property Rights in the Genetic Resources of International Agricultural Research Institutes-Some Recent Problems" 1 (1998) *Bioscience Law Review*, pp. 2-3.

91 The Costa Rican *Instituto Nacional de Biodiversidad* (INBio) was formed in 1989.

for those peoples and communities that depend on them for their cultural and even physical survival"[92]

V. THE CORPORATIZATION OF FOOD - TNC'S, SEED WARS AND FOOD SECURITY.

Six chemical companies dominate plant genetic engineering - Monsanto, Enimont, Du Pont, Sandoz, Zeneca and Ciba Geigy. Together with Shell, WR Grace and Cargill - the world's largest international grain and oilseed trader - these companies also dominate the international seed business.[93] Modern biotech products are a result of research and heavy investment in sophisticated laboratories of universities or MNC's in industrialized countries.[94]

In 1998, the top 10 corporations in the commercial seed industry; controlled 32% of a $ 23 billion industry; in pharmaceuticals, 35% of the US$ 297 billion industry; in veterinary medicine, 60% of the US$ 17 billion industry; and in pesticides 85% of the US$ 31 billion industry.[95] The top five biotechnology firms in the world are based in the United States and Europe and control more than 95% of gene transfer patents. 80% of patents on GM foods are owned by just 13 MNC's and the top five agrochemical corporation's control "almost the entire global seed market."[96]

a. TNC's and the Seed Wars

Such is TNC's power that agricultural and food policy is in danger of being concentrated and controlled by these corporations. In the wake of seed and fertilizer developments in the 1960s – chemical TNCs began to buy up small family seed companies. However, takeovers on a massive scale occurred between 1985 and 1990 where TNCs acquired over 630 small seed businesses. The reason being simple; to have access to markets and the ability to patent

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92 Graham Dutfield, "Protecting and Revitalizing traditional ecological knowledge: Intellectual Property rights and community knowledge databases in India", in Michael Blakeney, *Intellectual Property Aspects of Ethnobiology – Perspectives on Intellectual Property*, (1999) Sweet & Maxwell, London, pp. 122.

93 *Biodiversity: A Matter of Extinction: The challenge of protecting the South's biological heritage*, Panos Media Briefing No.17/ November 1995, p.6. Available at: < http://www.panos.org.uk/PDF/reports/Biodiversity.pdf > Accessed on 15 July 2005.

94 Jai Prakash Mishra, "Intellectual Property Rights and Food Security – The Efficacy of International Initiatives", *The Journal of World Intellectual Property*, Vol. 4 No. 1, January 2000, p. 12-14

95 UNDP Human Development Report 1999, p. 68 Available at: < http://hdr.undp.org/reports/global/1999/en/>. Accessed on 2 August 2005.

96 Van Dillen, Bob and Leen Maura (eds.), "Biopatenting and the Threat to Food Security: A Christian and Development Perspective", (2000) CIDSE. Available at: < http://www.cidse.org/pubs/tg1ppcon.htm>, Accessed on 20 July 2005.

more seeds.[97] Thus echoing the words of Sklair, TNCs are not charitable organisations but organisations out to maximize profits.[98]

Seeds are seen as the first step to control farmers - as soon as they buy a company's seed they are forced into buying their fertilizers and pesticides as well. A parallel market is thus created for the pesticides and fertilizers. Such monopoly power also means that TNCs are able to control the prices of seeds. To increase their profits they can increase the prices. Patents are the lifeblood of TNCs; thus traditional practices of farmers and indigenous peoples in developing countries are also under threat by biopiracy and subsequent patents on seeds that they have used for generations. Thus literally overnight farmers find themselves having to pay royalties, unable to save seeds and subjected to IPR infringement threats. Important staple foods and seeds are therefore in danger of becoming the private property of TNCs; "who use patents to enclose the Third world's common genetic resources".[99]

"Companies that patent seeds and sell them to farmers clearly must intend farmers to plant these seeds. Consequently they are at a risk that farmers will save seeds and reproduce the patented product."[100] So companies also force farmers to sign contractual agreements thus effectively enslaving them. This gives TNCs the impetus to threaten farmers with legal proceedings. The most famous being, *Monsanto v. Schmeiser*,[101] a case filed by Monsanto against a Canadian farmer Percy Schmeiser, for infringements of their patent rights on the "round up" canola seed; wherein it was held Monsanto's patent was valid. It had been established in Canada in the *Harvard College v. Canada (Commissioner of Patents)* case[102] that genetically modified higher organisms such as plants are not patentable in Canada as they do not fall into any of the categories of patentable inventions enumerated in the Patent Act. In the Schmeiser case, as Monsanto's patent covered only the genetically modified plant cells but not the genetically modified plants themselves, the Supreme Court of Canada heard the question of whether growing genetically modified plants constitutes 'use' of the invention of genetically modified plant cells. It ruled that it does.[103]

The case drew worldwide attention as it drew into focus questions of accidental contamination; used by Percy Schmeiser as one of his defenses

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97 John Madeley, *Big Business –Poor Peoples –The Impact of Transnational Corporations on the Worlds Poor*, (2001) Zed Books, NY, p. 27.

98 Leslie Sklair, *Globalization – Capitalism and its Alternatives*, (2002) 3rd Ed., OUP, p.122.

99 Derrick A. Purdue, *Anti- Genetix – The Emergence of the Anti-GM Movement*, (2000) Ashgate, p. 7.

100 Drew L. Kershen, "Of Straying Crops and Patent rights", *Washburn Law Journal*, Vol. 43-3, (2004) p. 577.

101 *Monsanto v. Schelsmer* 2004 SCC 34.

102 *Harvard College v. Canada (Commissioner of Patents)* [2002] 4 S.C.R. 45, 2002 SCC 76. Also called the Harvard mouse case.

103 Peter Pringle, *Food, Inc, Mendel to Monsanto*, (2003) Simon & Schuster, NY, pp. 177-183.

which was rejected. "While companies are at risk of farmers saving and reproducing patented seeds, farmers are thus at risk of the inadvertent presence of patented seeds on their farmlands"[104]. In *Monsanto v. Dawson*,[105] it was held that inadvertent presence did not protect the possessor from liability for infringement. Monsanto is recently reported to have made about $15 million from suits filed against farmers for infringements on its intellectual property rights, although many of them have been settled out of court.[106]

So also TNCs focus on seeds and crops that they can profit from rather than on those that developing countries need. Thus putting the entire crop and seed culture in developing countries at risk. For e.g. Calgene's Flavr Savr tomatoes engineered to cut costs of manufacturing tomato paste and Monsanto's high starch 'quick fry' potato for the fast food market. Companies have shown little interest in third world foods like millet or yam.

According to Shiva, "farmers become dependant on TNCs and they can decide what is grown by farmers"[107]. This is dangerous as it will result in the spread of a monoculture and loss of plant genetic diversity – the basis of food security in developing countries. In a monoculture, disease or pests can destroy vast areas at a stroke. Examples being the Irish Potato famine in the 1840s caused by potato blight and in 1970, a maize blight in the USA destroyed 15 percent of the crop.[108]

The rapid corporatization of the agricultural and seed industry in developing countries has had drastic implications from crop failures to farmer suicides. In India, hybrid cotton tells a story of broken promises. Across the state of Andhra Pradesh farmers committed suicide following crop failures and after falling into debt trying to make their farms pay.[109] "Even as Farmers continued to be killed or commit suicide, the agricultural corporations are looking at more ways of controlling farmers and consumers by dismantling domestic food production systems"[110]. "However, many industry executives are smarting over what they believe to be unjustified criticism."[111] They see criticism as that propounded by

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104 *Supra* n. 102 p. 577.

105 *Monsanto v. Dawson*, No. 4:98 –CV-2004 TCM, 2000 WL 33953542.

106 See in general, Associated Press Report, "Monsanto Sues Farmer Customers Over Piracy Issues". Available at: <http://www.mindfully.org/GE/2005/Monsanto-Sues-Farmers30jan05.htm> Accessed 25 July 2005.

107 John Madeley, *Big Business –Poor Peoples –The Impact of Transnational Corporations on the Worlds Poor*, (2001) Zed Books, NY, p. 29.

108 Helena Hodge, Peter Goering & John Page, *From the Ground Up – rethinking Industrial Agriculture*, (2001) Zed Books, NY, p. 7

109 *See*, Vandana Shiva & Afsar Jafri, "Seeds of Suicide", Available at: < http://www.navdanya.org/articles/seeds_suicide.htm> Accessed on 23 July 2005.

110 Vandana Shiva, Radha Bhar & Afsar Jafri, *Corporate Hijack of Agriculture*, (2002) Navdanya, New Delhi, p. 20.

111 Marc Lappe & Britt Bailey, *Against the Grain – The Genetic Transformation of Global Agriculture*, (1999) Earthscan Publications London, p. 23.

[illegible] as an arbitrary disregard of the true benefits of GM crops".[112] This in a [illegible] can be said to be true as taking a completely one sided approach against biotechnology will not allow many of its true benefits and potentials from being realized. Like many new technologies - GM technologies have to be tackled by a balanced approach.

b. Terminator Technology

On March 3rd 1998, United States Department of Agriculture (USDA) and Delta and Pine Land Co.[113] were granted a patent, US 5,723,765 for one of the most controversial uses of genetic technologies. These Technologies are now known as Genetic Use Restriction Technologies (GURTs). GURTs are of two kinds; 'terminator technology' a new genetic engineering technique used to create sterile plants with infertile seeds that cannot be replanted. The second is 'traitor technology' which controls other plant characteristics or traits. These traits can be switched on or off by the application of inputs only available from the MNCs.[114] These technologies are able to protect the interests of MNCs by killing the seed after one generation. Farmers will then be forced to purchase seed every planting season. Further, the seeds will germinate and bear fruit only when used with the MNC's inputs e.g. chemicals and thus increasing sales/profits through increasing farmers' dependency on inputs. In this case, patents are no longer needed as the technologies have in-built protection. GURTs represent an extremely powerful form of control or ownership and will effectively create a stranglehold on the traditional farmer. "Patentees of GURTs have acknowledged that the real purpose of the technology is not agronomic but economic – to force farmers to become repeat customers."[115]

Public outcry forced Monsanto- the biggest player in GM crops to publicly pledge that it would not develop and market the technology. The United Nations Convention on Biological Diversity supported a *de facto* moratorium on Terminator technology in 2000. However, it is speculated the corporate Biopirates are making moves to impose terminator seed technology on farmers worldwide.

c. GM Seeds and Food Security in Developing Countries.

With over 800 million hungry peoples over the world, proponents of GM Technologies advocate that GM seeds and crops will end world hunger and bring about food security by increasing agricultural yields and improving nutrition. It is also claimed that GM crops will contribute to sustainable food production and

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112 *Ibid.*

113 On May 11th 1998, Monsanto announced it has reached an agreement to acquire Delta Pine Land Co.

114 See, Jeremy P. Oczek, "In the Aftermath of the Terminator technology Controversy: Intellectual Property Protections for Genetically engineered Seeds and the right to save and replant seed", *Boston Law Review* pp. 41 (2000) 627-657

115 Ikechi Mgbeoji, "The terminator patent and its discontents: Rethinking the Normative deficit in Utility test of Modern patent law", *St. Thomas L. Rev.* 17 (2004) [illegible]

help preserve the environment. However, these claims have been greatly criticized.

It is widely accepted that there are several reasons for food shortage and hunger in the third world and the production of food is only one of them. Increasing the amount of food on the planet will not necessarily solve the food crisis faced by millions; in fact it oversimplifies the causes of hunger and starvation in the Third world. Escobar attacks this notion of development which he sees as supported by Western governments and promoted by international aid agencies, arguing that such efforts fundamentally and purposefully misidentified the source of the problems in underdeveloped countries in order to enhance their own interests.[116]

Hunger in many places is not due to shortage rather due to lack of access to food, wastage and distribution flaws, in most cases man made. The poor do not have the money to buy food or in some cases are simply prevented from doing so. As pointed out by Amartya Sen, "Starvation is the characteristic of some people not having enough food to eat. It is not the characteristic of their being not enough food to eat".[117] A study conducted in India, the third largest food producer in the world shows that food and vegetables worth 350 billion rupees ($7.3bn) are wasted every year in India. The cause is the lack of food processing plants and over 20% of the 601 million tons of food grain produced annually is eaten by rodents.[118] This is while a third of the world's 800 million hungry live in India.

Malnutrition also has an excruciatingly painful link with poverty. Poverty is created by a complex mix of social and political factors. Poverty is an extremely complex phenomenon manifested in a dense range of overlapping and interwoven economic, political and social deprivations. These include economic deprivation in all its forms — assetlessness, low income levels, hunger, poor health, insecurity, physical and psychological hardship, social exclusion, degradation and discrimination, and political powerlessness and disarticulation. It is on a similar basis that Upendra Baxi, rejects the words 'poverty' and 'poor', as he says they tend to normalise what ought to be centrally problematic. He substitutes the word 'impoverished' because impoverishment is part of a dynamic process of public decision-making where it is considered just, right and fair that some people may become or stay impoverished.[119]

In Africa, few understand that the problem of hunger is directly linked to lack of access to food, conflict, colonialist shadows, political and economic considerations. Several African countries over the years have displaced food

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116 *See*. Arturo Escobar, *Encountering Development – The Making and Unmaking of the Third World*, (1995) Princeton University Press, New Jersey, pp. 21- 54.

117 Amartya Sen, *Poverty and Famines*, (1981) Oxford University Press, p.1.

118 Habib Beary, 'India's Food going to Waste', Available at: < http://news.bbc.co.uk/2/hi/south_asia/1695954.stm> Accessed on 27 July 2005. (2001)

119 Upendra Baxi, *Law and Poverty. Critical Essays*, (1988) N.M. Tripathi, Bombay, pp. vi- x.

crops with export crops. Instigated by rich countries and TNCs these crops are not conducive to third world needs. e.g. "During the Ethiopian famine of 1984 the country was exporting coffee, meat, fruits and vegetables to industrialised nations."[120] So also when famines hit Burkina Faso, Mali, Niger and Chad they were producing record harvests of cotton for export. "Armed conflict causes farmers to flee their land, leaving crops unharvested and livestock abandoned. It can turn large areas of fertile land into no-go areas as far as food production is concerned."[121] Armed conflicts like that between Eritrea and Ethiopia in 1998 has had severe implications on the populace in terms of hunger and food.

TNCs propagating GM seeds are pushing developing and poor developing countries to a 'monoculture' environment of agriculture. This makes them susceptible to pests and diseases as well as has implications on biodiversity. For example in India there are over fifty thousand varieties of rice, so if some are attacked by pests, the others will survive. Multinationals have also concentrated on high profit crops and not the needs of poor countries. So this rubbishes claims that they are conducting research for solving the world's food problems. Also focus has been on herbicide resistance rather than on drought resistance; this is to ensure that TNCs also make forays into the pesticide and fertiliser markets.

GM seeds are targeted at large-scale commercial farmers growing cash crops in monocultures. This could undermine food security by wasting the scarce resources of poorer farmers in developing countries besides undermining their rights to use and save seeds. In addition, GM crops are known threats to other plants and insects. "They can cross-pollinate with non-GM plants, endangering diverse original varieties, particularly in developing countries".[122] The introduction of GM seeds and crops in developing countries will also have severe impacts on their economies. Besides leaving them open to be preyed upon by TNCs and other vested interests, they may be witnesses to upheavals in their labour markets as well as shift from self-sufficiency to an exporting role.[123]

Thus, new technologies like GM seeds are not 'the' solution to food security in developing countries. GM technologies have great scope and potential in the developing world, but to assert that they will solve world hunger is rather far fetched. At best they make a feeble attempt to address some of the symptoms of hunger but not the stark causes of hunger. It is essential that these new technologies be incorporated into other strategies in order to tackle hunger and impoverishment.

VI. CONCLUDING REMARKS

Genetic engineering does have potential for benefiting agricultural production in the industrialised countries as well as in the third world. GM seeds

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120 Stephen Nottingham, *Eat Your Genes – How Genetically Modified Food is Entering Our Diet*, (1998) Zed Books, London, p.157.

121 *Ibid.*

122 *Ibid*, at pp. 160- 164

123 See in general, *Ibid.*

promise to provide enormous benefits. Many modified seeds and crops could boost prosperity in the developing world and provide new choices for consumers. It could also make our food healthier and more nutritious to eat. However, if this technology is to fulfil its potentials it must have public acceptability; future economic viability and probably most crucially proper legislative and regulatory frameworks. This potential will however never be fulfilled if the GM revolution is allowed to be hijacked by short term profits, corporate greed and general apathy towards the developing world. It is essential that the needs of developing countries be focused upon, like research on drought resistant crops, staple foods of developing countries and cheap alternatives that will not tax the third world.

The potential risks of genetic pollution and misadventure on the environment, human and animal health require that these technologies be tested and regulated very closely. New technologies like GM seeds are shrouded by the controversy on risks and benefits. Do the benefits of the introduction of these outweigh the potential risks they pose? Or based on Beck's argument they will only be forms through which risk is exported to developing countries? Given that the benefit to consumers of most GM food is small, the accuracy and amount of information available becomes crucial for an assessment of risk perception. However, most of the recent developments surrounding GM technologies are surrounded by secrecy to protect commercial interests. A period of time is required to evaluate the wider implications of GM technologies in agriculture, especially their effects on developing countries. It is here that there has to be cooperation and debate between academia, industry, scientists and governments of both the developed and developing spheres.

The need to apply the 'precautionary principle' is also of utmost importance. This principle must be translated into national and international regulations so as to minimize and regulate risk to the environment. Guidelines based on the CBD and Biosafety Protocol have to be enshrined in this precautionary approach. These regulations must create conditions to facilitate access to genetic resources for environmentally sound uses and not impose restrictions that run counter to the objectives of the CBD. They must specify mandatory requirements for benefit- sharing in a fair and equitable way and support efforts to bring about an equitable balance between intellectual property rights and the protection of traditional knowledges. Further, the CBD's relationships with the World Trade Organization (WTO) needs be clarified if there is to be any further progress.

Another option would also be the establishment of an effective multilateral system as initiated by the ITPGR for the exchange of plant genetic resources that supports the conservation, development and sustainable use of plant genetic resources and recognizes Farmers' Rights. A regulatory system that enjoys the confidence of the public as well as that of business and farming communities is essential for the success of GM technology.

In the long run it is also essential that developing countries strengthen their scientific and technological capacity. Effective science and technological

principles should be stressed upon as the battle over GM technologies and genetic resources will not be won at international conferences or only through international conventions"[124].

Some of the recent debate on genetically-engineered seeds has been based on the grounds of substantial yield increases, and implies that the high yields promised by these seeds would be reason enough for the farmers to buy and sow them. This is assuming that farmers can pay for higher priced seed and would spend more on seed since they would be generating more revenue from the increased output. Both these pretensions are not valid for the large majority of farmers in many developing countries who often need cheap seeds. Many farmers also find it difficult to market their produce at remunerative prices since they have virtually no say in the market place.

Strong intellectual property protections for GM seeds are partly responsible for the rapid growth and ingenuity of new seed varieties – this cannot be entirely denied. It is important that IPRs be protected without compromising the rights of farmers and indigenous peoples. However, the intellectual property paradigm has resulted in serious distributive problems: western-specific ideas about property, authorship, and individual creative inventors which do not translate well to areas where cultural knowledge or generational innovations form the basis of important societal achievements. Until international intellectual property law is made aware of the importance of the public domain in preserving genetic diversity, protecting the global food supply, and safeguarding traditional genetic resources, intellectual property law will under-value and under-compensate the contributions and agricultural concerns of the developing countries that safeguard the vast majority of the world's plant genetic resources. "Also techniques like seed sterilization should be banned, as they represent a danger to the autonomy of farmers and to biodiversity"[125].

The added threats of agricultural biotechnology to the environment and health, coupled with its control by TNCs, have again strengthened calls for binding legal mechanisms on TNCs. At present TNCs are only legally accountable to their shareholders and are guided by non-binding voluntary codes of conduct. It is worthy to observe in the light of the above that most efforts for binding obligations on TNCs have been made at the global and not domestic fronts. This is understandably in recognition of the power and influence of TNCs like in the case of the seed industry. Nevertheless, the need for strong domestic regulations to encompass problems caused by TNC activities must be urged and encouraged.

The global quest for binding regulations on TNCs has gone on for some time now. Some attempts to hold TNCs accountable include the defunct United Nations Centre on Transnational Corporations, which produced a draft voluntary

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124 Calestous Juma, *The Gene Hunters – Biotechnology and the Scramble for Seeds*, Princeton University Press, (1989) New Jersey, p. 210.

125 Robert Ali Brac De La Perriere & Frank Seuret, *Brave New Seeds – The Threat of GM Crops to Farmers*, (2000) Zed Books NY, p.114.

code of conduct for TNCs, but was never approved on account of pressure by the United States Government. Its successor, the United Nations Commission on Trade and Development has never really addressed the issue. The OECD guidelines on Multinationals, the ILO Tripartite declaration, United Nations Global Compact, all attempted to address the question but have proved inadequate, as they were influenced by corporate undertones and most significantly, lacked enforcement mechanisms. [126]

Today, the proposed United Nations Norms on human rights responsibilities of transnational corporations and other business enterprises with regard to human rights[127] appears to be the light at the end of the tunnel. A human rights approach is essential as in the case of GM technologies where we see the implications on the rights of the poor, farmers and indigenous peoples by TNC activity. However, the interesting thing about rights language is its strange vulnerability to appropriation. One needs to be acutely conscious of how rights language is vulnerable to appropriation by the interests of multinational capital, fashioning what Upendra Baxi calls '*trade related market friendly human rights*'. He asserts the need for 'a full range of precautionary principles to further develop the Norms. The mediation of free market fundamentalism via human rights logics and norms is required despite the fact that they raise imponderable issues'.[128] Thus a human rights approach must be mirrored in "a tapestry woven in three colours, one of social-norming codes, another of multiplicity of voluntary codes and a third of diverse mandatory national codes"[129]

The future of GM technologies is thus difficult to assess due to the agendas of the many interested parties. The concepts of multinational domination, food security, sustainability and rising population make the debate more complex and intense. GM seeds and crops have an important role to play in solving many problems in agriculture, but it needs to be integrated into other strategies. If we lose GM technology due to hidden agendas and corporate greed, it will be a great loss to society as a whole.

126 See in general, Christian Aid Report, *Transnational Corporations and the Need for Regulation*, Available at <http://www.christian-aid.org.uk/indepth/0111trbk/05_Chapter5.pdf> at p. 123. Accessed 28 June 2005.

127 Approved August 13, 2003, by U.N. Sub-Commission on the Promotion and Protection of Human Rights resolution 2003/16, U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003).

128 Upendra Baxi, "Market Fundamentalisms: Business Ethics at the altar of Human Rights", *Human Rights Review*, 5 OUP, (2005) pp. 1-26.

129 Jagdish Bhagwati, *In Defense of Globalization*, (2004) OUP p. 195.

34 Ban.L.J. (2005) 33 - 62

WTO DISPUTE SETTLEMENT SYSTEM AND DEVELOPING COUNTRIES*

*B.C. NIRMAL***

INTRODUCTION

The WTO Dispute Settlement system is 'a central element in providing security and predictability in the multilateral trading system'. The Understanding of Rules and Procedures Governing the Settlement of Disputes (DSU) provides for the establishment of dispute settlement mechanism which is far more detailed than the old GATT procedure. It is a rule based system of dispute settlement rather than power-oriented diplomatic solutions. The purpose of dispute settlement, according to DSU, is to clarify the provisions of the WTO Agreements in accordance with the customary rules of interpretation of public law. It is modelled on the adversarial system of settlement which postulates equality of parties before the adjudicating body. Although Article 30 of the DSU refers to the principles for the 'management of disputes' which implies preserving balance of concessions and obligations rather than giving a judicial verdict imposing definitive obligations on the parties to a dispute, the procedures to be adopted by the WTO Panels and the Appellate Body are by and large judicial. The DSU has been in operation for more than ten years and there has been a persistent demand from developing countries including India for its review.[1] Against this background an attempt has been made hereunder to recapitulate the salient features of the WTO Dispute Settlement System, its defects and flows and its operation and discuss the issues relating to lesser participation of developing countries in the dispute settlement procedure.

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1 In a Ministerial Decision adopted at the end of Uruguay Round the Ministerial Conference was invited to complete a full review of the DSU by 1 January 1999. The review started in 1997 and deadline was extended to 31 July 1999. At the Doha Ministerial Conference in November, 2001, WTO Members agreed to improve and clarify the DSU. These negotiations were scheduled to conclude by 31 May, 2004. On May, 28, 2003, the deadline was extended to allow the negotiations to proceed on the lines of the ongoing Doha negotiations. On 16 December, 2003 at the meeting of the special session it was agreed that henceforth the negotiations would be based on the draft legal texts rather than on specific issues. On June 2003, Ambassador Peter Balas, Chairman of the DSU Review Committee submitted a report to the Trade Negotiations Committee. That report is known as the Balas text. See Report by the Chairman Ambassadaor Peter Balas to the Trade Negotiations Committee, WT/TN/9 (6 June, 2003).

ORGANIZATION AND STURUCTURE OF THE DISPUTE SETTLEMENT SYSTEM

There are five components of the dispute settlement mechanism – the DSB, Good Offices of the Director General, Dispute Panel, the Expert Review Group and the Appellate Body.

(i) The DSB :

The Dispute Settlement Body (DSB) is the body that has overall charge of the dispute settlement mechanism. It has authority to establish panels, adopt panel and Appellate body reports, maintain surveillance of implementation of rulings and recommendations and authorize suspension of concessions and other obligations under the covered agreement.[2] In carrying out this role the DSB is assisted by the good offices of the Director-General, the Disputes Panel and, possibly, the Appellate Body.

(ii) Good Offices of the Director-Generial

The Director-General can be asked to offer his good offices.[3] Where consultations, which have to precede the reference of dispute to a panel fail and where both parties agree, the case can be brought before the Director General who acting in his *ex officio* capacity, will be ready to offer his good offices, conciliation or mediation to settle the dispute. Where a request is made by a least developed country, he is bound to offer his good offices with a view to assisting members to settle disputes. In offering his good offices he is likely to offer his personal advice as well as the advice of key advisors from WTO Secretariat, including the Head of the Legal Division. Such advice is not binding and can not be cited in a later disputes panel report.

(iii) Disputes Panel :

Disputes Panel is the other important component body of the dispute settlement mechanism. It is established by the DSB and consists of three to five independent panelists chosen from a list of potential panelists maintained by the WTO Secretariat.[4] They should be men and women of sufficiently diverse

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2 Article 2.1, DSU

3 Article 5(6) of the DSU.

4 The EU proposal on a body of permanent panelists seeks the establishment of a roaster of 18 to 24 full time panelists. The EU hopes that it would lead to 'a professionalisation of the panel process', and 'help overcome problems with the selection of panelists'. Opponents of the proposals feel more comfortable with the current system. The proposal, according to them could make the members of the panel 'more ideological' and encourage them to engage in law-making. The proposal for panelists to be drawn from a permanent roaster was excluded from the Balas Draft. See also Bryan Mercurio 'Improving Dispute Settlement in the World Trade Organization. The Dispute Settlement Understanding Review - Making it Work?' JWT 38(5)(2004), 795-854 (arguing that a move to permanent penelist may produce the unwanted consequence of damaging, as opposed to improving, the system. See also *Raj Bhalla* v. *Luicenne Attards*, "Austins Ghost and DSU Reforms ' *International Lawyer*, 37 , 651, 676. (Suggesting a compromise position).

background and the wide spectrum of experience. A Government and/or non-government individual who has served on some form of a panel in the past or presented a case to a panel, or acted as a government representative under GATT, or on a WTO Council or Committee or has been employed as an expert by the WTO Secretariat is eligible to become a panelist. Those who have taught or published in the field of international trade law or policy, or have served as a senior trade policy official of a WTO member also qualify to become panelists if their names are included in the list prepared by the Secretariat. The Panel performs two functions (i) thorough investigation of the facts of the dispute taking into account the terms of the particular agreement alleged to be breached, and (ii) in the event of failure of the parties to a dispute to reach an acceptable agreement during the investigation submission of a written report to the DSB. The Panel's report should set out the panel's findings of facts, the applicability of relevant agreement provisions and the reasoning behind its recommendations.

(iv) The Expert Review Group

The Panel can seek information from any individual or group.[5] It also has a discretionary authority to consider or reject *amicus curie* briefs. Where the Disputes Panel is considering a matter of a particularly technical nature, it may, with the consent of both parties to disputes, set up an Expert Review Group (ERG).[6] An ERG consists of experts in the particular field under investigation. The ERG takes its reference from the Panel and submits a written report to the latter.

(v) The Appellate Body

The Appellate Body, a standing body established by the DSB consists of seven members who are appointed for a term of four years (with one possible extension of four years). The Appellate Body members must be individuals of recognized standing in the field of law and international trade. They should not be affiliated to any government.[7] They are appointed on the basis of a joint proposal forwarded by the Director-General, the DSB Chairman and the Chairman of the General Council and the Trade Councils. Its proceedings are confidential and based on information already provided in the dispute panel report. It gives its considered opinion in the form of a written report on the issues of law covered in the Panel report and the legal interpretation developed by the Panel. It can uphold, modify or reverse the legal findings and conclusions of the Disputes Panel. Its recommendations are deemed to have been accepted unless they are rejected unanimously by the DSB. It is pertinent to note here that the DSB can not refuse to adopt a report absent consensus and consensus requires at a minimum that the prevailing party does not object it.[8]

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5 Art. 13(1), DSU.
6 Art. 13(2), DSU.
7 Art. 17, DSU.
8 Art. 16, DSU.

Appellate Body reports, like panel reports bind only the parties to a particular dispute[9], and do not create binding precedent. The Appellate Body generally pays due regard to its previous decisions, although it is not obliged to follow them. Regarding the extent to which Panels will treat AB reports as authoritative, 'it is reasonable to presume that, absent unusual circumstances Panels will follow the decisions of the Appellate Body in much the same way that a lower court follows the decisions of a higher court'.[10] Adopted Panel reports 'create legitimate expectations'.[11] This, however, does not mean that the WTO Panel cannot decline to follow a previous panel report. If the past experience is any guide, panels are likely to follow the reports of previous panels 'unless those reports can be distinguished from the cases before them or the panels can be convinced that the previous panels were in error'.[12]

(vi) Costs and Expertise

The WTO does not charge any fee for the dispute settlement service. It does not award costs to the winning party. The litigants incur expenses in hiring legal expertise. While proposals that the panels must sanction the cost when a developing country wins against a developed country might seem attractive, given the adversarial nature of the proceedings their acceptance may not be very easy. Nevertheless, three measures need to be taken to enable the developing countries to pursue their cases effectively. *First*, the WTO Secretariat should improve further the existing mechanism designed to provide legal expertise to these countries.[13] *Secondly*, developing countries should develop their own expertise centres. And finally, a WTO trust fund should be established on the model of UN Trust Fund which helps poor countries to pursue their claims before the International Court of Justice.[14]

(vii) Jurisdiction

It is clear from Article 7 of the DSU that the dispute settlement system is open to members of the WTO. A Dispute Panel has jurisdiction to 'examine, in the light of the relevant provisions in (....the covered agreement(s) cited by the

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9 On the effect of DSB reports on non-parties see Natalie McNeilis, 'What Obligations Are Created by WTO Settlement Reports?' JWT, 37(3) (June 2003), 647; Donald H. Regan, 'Do World Trade Organization Dispute Settlement Reports Affect the Obligations of Non-Parties? Response to McNeilis', JWT, 37 (5)(2003), 883-896.

10 David Palmeter and Petros Mavroidis, The WTO Legal System : Sources of Law', AJIL, 92 (1998), 399, at 404

11 Japan-Alcohal, WTO DOC. AB 1996, 2 WT/DS1/AB/R, WT/DS10/AB/R/WT/DS 22/AB/4, at 15, cited in Palmeter et al, n. 9.

12 See Palmeter and Mavroidis, n. 10 at 403.

13 Recognition of the financial and technical burdens of preparing and presenting the case led to establishment of an Advisory Centre for WTO Law. The Secretariat has been helping smaller countries in the regard. See generally, J. Weiler, 'The Role of Lawyers and the Ethics of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', JWT 35(2) (April 2001), 191 at 205.

14 The present author made this suggestion in a presentation made at the Annual Conference of the Indian Society of International Law (2003).

parties to the dispute, the matter referred to the DSB' and to 'address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute'. The term 'covered agreements' means all of the multilateral WTO Agreements annexed to the Marrakesh WTO Agreement. In addition, the DSU is applicable to disputes between parties to the Agreement on Civil Aircraft and the Agreement on Government Procurement. The party referring the dispute must be in the position to identify the legal basis for its request in the specific provisions of a particular agreement or agreements. The *locus standi* to file the complaint is not conditional on the existence of material interest. 'A member's potential in trade in goods or services and its interest in determination of rights and obligations under the WTO Agreement are sufficient to establish a right to pursue a WTO dispute settlement proceeding.'[15]

III. ADJUDICATION PROCESS

The dispute settlement procedure involves following stages: mutual consultations, good offices and conciliation by the Director-General, establishment of the Dispute Panel, investigation of the dispute, examination, of the evidence preparation of the report appeal before the Appellate Body and adoption of reports of the Panel and the Appellate Body by the DSB.

(i) Consultations

Consultations are to precede the reference of the dispute to the Panel. Where a dispute arises the aggrieved member should make a request for consultations with the offending member. The request must be sent to the DSB in writing. Unless otherwise mutually agreed the offending member should send its reply within 10 days and consultations should commence within 30 days of the original request. Where a case involves perishable goods or is urgent, the reply and commencement of consultations should take place within 10 days of the original request. The Director-General may be asked to provide his good offices to settle the dispute. Article 24 requires the complaining member to exercise the restraint when the targeted member happens to be a least developed country. Article 4 (1) provides that during consultations special attention should be given to the particular problems and interest of developing country members. The good offices procedure may continue while the Dispute Panel process is in the progress, if both parties agree to it.

(ii) Proceedings before the DP

The complaining member may request the DSB to establish a panel to examine the case if no solution is found within sixty days. After receiving the request the DSB will establish a panel not later at 2nd DSB meeting. The Dispute Panel is to be constituted within 20 days of the DSB's decision to establish it. Its terms of reference and mandate are determined by the DSB in accordance with Article 7 of the DSU, special terms may be employed if both parties to the dispute agree within 20 days of the establishment of the DP. Composition of the Panel is

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15 Panel's Report in the Bananas Case WT/DS27/A/B, 1999, para 4.6

decided by the Secretariat. If parties do not agree on the composition of the panel, the Director-General in consultation with the Chairman of the DSB and the Chairman of the relevant WTO Council will make the nominations. Where the dispute is between a developed and a developing country, a panelist from developing country shall be included, if the developing country so requests.

The Panel is required to complete the examination of the case and produce a final report within six months (three months for urgent cases). It should never take more than nine months. It is required to hold meetings with both parties (at least twice) and also with third parties. It can seek information from any source.

It is the Panel's duty to make an objective assessment of the case before it and it should continue, throughout the course of its investigations, to encourage the parties to the dispute to settle the matter voluntarily. After the Panel has considered the written and oral evidence of both parties to dispute, it will distribute the factual and argument sections of its report to the parties for their perusal. The parties will then submit their written comments within a time period set by the Panel. Following receipt of both parties' comments on the descriptive sections of the report the Panel will issue an interim report to the parties of its findings and conclusion's. It will set a period of time in which the parties can respond to the interim report and this may include a further meeting to discuss any written comments made. Where no comments are made on the interim report, it will be considered as the final report and submitted to the DSB which should adopt it within 60 days of issuance unless either one of the parties to the dispute indicates that it intends to appeal or a consensus emerges in the DSB against adoption.

As already noted, a panel is required by Article 11 of the DSU to make an objective assessment of the matter. In the *Asbestos* case[16] Canada contended that the requirement imposed on panels by Article 11 to make an objective assessment of the matter implies "that scientific data must be assessed in accordance with the principle of the balance of probabilities".[17] In particular, Canada asserted that where the evidence is divergent or contradictory, the "principle of the preponderance of evidence implies that the panel must take a position as to the respective weight of the evidence". But the Appellate Body rejected this contention and said 'we can not second guess the Panel in appreciating either the evidentiary value....studies of the consequences, if any, of alleged defects in (the evidence)'.[18] It stated further that 'in this case the Panel's appreciation of the evidence, remained well within the bounds of its discretion as the trier of facts' The AB concluded that a panel need not, necessarily, reach a decision under Article XX(b) of the GAT 1994 on the basis of the "preponderant" weight of the evidence.[19]

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16 *European Communities : Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS 135/AB/R, 12 March 2001, ILM 40 (2001), 193.

17 *Id.* at 228.

18 *Ibid.*

19 *Ibid.*

A Panel enjoys a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence.[20] It is entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements. In other words 'a panel's appreciation of the evidence falls in principle, "within the scope of the panel's dispute as the trier of facts".[21] In assessing the Panel's appreciation of the evidence, the Appellate Body can not base a finding of inconsistency under Article 11 simply on the conclusion that it might have reached a different factual finding from the one the panel reached.[22]

Before the DSB can consider adopting the report, it must first circulate it to the other Members. Members who object to the report then have the opportunity to write to the DSB outlining those objections at least 10 days before the meeting at which the Dispute Panel report is due to be discussed. For this reason, the DSB has to wait at least 20 days after circulating the report to Members before holding an adoption meeting. Provided that no appeal has been lodged against the Dispute Panel report and that there is no consensus against adoption, the DSB will automatically approve the panel's recommendations at the adoption meeting.

(iii) Proceedings before the Appellate Body

Either party to the dispute may appeal against the final report to the standing Appellate Body. Proceedings before the Appellate Body are now governed by the Working Procedure for Appellate Review 2000. The participants and the third party participants submit their submissions. It is followed by an oral hearing in which the participants and the third participants present oral arguments and respond to questions put to them by Members of the Division hearing the appeal. The Appellate Body may receive and consider *amicus curie* briefs but it may or may not address, in its Report, the legal arguments made in such a brief. It may allow a third party which did not file a third participant's submission in the appeal, to attend the oral hearing as a passive observer on the request of such party. The AB allowed Zimbabwe to attend the oral hearing in the *Asbestos case*. The Appellate Body will review the existing evidence and should aim to report to the DSB with its findings within 60 days (and certainly never more than 90 days). The DSB must adopt the Appellate Body report within 30 days of issuance, unless there is consensus against adoption. Appellate Body Reports that are adopted by the DSB are, as Article 17.4 of the DSU provides, 'unconditionally accepted by the parties to the dispute' and, therefore, must be treated by the parties to a particular dispute as a final resolution to that dispute.

When the Appellate Body reaches a different conclusion on a question of law than that of the Panel, it makes the legal analysis with a view to facilitating the

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20 *Id.* at p. 225.

21 AB Report, *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* WT/DS 66/AB/R, adopted 19 January, 2001, para 151.

22 Korea-Taxes on Alcohlic Beverages WT DS 75/AB/R, WT/DS84/AB/R adopted 17 Feb. 1999, para 61, cited in the AB Report in the *Asbestos* case, n.16 at p. 225.

prompt settlement of the dispute pursuant to Article 3.3 of the DSU.[23] The only caveat is that it does so only when the fatual findings of the panel and the undisputed facts in the panel record provide the AB with a sufficient basis for its own analysis. If the factual findings of the Panel are not there, the AB refrains from completing the analysis. Since there is no procedure under the WTO dispute system for remand of such an issue to the original panel, the AB is not in position to fully address it. To overcome this problem certain proposals submitted by WTO members support the idea of a remand procedure.[24] For example the Balas text contains a proposal relating to remand procedure and an appeal against the remand panel reports. Scholars are however of the view that even though not textually based, the current system of completing the legal analysis is working well and there does not seem to be great demand for change. They point to several problems that granting remand procedure will create.[25]

(iv) Implementation of the Rulings

At a DSB meeting to be held within 30 days after the adoption of the Panel report or Appellate Body report, the party concerned must state its intentions in respect of the implementation of the DSB's recommendations. The DSB will allow the concerned party a "reasonable period of time" to implement the recommendations. In any event that reasonable period should not normally exceed 15 months from the report's original date of adoption. In the event of a party's failure to comply with the recommendations within the set time, it must enter into negotiations with the complainant in order to decide on a mutually acceptable level of compensation.[26] If, after 20 days of the expiry of the

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23. The judicially created technique of 'complete legal analysis is an 'unstated creation of judicial activism. See Bryan Mercurio, n. 7, at p. 815. Sydeney Cone explains this technique thus '... (the Appellate Body) has developed a technique whereby it undertakes to 'complete the legal analysis' found in the Panel Report (i.e. to act de novo as though it were itself a Panel) and then on the basis of the 'analysis' thus 'completed', to resume acting as the Appellate Body and reach definitive legal conclusions'. Sydney Cone, the Appellate Body, the Protection of Sea Turtles, and the Technique of 'Completing the Analysis', JWT, 33(2)(1999), 51, 56. In the absence of developed standards upon to which rely, the AB has completed the legal analysis in a number of cases but has failed to do so in certain other cases. See cases cited in Mercurio, n.3 at 815(n. 86). The Appellate Body in Australia Measures Affecting Importation of Salmon, WT/DS/8/AB/R (6 Nov. 1998), p. 223 attempted to standardise the practice by developing a standard for when it would complete legal analysis. It stated that it would complete the analysis 'to the extent possible on the basis of the factual findings of the Panel and /or of undisputed facts in the Panel record'. Para 118.

24. It is based on the EC proposal to the effect that any party can, within 10 days after the adoption of the AB report, request the DSB to remand those issues on which the Appellate Body could not rule back to the panel. A Joordanian proposal sought to give the Appellate Body itself remand authority. But its subsequent proposal provided for a remand procedure similar to the EC' proposed remand procedure. See Mercurio, n. 4 at p. 815 (f.n. 87).

25. Mercurio, n. 4, at p. 815

26. Article 22(1) DSU. *The U.S. Section 110(5) of the U.S. Copyright Act case* is the only example of an agreement of the parties on compensation.

reasonable time" no acceptable level of compensation has been agreed the complainant may request authorisation from the DSB to suspend concessions or obligations due to the offending party under the particular agreement in question.[27] The DSB should grant the request for suspension of concessions or obligations within 30 days of the expiry of the reasonable time unless there is a consensus against doing so. If the offending party objects to the level of suspension granted by the DSB, it can request that the matter be sent to arbitration.[28] Arbitration should be carried out by the original Panel members or, if this proves impossible, by an arbitrator appointed by the Director-General. The arbitration process should be completed within 60 days of the expiry of the "reasonable time" and its decision is final. On request from the complainant, the DSB will then authorise the suspension of concessions as recommended by the arbitration board unless there is consensus against doing so.

In principle, the DSB (or arbitration body) should authorise (or recommend), the suspension of concessions in the same sector of an agreement. However, if this is not practicable or does not produce the desired effect, authorisation may be granted to suspend concessions in a different sector of the same agreement or where the circumstances are serious enough, under another agreement. In general terms, withdrawal of concessions will take the form of increased import duties.[29]

As can be seen from the above, the DSB monitors the implementation of adopted panel and Appellate Body reports and recommendations. In the DSB's meeting held within 30 days of the adoption of the panel report or Appellate Body report the member concerned is required to convey its intention in respect of the implementation of the ruling of the DSB. The DSU expects prompt compliance of the ruling. In any case it must be implemented within a reasonable period of time. While the full implementation of the ruling is mandatory, there are two interim measures that can be resorted to pending full implementation of the ruling : (i) compensation and (ii) retaliation. As for the reasonable period of time, Article 21.3 provides that it shall be period of time proposed by the Member concerned and approved by the DSB. In the absence of such approval it shall be a period mutually agreed upon by the parties within 45 days after the adoption of the report. If no such agreement materializes, a period of time determined by the arbitrator who is normally a member of the Appellate Body within 90 days after the adoption of the report.[30] The reasonable period of time determined by the arbitrator has been between 6 to 15 months. In *Indonesia. Automobiles case*[31] the arbitrator gave full weight to matters affecting the interest of Indonesia as a developing country pursuant to the provisions of Article 21 (2) of the DSU and granted 6 months time against 9 months requested by Indonesia. It is important to note here that Article 21.2 provides; 'Particular attention should be paid to

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27 Article 22(2), DSU

28 Article 22(6), DSU.

29 Art. 22(3) The Bananas case is in point.

30 Article 21(3)(4)

31 WT MIN(99) 5, 1998 at para 23.

matters affecting the interests of developing country members with respect to measures which have been subject to dispute settlement'. By contrast Article 24.1 dealing with the least developed country makes consideration of special problems of such country mandatory.

Article 21.5 of the DSU states in pertinent part : 'Where there is disagreement as to the existence of consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel'. One aspect of a Panel's task under Article 21.5 of the DSU is to determine whether the new measure is consistent with the covered agreement in question. The Appellate Body ruled so in *Canada-Measures affecting the Export of Civilian Aircraft - Recourse to Article 21-5 of the DSU by Brazil (Canada - Aircraft (21.5))*.[32] In that case the Panel declined to examine an argument by Brazil on the ground that the argument "did not form part" of the reasoning of the original panel and was "not relevant to the present dispute, which concerns the issue of whether or not Canada had implemented the DSB recommendation'. The AB disagreed with that ruling and stated that :

> "Accordingly, in carrying out its review under Article 21.5 of the DSU a panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments, and factual circumstances related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel".

The AB stated further that[33] :

> Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examine the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply" as required by Article 21.5 of the DSU.[34]

When the issue concerns the consistency of a new measure "taken to comply', the task of an Article 21.5 panel is to 'consider that measure in its

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32 AB Report, WT/DS70/AB/RW, adopted 4 August 2000, para. 39-41.
33 *Ibid.*, paras 40-41
34 *Ibid.*, para 41.

[35] The fulfillment of this task requires that a panel considers both the measure itself and the measure's application. But this task is circumscribed by the specific claims made by the complainant when the matter is referred to the DSB for an Article 21.5 proceeding. Thus, it would not be appropriate for the panel to address a claim that has not been made.

With respect to a claim that has been made when a matter is referred to the DSB for an Article 21.5 proceeding, a panel must examine, for WTO consistency, even those aspects of a new measure that were part of a previous measure that was the subject of a dispute, and were found by the Appellate Body to be WTO consistent in that dispute and that remains unchanged as part of the new measure.[36] This is how the Appellate Body interpreted the task of an Article 21.5 panel in *United States - Import Prohibition of Certain Shrimp and Shrimp Products (Art. 21.5)*. In this case Malaysia argued that the Panel improperly limited its analysis to the recommendations and rulings of DSB, and thus failed to fulfill its mandate under Article 21.5 because it did not examine the consistency of the United States implementing measure with the relevant provisions of the GATT 1994. The background of the case is as follows. Malaysia's complaint related to a measure taken by the United States in the form of an import prohibiton to protect and conserve certain species of sea turtles, considered to be an endangered species. The Appellant Body found that Section 309 of the United States Public Law 101-162 was provisionally justified under Article XX(g) of the GATT. On 6 November 1998, the DSB adopted the reports of the original panel and the Appellate Body. The DSB recommended that the United States bring its import prohibition into conformity with its obligations under the WTO Agreement. On 6th December 1999, the period of time for implementation established by the parties under Article 21.3 of the DSU expired. At the DSB meeting of 23 October 2000 Malaysia informed the DSB that it was not satisfied that the United States had complied with the rulings and recommendations of the DSB and announced that it wished to seek recourse to a panel under Article 21.5 of the DSU. The DSB referred the matter to the original panel. In its Report circulated on 15 June 2001, the Panel found as follows :

> (a) the measure adopted by the United States in order to comply with the recommendations and rulings of the DSB violates Article XI-I of the GATT 94
>
> (b) in light of the recommendations and rulings of the DSB, Section 609 of Public Law 101-162 and applied so far by the United States authorities is justified under Article XX of the GATT as long as the conditions stated in the findings of this Report, in particular the ongoing serious good faith efforts to reach a multilateral agreement remain satisfied.

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35 WTO Appellate Body Report : *US Import Prohibition of Certain Shrimp and Shrimp Products : Recourse to Article 21.5 of the DSU by Malaysia* 41 *M* 46 (2002), p. 163.

36 *Ibid.*

The Appellate Body found that the panel correctly fulfilled its mandate under Article 21.5 of the DSU of examining the consistency, with the relevant provisions of the GATT 1994, of the United States measure taken to comply with the recommendations and ruling of the DSB in the case of *United States - Shrimp*. The AB also upheld the Panel's finding that the United States measure has now been applied in a manner that meets the requirements of Article XX of the GATT, 1994.

In *Australia - Salmon* case[37] the implementing Panel said, Article 21.5 is not limited to consistency of certain measures with those covered agreements or specific provisions thereof that fall within the mandate of the original panel'. Interestingly, Article 21.5 is silent on the approval of the report of the Implementing Panel.

Now turning to retaliation by way of suspension of obligations we have seen above that if compensation has not been agreed upon and the reasonable period of time is over, the complaining party may seek authorization of the DSB to retaliate by suspending concessions or other obligations equivalent to the level of nullification. Such request is to be made within 20 days after the expiry of the reasonable period of time. The authorisation by the DSB is automatic and shall be given within 60 days of the expiry of reasonable period of time. Once retaliation is granted, it will continue until the targeted party complies with the ruling of the WTO. Under Article 22.2 targeted state may seek arbitration with regard to level of suspension, preferably by the original panel.

The question of relationship or apparent incongruity between Article 21.5 and Article 22.6 of the DSU came up for consideration of the Implementing Panel in the famous *Banana's* Case and the Appellate Body ruled against the EC and the DSB approved that ruling. Under Article 21.3(c) the Arbitrator determined 15 months as the 'reasonable' period time which was to expire on 1 January 1999. The U.S. threatened to retaliate by imposing 100% on 5-20 million Dollar products from the EC from 1 February 1999. The EC referred the issue of compliance under Article 21.5 to the DSB. Simultaneously, Ecquador, one of the allies of the U.S. in the case, along with other complainants referred the question of the consistency of the EC measures with the covered agreements to the DSB. When the U.S. sought authorisation under Article 22.2, the E.C. raised the issue of suspension and alleged cross-retaliation by the U.S. The matter was referred to Arbitration (original panel) under Article 22.6. Thus due to peculiarity of circumstances the some panel was asked to determine these issues under different provisions of the DSU.

The Panel refused to give a ruling requested by the EC to the effect that the measures adopted by the EC shall be deemed to be consistent with the covered agreements unless the other parties established the inconsistency. On the other hand, with regard to the issue of compliance raised by Ecquador, the Panel concluded that the EC's measures were not consistent with the covered

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37 WT/DS64/12, para 29.

agreements. The Arbitration panel declined to accept the EC's argument that proceedings under Article 22.6 should be stopped, saying that the time limit specified in Article 22(6) would then have no meaning. The Arbitration panel rejected the EC's contention that going into WTO compatibility of the EC measures in a proceeding under Article 22(6) would deprive Article 21(5) of its rationale and observed : 'For those members that for whatever reasons do not wish to suspend concessions, Article 21(5) will remain the prime vehicle for challenging the implementation measure'.

In the instant case the arbitrator panel sought to wiggle out from the situation created by two simultaneous situations by adopting a somewhat technical approach and rigid adherence to the existing provisions of law and left the issue of the apparent incongruity between Articles 21.5 and Article 22.6 open. It is important to note here that under Article 21.5 the panel is required to submit its report within 90 days of the date of the referral, while the time limit specified in Article 22.6 is within sixty days form the expiry of the 'reasonable period of time. Again, Article 21.5 is designed to deal with the question of the extent of compliance with the decision of the DSB, whereas arbitrators under Article 22.6 are to look at the level of suspension of concessions and the issue of cross retaliation. In the instant case proceedings under these provisions were handled by the original panel members. but what would happen if original panel members were not available and the simultaneous proceedings are conducted by two different panels? It is also not clear whether amalgamation of two different proceedings by the Arbitrator panel would serve the purposes for which these provisions have been enacted. There is also doubt as to whether Article 19 could be of any help in dealing with a ticklish situation like one the arbitrator panel had to face in the *Banana's case*.[38]

In view of the apparent incongruity between Article 21.5 and Article 22.6 this issue requires a formal and definitive answer. The EU and many other countries have argued in favour of the completion of the procedure of a 'compliance panel' as a prerequisite to seeking an authorisation to retaliate. Although the U.S. initially opposed any idea of sequencing and favoured immediate retaliation, it changed its view after its defeat in the *U.S. Foreign Sales Corporation case*[39] It is important to be noted in this context that In several post-*Bananas* cases, parties concerned have evolved creative solutions to the problem of sequencing through 'voluntary agreements'. The voluntary agreements' reached between the complaining and the losing parties reveal two approaches. Under the first approach proceedings under Article 21(5) and 22(6) are allowed to be initiated concurrently but Article 22 proceedings are

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38 The Article provides, 'In addition to its recommendations, the panel or Appellate Body may suggest way in which the members concerned could implement the recommendations'. This in turn raises the question relating to the meaning of the word 'suggest' and also the legal status of 'suggested' measures.

39 Following its defeat in the instant case, the US. found itself unble to implement the rulings in a timely and WTO consistent manner. It subsequently agreed with the EU on sequencing for that particular case. The Balas Text also recommends this procedure.

suspended until the completion of the Article 21(5) procedure. If after the Article 21(5) hearing the respondent fails to comply with the ruling, the complainant will be free to commence Article 22 proceedings.[40] In the second approach the Article 21(5) procedure is initiated prior to initiating procedures to suspend concessions.[41] If non-compliance were found, the losing party would not object to a suspensation request but the losing party could contest the level of suspension. Thus far, there have been two cases in which the losing party admitted that it had failed to come into compliance.[42] Following that admission the complainants proceeded directly to Article 22 after the expiration of the reasonable period of time. Be that as it may, it has to be admitted that the current non-compliance proceedings lead to unpredictability in the WTO dispute settlement system and hence need to be tackled effectively on a 'priority basis. In an attempt to address the issue of sequencing the EC proposals require prior consultation before going to the compliance panel and insist that compliance proceedings are conducted before recourse to an Article 22(6) retaliatory panel. The U.S. also appears to have agreed to the general scope of this sequencing formula.

The Balas Text in Article 21 also requires the complaining party. To initiate and complete Article 21.5 procedures prior to requesting an Article 22 autorization to suspend concessions and provides that the compliance review procedure would be an 'accelerated compliance review'.[43] The Draft Amendments require the complaining party requests either consultations or the establishment of a compliance panel at any time after the Member concerned has indicated that it does not need a reasonable period of time for implementation or the Member concerned has submitted a notification of compliance pursuant to Article 21.6(c)(i), or (20 days before the date of expiry of the reasonable period of time or whichever is earlier. The Balas draft provides

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40 *Australia- Measures Affecting the Importation of Salmon. Recourse to Article 21.5 of the DSU by Canada Communication from the Chairman of the Panel.* WT/DS 18/17 (13 Dec. 1999); *U.S. - Tax Treatment for 'Foreign Sales Corporation'. Recourse to Arbitration by the European Communities under Article 21.5 of the DSU,* WT/DS/108/R (20 August 2001); *Canada-Measures Affecting the Importation of Milk and Exportation of Dairy Products Recourse to Article 21.5 of the DSU,* WT/DS/103 WT /DS/113 (3 Dec. 2001)

41. *Australia-Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse by the United States to Article 21.5 of the DSU.* WT/DS 126/8 (4 Oct. 1999), *Brazil Export Financing Programme for Aircraft. Recourse by Canada to Article 21.5 of the DSU* WT/DS 46 13 (26 Nov. 1999) *Canada Recourse to by Brazil to Article 21.5 DSU,* WT/DS 70.9; Anex (23 Nov. 1999), *European Communities Anti-Dumping Measures on Imports of Cotton Type. Recourses Art. 21.5 DSU,* WT/DS 141 (29 Nov. 2002).

42. *European Communities Measures Concerning Meat and Meat Products (Complaints by Canada and the United States Recourse to Arbitration by the European Communities* WT/DS 26/ARB, WT/DS48/ARB, 26 July 1999; *United States. Anti Dumping Act of 1916 Recourse to Arbitration by the United States under DSU,* Article 22.6, WT/DS/36 (ARB (24 Feb. 2004)

43. Discussion of the relevant provisions of the Balas Draft draws upon from Mercurio, n. 3 at p. 832-834.

the establishment of a panel 20 days after the request. The Panel so established would then circulate its report within 90 days which would be adopted 1 days later. It would be competent for either party to appeal the Panel decision to the Appellate Body. If the complaining party ultimately prevails, it can use Article 22 to request authorisation to suspend concession on the day the Panel report is adopted. Article 21 bis(9) states that no further compliance period could be given where the parties agree that the Member concerned has not implemented the rulings and recommendations of the DSB, the complaining party may only request arbitration as to the amount of the nullification or impairment at any point of time after the expiry of the reasonable period. But where there is disagreement as to the compliance of the concerned member but procedure under Article 21 bis has already been initiated the complaining party may request for such arbitration only after the adoption of the compliance Panel report and wherever appropriate the Appellate Body Report on compliance). The Draft also states that where a compliance Panel is established after arbitration has been requested, the arbitration procedure shall be suspended until the adoption of the compliance Panel report and as relevant, the Appellate Body Report on compliance. If necessary the arbitral decision on damages would then be rendered within 45 days of referral. After the entire process is completed the complaining party can request authorization to suspend concessions under Article 22.2.a. Upon request the DSB will authorize the suspension of concessions at the first meeting at which the item appears. Such suspension shall be temporary and only applied until the measures found inconsistent with a covered agreement has been removed. While the draft amendments relating to compliance review have certain positive features like discouragement to litigation on minor revisions and a unilaterial determination of non-compliance by the winning party prior to Article 22 procedure, they will stretch the current Article 22 time table. Moreover, the draft amendments will allow the losing party to continue to circumvent its compliance obligation even longer.[44]

Articles 21.7 and 21.8 deal with a situation where a ruling in favour of a developing country has to be enforced against a developed country. Article 21.7 gives the discretionary power to the DSB to consider 'what further action it might take which would be appropriate to the circumstances'. The question is whether 'further action' would include ' collective sanctions' as demanded by a few developing countries including India.

We have seen above that when the DSB gives its ruling the member concerned must bring the impugned measure into conformity with the covered agreements. There is no provision for payment of financial compensation for the damage caused by the impugned measures. The million Euro question is whether there should a provision for financial compensation either as an alternative to full implementation of recommendations or as part of recommendations. This questions has assumed unprecedented significance due

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44 Bernard O' Connor, 'Dispute Settlement System - the Banaras and Harmones Cases' JWT 38(2)(2004), 245 at 260.

to following reasons. *First*, the authorization to suspend concessions runs against a basic principle of the WTO i.e. liberalization of the trading system.[45] *Secondly*, sanctions hit most the innocent traders and producers rather than the offending Member of WTO.[46] *Thirdly*, sanctions may work but they do not always work.[47] *Fourthly*, a large suspensation of concessions is self destructive, 'as the increased import cost shifts the burden onto consumers of the importing country and the cost of the business increases, as enforcement gets complicated.[48] *Fifthly*, developing countries can not make use of sanctions against economically more powerful nations; to use sanctions would harm them more than the WTO incompatibility they were complaining of. And *finally* in certain circumstances the developed countries may be unable or unwilling to remove the offending measure and instead would be willing to make payment to the aggrieved country. For these reasons several members believe that the DSB should explore other realistic alternatives to retaliation and assert that compensation would provide 'better alternative to compensation. The negotiating proposals of Ecuador and Mexico[49] support the idea of compulsory compensation to the complaining party.[50] According to Ecquador's suggestion the possibility of negotiating a compensation package should be preserved at all stages of the sequence in which compliance is at risks. As regards the type of compensation Ecquador and Mexico are of the view that the WTO member concerned could offer a package of benefits or any other form of compensation that does not affect other Members under the agreements concerned. For developing countries, the Most Favoured Nation Clause could be waived temporarily in order to allow compensation. Jamaica felt that increased market access in agreed sectors of the developed country member could be a possible type of compensation.

While compensation is seen by several members as a viable alternative to sanctions, it may not be a feasible alternative where the amount of compensation is too large, especially when the offending member is a developing country and the complaining member a developed country.[51] Another problem with compensation is that it does not take third party interests into account. To overcome the problem Australia proposed that compensation arrangements be made available to all Members on a non-discriminatory basis and that arbitration should be used to determine the appropriate level of nullification or impairment in each case.

Apart from compensation, several alternatives like 'collective retaliations, 'negotiable remedies', imposition of fine on a member which fails to comply with a judgment after the reasonable implementation period, preventive measures; suspension of the right of the member concerned to invoke the DSU or to

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45. *Ibid.*, at 266.
46. *Ibid.*
47. *Ibid.*
48. Mercurio, n. 4, at 840.
49. *Ibid.*
50. See Connor, n. 44, at pp. 261-262.
51. Mercurio, n. 4 at p. 840 et seq

authorze large scale retaliation have been suggested by several WTO members. Mexico and Ecquador have proposed retroactive determination and application of nullification or impairment or multiplied calculation.[52] But many of these proposals are too radical to secure the consensus of WTO members. It needs to be recognized that the purpose of remedies in the current WTO is not punitive but 'rebalancing', their purpose is only to achieve a prompt settlement when all prior procedures have been exhausted. Under current practice WTO members are only compensated or they exercise their right to suspend benefits prospectively. Hence, before any changes are introduced the pros and cons of a move from a 'rebalancing approach' to one of punishment should be carefully considered,[53] especially because a number of developing countries still cling to the re-balancing approach.

Two more points which merit some attention here are related to 'carousel retaliation' and increased transparency in the adjudication process. While the EU wants that a prohibition be imposed on 'carousel retaliation,[54] the U.S. wants that the submissions of parties to panels and the Appellate Body be made public and public observance of panel and Appellate Body be allowed. But developing countries are against this proposal and insist that such increased transparency will lead to 'trials by media' and put undue public pressure on the members of the disputes panels and the Appellate Body. On the contrary, many western scholars feel that published submissions and open hearing will enhance the legitimacy and credibility of the WTO dispute settlement system.[55]

In a very interesting development on 8 April, 2004 the Chair of the Appellate Body, Georges Michel Abi-Saab, circulated a proposal regarding amendments to the 'Working Procedures for Appellate Review' for comments. At the special (negotiating) session of the WTO Dispute Settlement Body held on 28 May 2004 Members present briefly discussed the proposal. The proposal seeks to clarify the content of notices of appeal and introduce procedures for amendments in notices of appeal by the parties. The proposal also seeks to adjust the time frames for the oral hearing and the current 90 day limit within which the AB has to circulate its report on a case. It also aims to clarify the meaning of the word 'clerical' in a provision that allows Members to correct 'clerical error' in their written submissions.

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52. For further details see Mercurio, n. 4 at p. 842-485.
53. Connor, n. 44 at pp. 264-66.
54. 'Carousel retailation' means and refers to periodic modifications of the list of products that are subject to the suspensation of concessions if an adverse ruling is not complied with by the respondent Member State. When the EU did not comply with the adverse ruling in the *Hormones and Bananas cases* the US made provisions for such retaliation in 2000. These provisions have never been applied.
55. Bryan Mercurio, 'Improving Dispute Settlement in the World Trade Organization : The Dispute Settlement understanding Review Making it Work?' JWT 38 (5(2004), 795 at 810 (arguing that a more transparent system will enhance the credibility and legitimacy of the system to each Member's citizens and the media will provide a further procedural safeguard against abuse'. Interestingly the U.S. proposals increasing the transparency of the dispute settlement have been excluded from the Balas Draft.

V. Applicable Law and Rules of Interpretation

We have seen that the claims made by a party under Article 6.2 form the basis of a Panel's standard terms of reference under Article 7.1 of the DSU. As the Panel noted in *Korea-Government Procurement*, 'The purpose of the terms of reference is to, properly identify the claims of the party and therefore the scope of a panel's review'. The Panel also said : 'We do not see any basis for arguing that the terms of reference are meant to exclude reference to the broader rules of customary international law interpreting a claim properly before the Panel'.[56] Although there is nothing in Article 7 to suggest that the law applicable in Panel proceedings is limited to that contained in the covered agreements, many writers, citing this provision have come to this conclusion.[57] Palmeter and Mavroidis, however, argue that all of the sources of law set out in Article 38(1) of the Statute of the International Court of Justice are the potential sources of law.[58] Larand Bartels also supports this view and argues that the DSU contains no provisions excluding a prior any sources of international law from being applied to disputes by the panel and the Appellate Body. Yet where there is a conflict between the rights and obligations contained in the covered agreements and other norms, the conflict rule in Articles 3.2 and 19.2 of the DSU will ensure that these rights and obligations prevail to the extent of any inconsistency'.[59] Other international law sources, according to him, can be used in deciding a dispute : (a) as an aid to the interpretation of a given provision of an agreement; (b) as evidence of a Member's compliance with it obligations, and (c) as law in the claim of legal reasoning.[60] According to him in 'hard cases' it should be accepted that the Panels and the Appellate Body are entitled to apply the definitions, principles or rules of public international law contained in the covered agreements.[61] One important advantage of this approach is that WTO's secondary law including decisions of the WTO organs, Chairman's determinations and Panel and Appellate Body Reports and Working Procedures as well as WTO related agreement and other instruments will become the applicable law in WTO dispute settlement proceedings.[62]

The Panels and the Appellate Body decide the cases brought before them according to the relevant provisions of the WTO Agreements and covered Agreements cited by the parties to the dispute. Reported decisions of prior dispute settlement panels which include the report of GATT panels and WTO

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56 WT/DS 163/R, 4 May 2000, para 7.101 n. 755.

57 See Trachtman, 'The Domain of WTO Dispute Resolution', *Harvard International Law Journal*, 20(2)(1999), 342 G. Marceau, 'A Call for Coherence in International Law : Praises for the Prohibition against Clinical Isolation' in WTO Dispute Settlement', JWT 33(5)(1999), p. 87 at 110.

58 Palmeter and Mavroidis, n. 10 at p. 399.

59 Larand Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings', JWT, 35(3)(2001) at 528.

60 *Id* at pp. 518-519

61 *Id* at 510

62 *Id* at 519

panels and report of the Appellate Body also provide necessary guidance in the adjudication. The WTO practice makes a distinction between adopted panel reports and unadopted panel reports, while unadopted reports have no legal status in the WTO system[63], a panel could nevertheless find useful guidance in the reasoning of the unadopted report that it considered to be relevant'.[64] To the contrary, adopted reports have strong persuasive power and panels should take them into account. In *Japan-Taxes on Alcohlic Beverages* the Appellate Body stated that : 'Adopted panels reports are an important part of the GATT *acquis*'.[65] They are often considered by subsequent panels and create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute. As for the adopted recommendations of the Appellate body, they create non binding precedents which deserve a reverential respect from a panel. The views of the Appellate Body provide interpretative guidance for future panels. A panel may take into account the reasoning in an adopted Appellate Body Report and use the findings of the Appellate Body as a tool for its own reasoning.

The purpose of dispute settlement is to clarify the provisions of the WTO agreements 'in accordance with customary rules of interpretation or public international law'. In *United States–Standard for Reformulated and Conventional Gasoline*[66] the Appellate Body took the view that Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969 codify customary international law on the subject. As the WTO is grounded in agreement, not in custom, 'questions of customs are therefore likely to be rare'.[67] WTO Dispute panels and the Appellate Body may have a resource to the teachings of the most highly qualified publicists, but they have been reluctant to do so. Further, due to GATT's diplomatic heritage references to scholarly writings are rare.[68]

WTO panels and the Appellate Body have invoked general principles of law in support of their reasoning. For example they have applied the equitable principle of estoppel[69] and the rule of proportionality.[70] The Appellate Body has several times recognized the principle that readings which would result in reducing whole clauses or paragraphs of a text to 'redundancy or inutility' must be avoided.[71]

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63 *Japan Alcohal* case AB Report, Supra n. 11 at p. 15

64 *Id.*, p. 16

65 *Id.*, p. 15.

66 *ILM*, 35 (1996) 603 et seq.

67 Palmeter and Mavroidis, The WTO Legal System : Sources of Law', *AJIL*, 92(1998), 407.

68 *Id.* at 407-408

69 *United States - Measures Affecting Imports of Softwood Lumber from Canada*, Oct. 27-28, 1993 GATTB SD (40th supp) at 358, 480-86.

70 Articles 22.4 and 22.6 conform to the principle of proportionality recognized by the International Court of Justice the Gareikovo case, ICJ Rep. 1998 para 85.

71 U.S. Gasoline Panel Report WTO Doc. WT DS2?R, adoptd as modified by the Appellate Body, *ILM*, 35(1996) 224, Sec. II.B; *Japan Alcohal AB Report*, supra at p. 11, *United*

Turning to rules of interpretation to be applied by the WTO panels and the Appellate Body, it has been recognized that Articles 31 and 32 of the Vienna Conventional on the Law of Treaties, 1969, being codification of rules of customary international law are applicable in the GATT/WTO dispute resolution. Nevertheless, in many cases decided by the GATT panels these rules had been pushed aside. For example in *Tuna I* the Panel concluded that only subsequent agreements among all of the parties to the GATT and not agreements between the parties to a dispute would be relevant to the interpretation of the GATT. This view is hardly justified in view of Article 31.3.a of the Vienna Convention on the Law of Treaties which provides that 'any relevant rules of international law applicable in the relations between the parties shall be taken into account in resolving disputes'.[72] Again, the *Tuna Panel* refused to consider practice under the other agreements as 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' as provided for in Article 31.3.b of the Vienna Convention. According to the Panel such practice is a practice under those agreements, not under GATT.

Another point which deserves some consideration is whether GATT and other treaties cited by the parties to the dispute could be considered successive treaties relating to the same subject matter within the meaning of Article 30 of the Vienna Convention on the Law of Treaties, 1969. It is submitted that the WTO panels and the Appellate Body should follow the rules of interpretation as provided for in Articles 31 and 32 of the Vienna Convention. This is more necessary in cases involving international environmental agreements. A narrow, technical and conservative interpretation is certainly not justified by the text of the Vienna Convention.

It is heartening to note that in the *U.S. Shrimp case* the AB adopted the organic method of interpretation and held that the words 'must be read.... in the light of contemporary concerns of the community of nations about the protection and conservation of the environment'.[73] In the *Asbestos case* the Appellate Body interpreted the relevant provisions viz. Article III (4) and Article XX(b) of the GATT more liberally and for the first time upheld an otherwise GATT inconsistent, trade restrictive measure for non-trade reasons under the human health exception provided in Article XX. The *Asbestos* rulings and the AB Report in the *Shrimp case (Recourse to Article 21.5 of the DSU by Malaysia)*[74] have created a legitimate expectation that in future the AB would be more willing to adopt a more realistic and pragmatic approach to trade related environmental measures.

States - Restrictions on Imports of Cotton and Man-Made Cottons Fibre Underwear, WT/DS24/R at 16 adopted Feb. 25, 1997.

72 *United States - Restrictions on Imports of Tuna*, GATT Doc. DS 29/R (June 16, 1994), *ILM* 33 (1994) para 5.19.

73 WTO Doc ST/DS58/AB/R, Oct 12, 1998, paras 129-31, 155.

74 For the text of this decision, see *ILM* 41 (2002), 149.

Under the DSU Panels and the Appellate Body are required to apply and interpret the provisions of the covered agreements and give their reports on the basis of the relevant rules of international law. But functions assigned to these bodies are such that they are being forced to issue rulings on even such provisions that have been deliberately left vague by the negotiations of the covered agreements. But this has become inevitable due to lack of desire, on the part of WTO Members to go to the negotiating table to clarify these 'creative ambiguities'. In the performance of their task these adjudicatory bodies have filled up gaps in the existing treaty texts by applying the principles of interpretation. The Appellate Body has, for example, allowed parties to be represented by private counsel, interpreted Article 13 of the DSU to allow *amicus briefs* and established an additional procedure for entertaining such briefs in the *Asbesto* case for that case only, and developed the judicial technique of 'completing legal analysis'. Although like other courts and tribunals, the Panels and the Appellate Body will never admit that they make, shape or alter the law and have in fact displayed a remarkable degree of judicial restraint, they are no doubt contributing to the progressive development of international trade law by applying and interpreting the provisions of the relevant agreements in the spirit of progressive realism. While there is no place for judicial valour for the Panels and the Appellate Body in the dispute settlement system, there is also no place for moribund conservation and excessive formalism. Perhaps the need to bring the principles of the law and their application into harmony with the necessities of adjudication allow some space for judicial legislation within the well recognized and legitimate limits of the judicial functions of these adjudicatory bodies. It is said that courts legislate interstitially and their movements are confined from molar to molecular motions. We believe this holds no less true in the case of these adjudicatory bodies than other courts and tribunals.

(VI) *Amicus Curiae* Briefs :

Only parties to a dispute and third parties are entitled to submit information directly to the Panel. However, Article 3 of the DSU authorises a panel to seek information and technical advice from any individual or body. Using this provision NGOs have been sending their briefs to different panels. It gives rise to the question of acceptability of such briefs by the Panels. Although this issue was raised incidentally in several cases, the Panel in the U.S. Import *Prohibitions of Certain Shrimp and Shrimp Products* made a categorical pronouncement on the issue and refused to consider the unsolicited *amicus curiae* briefs, holding that 'accepting non-requested information from non-governmental sources would be incompatible with the provisions of the DSU as currently applied'.[75] However, 'if any party in the present dispute wanted to put forward these documents as part of their submissions to the panel, they were free to do so'. The Appellate Body overruled this holding and said : 'A panel has the discretionary authority either to accept and consider or reject information and

75 WT/DS58/R, 1998, para 7-8.

advice submitted to it whether requested by a Panel or not'.[76] The AB also made it clear that attaching a brief or other material to the submission of either an appellant or an appellee, regardless of the origin of such material renders that material at least *prima facie* an integral part of that participant's submission.[77]

In *United States Import Prohibition of certain Shrimp and Shrimp Products (Recourse to Article 21.5 of the DSU by Malaysia)* the Appellate Body received a 'Human Society Brief'.[77a] This brief was attached as an exhibit to the appellatte's submission filed by the United States in this appeal. At the oral hearing in this appeal the AB asked the United States to clarify the extent to which it adopted the arguments set out in the Human Society Brief and decided to focus its attention on the arguments in the submission of the United States. The AB had also received a brief from Professor Robert Howse but in rendering its decision it did not found it necessary to take into account his brief.

In *European Communities - Measures Affecting Asbestos and Asbestos Containing Products*[77b] the Panel received five written submissions from non governmental organizations, two of which the Panel decided to take into account. When the case came up for consideration by the Appellate Body, after consultations among all seven Members of the Appellate Body, the AB adopted pursuant to Rule 16(1) of the Working Procedures, an additional procedure for the purposes of this appeal only, to deal with written submissions received from NGOs ("Additional Procedure"). It received 13 NGO briefs but returned them to their senders since they were not in accordance with the Additional Procedure. Pursuant to Additional Procedure, it received seventeen applications for leave to file a written brief. As six Applications were received after expiry of the time limits specified in paragraph 2 of the Additional Procedure, leave to file a brief was denied. The AB considered and reviewed 11 applications received by it within the time limits and in each case, decided to deny leave to file a written brief. Besides, the Appellate Body did not accept a brief received from the Foundations for International Environmental Law and Development on its behalf and on behalf of 4 other organizations.

It is submitted that the practice of accepting *amicus curiae* briefs is without any clear legal basis. The DSU permits only parties and third parties to make submissions to panels. Moreover, WTO members are not permitted to join a dispute at the appeal stage. Therefore, allowing a NGO to file a brief with the AB would mean giving an outsider more access to the WTO dispute settlement system than to Member Governments not directly involved in the dispute. Since the object of the WTO Dispute Settlement mechanism is to determine the rights and obligations of the WTO members under the Marrakesh Agreement and other

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76 WT/DS58/AB/R 1998, para 108

77 In *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismouth Carbon Steel Products Originating in the United Kingdom*, the AB held that it had legal authority to accept and consider amicus curiae brief in the appeals process.

77a *Supra* note 35.

77b *Supra* note 16.

covered agreements, permitting NGOs to submit their briefs would mean giving them an opportunity to influence the legal interpretation of the legal provisions without having any responsibility and obligations in the matter. Further, as is evident from the denial of permission by the Appellate Body to 13 organizations to file a brief in the *Asbestos case*, these unsolicited briefs may not necessarily provide worthwhile inputs to the proceedings before the Panels and the Appellate Body, but rather may unnecessarily create hindrance to the smooth and orderly conduct of proceeding by the adjudicatory authorities.[78] In any case the utility of unsolicited *amicus curiae* briefs is doubtful and uncertain.

In the *Asbestos case* the AB sought to deal with the problem of *amicus curiae* briefs by adopting an additional procedure only for that case but in doing so it transgressed its own competence and power. At the General Council Meeting, India strongly objected to the adoption of the Additional Procedure as a dismissal of the 'overwhelming sentiment' of Members against the acceptance of unsolicited *amicus curiae* briefs.[79] Most significantly, none of the proposals on *amicus curiae* briefs has found place in the Balas draft. But since the practice of accepting unsolicited briefs has the backing of the Appellate Body, the issue will not simply disappear. Therefore, WTO members should come together and resolve this issue for ever. To this end, the rules and principles enunciated by the Appellate Body in *British Steel and Asbestos* should be codified as part of the DSU review.

WTO DISPUTE SETTLEMENT PROCEDURE AND DEVELOPING COUNTRIES

Developing countries have made scant use of the dispute settlement procedure under the GATT. Observers have attributed the failure of developing countries to use the GATT dispute settlement procedure to 'power politics' of the system. Not surprisingly, many of these some observers predicted the greater use of the WTO's more legalistic dispute settlement procedure by the developing countries in view of the legal reforms ushered in by the DSU, namely the right to a panel, automatic adoption of panel reports and an effective system for monitoring of the DSB's ruling.[80] This optimism was also based on the DSU provisions relating to differential treatment specifically designed to help developing countries. Statistics on participation rates of WTO members in the dispute settlement procedure shows that the said optimism was misplaced. Thus while the developing countries form two thirds of the membership of the WTO, less than one fourth of the complaints have been presented by the developing

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78 To the contrary there is a 'feeling that the Appellate Body should strictly apply the criteria set forth in the additional procedure. See generally, Geert A. Zonneckeyn, The Appellate Body's Communication on *Amicus Curiae Briefs*', JWT 35 (2001) 562.

79 Even supporters of *amicus curiae* briefs recognize the necessity of establishing uniform rules or uniform practice for deciding the admisssibility of such briefs : See Zonneckeyn, n. 78 at p. 563.

80 See generally, Marc L. Busch and Eric Reinhardt, 'Developing Countries and General Agreement on Tariffs and Trade World Trade Organization Dispute Settlement', *JWT*, 37(4)(2003) 719.

countries before the DSB. Up to September 2000 developed countries presented 154 complaints (89 against other developed countries and 63 against developing WTO members), while developing countries filed only 53 claims (35 against developed members and 18 against developing members).[81] Amongst developed Members the U.S. has been the most frequent participants in disputes todate, followed by the E.U.

There is not any single reason for the less use of the dispute settlement procedure by the developing countries.[82] In fact, a combination of legal, political and economic reasons inhibit the willingness and ability of the developing countries to use the WTO dispute settlement procedure. Financial and technical burdens of preparing and presenting the case, potential gains from a favourable outcome, volume of trade, damage to long term relationship, likely consequence of a favourable ruling against, the complainant's own industry and loss of credibility back home due to an unsuccessful complaint are likely to guide the decision of a developing WTO Member to present a complaint before the DSB.[83] The Ecquadorian experience has shown that retaliation as a measure of last resort is ineffective for small developing countries due to their limited power and the adverse impact of the retaliatory sanction on their economy. It should be recognized that a challenge to the authorisation of retaliation may lead to a number of procedural steps and only that litigant state can enforce the retaliatory sanction which has ability to effect and the staying capacity at the implementation and enforcement stage that many developing countries lack. Their inability to secure the implementation and enforcement of a favourable ruling is likely to discourage the recourse to the dispute settlement procedure. Political considerations like GSP preferences and official development assistance are also likely to prevent developing countries from engaging in litigation with developed countries.

Many observers view the lack of legal and technical capacity as the major obstacle to the use of DSB by developing countries. In their view it is the lack of legal expertise which prevents a developing country from securing greater

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81. Up to September, out of 207 requests for consultation 154 were presented by developed countries. See Jose Luis Perez Gabilondo, 'Developing Countries in the WTO Dispute Settlement Procedures': *JWT*, 35(4)(2001), 483-488. In the eight years of its operation, the DSB received notification of nearly 300 separate complaints. Nearly 70 of these were subject to ruling by WTO Panels. Majority of these rulings were reviewed by the Appellate Body. See generally, Christopher Arup, 'The State of Play of Dispute Settlement "Law" at the World Trade Organization', *J.W.T.* 37(5)(2003), 897-920.

82 Only six or so developing countries (led by Brazil and India) account for 90 percent of rulings involving developing countries. Interestingly, no African country has ever filed a dispute. Bangladesh because the first LDC to life a case when it requested a Panel against India on 28 January, 2004. See India, *Anti Developing Measures on Batteries from Bangladesh, request for consultations by Bangladesh*, WT/DS306/1, G/L/669, G/ADP/DS2/1 (2 February, 2004).

83. For a list of factors having a bearing on the decision of a WTO Member to participate in the dispute settlement procedures see : Busch & Reinhardt, n. 80 ; Gabilondo, n. 81.

concessions at the early settlement stage.[84] The lack of the human resources and administrative structures to manage the dispute from the initiation of the procedure to its conclusion may not only discourage a developing country from engaging itself in litigation against a developed country but will also adversely affect the final outcome of litigation. It is true that the WTO Panels and the Appellate Body allow parties to be represented by private counsels and developing countries may hire a law firm for this purpose, but they still need administrative structures to match the dispute with the country's trade policy and defend the country's trade interests within the WTO.[85] By contrast developed Members have 'a core of professionals who regularly administer cases, carry out research, represent the state in WTO dispute and define the doctrines and law principles which are to be maintained in all cases'.[86]

Now turning to differential treatment provisions of the DSU that seek to help the developing members of the WTO, they are too general to be of any significance.[87] If the conclusions of the Panel's report in the case of *EU-India on Anti-Dumping Duties on Textiles*[88] were to be exported to the terminology used in Articles 4.10, 12.10, and 21.7/8 of the DSU[89] the fact that they lack content from substantive point of view becomes apparent. The same can also be said about Article 12.11 of the DSU, which provides that the Panel should explicitly indicate the relevant provisions on different treatment contained in the agreement. Article 12.11 provides 'an additional instrument of procedure to claim that within the

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84. Busch and Reinhardt, n. 80 at p. 723. They argue that 'more negotiations in the shadow of the law, rather than litigation per se, will help level the playing field for developing countries at the WTO.' *Id.* at 733.

85. Oyebisi, n. 81 at p. 486.

86. *Ibid.*

87. For an interesting study of the special and differential treatment provisions see, Kofi Oteng Kufuor, 'From the GATT to the WTO : The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes', *JWT*, 31(1997), 117. See also Asith. Qureshi, The World Trade Organization : Implementing International Trade Norms (1996) 143-4 (arguing that a significant number of the provisions in relation to developing and least developed countries are hortatory in character and difficult then free. See also M.B. Rao and Manjula Guru WTO Dispute Settlement and Developing Countries (2004).

88. The Panel noted that the parties themselves agree that the first sentence of Article 15 of the Anti-Dumping Agreement ('It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering that application of anti-dumping measures under this Agreement) does not impose legal obligations on developed country members. WT/DS 141/R, para 6.

89. 'All Members during consultations should give special attention to the particular problems and interests of the developing countries (Art. 4.10); the possibility of special time frames during consultations and during the procedure provided the time frames for DSB decisions are not affected and sufficient time is given for the developing country to prepare its argumentation (Art. 12.10); particular attention is to be paid to matters affecting developing countries with regard to the surveillance of the DSB recommendations (Art. 21.2); to consider other further action appropriate to the circumstances (Art. 21.7/8).

report, an allegation sustained in a specific rule should be dealt with separately[90]. Article 8.1[91] is probably the only operative clause of the DSU but its usefulness needs to be judged by undertaking an analysis of the number of cases in which the Panels have had a national from a developing country together with information on the number of cases in which developing countries prevailed.[92] As the above mentioned provisions have proved ineffective in practice, it is desirable that existing operative clauses of the DSU are further strengthened and if necessary new operative provisions are added to enable the developing countries to overcome the asymmetries faced by them during DSB procedures.

As we have seen earlier, the DSU envisages compensation as an interim remedy and lays down an elaborate procedure for securing compliance of a favourable ruling through retaliation (even cross-retaliation). Amendment proposals tabled by some of WTO members place more emphasis on the remedy of compensation and even favour the extension of this remedy to third parties affected by the same measure as the complainant.[93] As far as the poorer countries are concerned, there is a proposal which supports the concept of 'compensation in kind', such as the lowering of selected home market tariff.[94]

As the Ecquadorian experience in the *E.C. Bananas case*, has shown, many small developing economies do not have retaliatory power. In order to address this problem developing countries have mooted the idea of collective retaliation which if accepted, would authorize all WTO Members (would even oblige under the idea of collective responsibility) to suspend concessions vis-à-vis a non-complying member.

Under Article 21.3 a respondent Member is under a legal obligation to comply immediately with the recommendations of the DSB. However, even if there are practical difficulties in making compliance, the Member concerned is duty bound to do so within a reasonable period of time. As the member concerned may find difficulty in complying with the DSB's ruling not only because

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90. Gabilando, n. 80 at 488. The author makes this observation while comparing Art. 12.11 with the second sentence of Article 15 of the Anti-Dumping Agreement which according to the WTO Panel Report in *European Communities Anti-Dumping Duties* imposes a legal obligation but the obligation is practically of means and not of result. Notably, in this case India had invoked Art. 15 of the anti-Dumping Agreement 'and not Art. 12.11 of the DSU which provides that the panel should explicitly indicate the relevant provisions on differential treatment contained in the agreements that have been raised.

91. Art. 8.10 of the DSU provides that the panels shall include at least one panelist from a developing country. The right to invoke the Decision of 1966 (Art. 3.10) is another operative provision.

92. Gavilondo, n 80 at 488.

93. In *United States Homestyle* the United States did a bilateral deal with the E.C. over compensation for copyright infringement without providing any time table for bringing its law into general compliance. Disappointed with this Australia send its trade Minister to Washington. Australia has made proposals to the Review of the DSU to ensure compensation is payable on a discriminatory basis. Arup, n. 81 at p. 918 (n. 95).

94. Arup, n 81, at p. 918.

of economic reasons but also due to legal and constitutional considerations[95] a distinction has to be made between genuine problems and strategic compliance and due allowance will have to be given in genuine cases. Already Article 24 requires a complainant member to make allowance for least developed countries in the dispute settlement process. This benefit could also be extended to other members, especially developing countries. The concept of 'reasonable time' defined in Article 21(3) of the DSU, needs to be re-defined in the light of the objective of the DSU i.e., to provide security and predictability to the multilateral trading system through the effective resolution of disputes.[96] As non complaince presents a serious challenge to the legitimacy of the WTO system and compulsion is not the surest way to secure the compliance a pragmatic interpretation of 'reasonable time' is desirable.

The Balas Draft recognizes the need for improvements to the dispute settlement system and incorporates some of the changes recommended by developing country members. Specifically, the Draft provides for increased timeliness for developing country members and also for timely notifications by the parties to the DSB of mutually agreed solutions and more disciplines by competing parties at the consultation stage. Moreover, the bracketed Article 28 grants a panel or the Appellate Body the right to award an amount of litigation to a developing country member when it successfully wins or defends in a litigation.[97] But the Balas text does not include such controversial proposals of the developing countries as mandatory arbitration, retroactive compensation, limits on filing disputes against developing countries and collective counter measures.[98]

The developing countries have put far-reaching proposals for legal assistance and drastic changes to the enforcement mechanism in the DSU. They insist on strengthening of the special and differential treatment provisions of the DSU but do not accept proposals for increasing transparency in the system and feel that the system should remain strictly intergovernmental without making it in any way open to the public. They are the most ardent proponents of a rule based adjudicatory model of dispute settlement and want the system to become even more legalistic and adjudicatory so that it resembles a court and reject the U.S. proposals for moving the system towards a more a concilitatory and diplomatic disputes settlement model.

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95 For instance, the Australian Government faced difficulty in obtaining the necessary cooperation from the Tasmanian Government to compliance with the ruling in *Australia v. Salmon*.

96. For an interesting study of 'a reasonable time' see P. Monnier, 'The Time to Comply with an Adverse WTO Ruling : Promptness within Reason', JWT 35(5)(2001), 825. *In Chile Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT DS 207 an arbitrator panel while giving Chile time to repeal or modify import relief measures for local agriculture took into account political sensitivities.

97 Mercurio, n. 2

98 *Ibid.*

CONCLUDING OBSERVATIONS

The creation of the Dispute Settlement Body (DSB) as part of the World Trade Organization may be regarded as a seminal event in the history of international trade in general and international adjudication in particular. With its novel and basic features such as the reverse consensus rule for adoption of Panel reports and a standing Appellate Body, the WTO Dispute settlement system has slowly but steadily evolved into a highly legalistic adjudicatory body which is continuously moving forward to resemble a domestic court in the near future. Its grand success in adjudication of trade disputes has impacted the multilateral trade system in the unforeseen ways and has made enormous contribution to the progressive development of international trade law through its impressive jurisprudence that has accumulated since 1995. More than 300 complaints have been filed during the first ten years of its operation which is a record of its sorts as compared to any international adjudicatory body, including the International Court of Justice. It not only testifies to the grand success of the DSB as an institution but also reveals an embedded confidence of WTO members in the system. It is therefore quite natural and logical that its success and importance on the international trade scene has been acknowledged almost universally by developed and developing countries, trade experts, jurists and scholars alike and in the literature on the subject. It has received flattering descriptions such as "the core "linchpin" of the whole trading system, a "major success story", "indicative of the trample of legalism over power politics"[99] and the moniker of 'word trade court"[100]

During the first decade of the existence of this new adjudicatory system panels and the Appellate Body have generally sought to strike a healthy balance between the political and judicial institutions of the WTO and have resisted political pressure. Moreover, both the Panels and the Appellate Body seem to have taken their tasks to assist WTO members in achieving a satisfactory and prompt settlement of their disputes in accordance with the rights and obligations laid down in the WTO agreements and to provide security and predicatability to the multilateral trading system, seriously and sincerely and have endeavored to accomplish them with a sense of realism and pragmatism. The Appellate Body, in particular has generally shown extraordinary circumspection' in its interpretative tasks and taken care to avoid sweeping statements and give ample reasons for any decision.

Notwithstanding the great success of the DSB, the WTO dispute settlement process is conceptually and institutionally flawed and the system is no longer immune from criticism. One of the serious allegations against the system is that the DSB is engaged in judicial activism and is creating rights and

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99. See Raj Bhala, "The Myth about Stare Decisis and International Trade Law (Part I of a Triology) *Am. U. Int'l L.* Rev. 14 (1999), 845, 856 (He argues that these discriptios are irrational and flattering).

100. John A. Ragosta, "Unmasking the WTO Access to DSB System" Can the WTO DSB Live up to the Moniker "world Trade Court" Laws Pol'y Int'l. Bus. 31 (2000) 739.

cc gations in violation of Article 3.2 of the DSU.[101] It is being said assertively that WTO panels are "making law" as if they were Platonic Guardians of trade sitting in secret in Geneva.[102] But this criticism has been refuted by persons associated with the working of the system.[103]

It needs to be recognized here in this context that "(J)udicial law making is a permanent feature of administration of justice in every society' and the root cause of the so called judicial legislation by panels and the Appellate Body lies not so much in their activism but in the often ambiguous nature of the WTO's substantive commitments[104] and crucial flaws in the DSU's design.[105] So instead of blaming the Appellate Body and Panels for judicial activism, WTO members should address these issues through diplomatic negotiations because given the imbalance between the ineffective rule making procedures and the highly efficient judicial mechanism there may be pressure in same case for the panels and the AB to put purposive and policy oriented interpretations on the provisions of substantive agreements. But this kind of pressure can not and should not be a pretext for excessive judicial activism and remedy for the ills plaguing the dispute settlement should be sought in its reforms. For their own part the Appellate Body and panels should therefore resist the temptation of judicial law making and creating rights and obligations where none existed.

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101. After a recent decision in *EC-Sardines* a number of WTO members publicly criticized the DSB for judicial activism. Minutes of Meeting, WT/DSB/M134, Oct. 23, 2002 (Circulated Jan 29, 2003).

102. John Ragosta, Navin Joneja and Mikhail Zeldonch, 'WTO Dispute Settlement : the System is Flawed and Must Be Fixed', *The International Lawyer*, 37 (3-4) (2003), 697, at 750-51. Frieder, Roessler, one of the architects of the WTO's DSU has observed that the AB has 'shifted decision making authority from the political to the judicial organs of the WTO, and consequently changed the negotiated balance in the WTO cited by Ragosta et al op. cit; at p. 708.

103. James Bacchus, of the WTO's Appellate Body has this to say : '(T)he fact that the meaning that one member may happen to see however charly, for a particular word or provision or obligation does not happen to prevail after 'full and fair hearing does not mean that the DSB has either added or diminished the rights and obligations of that member that are provided in the covered agreement' cited in Ragosta et al, n.... p. 709 (f.n. 43).

104. Joel P. Trachtman, 'The Domain of WTO Dispute Resolution', Hrv. Int' L.L. J. 40 (1999) 333 (quoting H. Lauterpacht, The Development of International Law by the International Court (1982), 155). But Ragosta et al argue that the position of judicial activism at the domestic level is controversial and moreover the damages of judicial activism are far great in an international context than in the domestic context. Int. Lawyer, 37 (3-4), (2003), 697-752. According to some scholars binding nature of dispute settlement, ambiguous and vague substantive provisions, absence of procedural protections, lack of oversight, and de facto (if not de jure) stare decisions have enabled the AB to carve out a role for itself the ultimate arbites of the WTO rules. See Ragosta et al., n. at p. 706.

105. According to Dean Michael Young '(I)mportant issues regarding dispute resolution remain unresolved...The procedural rules governing the panel, arbitration, and appellate body proceeding....receive only passing attention in the understanding...' cited in Ragosta et al. n. at 699 (f.n. 8).

Turning to efforts to improve the dispute settlement, the DSU negotiations have been going on for last many years but without any concrete results because of differing positions of WTO members on every thing from the philosophical direction of the DSU to the semantics of procedural rules. By all indications the DSU review will not bring out any radical change in the structure and direction of the DSB; only minor procedural and technical changes in the system are expected to take place as a result of this review.[106] It is hoped that many of the proposals outlined in the Chairman's text in the event of their eventual incorporation in a completed DSU Review will improve the efficiency and effectiveness of the DSB. For example, the proposal strengthening provisions for special and differential treatment of developing country members, the proposals for the establishment of panels at the first request, the proposed amendments to Articles 21 and 22 of the DSU which will resolve the long standing 'sequencing debate' are expected to strengthen the WTO dispute settlement.[107] On the other hand some proposals such as those where relate to remand procedure and the introduction of "interim[108] review in the appellate procedure are not likely to be accepted by WTO members on account of practical consideration.

To conclude the WTO dispute settlement system as a whole is functioning well and this is the main reason why the DSU review has not completed its mandate. No wonder, most critics of the DSU do not criticize the system as such but rather focus on individual rulings.

106. Mercurio n. 4, at p. 854.
107. *Ibid.*
108. *Ibid.*

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SHOULD *MATRIMONIAL UNITY* BE TRANSPLANTED TO MEDICAL CONFIDENTIALITY? EXAMINING SPOUSAL NOTIFICATION OF INFECTIOUS DISEASES IN THE CONTEXT OF NIGERIAN MARRIAGE LAWS

Babafemi Odunsi*

I. INTRODUCTION

Husband and Wife: Special Relationship

From the points of law, religion, social norms, culture and others, matrimony is accorded some special treatments that make it distinctive from all other interpersonal relationships.[1] By virtue of marriage, spouses enjoy some advantages at law, which are unavailable to unmarried persons. The basis of some of the special treatments enjoyed by married couples is the legal categorization of the spouses, though two separate individuals, as one person. This legal transmutation of spouses into one entity is described as *legal unity*,[2] rephrased as 'matrimonial unity' in the title of this paper. It is a creation of common law.[3]

It seems that the principle of legal unity had been recognized long before the comparatively modern era common law evolution. There appears to be an indication of the existence of the principle in biblical Old Testament times. According to an injunction in the book of Genesis[4]: "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: *and they shall be one flesh*."[5]

In various ways, statutes have implicitly consolidated the principle of legal unity. One of such ways can be found in the Nigerian *Criminal Code*, which provides that a spouse shall not be criminally culpable for damage to the property of the other spouse.[6] While there is no explicit reference to legal unity in the *Criminal Code* provision, it is manifest that the provision revolves round legal unity; seemingly, what one spouse does to the property amount to doing it to his or her own property.

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1. E I Nwogugu , *Family Law in Nigeria* (Ibadan: Heineman Educational Books (Nigeria) Ltd, 1974) xxviii
2. *Ibid* at 83
3. *Ibid*.
4. *Genesis* II, 24
5. Emphasis added
6. Section 36 *Criminal Code Act*, Cap. 77 Laws of the Federation of Nigeria (LFN), 1990

One area in which the unity of spouses may appear contentious, concerns the duty of a doctor to keep the confidence of patients. Simply, medical confidentiality imposes an ethical duty on a doctor not to disclose to a third party what he discovers about his patient in professional capacity, without the consent of the patient or legally sustainable grounds.[7] Medical confidentiality, essentially, is one mechanism for safeguarding the right of the patient to privacy, which is guaranteed under the Nigerian Constitution.[8] As will be shown subsequently, it is debatable whether a doctor, without his patient's consent, can legally disclose to the spouse of the patient that the patient suffers from a sexually transmittable infection. Using HIV/AIDS to represent sexually transmittable disease, we can assume the following scenario to illustrate: a doctor discovers that his patient who is married is HIV positive. Notwithstanding the doctor's advice, the patient insists he would not inform his wife nor strive to engage in safe sex. In the absence, or uncertainty of any legal backing, what would be the legal situation of the doctor if he overreaches the patient to inform the spouse?[9] This paper addresses this question with reference to the principle of legal unity and special relations existing between husband and wife. It will essentially examine whether matrimony is a basis for the doctor to overreach the patient in the scenario assumed above.

II. Spouses as Sexual Partners: Examining Different Levels of Sexual Partnership

Before proceeding further, it needs to be emphasized that this paper does not seek to argue the merits or desirability of *partner notification* as a measure of controlling HIV/AIDS or any other sexually transmitted disease.

Partner notification or contact tracing, as it may also be called, is the process of locating and informing, or warning the *sexual partners* or other persons who may be a risk of contracting a disease through the sexual or other behaviours of infected persons. Generally, partner notification is a means of preventing spread of disease, especially sexually transmittable diseases. Partner notification has featured significantly in the discussion of curtailing the spread of HIV/AIDS.[10]

In discussions of the desirability of partner notification as disease control measure, it seems that the special relationship of husband and wife does not attract any distinctive attention. Spouses tend to be summarily subsumed into the indistinctive classification of 'sex partners'.[11] The argument that human rights protection is a better option in the drive to control HIV/AIDS, necessarily leads to the conclusion that patients' rights to privacy should not be transgressed by

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7. See J.K Mason, R.A McCall Smith and G.T Laurie *Law and Medical Ethics* (5th ed.), (London: Butterworths, 1999) at 191-193.
8. See Section 37 of the Constitution of the Federal Republic of Nigeria, 1999 [hereinafter 'Nigerian Constitution'].
9. This illustration is extracted substantially from D.G Casswell, 'Disclosure by a Physician of AIDS-Related Patient Information: an Ethical and Legal Dilemma', Can. Bar Rev. 68 (1989) 225.
10. See e.g. D.G Casswell *supra* note 9.
11. See generally *ibid.*

notification of "sexual partners". In such situation, there is a tendency to foreclose the analysis whether the special relationship of married couples warrant that an exception be made in the case of spouses.

In discussing the right of a sexual partner to know about the health or other condition of the other, it would seem unrealistic to simply loop spouses and non-spouses in the same category of sexual partners. Doing so, it is argued, would be an affront on the institution, which is held sacred in various cultures and legal systems.[12]

Any discourse of partner notification should take cognizance of levels of sexual partnership. True, a spouse through marriage becomes a sexual partner. It is however arguable that the situation of the spouse as a sexual partner cannot be equated with those of *mere* sexual partners who may range from temporary girlfriends, casual acquaintances to commercial sex workers.

Mutually, as foundation of marriage, spouses solemnly undertake and bear the onerous moral burden to stand by each other for better for worse, for richer for poorer, in sickness, and in health. Manifestly, in that light, sexual intercourse is a slight portion of the yoke of marriage. Spouses, essentially, are *life* partners whose individual fates have become intricately interwoven. Simply, the situation of one fundamentally affects the other.

Putting spouses in a special class of sexual partners is the starting point in the examination of the justifiability of doctors' breach of patients' confidence in notifying spouses of the risk of communicable diseases.

III. Nigerian Law and Types of Marriage: Focus on Statutory Marriage

Statutorily regulated monogamy and customary law polygamy are the two types of marriage in Nigeria. The *Marriage Act*[13] and the *Matrimonial Causes Act*[14] govern monogamy, which is also commonly referred to as 'statutory marriage' 'Christian marriage', or 'marriage under the Act', because it is regulated by statutory provisions.

Monogamous marriage has been defined in the case of *Hyde v Hyde*[15] as a marital union of one man and one woman to the exclusion of all others. Thus, when a man and a woman undergo a statutory marriage, none of the parties can contract another marriage while the statutory marriage subsists.[16] A marriage contracted in violation of this rule would be void. Apart from that, such act amounts to a crime of bigamy.[17]

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12 See E.I. Nwogugu *supra* note 1 at xxxviii.

13 Cap. 218 Laws of the Federation of Nigeria (LFN) 1990.

14 Cap. 220 Laws of the Federation of Nigeria (LFN) 1990.

15 (1866) LR 1 P&D 130 particularly at 133, per Lord Penzance.

16 See Sections 47 and 48, *Marriage Act*.

17 Section 370, *Criminal Code Act*, Cap. 77 *Laws of the Federation of Nigeria* (LFN), 1990. See generally, C.O.Okonkwo and Naish: *Criminal Law in Nigeria* (London: Sweet & Maxwell, 1980), 284-287. See also Sections 47 and 48 of the *Marriage Act*. See also C.O.Okonkwo, 285-287.

The *Blacks Law Dictionary* defines polygamy as, "[t]he state or practice of having more than one *spouse* simultaneously," [18] and a polygamist as, "[a] person who has several spouses simultaneously."[19] With its connotation of plural or multiple marriages, polygamy encompasses a situation where a man simultaneously has more than one wife (polygyny) and where a woman simultaneously has more than one husband (polyandry). However, in Nigeria, polygamy is largely restricted to the practice of a man having more than one wife. The practice of a woman simultaneously having more than one husband, apart from being a social aberration, is illegal in Nigeria.[20] Therefore, in the context of this paper, discourse of polygamy is largely restricted to the polygyny.

Polygamy is governed by Nigerian customary law, which varies from place to place, according to the cultures and ways of life of each community. This is why customary law has been described as "a mirror of accepted usage."[21] Polygamy is an inherent customary practice of the indigenous people of Nigeria. As a Nigerian sociologist puts it, "[w]e were born into polygyny. It is part and parcel of our society."[22]

This paper will however focus on statutory or monogamous marriage. The reason for this restriction is that the statutorily provided benefits of legal unity, which form the bedrock of the argument for expanding to medical confidentiality, are largely limited to monogamous marriages.[23] Secondly, the doctrine of legal unity is a creation of common law;[24] while common law applies in many respects to monogamous marriage in Nigeria,[25] it does not apply to polygamous marriages which are strictly governed by customary law.[26]

Legal unity manifests in various aspects of marriage. These will be examined in light of legal effects of marriage and some legal exemptions which husband and wife enjoy by virtue of their marriage.

IV. Legal Consequences of Marriage

Statutory marriage is a contract out of which flow some rights, duties and obligations for the parties to the marriage contract. The rights and duties can be

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18. B. A. Garner *et.al* (eds.) *Black's Law Dictionary* (8th edn.) (St. Paul, Mn: Thomson West, 2004), 1197 [Emphasis added] See, W.J. Stewart *Collins Dictionary Law* (2nd edn.), (Glasgow: Harper Collins Publishers, 1996). Sheila Bone (ed.) *Osborn's Concise Law Dictionary* (9th edn.) (London: Sweet & Maxwell, 2001), 291. See also The Law Commission, *Family Law Report on Polygamous Marriages* (London: Her Majesty's Stationary Office, 1971), 1
19. B. A. Garner *et al* (eds.) *ibid.*
20. See S.N.Chinwuba, *Modern Family Law in Southern Nigeria*, (London: Sweet & Maxwell, 1966), 167.
21. *Owonyin v Omotosho* [1961] 1All N.L.R. 304 at 309
22. S. F. Petasalis, *The Silent Power: A Portrait of Nigerian Women* (Quebec: Meridian Press, 1990) 47.
23. See e.g. C.O. Okonkwo, *supra* note 17, 123. See also Section 161(3) together with Section 2(1) *Evidence Act* Cap. 112 Laws of the Federation of Nigeria (LFN), 1990
24. E.I. Nwogugu *supra* note 1 at 83
25. See S.A. Adesanya, *Laws of Matrimonial Causes* (Ibadan: Ibadan University Press, 1973) 2
26. E.I. Nwogugu, *supra* note 1, xxxii

summed as 'consortium' Lord Reid, in the case of *Best v Samuel Fox & Co.*[27] explained consortium as a name for what a spouse enjoys by virtue of "a bundle of rights, some hardly capable of precise definition." More simply, consortium can be described as the right of one spouse to the company, assistance and affection of the other. While the interpretation of 'consortium' may be open wide-looping, some consequences of marriage tend to indicate what consortium in effect is. Some of these are examined subsequently.

One is that marriage entitles a woman to use the husband's surname. The woman can even retain the name after termination of the marriage by divorce or death of the husband.[28] The husband and wife mutually owe duties to cohabit in a place designated as the matrimonial home. Cohabitation does not rigidly connote that they both stay under the same roof at all times. They would still be deemed to be cohabiting if some factors such as nature of their jobs, keep them apart, and the staying apart is based on mutual understanding.[29] Husband and wife also have duties to engage in sexual intercourse with each other, subject to the condition that the right to sex of one must not be exercised such a way that would be harmful to the other.[30]

From another perspective, one legal consequence of marriage is that some legal rules are made to apply to spouses which do not apply to unmarried persons. Generally, under common law, spouses cannot contract with each; doing so would amount to one person contracting with himself or herself. Husband and wife are also entitled to defend each other. Similarly, husband and wife, generally, can be liable in tort for acts committed against each other against each other's property. This rule also manifests in criminal law; as mentioned in the early part of this paper, by virtue of which husband and wife cannot be criminally liable for offences committed against each other's property.[31] Furthermore, husband and wife cannot be held criminally liable for conspiring between themselves because doing so would amount to one person conspiring with himself or herself.[32]

V. Medical Confidentiality in the Context of Marriage

The basis of the special provisions made to regulate the relationship between spouses is to strengthen the bond between husband and wife. "These rules recognize the particular relationship of married people and the need to foster and preserve marital harmony and unity."[33]

The rationale for special legal rules for spouses is quite commendable. The question is whether the special rules extend to the realm of medical confidentiality, so that a doctor can summarily notify one spouse of the HIV

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27 (1952) AC 716 at 736
28 *Fendal v Goldsmith* (1877) 2 PD 263; see also *Cowley v Cowley* (1901) AC 450
29 *R v Creamer* (1919) I KB 564 (CA)
30 R v Miller (1954) 2 All E.R 52
31 E.I. Nwogugu *supra* note 1, at 97-99
32 See *Keshiro v I.G.P* (1955-56) WRNLR 84
33 E.I. Nwogugu *supra* note 1, at 97

positive status of the other in case of refusal or reluctance. As a prelude to this, medical confidentiality would be examined in some detail.

VI. Right to Privacy and Medical Confidentiality

In the simplest sense, 'right to privacy' connotes the right to control information about oneself.[34] The right to privacy is the epicenter of all human freedoms and rights.[35] Based on its importance, recurs in various international human rights treaties and constitutions of different countries.[36] In the realm of medical law and practice, the right to privacy translates to medical confidentiality. Medical confidentiality dictates that a doctor, save in exceptional cases, must not disclose confidential information he obtains in the course of doctor-patient relationship. In the case of *Hunter v Mann*,[37] Boreham J summed up the kernel of medical confidentiality in the following words: "...the doctor is under a duty not to disclose, without the consent of the patient, information which he, the doctor, has gained in his professional capacity."

Flowing from the foregoing is that the doctor should not disclose such information; similarly, any information obtained by the doctor in breach of medical confidentiality will be inadmissible and, where wrongfully admitted, would be excluded from the records in the case of court proceedings.[38]

Generally, medical confidentiality is rationalized on the ground that it would enable patients to give, freely and confidently, information to their doctors. According to the British Medical Association,[39]

> [P]atients have a right to expect that information about them will be held in confidence by their doctors. Confidentiality is central to trust between doctors and patients. *Without assurances about confidentiality, patients may be reluctant to give doctors the information they need in order to provide good care.*[40]

The normative sources of medical confidentiality include professional self-regulation, common law and statutory provisions. Among other measures an aggrieved patient may seek to recover from a doctor for breach of confidence.[41]

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34. J. H.F. Shattuck, *Rights of Privacy* (Skokie, Illinois: National Textbook Company, 1977), xiii.
35. *Ibid.*; see the Canadian case of *R v Dyment* 55 D.L.R. (4th) 503 at 513, per La Forest J, referring to Alan F. Westin, *Privacy and Freedom* at 349-350.
36. For example, see section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (hereinafter 'Nigerian Constitution').
37. [1974] QB 767 at 772.
38. See *R v Dyment*, *supra* n. 35.
39. British Medical Association (BMA) guidance *Confidentiality: Protecting and Providing Information* June 2000, obtained at www.gmc-uk.org accessed on 17/4/2005;see also BMA guidance, *Confidentiality & disclosure of health information*, October 1999 obtained at www.bma.org.uk accessed on 17/4/2005.
40. *Ibid.* [emphasis added].
41. See M. A. Jones *Medical Negligence*, (London: Sweet and Maxwell, 2003), 170-172.

At different points, the doctor has to balance the right of his patient to confidentiality against overall public interest. In that light, the patient's right to privacy is not absolute and the doctor's duty to keep patient's confidence not rigid. Consequently, common law, statutes and ethical guidelines permit doctors to disclose patients' information without consequences in some situations.[42] The first situation when a doctor can legitimately break confidentiality without the patient's consent is when it is in the patient's interests to do so and it is medically undesirable to seek the patient's consent.[43] The doctor's duty to safeguard public interest in some situations control of crime and the need to safeguard members of the public from harm are included in public interest exceptions. This aspect of the doctor breaching confidence in overriding public interest is open to debates, and "is arguably the most controversial permissible exception to the rule of confidentiality."[44]

VII. Exceptions to Medical Confidentiality: the situation of Spouses and Infectious Diseases

Generally, under common law there is no duty of care in the absence of special legal relationship. Thus, except in the accepted cases of public interest, a doctor is not legally bound to warn or inform a third party about the danger constituted by the doctor's patient to a third party. Conversely, the doctor has a legal and ethical duty to keep the confidence of the patient.

In the absence of an express legal duty to intervene or *rescue*[45] under common law, it becomes arguable whether a doctor could legitimately breach the confidence of his patient in order to protect a spouse from being exposure to an infectious disease by the other spouse.[46] Related to the above situation is the question of possible consequences to the doctor where he chooses to keep the confidence of his patient and the third party is injured.

This question can be addressed by an analysis of the rules relating to notification of transmissible diseases in Nigeria. A legislation that relates to notification of transmissible diseases is the *Venereal Diseases [Ordinance]*.[47] The kernel of the legislation, as presently contained in the *Venereal Diseases Laws* of Oyo State of Nigeria,[48] is contained in Section 3(1), which states:

> Any person suffering from any venereal disease or suspecting that he is so suffering shall, on becoming aware of his condition immediately consult-

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42. See M. A. Jones, *supra* note 41 at 173-184. See also J.K. Mason et al *supra* note 7 at 193-198.
43. J.K Mason, R.A McCall Smith and G.T Laurie *supra* note 7 at 194.
44. *Ibid* at 195.
45. *Ibid* at 201.
46. In the context of this paper, it is assumed that the spouse at risk is not the patient of the doctor.
47. Laws of the Federation of Nigeria 1958; the legislation made during the colonial era now forms part of state legislations applicable in various states. I will adopt the legislation of Oyo state, one of the states constituting the Federation of Nigeria, in this paper.
48. Cap. 167, Laws of Oyo State of Nigeria, 2000.

(a) the medical officer of health for the area in which he is residing, or

(b) a qualified medical practitioner,

and shall place himself under treatment by that medical officer of health or qualified medical practitioner, who may direct that such person shall attend for treatment at an approved.

There is no provision in the legislation to the effect that a doctor is bound to notify a spouse about the other spouse's infection. The common law applicable in England is one of the sources of Nigerian law.[49] Therefore, as in England, there is no duty to *rescue* in the absence of legal duty in Nigeria. Furthermore, there does not seem to be any practice directive by the Nigerian Medical Association (NMA)[50] compelling or empowering doctors to disclose patients' infectious diseases to a spouse. In any case, it is doubtful whether the NMA's position can be radically different from the global situation which largely enjoins the keeping of patient's confidence. Based on the above analysis, the Nigerian position, ostensibly, is that there is no legal basis for the doctor to notify a spouse about the partner's infectious disease. Such decision is at the discretion and peril of the doctor.

Using HIV/AIDS as a reference, government policies in Nigeria tend to align with keeping the confidence of infected persons. For example, the *Armed Forces HIV/AIDS Control Policy Guidelines*[51] provides:

> Medical records and other aspects of care of service Personnel with HIV/AIDS must be protected by full confidentiality, with release of information strictly on a "need to know" basis. All persons who "need to know" shall also be bound by the principle of confidentiality.[52]

While the HIV/AIDS policies are not legally binding, as products of the Federal Government, they stand to enjoy significant deference as the national standard for dealing with HIV/AIDS as a communicable disease. Thus there is a strong indication that the prevailing policy in Nigeria leans in favour of keeping the confidence of HIV infected persons, than breaching it.

VII. Legal Unity as Justification for Breach of Confidence in Nigeria

Inferably, the prevailing rules relating to medical confidentiality in Nigeria do not legitimize doctors' breach of patients' confidence in the interest of spouses, notwithstanding the principle of legal unity. Essentially, while it may

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49. See A.O. Obilade, *The Nigerian Legal System* (London: Sweet & Maxwell, 1979) 55-56.
50. The NMA is the regulatory body of medical practice in Nigeria, the equivalent of the BMA or CMA.
51. *Armed Forces HIV/AIDS Control Policy Guidelines* Issued under the authority of Hon. Minister of Defence, October 2003.
52. *Ibid* at 16-17.

seem harsh, the situation is that a doctor is not empowered or obliged to tell a spouse about the HIV status of the other spouse. This also appears to be the prevailing norms beyond Nigeria too.

Some have argued that unauthorized disclosure of medical information to family members does not amount to unjustified breach of confidence.[53] However, it seems that the argument does not enjoy popular support.[54] In the specific context of spouses, the generally acceptable position appears to be that legal unity does not apply in the realm of medical confidentiality. Some writers have strongly alluded to this situation in the following words:

> The longest established family relationship is that of the spouse- what are his or her rights in both the positive and negative aspects of confidentiality? *If the treatment is for medical condition, a married person has the same rights to confidentiality in respect of the spouse as in respect of anyone else...*[55]

IX. Conclusion

Seemingly, legal unity is a tool of convenience created to regulate matrimonial relationship in some respects. However, it falls far short of expectation in its not enabling doctors to disclose medical information about spouse to the other spouse, without consent. A situation where people who are to share each other's joy and sorrow are permitted to conceal issues such as HIV/AIDS infection or any other medical condition from each other, is open to some moral criticisms. Unfortunately, moral arguments are of little significance in the face of established legal principles. There is therefore an urgent need for review of this aspect of matrimonial and other laws in Nigeria.

True, it is important to protect the right to privacy to avoid exposing infected persons to stigma and other disadvantages. At the same time, such reasoning has to take appropriate attention to the special relationship of husband and wife. In the case of married persons, it would seem that such disclosure would even be in the interest of HIV/AIDS control. For example, if one spouse is promptly aware of the status of the other, he or she may take measures for safe sex, or ensure that the infected one receives treatment. Along this line, it is important that legal unity and special legal rules it facilitates for married persons be extended to the realm of medical confidentiality.

53. A. Samuels 'The Duty of the Doctor to Respect the Confidence of the Patient' Med Sci. & Law Vol. 20 (1980) 58.
54. J.K Mason, R.A McCall Smith and G.T Laurie *supra* note 7, at 202.
55. *Ibid.* at 204 [emphasis added].

34 Ban.L.J. (2005) 72 - 99

A CRITICAL APPRAISAL OF THE LEGAL REGIME OF THE WEST AFRICAN GAS PIPELINE PROJECT

Taiwo Adebola Ogunleye*

INTRODUCTION

International sales transaction involves the sale of goods and services. Parties usually agree on the mode of transport to be adopted. Oil and gas are equally sold in international transaction. They are normally transported by ship. However, they can also be transported through pipeline. Over the years neighbouring countries have adopted pipeline as a convenient mode of transporting of oil and gas. This stems from the fact that it is cost effective and highly convenient. Cross border pipeline, though innovative can raise a lot of fiscal, regulatory and environmental issues. These issues often lead to conflict and can disrupt the transaction. The West African Gas Pipeline (WAGP) project is a cross border pipeline. It is a pipeline designed to transport gas from Nigeria to Benin, Togo and Ghana for generation of electricity in these countries. The project being a cross border pipeline, would obviously be vulnerable to conflict and disruptions if there is no proper regulatory and institutional framework. The latter is imperative because the four countries operate different legal systems and speak different languages. These two factors can affect the success of the project. In addition the gas pipeline will traverse these countries, which are developing and they have no experience in cross border pipeline.

This paper examines the legal regime and institutional framework of the WAGP project. This is with a view to determining how they will regulate the pipeline as well as ensure its success as a mode of transportation. The paper begins with a background to the project. It then goes into what the pipeline project entails by reviewing the legal framework of the pipeline. In addition, it examines the institutions that will manage the construction and operation of the pipeline. Thereafter, it considers the environmental issues involved in the construction and operation of the pipeline. Finally, it assesses the advantages of the pipeline and ends with a conclusion.

BACKGROUND TO THE PROJECT

The concept of the project started in 1982 when the Economic Community of West African States (ECOWAS) proposed the development of a gas pipeline throughout West Africa.[1] It was one of its key regional economic policies. Subsequently, in 1991 an ECOWAS regional energy distribution plan

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1 www.eia.doe.gov/emeu/cabs/wagp.html visited on 28.3.2004

was established [2] Meanwhile, the report of a feasibility study undertaken in 1992 concluded that a sub-regional pipeline that will transport gas from Nigeria to Ghana was practicable.[3] As a follow up to this, the governments of Nigeria Benin, Togo and Ghana signed a Heads of Agreement (HOA) on the 5th of September 1995.[4] The HOA was the first step taken by the four countries. It was for the construction of a pipeline that will be open access for the transportation of natural gas from Nigeria and any other sources along it to consumers in Benin Togo and Ghana. The HOA broadly outlined the principles under which the gas pipeline would be developed. It provided that a private developer would be selected to build, own and operate the pipeline. At the meeting of the Heads of States of the four countries on May 6, 1999 a Steering Committee[5] was set up.[6] The Committee was to work on the development of the pipeline. It was also authorised and directed to negotiate an International Project Agreement for the pipeline. Thereafter, a Memorandum of Understanding was executed by the four countries with Chevron Nigeria Limited, Ghana National Petroleum Corporation, Nigerian National Petroleum Corporation, Shell Petroleum Development Company of Nigeria Limited (SPDC), Societé Beninoise de Gaz S.A. (SOBEGAZ) and Societé Togolaise de Gaz S.A. (SOTOGAZ) on August 11, 1999. The MOU provided that the companies would establish a new company to develop the pipeline project. It also provided that the new company would own and operate the Pipeline System. The consortium incorporated a company in Bermuda called West African Gas Pipeline Company Limited (WAGPCo). WAGPCo is an investment company comprising these public corporations and private sector companies from Benin, Ghana, Nigeria and Togo. The companies executed a comprehensive shareholders agreement for WAGPCo[7], under which each member has share ownership in the following percentages:

ChevronTexaco West African Gas Pipeline Ltd: 41.87%

Nigerian National Petroleum Corporation: 25.25%

Shell Overseas Holdings Ltd: 16.50%

Takoradi Power Company Ltd: 16.38%

Societe Beninoise de Gaz SA: 2.0%

Societe Togolaise de Gaz SA: 2.0%

Chevron Nigeria Limited, the Nigerian affiliate of ChevronTexaco Corporation, is the managing sponsor. It will implement and manage the project.

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2 *ibid*

3 *ibid*

4 It terminated on the 31st of January 2003 when the WAGP Treaty was signed.

5 This Committee was dissolved when the WAGP Treaty established the WAGP Authority in 2003.

6 This is pursuant to Article 4.1 of the Heads of Agreement.

7 The final ownership of WAGPCo will however depend on the participants making the necessary capital contributions provided for in the shareholders' agreement.

THE WAGP PROJECT

It is a sub-regional high-pressure natural gas pipeline. It will begin physically at the Alagbado T-junction in Ota, Ogun State near Lagos, which shall link the outlet point of the Escravos-Lagos Natural Gas Pipeline System (ELNGPS), and run about 56 kilometres onshore, to the Nigerian coast, thereafter straight out to sea. At the sea it will run in a westerly direction roughly parallel to the coast, between about 15 and 20 kilometres offshore, in water depths between 26 and 70 metres. The initial construction of the new WAPCo pipeline will terminate at Aboadze in western Ghana, which is the site of the Takoradi Power Station. The total length of the new pipeline will be approximately 690 kilometers. About 620 kilometers of the pipeline will be built offshore. Lateral pipelines will be laid, to permit natural gas to be delivered along the way, at regulation and metering stations to be situated at landing points at Cotonou in Benin, Lomé in Togo, and Tema (near Accra) in Ghana. Once they make landfall, these lateral lines traverse approximately 4 km in Cotonou (with another 9.5 km of low pressure "link line" downstream of the regulating and metering station), 1 km in Lomé (with another 0.5 km of low pressure "link line" downstream of the regulating and metering station), 1 km at Tema and about 300 meters at the Takoradi Power Station. The pipeline will cross international waterways.

The pipeline is an open access transporter of gas.[8] It is not a marketer of gas. The pipeline is to be built and operated by West African Gas Pipeline Company Limited (WAGPCo). WAGPCo shall have exclusive ownership and operating right on the pipeline.[9] The gas to be transported in the WAGPCo pipeline will be principally associated gas. The gas will be supplied by N-Gas a company formed for the purpose of the project in Nigeria.[10] N-Gas is a joint venture company owned by NNPC & NGC with 62% of the share holding. Chevron Texaco has 20% of the shares and Shell 18% of the shares. N-Gas will acquire the gas from producers, sell the gas to customers, and if desired by the customers act as shipper on ELNGPS and WAGP to enable a delivered sale basis.[11] N-Gas will enter into a gas purchase agreement with the producers, a gas sales agreement with the buyers, a transportation agreement with Nigeria Gas Company for transportation of gas on ELNGPS, and a transportation agreement with WAGPCo for transportation of the gas on WAGP.[12]

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8 Article II 2(2) Treaty on West African Gas Pipeline Project

9 Article IX (1) ibid

10 M. Byrnes *The West African Gas Pipeline Project- A Case Study* paper delivered at the 16th Annual International Law Institute, Houston, Texas on 27th February, 2004..www.ilstexas.org annual-institutes/2004/CD/presentations&papers/Byrnes%20martin%20-%20Paperpdf visited on 30/3/04

11 *ibid*

12 *ibid*

The pipeline is intended to transport the gas to electricity generating companies and other industrial buyers and users of Natural Gas in West African Region.[13] The major customers of the gas are the Volta River Authority's Takoradi Thermal Power Station and the Communaute Electrique du Benin (CEB) of Togo and Benin. These are the foundation customers. However, the pipeline would most likely be extended to transport gas to Cote d'Ivoire. In fact, the long-term plan is to extend the pipeline to Dakar, Senegal and other West African countries.

THE LEGAL FRAMEWORK

There is no doubt that this project is a cross border venture that will raise a lot of legal issues particularly in regard to the applicable laws. This is because the countries involved have different legal systems as well as language dissimilarity. Nigeria and Ghana speak English and operate the common law system. Togo and Benin on the other hand are French-speaking countries with a civil law system. This difference in the legal system can create problems in the implementation of the project as well as the operation of the pipeline. Problems like the legal status of WAGPCo, issuance of pipeline licence and fiscal matters are likely to arise. Right from the early stage of the planning for the project these problems have been realised and steps have been taken to forestall these problems. One of the steps taken is the establishment of a legal regime for the project. The legal regime consists of a Treaty, an International Project Agreement (IPA), WAGP Regulations and an enabling legislation in the four countries.[14] This legal regime was established to forestall problems that would arise if the countries have to amend or enact laws for the implementation of the project and management of the pipeline. For instance, it was discovered that Togo and Benin do not have any law on pipeline. Ghana has a Pipeline Law but does not have any regulation on licensing of Pipelines. Nigeria is the only country that has a comprehensive law and regulations on pipeline. This apparently made it imperative for the countries to come up with a uniform legal regime that will govern the pipeline. The structure of the legal regime is discussed hereunder.

The WAGP TREATY

In addition to the initial legal arrangement[15] the four countries on 31st of January 2003 signed the WAGP Treaty. This Treaty is the first major step taken to ensure a uniform legal regime for the construction and operation of the pipeline. The Treaty is for a period of 20 years. It sets out the principles that will govern the construction of the pipeline as well as its operation.[16] It provides for the harmonization of the legal and fiscal regime that will govern the pipeline. It establishes a joint authority known as WAGP Authority[17] and a common judicial

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13 Article II 2(1)

14 This legislation will domesticate the Treaty, the IPA and WAGP Regulations.

15 That is the Heads of Agreement and the MOU

16 Article II

17 Article IV

body known as WAGP Tribunal[18] for the pipeline. The WAGP Authority is to act as the regulatory body for the pipeline. The WAGP Tribunal is to determine any disputes that arise from fiscal matters relating to the pipeline. The Treaty also provides that the four countries shall enact its provisions and the International Project Agreement into law.[19] This law will govern the pipeline in each country.[20] This, in essence will ensure that the law regulating the pipeline in all the four countries are the same. The Treaty provides that the enabling law, the IPA and the WAGP Regulations shall specifically govern the pipeline to the exclusion of any other law or regulation on pipeline in the four countries.[21] Moreover it provides that each country shall include in the WAGP Enabling Law all the WAGP Regulations and provisions that will give the WAGP Authority full and exclusive powers to exercise the functions conferred upon it under the WAGP Treaty. This is novel in the sense that once the enabling law has been passed into law countries like Togo and Bénin need not enact any law on pipeline.

Another unique feature of the enabling law is that it is made supreme above other laws that are inconsistent with it. It is only the constitution that has this attribute. Of course it will certainly not override the constitution. This is simply because the enabling law derives its force of law from the constitution. In Nigeria for instance the Constitution is supreme and its provisions have binding force on all authorities and persons throughout country.[22] Moreover, Section 1(3)[23] provides that where any other law is inconsistent with the provisions of the Constitution, it (the Constitution) shall prevail, and that other law shall to the extent of the inconsistency be void.[24] Besides, Section 40 of the WAGP Act[25]provides that it shall be subject to the Constitution.

The Treaty provides for the agreed fiscal regime for the pipeline.[25] This regime is to be applied by the Tax Authorities of the four countries to WAGPCo and all applicable persons.

THE INTERNATIONAL PROJECT AGREEMENT (IPA)

The International Project Agreement on the pipeline was signed on the 28th of May 2003. It provides the details of the commitments between WAGPCo and the countries. It mandates WAGPCo to conduct an Environmental Impact Assessment and produce a Pipeline Development Plan. It identifies the legislative provisions particularly the fiscal regime, access code, pipeline Regulations and pipeline development. It sets out the tariff methodology for the

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18 Article VI (4)
19 Article III
20 Article I
21 Article III 2(1)
22 Section 1(1), Constitution of the Federal Republic of Nigeria 1999
23 *Ibid*
24 *Ibid*
25 West African Gas Pipeline Project Act, 2005 that, is the enabling Act in Nigeria.
26 Article V

pipeline. It reiterates that the governments of the four countries will set up a single regional regulatory authority to supervise the cross-border pipeline development and operations. The agreement confirms the mutual commitment of WAGPCo and the four countries to the implementation of the project. The IPA provides the commercial and regulatory structure applicable to the project. It establishes a comprehensive and harmonized Investment Regime that would make WAGP Co operate effectively as a single business entity across the four states. The IPA provides that English will be the language of interpretation in the event of any dispute. This resolves the problem that may arise between the countries on the issue of the language to adopt, since French is the official language of two (Togo and Benin) of the four countries.

ENABLING WAGP LEGISLATION[27]

As part of the legal framework for the pipeline the IPA[28] provided for a draft legislation[29] to be passed into law by the four countries as the Enabling WAGP legislation. This is to ensure a uniform legal regime for the pipeline. In Ghana, Members of Parliament unanimously voted to pass the West African Gas Pipeline Bill on the 3rd of November 2004.[30] The bill seeks to incorporate into the domestic laws of Ghana, the provisions of the treaty on the Gas Pipeline that required reinforcement by law in Ghana.

In Togo, at an extraordinary sitting in 2004 the Parliament of Togo gave President Gnassingbe Eyadema an approval to ratify the West African Gas Pipeline Treaty.[31]

WAGP Project Act in Nigeria

Nigeria has already passed the WAGP project Act in to law. It was signed into law by the President on 20th June 2005. The Act has seven parts and two schedules. Part I deals with corporate matters. Part II is on the WAGP Authority. Part III deals with the licensing regime for the pipeline. Part IV is on the WAGP Regulations. Part V deals with the financial provisions for the pipeline project. Part VI governs the environmental aspects, while part VII deals miscellaneous provisions like Anti-trust, ownership of the pipeline, insurance program etc. The first Schedule is on the fiscal regime. The second Schedule is on the WAGP regulations.

The Act provides that WAGPCo shall not be required to incorporate a subsidiary in Nigeria or conduct its operation through a subsidiary.[32] The Act establishes the legal presence of WAGPCo in Nigeria and grants it an exemption

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27 The details of the Enabling Act of the countries are not available to the author except that of Nigeria which is discussed in this work.

28 Clause 8

29 The draft legislation is in Schedule 22-25 of the IPA

30 http://www.accra-mail.com/story.asp?id=11630 visited 3/12/2004

31 http://www.panapress.com/paysindexlat.asp?code=eng050 visited 3/12/2004

32 Section 1(1)(b)

from the provisions of the Companies and Allied Matters Act that requires it to be incorporated as a separate local legal entity.[33] It provides that the Corporate Affairs Commission (CAC) shall register WAGPCo as an external company.[34] In order to do so, WAGPCo is required to deliver a statement to the CAC containing the following information about:[35]

1. its name;
2. its country of incorporation, its registration number and the identity of the register in its country of incorporation;
3. the address of its registered office in its country of incorporation;
4. copies of its constitutional documents;
5. details of its directors and secretaries;
6. the amount of its authorised and issued share capital;
7. the address of any office of the company in Nigeria; and
8. the name and address of all persons resident in Nigeria authorised to accept service on behalf of the Company in respect of the business of any branch of the Company

Moreover, WAGPCo is not required to comply with any reporting and filing requirements under the CAMA except that it has to notify the CAC of any change to the information submitted for its registration.[36] This must be done within 28 days of such change. However, it is required to submit auditec financial reports to the CAC within six month of the end of each tax year.[37]

The Act also provides that there shall be no restriction on the ownership or any transfer thereof, or any transaction concerning shares in or share capital of WAGPCo.[38] Similarly, any sale, transfer, pledge of or other transaction in the share capital of WAGPCo or the share capital of a shareholder shall not be subject to any prior approval of any authority in Nigeria nor shall it give rise to any right to suspend or revoke a project authorisation or a project right nor to amend the terms and conditions thereof.[39] WAGPCo is allowed to create a mortgage, charge or other security over its properties situated in Nigeria, such mortgage, charge or security may be registered with the CAC or the appropriate registry.[40] The WAGPCo is allowed to construct, own and operate an electricity

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33 Section 2(1)
34 *Ibid*
35 Section 2(2)
36 Section 2(3)(a)
37 Section 2(3)(b)
38 Section 4
39 *Ibid*
40 Section 2(5)

generating plant as part of the pipeline system.[41] Similarly, it may construct, own and operate such communication facilities.[42]

The WAGPCo, a buyer, a seller or a shipper does not need to obtain transit, export or import permit, license or other authorisation for the purposes of export of Natural Gas from Nigeria, transit of it through Nigeria by means of the pipeline system or import of it to Nigeria by means of the pipeline system.[43]

The WAGPCo, its affiliates, shareholders or the project contractors shall be liable for any environmental damage that occurs by reason of any activities on the pipeline project.[44] They shall however, not be liable for any environmental damage if it is not caused by the project activities.[45] The pipeline system shall remain the property of WAGPCo notwithstanding any suspension, termination, cancellation or expiration of the licence granted it by law in Nigeria.[46] Similarly, a third party cannot acquire ownership or interest in the pipeline system simply because it is situated in, under or over his land.[47]

In Nigeria, the WAPG Authority is empowered to perform the functions assigned to it under the treaty, monitor compliance by the WAGPCo with the WAPG Regulations and exercise the powers conferred on it under the WAPG Regulations.[48] Before the establishment of the WAPG Authority, the steering committee shall be responsible for carrying out these functions, which would be done until the Authority acquires full authority to perform its functions. [49] The Authority is required to report to the committee of ministers.[50] It is also subject to its direction in respect of its activities in and relating to Nigeria.[51] The Act provides that the Government of Nigeria shall be bound by the actions and decisions of the authority to the extent of the powers it conferred on it as well as those conferred on it by the Treaty and Regulations.[52] The Government of Nigeria is also required to provide funds and support the activities of the Authority as the need arises.[53]

The Act requires the Minister of Petroleum to adopt and implement the WAPG regulations.[54] Nevertheless, the West African Pipeline Authority is granted

41 Section 16(a)
42 Section 16(b)
43 Section 17
44 Section 32
45 Section 31(2)
46 Section 37(1)
47 Section 37(2)
48 Section 4
49 Section 5
50 Section 6
51 *ibid*
52 Section 8
53 Section 9
54 Section 20(1)

excusive power to administer and enforce the regulation in Nigeria and may collaborate with the minister and any other government agency.[55] This provision confers on the Authority a higher level of control over the pipeline.

The pipeline system and the WAGPCo shall be exclusively regulated in Nigeria by the West African Gas Pipeline project Act and the WAGP Regulations.[56]

The NNPC is allowed to undertake commitment in any commercial agreement relation to the pipeline project.[57] In addition, the NNPC is allowed to charge any of its assets, revenue and account, which are designated for the pipeline project as a security for the performance of its obligation under any agreement relating to the pipeline project to which it is a party.[58]

Moreover, the President of Nigeria on behalf of Nigeria may in writing guarantee the performance by the NNPC of its undertaking under any agreement relating to the pipeline project to which the NNPC is a party. Subject to exceptions that may be contained in any commercial agreement to which Nigeria and the NNPC is a party. The Act provides for an unconditional waiver any immunity that Nigeria and NNPC have from suit, execution of legal process in connection with any action or proceeding to obtain or enforce any arbitral award in relation to the pipeline project.[59] This waiver is subject to any exceptions as may be contained in any commercial agreement to which Nigeria or the NNPC is a party.[60] Where an award is obtained against Nigeria or the NNPC under a dispute resolution proceedings in any agreement relating to the pipeline project to which it is a party such award will constitute conclusive evidence of the existence of the amount of the claim against it.[61]

The Act also provides that the following laws shall not apply to the WAGPCo, buyer, shipper and project contractor in respect of the pipeline project.[62]

(a) Section 17(1) and 18 of the Oil Pipeline Act and any Regulation made pursuant to it

(b) The Petroleum Act and all Regulations and statutory guidelines made thereunder

(c) The export incentives and miscellaneous Act (as amended)

(d) Wireless Telegraphic Act (as amended)

(e) Investment Promotion Commission Act (as amended)

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55 Section 20(3)
56 Section 21
57 Section 28
58 Section 29
59 Section 31(1)
60 *Ibid*
61 Section 31(2)
62 Section 39(2)

(f) Investment Securities Act.

WAGP REGULATION

The IPA provides that after its execution the draft of WAGP Regulations should be prepared by WAGP Authority in consultation with WAGPCo.[63] It provides for the content of the Regulations.[64] The Regulations must specifically provide for the construction and operation of the pipeline but do not include environmental standards and procedures for obtaining environmental approvals.[65] The Regulations must:[66]

(a) be consistent with the IPA;

(b) adopt the Agreed Design Standards;

(c) accord with internationally acceptable industry standards; and

(d) accord with recognised good practice applicable to high pressure Natural Gas pipelines.

The Regulations shall not govern the environmental standards, which shall be applied to the Pipeline System and implemented in the construction and operation of the Pipeline System, or the procedures for obtaining environmental approvals, which standards and procedures shall remain the subject matter of the prevailing environmental legislation applying in each State.[67]

The Regulations must include, without limitation, regulations addressing the following matters:[68]

(a) standards and procedures for the design and construction of the Pipeline System incorporating the Agreed Design Standards;

(b) standards and procedures for the testing and commissioning of the Pipeline System incorporating the Agreed Design Standards;

(c) standards and procedures for the operation and maintenance of the Pipeline System including for the repair, testing and checking of the Pipeline System (for internal and external corrosion) incorporating the Agreed Design Standards;

(d) standards of and procedures for measurement to be used in the Pipeline System;

63 Clause 12.1 of the IPA
64 Clause 12.2 of the IPA
65 *ibid*
66 Schedule 6 of the IPA
67 *ibid*
68 *ibid*

(e) health and safety requirements and practices for the Pipeline System;

(f) environmental operating requirements, including detection, repair and remediation of leaks and discharges;

(g) qualifications and experience required for operating personnel and companies;

(h) requirements for periodic reporting to the WAGP Authority;

(i) rights of inspection to be granted to the WAGP Authority;

(j) a regime providing for the imposition of penalties on the Company for certain breaches of the WAGP Regulations in the operation of the Pipeline System and for continuing Company Events of Default of this Agreement;

(k) procedures to deal with an emergency situation, including the circumstances in which the Company may be required to suspend its operations for reason of risk to health, safety or the environment;

(l) procedures for the termination and/or resumption of operation of the Pipeline System including procedures for abandonment;

(m) to the extent not included in the Rules of Procedure, procedures for the conduct of hearings of the WAGP Authority, where appropriate, under the WAGP Regulations; and

(n) to the extent not included in the Rules of Procedure, procedures for review by the Committee of Ministers and the Fiscal Review Board, and appeals to the WAGP Tribunal, in accordance with the WAGP Treaty.

The Regulations must provide that:[69]

(a) all drawings, plans, designs and other technical documents made or prepared by the Company for the purposes of the Project, and any plans for the fabrication or construction of the Pipeline System, which have been approved by the Steering Committee or its delegates prior to the establishment and empowerment of the WAGP Authority shall be deemed to have been duly approved by the WAGP Authority;

(b) all actions (other than those identified in paragraph (a) above) taken in accordance with this Agreement by the Steering Committee or its delegates prior to the establishment and empowerment of the WAGP Authority which are functions of the

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[69] ibid.

WAGP Authority, shall be deemed to have been duly taken by the WAGP Authority.

(c) any drawings, plans, designs and other technical documents made or prepared by the Company for the purposes of the Project, and any plans for the fabrication or construction of the Pipeline System, which have been approved by the WAGP Authority or its delegates (or deemed to have been so approved by operation of paragraph (a) above) prior to the entry into force of the WAGP Regulations, which are approvals provided for in the WAGP Regulations, shall be deemed to have been approved under the WAGP Regulations upon their entry into force; and

(d) all actions taken by the WAGP Authority (or deemed to have been so taken by operation of paragraph (b) above) prior to the entry into force of the WAGP Regulations, which are actions provided for in the WAGP Regulations, shall be deemed to have been duly taken under the WAGP Regulations upon their entry into force.

THE INSTITUTIONAL FRAMEWORK

As mentioned earlier, the Treaty WAGP 2003, established some institutions to regulate the pipeline in the four countries. These institutions are the WAGP Authority and the WAGP Tribunal. Apart from these institutions, there are also the Fiscal Review Board and the Committee of Ministers established by the Treaty.

WAGP Authority

The WAGP Authority is to act as an international institution with legal personality and financial autonomy.[70] The Authority shall be recognised in the four countries as a legal person capable of assuming rights and obligations as well as being a party to legal proceedings before the courts of state parties.[71] These functions shall include power to monitor compliance with and enforce the WAGP Regulations.[72]

The Treaty provides for the establishment of the WAGP Authority.[73] This Authority has three overseeing functions namely Representative, Facilitative and Regulatory. It also provides that the Authority shall have exclusive jurisdiction to exercise its powers and perform these three functions.[74] The Authority would be a legal personality with financial autonomy and act as an international institution.[75] The four countries are required to recognise WAGP Authority as a

70 Art IV 1(1)
71 Article IV 1(2)
72 Article III 2(2)
73 Article IV 1(1)
74 Article IV 2(1)
75 Article IV 1(2)

legal person capable of suing and being sued under their laws.[76] Under the representative functions, the Authority is to act on behalf of the countries.[77] The representative functions are to:

(1) Give its consent to changes to the legal corporate structure of WAGPCo as provided in the IPA or to the transfer of shares in the company by the shareholders;[78]

(2) Give interim and final approval to WAGPCo on the design of the pipeline system and the plan for its fabrication or construction as provided for in the IPA;[79]

(3) Give notice to WAGPCo of failure to comply with the Access Code;[80]

(4) Give notice to the WAGPCo to remedy a breach of the IPA;[81]

(5) Give a Notice of Default to WAGPCo;[82]

(6) Give notice of acceptance of transfer of the Pipeline System following cessation of operation by WAGPCo;[83]

As part of its representative functions, the Authority is empowered to negotiate and agree on the following:

(1) with WAGPCo on the terms of, and approve the Pipeline Development Plan as well as any amendment thereto;[84]

(2) with WAGPCo on the terms of amendment to the condition on which the pipeline Licences are granted;[85]

(3) with WAGPCo on the terms of the Access Code and any amendment thereto.[86]

(4) with WAGPCo waivers of the requirement of the Access Code as contemplated in Clause 26 of the IPA;[87]

(5) on the appointment of a third party operator of the Pipeline System in accordance with the provisions of the IPA;[88]

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76 *ibid*
77 Article IV 2(2)(a)
78 Art IV (2) (2)(a)(i)
79 Art IV (2) (2)(a)(iii)
80 Art IV (2) (2)(a)(xiii)
81 Art IV (2) (2)(a)(xiv)
82 Art IV (2) (2)(a)(xv)
83 Art IV (2) (2)(a)(xxviii)
84 Art IV (2) (2)(a)(v)
85 Art IV (2) (2)(a)(vi)
86 Art IV (2) (2)(a)(vii)
87 Art IV (2) (2)(a)(viii)
88 Art IV (2) (2)(a)(x)

(6) with WAGPCo on any matters arising in connection with any expansion of the Pipeline Project;[89]

(7) upon inclusion of items in the Exempt Goods List as well as future additions to the List;[90]

(8) with WAGPCo on maintenance standards in accordance with Schedule 9 of the IPA;[91]

(9) with WAGPCo on changes to the Approved Tariff Methodology in accordance with Schedule 7 of the IPA;[92]

Furthermore, the Authority is to take the following actions and decisions as part of its representative duties:

(1) Monitor compliance by WAGPCo of its obligations under the IPA;[93]

(2) Approve the Conceptual Design Package and the Front End Engineering Design Package as provided for in IPA;[94]

(3) Consult with WAGPCo on the text of WAGP Regulations when a notification by it for change and consult on the terms of any amendment thereto;[95]

(4) Consult with WAGPCo on proposals for amendment to the WAGP Enabling Act;[96]

(5) Resolve the consequences of a default of the IPA by WAGPCo;[97]

(6) Co-ordinate the administration of the Fiscal Laws. This includes giving Notices of Assessment, negotiating and agreeing interest rate deductibility mechanisms or approving the terms of loan agreements for interest rate deductibility purposes;[98]

(7) Act on behalf of the four countries respective Tax Authorities in respect of any proceedings brought by WAGPCo against any or all the countries before the WAGP Tribunal;[99]

(8) Report to the Committee of Ministers on the implementation by the four countries of their obligations under the Treaty and particularly

89 Art IV (2) (2)(a)(xii)
90 Art IV (2) (2)(a)(xxiv)
91 Art IV (2) (2)(a)(xxv)
92 Art IV (2) (2)(a)(xxvi)
93 Art IV (2) (2)(a)(ii)
94 Art IV (2) (2)(a)(iv)
95 Art IV (2) (2)(a)(ix)
96 Art IV (2) (2)(a)(xi)
97 Art IV (2) (2)(a)(xvi)
98 Art IV (2) (2)(a)(xvii)
99 Art IV (2) (2)(a)(xviii)

where it appears that a country or its Authority is failing to comply with the provisions of the Treaty or the WAGP Enabling Act to the detriment of WAGPCo, a Project Contractor, a Buyer, a Seller or a Shipper;[100]

(9) Carry out audits of WAGPCo pursuant to Clause 10 of the IPA;[101]

(10) Prepare and notify[102] WAGPCo of its funding requirements for the operation of the Authority and agree with the company on certain changes to its funding;[103]

(11) Discuss with WAGPCo and give it prior written permission to enter into Gas Transportation Agreements[104] in accordance with the Access Code;[105]

(12) Provide WAGPCo such approvals or consents as may be required by the IPA;[106]

(13) Establish and agree with WAGPCo the Certification System;[107]

(14) Make certain notifications as are specified in the IPA or the WAGP Regulations;[108]

(15) Agree with WAGPCo on a replacement index.[109]

(16) Intervene where there is a challenge to the Project Authorisations or Supplemental Authorisations by way of appearance and defence in any proceeding as well as an appeal against the decision of such proceedings.[110]

Under the facilitative functions the Authority is to do the following:[111]

(1) Facilitate the grant, renewal or extension of Project Authorisations and Supplemental Authorisations in accordance with Clauses 16 and 17 of the IPA;

(2) Receive, review, consult with the Technical Authorities and comment on Conceptual Design Package and the Front End Engineering Design Package in accordance with Schedule 17 of the IPA;

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100 Art IV (2) (2)(a)(xix)
101 Art IV (2) (2)(a)(xx)
102 As specified in Clauses 9.4(b), 9.4(c) and 9.4(i) of the IPA
103 Art IV (2) (2)(a)(xxi)
104 This apart from the Foundation Gas Transportation Agreements
105 Art IV (2) (2)(a)(xxii)
106 Art IV (2) (2)(a)(xxiii)
107 Art IV (2) (2)(a)(xxvii)
108 Art IV (2) (2)(a)(xxix)
109 Art IV (2) (2)(a)(xxx)
110 Art IV (2) (2)(a)(xxxi)
111 Article IV 2(2)(b)(i)-(ix)

(3) Receive, review, and respond to the draft and final Pipeline Development Plan and ay subsequent amendment thereto;

(4) Receive, review, and respond to the draft and final Environmental Impact Assessment and Environmental Management Plan, and co-ordinate and facilitate all necessary environmental approvals;

(5) Co-ordinate amendment to the Environmental Management Plan in accordance with Clause 19 and Schedule 2 of the IPA;

(6) Provide administrative services for the Fiscal Review Board and the WAGP Tribunal in accordance with the Rules of Procedure;

(7) Receive reports and notifications from WAGPCo as specified in the IPA or in the WAGP Regulations;

(8) Distribute the original and amended Emergence Response Plan; and

(9) Notify relevant agencies of the occurrence of an Emergency Condition.

Under the regulatory functions the Authority is to do the following:[112]

(1) Review and respond to WAGPCo's submissions associated with Approvals to Operate and grant Approvals to Operate in accordance with Clause 16.5 of the IPA and the WAGP Regulations;

(2) Enforce the WAGP Regulations and exercise the powers and responsibilities conferred on it by the said Regulations including among other things its power to inspect the design, construction and operation of the Pipeline System in accordance with Clauses16.5 and 22.8 of the IPA and the WAGP Regulations;

(3) Monitor the compliance of WAGPCo with the Access Code imposed by regulation made pursuant to Clause 26.7 of the IPA and enforce as well as exercise the powers and responsibilities conferred on it under the Access Code and those implementing regulations;

(4) Intervene and use its best endeavours to ensure the compliance by any of the four countries or its Authorities with the IPA or the WAGP Enabling Act where such country or its Authority has failed to comply to the detriment of a WAGP company. A Project Contractor, a Buyer, a Seller or Shipper; and

(5) Act as a mediator between WAGPCo and an aggrieved person who wishes to become a shipper.

All the above listed functions and powers of the Authority can be amended or supplemented by the Committee of Ministers, and this shall be by written instrument.[113]

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112 Article IV 2(2)(c)(i)-(v)

113 Article IV 2(3)

Decisions that relate to the terms of and approval of the Pipeline Development Plan,[114] notice of failure to comply with the Access Code, notice to remedy a breach of the IPA, Notice of Default, changes to the Approved Tariff Methodology with WAGPCo, notice of intention of acceptance of transfer of the Pipeline System following cessation of operation by WAGPCo are subject to the prior approval of the Board of Governors.[115] All the decisions, actions and proceedings of the Authority must be conducted in accordance with the Rules of Procedure.[116] These Rules must contain detailed rules and requirements governing the proceeding of the Authority, including public hearings if necessary.[117] Any decision taken by the Authority in respect of its functions must be in writing.[118] Similarly, the Authority is expected to exercise its functions in accordance with the principles of natural justice and in a manner consistent with the WAGP Treaty, the WAGP Enabling Act, the WAGP Regulations and the IPA.[119] Where any decision is to be taken and the Director General (DG) or any member of the Board of Governors has any direct personal financial interest in the matter the DG or such member is barred from participating in the deliberation on such matter.[120] The Authority is not allowed to offer, promise or give undue pecuniary or other advantage either directly or indirectly to any person or public official of the four countries in order that the official acts or otherwise in relation to the performance of official duties.[121] All the decisions of the Authority shall have full legal effect in the four countries as if it was made by the national government of the various countries.[122]

The Authority has a Board of Governors and a Director General (DG) who shall be the chief executive officer.

The Board of Governors is composed of four members with each member appointed by their respective Heads of State.[123]

The term of the Board is four years.[124] However, the first set of members are to be appointed by two of the four countries.[125] They shall serve for a term of two (2) years. Each member must have qualifications relevant to the activities of the

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114 Or it amendment
115 Article IV 3(1)
116 Article IV 3(2)
117 *ibid*
118 *ibid*
119 Article IV 3(3)
120 Article IV 3(4)
121 Article IV 3(5)
122 Article IV 3(6)
123 Article IV 5(1)
124 *ibid*
125 One would be from a French speaking country while the other would be from an English speaking country.

WAGP authority.[126] Members of the Board are allowed to have alternates.[127] The Board would be presided over by each member for a term of one (1) year. The alphabet of the names of the four countries would be used to determine the order of rotation of the chair.[128] The Board is to meet from time to time to.[129]

1. Consider recommendations to the Committee of Ministers on the appointment, revocation and replacement of the DG;
2. Give its prior consent to a decision or action of the DG in respect of the terms of and approval of the Pipeline Development Plan,[130] notice of failure to comply with the Access Code, notice to remedy a breach of the IPA, Notice of Default, changes to the Approved Tariff Methodology with WAGPCo, notice of intention of acceptance of transfer of the Pipeline System following cessation of operation by WAGPCo;
3. Consider recommendation to the Committee of Ministers in respect of any change of the location of headquarters of the Authority;
4. Approve the funding requirements of the Authority;
5. Determine the organisational structure of the Authority;
6. Consider the requests brought by WAGPCo and any of the four countries for review of the decisions and actions of the DG[131] that affect their respective rights under the Treaty or the IPA.

The meeting of the Board can be convened by any of its member or at the request of the DG or WAGPCo on any of the above listed matters.[132] The quorum for meetings is three (3) members or their alternate.[133] Each member has a vote.[134] The decisions are subject to a majority vote except decisions on the representative functions of the Authority, which have to be unanimous.[135] Vote by proxy is allowed.[136] In situations where there is an urgent matter referred to the Board and it is impossible for it to meet physically, members are allowed deliberate via any means of communications provided there is a written minute to that effect.[137]

126 Article IV 5(1)
127 Article IV 5(2)
128 Article IV 5(3)
129 Article IV 5(4)
130 Or it amendment
131 These must not be decisions, which the Board had already given its consent.
132 Article IV 5(5)
133 Article IV 5(6)
134 *ibid*
135 *ibid*
136 *ibid*
137 *ibid*

The DG is the legal representative of the Authority and his decisions and actions[138] bind the Authority.[139] He is directly responsible to the Board of Governors. He oversees the administrative structure of the Authority. Apart from this the DG performs the regulatory, facilitative and representative functions of the Authority.[140] The Committee of Ministers appoints the DG on the recommendation of the Board of Governors.[141] The term is for five (5) years.[142] Education, training and experience are the prerequisites taking into consideration before the appointment.[143] The DG may however be removed from office before the end of his term.[144] Where he is not removed before the end of his term, he may be granted a further term of five years.[145] In the event of revocation, resignation, non-renewal or death of the DG, another will be appointed for a term of five years.[146] Nevertheless, if the office of the DG suddenly becomes vacant, the Board is allowed to nominate an officer of the Authority to act pending the appointment of a new DG.[147] The DG must not have any financial interest in WAGPCo or any shipper, buyer, seller or Project contractor.[148] He must observe confidentiality of information he got in the course of his employment.[149] The DG and all the staff of the Authority enjoy privileges and immunities provided by the ECOWAS General Convention on Privileges and Immunities.[150]

WAGPCo[151] and the four countries[152] will fund the Authority.[153] Its office is in Ghana. The official languages of the Authority are French and English.[154] The Authority is to submit a report annually to the Committee of Ministers.[155] The WAGP Authority is structured as an international institution. It is independent of the four countries. The staffs enjoy diplomatic immunities.

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138 These must be within the scope of his power under the WAGP Treaty and Regulations.
139 Article IV 4(5)
140 Article IV 4(1)
141 Article IV 4(2)
142 *ibid*
143 *ibid*
144 Article IV 4(3)
145 *ibid*
146 *ibid*
147 Article IV (4)(1)
148 Article IV (6)(2)
149 *ibid*
150 Article IV (6)(3)
151 This is as provided for in Clause 9 of the IPA
152 This is from charge paid by the shippers on the pipeline.
153 Article IV (7)(1) & (2)
154 Article IV (9)
155 Article IV (10)(1) & (2)

The Treaty, however did not address the question liability of the Authority to any civil wrong against a third party.

WAGP Tribunal

The Treaty establishes a Tribunal.[156] It shall be an ad -hoc body that will be constituted only when required to hear an application for review within its jurisdiction.[157] It has exclusive jurisdiction to:[158]

1. Hear all appeals from any final decisions of the Fiscal Review Board brought by any applicable person or country;
2. Conduct and review matters brought by WAGPCo or any of the four countries on the decision of the Committee of Ministers or WAGP Authority on administrative issues and improper exercise of regulatory powers; and
3. Hear and determine applications brought by WAGPCo on claims that a country owes it an amount under the Fiscal Laws.

The jurisdiction of the Tribunal is restricted to fiscal and administrative matters. Furthermore, the jurisdiction of the Tribunal in 1 and 2 above is appellate in nature and not original, while its jurisdiction in 3 is original. The question is where does an appeal lie if a party is not satisfied with the decision of the Tribunal.

Moreover, the Tribunal does not appear to have jurisdiction on matters relating to the environment, tort, contract and human right abuse. The Treaty did not address which court will have jurisdiction on such matters. The Treaty in view of the international nature of the pipeline should have addressed the issue. The Treaty should have provided for a designated court for such matters or saddle the Tribunal with the responsibility of adjudicating on them.

The panel of the Tribunal consists of five (5) judges.[159] Four of the judges are to be appointed by each of the four countries from a higher court that has jurisdiction over tax and administrative matters.[160] The President of the ECOWAS Court of Justice is to appoint the fifth (5th) judge who shall be the presiding judge.[161] He must not be a national of any of the four countries.[162] The panel is required to be independent and impartial in the hearing as well as the determination of any matter before it.[163] Similarly the panel should not act as if it is representing any of the four countries or the ECOWAS states in any

156 Article VI (5)(1)
157 Article VI (5)(2)
158 Article VI (5)(3)
159 Article VI (5)(1)
160 *ibid*
161 *ibid*
162 *ibid*
163 Article VI (5)(2)

proceeding.[164] The Rules of Procedure of the Tribunal are to be drawn by the Committee of Ministers.[165] The Committee is also empowered to amend it.[166] The decision of the Tribunal is final and binding on the parties to its proceedings.[167] The decisions can also be enforced in any of the four countries.[168] The WAGP Authority is to provide administrative support for the Tribunal.[169] It is also to issue notices to the parties (including notice to itself).[170]This appears clumsy in the sense that it does not guarantee the independence of the Tribunal in matters that relate to it. Moreover the Authority can decide to suppress information that might be adverse it in any proceeding. It may also refuse to deliver notice to the parties. This is important in view of the fact that the Tribunal is *ad hoc* and not permanent. In order to ensure the independence of the Tribunal, it may be necessary to separate the administrative unit of the Tribunal from the Authority. This will enable it to function without bias.

Fiscal Review Board

The Treaty establishes a Fiscal Review Board,[171] which is an ad hoc body to be constituted only when required to hear an application for review of matters within its jurisdiction.[172]The Board has exclusive jurisdiction to hear applications for review of a decision or action or inaction of a country[173], a Tax Authority, any other State Authority or WAGP Authority in relation to the application of the Agreed Fiscal Regime,[174] including specifically:[175]

(a) applications filed for review of any Assessment or any amended or altered Assessment issued by any country or failure of any of the four countries to issue an amended Assessment following the submission of amended Returns;

(b) applications filed for review of any imposition of a withholding or deductions contrary to paragraphs B.50 or B.51 of Schedule 8 of the IPA or of failure of any country to treat any withholding in accordance with paragraph B.52 of Schedule 8 of the IPA;

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164 *ibid*
165 Article VI (10)
166 *ibid*
167 Article VI (6)(2)
168 *ibid*
169 Article VI (7)
170 *ibid*
171 Article VI (1)(1)
172 Article VI (1)(2)
173 From any of the four countries
174 This includes the Non-WAGP Regime matters which are modified by the implementation of the Agreed Fiscal Regime
175 Article VI (1)(3)

(c) applications for review of any refund of VAT by any county or any refusal by any country to make a repayment of VAT or any requirement of a country that VAT be paid or charged, or any refusal in whole or in part by any country to allow a credit for Tax in respect of VAT paid and not refunded;

(d) applications filed for the review of any imposition of any customs duties pursuant to Part D of Schedule 8 of the IPA by any country;

(e) applications filed for review of any imposition of any Tax by any country contrary to the provisions of the Fiscal Laws or the failure of a country or WAGP Authority to comply with the Fiscal Laws or to correctly apply the Non-WAGP Regime as modified by the implementation of the Agreed Fiscal Regime; and

(f) applications for review of any imposition of any penalty under Part F of Schedule 8 of the IPA or any demand for interest by any Tax Authority under paragraph B. 49 of Schedule 8 of the IPA or any refusal of any Tax Authority or country to pay interest pursuant to paragraph B. 49 of Schedule 8 of the IPA.

The heads of the Tax Authorities of the four countries or their representatives shall compose the Fiscal Review Board.[176] It shall be constituted whenever the WAGP Authority receives a notice for review.[177] The members of the Board are to conduct the hearing in an independent and impartial manner.[178]

An appeal on the decision of the Fiscal Board to the WAPG Tribunal shall be only on point of law and not of facts.[179]

The IPA enjoins each of the four countries not to exercise its right of appeal on the decision of the Fiscal Board or WAPG Tribunal in its domestic court.[180] This provision appears to oust the jurisdiction of the local court on fiscal matters relating to WAGP. However, it appears that any matter that is not fiscal can be instituted in a domestic court.[181]

Committee of Ministers

The Treaty establishes a Committee of Ministers of the four countries.[182]The Committee is mandated to invite the Executive Secretary of ECOWAS to attend its meetings as an observer.[183] He has no voting right and his presence does not

176 Article VI 2(1)
177 *ibid*
178 Article VI 2(2)
179 Para.50 (1) of the First Schedule to the West African Gas Pipeline Act 2005
180 Clause 29.10 of the IPA
181 *ibid*
182 Article X (1)
183 *ibid*

count for the purpose of quorum.[184] The Committee is to meet at such times and places as it may determine but shall be at the request of any of its members, the Authority or the WAGPCo.[185] It means that the Committee has a flexible period of meeting and not a fixed one. The Committee has the following functions:[186]

a. to consider the report of the WAGP Authority on the operation and implementation of the WAGP Treaty and the IPA;

b. to agree on any further measures which may be necessary or expedient to achieve the objectives of the Treaty;

c. to discuss any matters arising from the implementation of the Treaty and the IPA;

d. to endeavour to settle any dispute that arises under the Treaty and the IPA;

e. to review decisions of the Authority;

f. to amend or supplement by written the powers and functions of the WAGP Authority; and

g. upon request of any of the four countries deliberate on:

(i) any matter that relates to the interpretation or implementation of the Treaty, the Enabling Legislation or the IPA;

(ii) the consequences of any measures announced or taken which do or could substantially affect the construction or the operation of the WAGP;

(iii) any action proposed in relation to any rights or obligations of the four countries under the Treaty, the Enabling Legislation or the IPA; and

(iv) the future of the WAGP and its continued development and operations, in the event of the termination of the IPA for any reason.

The Treaty did not indicate who is to service the meeting like a secretary. It also did not provide for who will chair the meetings and the mode of electing one. There is no provision on the Rule of procedure to be adopted at the meetings. In addition the role of the Executive Secretary of ECOWAS as an Observer is not indicated.

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184 *ibid*
185 Article X (4)(1)
186 Article X (2)

ENVIRONMENTAL ISSUES

There is no doubt that the pipeline will generate significant long-term positive impacts on air quality in Nigeria. Specifically, it would reduce gas flaring in the country. Nevertheless, there might be possibilities of adverse impacts associated with the pipeline. The environmental impacts of the project include likely impacts of the pipeline on the terrestrial and marine ecosystems it crosses. Pipeline can break open. When this happens, if the gas leaks out it can explode and cause fire. It can equally poison water, crops, and land along its path. It will also pollute the air. Where people are near the leakage they may experience tiredness, dizziness, headaches, nausea as well as vomiting, they may find it difficult to breath. This can result in loss of consciousness, and death can occur. Accordingly, it is often advisable to ensure that a pipeline does not pass through densely populated areas. If this is inevitable it must be audited every year and checked for safety. As mentioned earlier the WAGP will traverse the sea. Gas spills on water are potentially more dangerous than spills on land because it may spread much more quickly over water and is not promptly contained. Consequently, it is believed that an accident resulting in a major gas spill could be hazardous to the marine environment along the pipeline route. Moreover, the pipeline is vulnerable to vandalisation. It might be physically attacked with explosives or through other means. In recent time, Nigeria has experienced a lot of pipeline vandalisation. This shows that the WAGP project could be vulnerable to physical attack in a variety of ways. The pipeline can either be destroyed or damaged. The attack can also be on the electricity grids and communications networks. Such attack could in turn affect the pipeline control and safety systems. The environmental damage associated with gas spill is not confined to fire and the freezing impacts near the spill. It also pollutes the three media. In January 2004 a gas accident at an Algeria's Skikda LNG terminal killed or injured over 100 workers.[187]

The common causes of pipeline accidents identified are[188]: anomalies in the pipe not detected or not acted upon, operator inattention or error, computer system malfunction, shut-off capability insufficient or improperly deployed, and leak detection insufficient. It believed that these causes would be avoided in the WAGP.

In order to ensure that the pipeline does not affect the environment adversely, the IPA provides that WAGPCo should prepare and submit to the WAGP Authority a preliminary version of the Environmental Impact Assessment (EIA), which must include without limitation the following:[189]

(a) the identification of environmental values potentially at risk;

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187 Junnola, Jill *et al.* "Fatal Explosion Rocks Algeria's Skikda LNG Complex." *Oil Daily*. Jan. 21, 2004. p6.

188 http://commerce.senate.gov/hearings/0313asm2.pdf visited on 15/12/2004

189 Clause 19.1 of the IPA

(b) the potential impact of the Project on such values;

(c) a baseline study (including the identification of pre-existing environmental liabilities and risks, both actual and contingent);

(d) potential mitigation measures;

(e) an alternatives discussion; and

(f) the assessment necessary to develop the Environmental Management Plan.

The EIA should address each State individually and should also consider the overall impact of the Project on the environment, focussing on cross-border aspects and issues of common interest.[190] Similarly, it provices that WAGPCo should submit a preliminary Environmental Management Plan (EMP), which must include without limitation the following:[191]

(a) a description as to how the impact mitigation measures proposed in the draft Environmental Impact Assessment will be managed in practice;

(b) a description as to how the Project will be managed and operated to maintain compliance with applicable legal requirements, to avoid or minimise adverse environmental, safety and socio-economic effects, and to enhance the environmental, safety and socio-economic aspects of the Project;

(c) a plan to monitor relevant aspects and impacts of the Project as well as to evaluate the effectiveness of mitigation measures and to adjust them as needed throughout the construction and operation of the Pipeline System;

(d) a description of the procedures to periodically revise and update the Environmental Management Plan; and

(e) an assessment of the impacts of the Project in each State and also the overall impact of the Project.

The E IA and EMP to be prepared and submitted by WAGPCo must be consistent with:[192]

(a) the highest standard of contemporary practice used in similar conditions for the construction and operation of high pressure Natural Gas pipelines in order to protect the environment;

(b) internationally acceptable industry standards and recognised good practice applicable to high pressure Natural Gas pipelines; and

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190 *ibid*

191 Clause 19.2 of the IPA

192 Clause 19.8 of the IPA

(c) the standards used by export credit agencies and international finance institutions in similar conditions for the construction and operation of high pressure Natural Gas pipelines in order to protect the environment, to the extent the Company would need to comply with such standards.

The WAGP Authority on its part is required to work with all of the Technical Authorities.[193] Each State Environmental Protection Authority is required to work as appropriate with each Technical Authority in its country, to ensure consistency between the permitting process and the environmental approval process and to suitably address impacts relevant to each organisation.[194] If conflicts should arise between the requirements of a State Environmental Protection Authority and the requirements of a Technical Authority, the State Authorities concerned shall rectify these conflicts within 20 days of them being pointed out in writing by WAGPCo.[195] The State Environmental Protection Authorities will participate in activities conducted by WAGPCo in conjunction with the Technical Authorities to address common issues and to efficiently advance the approval processes.[196]

THE ADVANTAGES OF THE PROJECT

The project will no doubt improve energy supply in the four countries. The pipeline will bring about transfer technology, both in its construction and operation.

It will also attract foreign direct investment into the four countries. Similarly, it will promote industrialisation since it will increase power generation of the sub-region. It will break down artificial barriers to the integration of the sub-region, stimulate private sector investment, and contribute to job creation. The gas supply would boost economic development, leading to the establishment of new power plants and industries. Another distinguishing feature of the project is that the ownership structure reflects public/private sector partnership that would create opportunities and provide cost effective energy for West Africa.

This pipeline project will engender benefits to Nigeria. It will help put out the gas flaring in the country. It will reduce waste of valuable resources and generate new revenue for Nigeria. It will help to reduce greenhouse emissions. It will attract private-sector investment. Another reason why the West African Gas Pipeline is a model project is the conversion of natural resources found within a region for its value and development. In addition, it will keep natural resources within the continent as a basis for creating new value-added businesses and industries. It will stimulate foreign trade.

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193 Clause 19.4 of the IPA
194 *ibid*
195 *ibid*
196 *ibid*

THE PROBLEMS OF THE PROJECT

The project no doubt would promote economic development and integration but there are however some likely problems that can emanate, which may affect the success of the project. One common problem is political instability. Although it appears to have reduced, political instability has affected the level of development in the four countries involved in the project. Just recently a political crisis arose in Togo after the death of President Gnassingbe Eyadema. But for the intervention of the African Union it would have degenerated into a civil war. In addition, a change in government is another factor that can affect the project. A new government may adopt different policy, and therefore not be committed to the WAGP project. Funding is also a factor that can affect the project. Even though the Treaty makes provisions for funding and commits each country to contribute, default in contributing or delay may slow down the pace of the project.

CONCLUSION

This paper has examined the legal regime for the West African Gas Pipeline project as well as the institutional framework. This was done in the light of some issues that arise in the construction and operation of a cross border pipeline. Such issues entail the legal regime, ownership and operation structures, institutional framework, financial and fiscal matters and inter-governmental agreement. It reveals that in order to ensure the success of this pipeline project a unique legal regime has been established, which has created a uniform regulatory framework for the pipeline in the four countries. This has been done through the signing of a Treaty between the countries and an Implementation Project Agreement (IPA). Another feature is the establishment of a transnational institution to carry out administrative functions on behalf of the countries in respect of the pipeline project. In addition, the four countries have ratified and enacted into law the Treaty. This shows a level of commitment by the countries to the success of the project. Moreover, the IPA provides for all the detail plans for the execution of the project. It is remarkable to note that the legal regime has provided for regulations in areas where state parties are deficient. Another distinctive feature of the pipeline project is the establishment of institutional frameworks that would see to the construction and operation of the project. It has incorporated an international company with public corporations and private companies as shareholders. It has established an international body to oversee the project and execute the decisions of state parties on the project. This body will act as a conduit pipe between the WAGPCo and the states. It has also set up a judicial body to determine disputes in relation to fiscal and administrative matters. Moreover the legal regime has established a fiscal system for the project. It also has established the appropriate procedure for setting of tariffs. It has indeed taken environmental issues into consideration by setting standards to be complied with by WAGPCo. The legal regime appears to have covered some problems that usually arise in cross border pipeline arrangement and has tried to ensure a uniform legal regime in the four countries. It is however, too early to determine whether the legal regime is adequate or not since the project is still at its infancy.

One thing that does not appear to have been covered in the legal regime is the jurisdiction of the court to hear and determine disputes between the WAGPCo, WAGP Authority and shippers, buyers as well as individuals and corporate bodies in any of the four counties. Besides, political instability in any four countries can adversely affect the success of the project. This in itself creates a lot of uncertainties as regards its success or failure.

NOTES AND COMMENTS

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INTERNATIONAL LAW: WHETHER A LAW OR NOT?

Anupama Goel*

> The word 'law' stimulates in us the attitude of obedience to authoritative rules that we have come through our upbringing to associate with the idea of municipal law. Change the word for some other and magic evaporated...
>
> G.L. Williams[1]

I. INTRODUCTION

There has always been a need to enhance the prestige of international law by calling in aid the magic of word 'law', especially in the traditional sense of the term. Law in its most general and comprehensive sense signifies a rule of action and is applied indiscriminately to all kinds of action whether animate or inanimate, rational or irrational[2]. It is a very wide term with many connotations and meanings given to it by different jurists at different times, may be due to which there are two schools of thoughts regarding the nature of international law. According to the traditional view, the international law is not a 'law' and it is a kind of residual grab bag of various old customs, a number of treaties, some decisions of the World Court and a more numerous collection of national decisions referring to international law, some U.N. Resolutions and a loose collection of writings of publicists. The other contemporary school of thought is that international law is a 'proper' law. It has grown out of the interaction of states over the years. It reflects their mutual accommodation within the international system. It is law that is deeply rooted in the self interest of the aggregate of states even if, at any point in time, it is not in the self interest of any one of them.[3]

Due to spurt of changes and modifications in the concept and perception of international law in recent times after the advent of United Nations and many other international organizations, institutions and specialized agencies working for and reaching up to individuals, the thought of first school i.e. the traditional school seems to have become obsolete and contemporary approach[4] seems gaining ground due to various reasons which have been discussed in detail in this paper.

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1 G.L. Williams, "International Law and the Controversy Concerning the word 'Law' "in *Philosophy, Politics and Society*, p.143.

2 Granville William (ed.) *Salmond on Jurisprudence*, (1957), p.20.

3 For details see, Anthony D' Amato, *International Law*, (1995),pp.1-26.

4 For the sake of convenience and clarity, international law has been divided into two, old international law and modern international law of the preceding century and on ward.

To substantiate that the international law is a proper law, the whole conception of 'international law' can be studied and analysed mainly on these aspects – applicability and acceptability; existence and entitlement; enforcement and effectiveness.

II. APPLICABILITY AND ACCEPTABILITY:

International law is primarily a law for the international conduct of states. It comprises a system of rules and principles that govern the international relations between sovereign states and other institutional subjects of international law, such as international organizations,[5] inter-governmental and non-governmental organizations,[6] territorial or political units,[7] regional unions such as European, African or American organizations [8] and most importantly, the individuals.[9]

The juridical origin of international law lies in practical necessity. *Ubi societas, ubi jus* , where there is society there is law. It can be argued that 'law is the hallmark of any political community which exists for the common good. Law is necessary for the society to function and, because it is necessary, it is *ex-hypothesi* binding. Therefore, because international society is a community of interacting and interdependent states, it also needs rules governing its life. These are the rules of international law which provide a set of stable, orderly and predictable principles by which the society can operate.[10] The most cogent argument for the acceptability of international law as a system of law is that members of the international community recognize that there exists a body of rules binding upon them as law. States believe international law exists. Even those pursuing potentially unlawful action do not deny the existence and relevance of international law.[11] As Louis Henkin has put it, "Almost all nations

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5 In the case of *Concerning Reparation for Injuries Suffered in the Service of the United Nations*, the International Court of Justice affirmed the 'legal personality' of United Nations. UN was entitled to claim also against a non-member state as it owed duties prescribed by general international law.

6 Non-Governmental organizations have been accorded certain limited rights on the international plane, such as rights to attend as observers in meetings etc.

7 These units to a limited extent, may be directly the subjects of a rights and duties under international law, for e.g. rights and duties of political communities recognized as belligerents and insurgents.

8 These organizations or communities have personality distinct from that of member states.

9 Many treaty provisions regarding human rights and fundamental freedoms apply directly to individuals, who may in certain circumstances institute proceedings before the international body to secure the observance of such rights, even against the state of which they are nationals. See , ICCPR, CRC, CEDAW, CAT etc.

10 *Supra* note 3, at 17.

11 Iraq invaded Kuwait in 1990, Tanzania invaded Uganda in 1978/79 or U.S. invaded Iraq in 2003 or the war crimes committed in Bosnia and Rwanda. The great majority of states regarded this action as 'unlawful', not merely 'immoral' or 'unacceptable.' Similarly, the violators do not dismiss international law as

observe almost all principles of International law and almost all of their obligations almost all of the time"[12]

Law has a self-perpetuating quality. When it is accepted that the principles governing the activities of a society amount to 'Law, as is the case with international Law, the rules of that system assume a validity and force all of their own. For example, if a state is presented with a choice of action, one which is legal and one which is not, it will take pressing reasons for the state to act consciously in violation of 'the law. Breaking international Law, like breaking national law, is not a matter to be taken lightly and certainly it is not the preferred course of conduct for a state. There is, in other words, a psychological barrier against breaking international law simply because it is law. If a state does embark on such a course of conduct its action will be described as unlawful' or 'illegal', and these are regarded as more powerful forms of criticism than behaviour which is simply 'immoral' or 'unacceptable'. The psychological force of international rules as a system of law is a reason in itself why international law is accepted and obeyed.[13] It is practised on a daily basis as 'law habit' in the foreign offices, national courts and other governmental organs of states as well as in international organizations. The legal character of international law is also acknowledged in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States,1970 which includes the duty of every state to fulfill in good faith its obligations under the generally recognized principles and rules of international law.

III. EXISTENCE AND ENTITLEMENT:

Some jurists have said that international law ought to be classified as a branch of ethics rather than of law. The question is partly one of words and sounds only of academic importance because it depends on the definition of law which we choose to adopt. in any case it does not affect the value of the subject one way or the other, though those who deny the legal character of international law often speak as though "ethical" were a depreciatory epithet.[14]

To prove and justify that international law exists as 'law', different theories and definitions of law from various schools have been briefly mentioned here. Hugo Grotius, a natural law exponent and 'father of international law', was

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irrelevant but seek instead to justify the invasion as lawful under the legal rules concerning collective security and use of force.

12 Louis Henkin, *How Nations Behave*, (1979), p.47.

13 The Director of the Yale Institute of International Studies has recently remarked that those 'who make light of treaty commitments in general seem to ignore the fact that the vast majority of such engagements are continuously, honestly, and regularly observed even under adverse conditions and at considerable inconvenience to the parties...'The record proves that there is a 'law habit' in international relations. For details see, Nantwi, *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law* (1996), Ch.IV. quoted in D.J. Harris, *Cases and Materials on International Law*, (2004).p.2.

14 D.J. Harris, *Cases and Materials on International Law*, (2004).p.2.

of the view that man always desires a peaceful society for which principles of natural law are derived by man's intellect. These principles of reason can be deduced in two different ways : *a priori*, by examining anything in relation to the rational and social nature of man, and *a posteriori*, by examining the acceptance of these principles among the nations.[15] According to Grotius, legal authority comes from the people and not from the arbitrary will of a ruler. He uses the construction of 'social contract' for a two fold purpose, internally for the justification of the absolute duty of obedience of the people to the government internationally to create the basis for legally binding and stable relation among the states.[16] Main concern of Grotius was the stability and orderliness of international society. His social contract theory served this purpose, firstly by stressing against medieval conception, the equivalence of different forms of government established by different peoples, secondly by freeing the ruler or the government which conducts foreign relations from any internal restriction or fetters and thirdly by stressing the absolute force of a promise once given.[17]

Much before Grotus Thomas Acquinas defined law as 'an ordinance of reason for the common good made by him who has the care of the community and promulgated.'[18] Since the world is ruled by divine providence, the whole community of the universe is governed by divine reason. Divine law is supreme. Natural law is a part of divine law, that part which reveals itself in natural reason. Man, as a reasonable being applies this part of divine law to human affairs, and he can thus distinguish between good and evil. It is from the principles of eternal law as revealed in natural law, than all human law derives. According to Thomas Acquinas, all law enacted by human authority, that is positive law must keep within the limits of *lex divina*, the positive law enacted by God Himself for all mankind. Human law is part and parcel of divine government. there is no schism between faith and reason, on the contrary, reason is partial manifestation of faith. The state is a national institution, born from elementary social needs of men.[19]

Natural law theories have greatly influenced the positive law and modified it. That law is an instrument not only of social contract but of social progress as well is true even for international law which regulating relations between states as its subjects unlike individuals in municipal law.

According to early exponents of analytical positivism International Law is not a law in the proper sense of the term. According to **John Austin** of the Analytical School. law is 'a rule laid down for the guidance of an intelligent being by an intelligent being having power over him'. According to him the positive law or 'law properly so called' is characterized by four elements' command, sanction, duty and sovereignty. The science of jurisprudence is concerned with positive

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15 W. Friedmann, *Legal Theory*, (1967), p.11.
16 *Id.* at 117-120.
17 *Ibid.*
18 Thomas Acquinas, *Summa Theological*, Part 2, Vol. 8. p.8 (English ed. 1927).
19 *Supra* note 14 at 108-109.

laws or with 'laws strictly so called', as considered without regard to their goodness or badness.[20] Every positive law, or every law simply and strictly so called, is set by a sovereign or a sovereign body of persons for to a member or members of independent political society wherein that person or body is sovereign or supreme.[21] A law in the proper sense of the term, is therefore a general rule of human action, taking cognizance only of external acts and enforced by a determinate authority. Similarly, Holland accepted the command theory in principle and general rule of human action taking cognizance only of external acts, enforced by a determinate authority. [22]

According to Kelsen, the science of law is a hierarchy of normative relations traceable to some fundamental 'Grundnorm', not to a sequence of causes and effects, like natural science. This produces the essential difference between 'ought' and 'is'. (*sollen* and *sein*) He defined law as de-psychologised command... a rule expressing the fact that somebody ought to act in a certain way. The operation of the sanctions depends on the operation of other rules of law.[23]

According to H.L.A. Hart, a great jurist of the present century who combines positivism with natural law social acceptance predominates in primitive societies and organized authority predominates in more developed societies. This distinction is expressed in terms of a contract between primary rules of obligation and secondary rules of recognition. The main defects of rules of behaviour controlling primitive society are their uncertainty, their static character and their inefficiency. The remedy for the uncertainty of a regime of primary rules is 'the rule of recognition, which means acknowledgement of the rules of behaviour as authoritative, i.e. 'as a proper way of disposing of doubts as to the existence of the rule'. The remedy for the static quality of primary rules consists in 'rules of change' i.e. some form of empowering an individual or a group of persons to introduce new primary rules for the conduct of the life of the group. The remedy for inefficiency consists of secondary rules empowering individuals to make authoritative determination of the question whether on a particular occasion a primary rule has been broken.[24]

Both historically and logically, the primary rules of obligation generally give way to secondary rules, in which the form of recognition, changes and adjudication is systematized, usually through the centralization of authority, the articulation of definite procedures for the making application and execution of law, and a system of official sanctions. In the contemporary world, international

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20 John Austin, *Lectures on Jurisprudence*, (1876),p.176.

21 *Id.* at 225. (The sovereign, according to Austin is a determinate human superior, not in a habit of obedience to a life superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in the society, and the society (including the superior) is a society political and independent.

22 Holland, *Elements of Jurisprudence*, (1924), p. 41.

23 R.W.M.Dias, *Jurisprudence*, (1985), p. 361.

24 H.L.A. Hart, *The Concept of Law*, (1961), p. 91.

law is the conspicuous illustration of a system of ' primary' rules. Hart sees the basis of obligation in international law as that of all customary law, in the fact that the rule 'is observed, not because it has been consented to, but because it is believed to be binding ....'[25]

Let us now consider the legal nature of international law from the perspective of Historical School of jurisprudence according to which law is not the command of the sovereign but is predominantly customary in nature. According to Savigny, a jurist from Historical School, source of law is *volksgeist* i.e. popular consciousness. Law grows with the growth, and strengthens with the strength of the people. It is developed by custom and popular faith. In all societies, it is found already established like their language, manners and political organization having their own character. Law, language, custom and government have no separate existence. There is but one force and power in people and underlies all these institutions.[26]

About the development of law, Savigny says that in the earlier stages law develops spontaneously according to the principle of internal necessity. After the society has reached a certain stage of civilization, the different sides of national activities, hitherto developing as a whole, divide in different branches and are taken up by specialists and jurists, linguists and scientists. The relation of law to the general life of the people might be called its political element, its connection with the justice science, its technical element. The correlation of these two elements varies with the element of life of a people but both participate more or less in the development of law.[27]

Henry Maine, a jurists from Anthropological School, traced out the institution of law from static societies to progressive societies. According to him, in static societies the method of law-making and the development of their legal institutions do not proceed a certain stage. They move from law-making by personal command, issuing from rulers believed to be acting under divine inspiration to a gradual crystallization of habits into custom. Concurrently with this, the theocratic power of the original royal law makers weakens and gives way to the dominion of an aristocratic minority, which formulates the legal customs. The epoch of customary law, and of its custody by a privileged order is followed by an era of codes, such as Solan's Attic Code or the Twelve Tables of Rome. Few progressive societies move beyond the phase of codes and status relationships because they are propelled by a conscious desire to improve and develop. Three agents of legal development in sequence are legal fiction, equity and legislative. By the use of legal fiction, the law is in fact, changed in accordance with changing needs. Equity is used to modify the law, " as a set of principles invested with a higher sacredness than those of original law." Finally,

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[25] *Supra* note 14 at 288.
[26] For details see, *id.* at 269-293.
[27] *Supra* note 17 at 28.

legislative represents the most direct comprehensive and systematic method of law making, expressive of an entracted law-making power of the state.[28]

As international law, both traditional and contemporary consists of customary principles based upon the behavioural pattern and social, economic and political needs of states and is still evolving, its nature comes out to be of 'proper law', from the standpoint of exponents of Historical and Anthropological School.

Kohler defined law as the standard of conduct, which is consequence of the inner impulse that urges men towards a reasonable form of life, emanates from the whole, and is forced upon the individual.

Roscoe Pound, a Sociological School jurist described that the cardinal task of law is 'social engineering' which means a balance between the competing interests[29] in the society. Pound's approach to law considers law as means to social end and an instrument in social development. Such a classification greatly helps to make inarticulate provides articulate, to make legislator as well as the teacher and practitioner of law conscious of the principles and values involved in any particular issue. It is thus an important aid in linking of principle and practice.[30]

Pound concentrated more on the functional aspect of law. According to him law is a social institution to satisfy social wants, the claims and demands involved in the existence of civilized society with the least friction and waste. The end of law should be to satisfy maximum of wants with minimum friction. It is duty of law to make a 'valuation of interests' and to strike a balance between stability and change.[31]

Duguit's concept of 'social solidarity' depended on inter-dependence of men. There are common needs of individuals which are satisfied by mutual assistance and some diverse needs are satisfied by the exchange of services. Therefore, division of labour is the most important fact of social cohesion. Social solidarity is a fact and is necessary for social life.[32]

Therefore, it can be seen that regarding the existence and entitlement of international law as 'law', the difficulty arises only when it is defined on the basis of Analytical School as jurists of this School analyse law in perfect form on the basis of its constituents. Moreover, during Austin's time, international law existed in the form of customary rules and international treaties, enforcement mechanism etc. were unknown and therefore, he treated international law as a set of moral rules only. In the present century, international legislation by means of

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28 *Supra* note 14 at 215-216.

29 All kinds of private, public and social interests which need to be satisfied have been enumerated by Pound.

30 For details see, Roscoe Pound, *Interpretation of Legal History*, Chap.7, quoted in *Supra* note 14 at 336.

31 *Supra* note 14 at 339.

32 *Supra* note 17 at 47.

international conferences or through existing international organs is practica , settled unlike emanating in the form of 'edicts' from despotic sovereign as contemplated by Austin.[33]

Therefore, due to the nascent stage of international law during the perioc of positivism, problems regarding its constituent elements arise. But if we consider, international law on the basis of other Schools, it comes out to be a 'proper law' as the premise of each of these Schools is quite different, from that of analytical school of jurisprudence. Thus, International law is a part of natural law similarly as that of municipal law, it is based on customs as per Historical School and its main objective is to maintain international peace and security which is the basic premise of any law from the point of view the sociological school of Jurisprudence.

IV. ENFORCEMENT AND EFFECTIVENESS:

Effectiveness of international law lies in expediency and mutuality and the great majority of rules of international law are observed by nations without actual compulsion, for it is generally in the interest of all nations concerned to honour their obligations under international law.[34]The real foundation of the authority of international law resides in the fact that the states making up the international society recognize it as binding upon them, and, moreover, as a system that *ipso facto* binds them as members of that society, irrespective of their individual will.[35]

Many jurists claim that the hallmark of any system of law is that its rules are capable of being enforced against malefactors. Consequently, one of the most frequent arguments used against the legal nature of international law is that it is not generally enforceable. Enforcement is the hallmark of law is the argument which relies on early conceptions of law and also of the philosophy of law itself. When we consider what law is, we soon realize. It is not a system of "might makes right" in the sense that the state constantly has to compel people, at gunpoint, to behave in a certain way. The rules are obeyed not out of fear of the state's power, but because the rules by and large are perceived to be right, just, or appropriate. No state could possibly compel people to obey all these rules at gunpoint. As Roger Fisher observed, much of what we call 'law' in the domestic context is also unenforceable.[36]

The fact that some states disobey periodically some rules of international law does not itself mean that those rules are not rules of "law" because even in domestic society some people (e.g criminals) break the law from time to time. Moreover, lack of enforcement measures may be true for traditional international law, but modern international law possesses many enforcement measures sans

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33 For details see, J.G. Starke, *Introduction to International Law*, (1984), p.18.

34 Morgenthau, *Politics Among Nations*, (1985), pp.312-313.

35 Fitzmaurice, "The Foundations of the Authority of International Law and the Problem of Enforcement", *Modern Law Review*, 19,(1956), pp. 8-9.

36 *Supra* note 3, at 1-3.

even a system of institutionalized enforcement. The absence of 'police force' or compulsory court of general competence does not mean that international law is an impotent system of law.

Modern international law comprises a number of methods of enforcement in the form of legal and extra-legal sanctions. The techniques may be less than perfect, but can be seen to be evolving in accordance with developments within the international community.[37]

Problems within international law are capable of legal analysis and methods of enforcement do exist. International law has a considerable number of methods of dispute resolution which involve examining the evidence and finding the facts in a manner not unlike those operating in municipal law.[38] Most legal systems provide for the use of forceful sanctions or penalties against malefactors. Under the UN Charter, the Security Council may resort to provisional measures or enforcement action against a state when its action poses a threat to the peace, or constitutes an act of aggression or breach of the peace.[39]

Moreover, there are various procedures for the settlement of disputes by judicial means. There is International Court of Justice (ICJ) for states being the principal judicial organ of the United Nations and the newly formed International Criminal Court for dealing with serious violations of international law by Individuals. Moreover, while a state cannot be compelled to use the ICJ for the resolution of a legal dispute, if a matter is referred to it, its award is binding on the parties and must be carried out. In this sense, the ICJ is primarily concerned with the enforcement of International rights and duties, even though the procedure by which states can be compelled to carry out awards of the court is very limited.[40]

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37 John O' Brien, *International Law*, (2001), p.38

38 Conventional peaceful methods of dispute resolution mentioned in Art 33(1) of the U.N. Charter are mediation, inquiry, conciliation, arbitration, judicial resolution in municipal courts or before the ICJ, through the offices of the United Nations or through the regional agencies etc.

39 Under Chapter VII of UN Charter, enforcement action authorized by resolution of the Council comprises military action. For e.g., as in Korea (1950), against Iraq (1990-91) and as authorized (but barely used) against Indonesia over East Timor (1999-2000); or economic sanctions, as with the trading restrictions and embargoes against South Africa (1977) and Serbia/Montenegro (1992); or other similar measures, be they diplomatic, political or social, such as mandatory severance of air links with Libya (as a result of the Lockerbie incident (1992-1993)

40 Such compulsion is by reference to the Security Council under Art. 94 of U.N. Charter.ICJ decision in the Lockerbie case (*Libyan Arab Jamahiriya* v. *U.K. and U.S.* (1992 ICJ Rep para. 22), where Libya had applied to the court for the indication of interim measures of protection (similar to temporary injunctions) because of alleged threats made by the UK and US as a response to allegations that Libyan nationals were responsible for the destruction of aircraft over Lockerbie in 1988. During the hearing of Libya's application, the Security Council adopted enforcement measures and the court took the view that it was bound to

In recent years International law has witnessed the growth of specialized judicial institutions and *ad-hoc* tribunals concerned with discrete issues of international law. The Iran-US-Claims Tribunal for the judicial settlement of inter-state disputes between U.S. and Iran (1979) and the Yugoslavia and Rwanda War Crimes Tribunals reflects the growing importance of individuals as subjects of international legal disputes. Both the Yugoslavia and the Rwanda tribunals have tried, convicted and sentenced individuals and the ICC reflects the growing importance and effectiveness of international disputes resolution mechanism.

National courts may also decide a substantive question of international law, which will then be binding on the parties. Moreover, awards of domestic tribunals, even if not voluntarily complied with, may be enforced by the normal enforcement machinery of the national legal system, subject only to certain immunities which foreign states enjoy. Again, in practice, such awards are seldom ignored because of the effect the neglect of such law and would have on the relations between the state of jurisdiction and the state against whom the order was made. Some rules of international law are enforced by becoming part of a national legal system through an act of incorporation. In these circumstances the sanctions available do not differ greatly from those available in respect of municipal law.[41]

Another method of enforcing legal obligations is to ensure that any violation results in the loss of corresponding legal rights and privileges. An individual state may take action to suspend rights and privileges enjoyed by the offending state; this may take the form of suspending diplomatic relations[42] or downgrading the level of representation or in appropriate cases, treaty obligations may also be suspended.[43] In this era of globalization, when the whole world is squeezing, various kinds of sanctions and implementation measures under international law are evolving with full force and vigour so as to ensure better and smooth relations between states and other entities of international law.

V. CONCLUSIONS:

International law is in a state of transition and evolution. Many principles which held good at the beginning of the 20th Century or indeed which held good

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dismiss Libya's claim because of the mandatory Council resolution which decisively characterized Libya's conduct as a threat to international peace (SC Res. 748).

41 J.B. Scott, "The Legal Nature of International Law", AJIL 1(1907) 831.

42 For e.g., United Kingdom broke diplomatic relations with Argentina after its invasion of the Falkland islands (1982), the United States froze Iranian assets after the unlawful seizure of its embassy in Tehran (1979-80).

43 Expulsion or suspension from inter-governmental organizations, as the International Atomic Energy Agency suspended Israel after the latter's unlawful attack on the Iraqi nuclear facility (1981). The European Community as a whole imposed trading restrictions on Serbia and Montenegro (1992). Nigeria was suspended from the Commonwealth as a result of its violation of human rights norms (1995). The European Union imposed limited penalties (now lifted) on Austria (1999-2000).

during the period between first and second world wars are no longer valid[44]. The change in the balance of interests and values in the world community resulting from the independence since 1945 of colonial and similar territories has had an effect in shaping or reshaping some of international law rules.

An emerging system of sanctions apart from self-help and public opinion for the enforcement of international law is discernible, while recourse to so called law-making treaties and various aspect of the activities of international organizations may be pointers in the direction of an emergent legislative process or atleast an international analogue thereof. [45]

There is also an increase in the subject-matter of international law to cover what Friedmann has called "the international law of co-operation." The development of the international law of human rights and international environmental law are notable examples of this more positive, community minded kind of law. Therefore, international law may now properly be regarded as a complete system[46], may be yet growing and evolving as any other form of law is. For better clarity, its comparison with any other legal system, whether municipal or national should be avoided as this legal system has its own unique characteristic features, *viz.* subjects, area of operation, constituent elements and enforcement mechanisms etc.

44 Charles G. Fenwick, *International Law*, (1967), p.32.
45 Robert Jennings and Arthur Watts (ed.), *Oppenheim's International Law* (2003), Vol, p 11-12.
46 See H. Lauterpacht, *The Function of Law*, (1958), pp 51-135.

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GENERAL PRINCIPLES OF TAX JURISPRUDENCE IN INDIA

–Jitendra Tiwari*

I. INTRODUCTION

'Jurisprudence' is the name given to a certain type of investigation into law, an investigation of an abstract, general and theoretical nature which seeks to lay bare the essential principles of law and legal systems.[1] Law is not a jungle and law making is not a thing without principles, precedents and fixed rules. Every law, whatever be the subject matter with which it deals, has to conform to certain basic tenets, norms and rules. Its validity will always be tested with reference to such basic requirements. Law of taxation has always been considered to be a complex, complicated and brain storming subject which can only be simplified by applying the principles of jurisprudence. Jurisprudential principles underlying tax laws may be termed as 'Tax Jurisprudence'. Against this background an attempt has been made in this study to dissect and discuss some general principles of 'tax jurisprudence'[2].

II. TAX JURISPRUDENCE IN ANCIENT INDIA:

The principles of tax jurisprudence in India can be traced to ancient times, say over two thousand years ago. Tax laws and principles existed even during *Vedic* periods. Therefore it can be safely stated that tax is as old as life itself. Manu describes that the king should realize taxes, "little by little, as a leach, calf or bee sucks blood, milk or honey" and the rates of tax should be reasonable and affordable to the people. Kautilya in his 'Arthshastra' suggests detailed taxation policies including tariff rates of direct and indirect taxes. Kautilya stated that the rates of taxation vary with the type of trade and business generating profits, the focus should always be on taxing net profits that too at moderate level. Kalidasa in his 'Raghuvamsha' says that the king gathers taxes from the subjects only to be utilized on the welfare, just as the sun gathers water only to return it a thousand fold.

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1 Salmond on *Jurisprudence* (12th Edition) (1966) P1; The word "Jurisprudence" has meant many different things at different times. For a discussion of its meanings see A. H. Campbell, "A Note on the Word 'Jurisprudence'." (1952) 58 *LQR* 58(1952) 334.

2 Some times the term like Medical jurisprudence, Architectural, or Engineering jurisprudence and Environmental jurisprudence etc. are used. When used in this sense, the phrase refers to treatise dealing with that part of knowledge, which is useful in applying legal doctrines or principles applicable to or useful for medico-legal cases or architectural or engineering or environmental cases.

The use of tax incentives in India can also be traced to ancient times. "Tax incentive is a technique of selective tax reduction with a purpose to encourage tax payers to act is a designed manner to pursue a particular line of action by stimulating an increase in flow of labour or managerial effort or the savings and investment and thus the allocation of the resources." This technique of tax incentive was illustrated in 'Dharmashastra' and 'Arthashastra'. This is obvious from a passage of *Arthashastra of Kautilya*[3], the passage runs as follows:

> "In the case of construction of new works, such a tanks, lakes, etc., taxes (on the lands below such tanks) shall be remitted for five years (panchavarshibah parihara) repairing neglected or ruined works of nature, taxes shall be remitted for four years for improving or extending or restoring water-works over-grown with weeds, taxes shall be remitted for three years. In the case of acquiring such taxes on the lands below such works shall be remitted for two years. If uncultivated tracts are acquired (for cultivation) by mortgage, purchase or in any other way, remission for taxes shall be for two years."[4]

The prime concern of the society at that time was agriculture and therefore these concessions were given to give fillip to agricultural activities. It is obvious that Kautilya not only laid down the tax provisions called revenue but also tax concessions in appropriate cases, which indicated his awareness to the fact that this also helped to augment the revenue. It can be said now that the earliest secular code of Hindu law which adopted the technique of tax incentive was the 'Arthashastra' of Kautilya.

Kautilya also stated the ultimate purpose of the tax incentive as under :

> "The king shall bestow on cultivation only such four and remission (*anugrah panihara*-4) as well tend to swell the treasury and shall avoid such as deplete it'..... " A king with depleted treasury will eat into the very vitality of both citizen and country people. Either on the occasion of opening new settlements or any other emergent occasions, remission of taxes shall be made."[5]

Sukra in his 'Sukrunitisar' also gives a salutary rule when he says:

> "If a cultivator constructs a tank, a well or an artificial water course or brings under cultivation land previously followed, the king should a levy a tax thereon till the person making the expenditure has recovered twice of the amount spent by him."[6]

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3 Work on Political Science claimed tc date from the period (321-296 BC).

4 "Kautilya's Arthashastra" Book III Chapter IX, sloka 170 translated by Dr. R. Sharmasastry (1923 II Ed.) 209.

5 *Ibid*, Book II Chapter I sloka 47 translated, p. 50.

6 Sukrunitisar (IV 2-121-122) as cited in Kane P. V. Vol. III *History of Dharmashastra*, p. 191.

The King was a servant of the people, according to Mahabharat the Sukraniti, and the Budhist Aryadeva, receiving a portion of the taxes as his wages.[7]

The aforesaid principles of tax jurisprudence in ancient India are also relevant today.

III.POWER OF TAXATION

Benjamin Franklin observed in 1789, in this world nothing can be said to be certain except death and taxes. Tax as understood in common parlance is a compulsory contribution, usually of money, that is required for the support of a government. "Taxation, as the source of public revenue" has rightly been described as "a foundation of all political institution."[8] The celebrated classical remark of Mr. Justice Roberts that taxes are "the life blood of government"[9] has a perpetual validity.

A tax is an exaction by the state which it can levy and collect in the exercise of its sovereign power.The power of taxation is an attribute of sovereignty.[10] As observed by Chief Justice Marshall in *M'Cullock* vs. *State of Maryland*[11] "the power of taxing the people and their property is essential to the very existence of government." Professor Willis in his book, *Constitutional Law of the United States* observes as follows:

> "The three great legislative powers usually exercised by any government are the power of taxation, the police power, and the power of eminent domain. The power of taxation may be defined as the legal capacity of Government to impose charges upon persons or their property to raise revenue for governmental purposes. The levying of taxes is a legislative function; the determination of the amount of each individual's tax is an administrative function; but whether either function has been properly exercised is a judicial function. Taxation may be regarded as a contribution of people for the general benefits which they receive from the Government but the constitutionality of a tax does not depend upon a showing of benefits."

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7 "The king was created as the servant of the people by being given a portion of the taxes as his wages."- Sukraniti; "what conceit is this, Oh King so ill benefitting a servant of the people, receiving from them your wages ?" Aryadeva- both these examples have been quoted by A. S. Panchapabesa Ayyar in his book *The Contribution of Hindu Law to World Jurisprudence* (1943), p. 46.

8 Julius Stone, *Social Dimensions of Law and Justice*, (Bom.) Tripathi, 1966, 324.

9 *Bull* vs *United States* (1924) 295 U.S. 247.

10 *Jagnath Baksh Singh* vs. *State of U.P.* AIR 1962 S.C. 1563 (1570); where in the Supreme Court observed that the power of taxation is the sovereign right of the state. It can be noted here that sovereign and sovereignty are two different concepts. Sovereign is the subject of sovereignty and sovereignty is the attribute or quality of a sovereign.

11 (1819) 4 Law Ed. 579 (607).

As an incident of sovereignty the power of taxation can only be exercised through legislatilon[12] Article 265 of the Indian Constitution says that "No tax shall be levied or collected except by authority of law". Similarly[13] under Article I, Section 8(1) of American Constitution, Congress "shall have power to levy and collect taxes, duties, imposts and excises." Under English law also, all taxes are imposed by statute and no one can be forced to pay a single shilling by way of taxation which cannot be shown to the satisfaction of the judges to be due from him under an Act of Parliament.'[14]

The principle the power of taxation can only be exercised through legislation, was established long ago by the *Magna Carta* in England, and constitutes the basis of parliamentary sovereignty in England. "Law" in democratic countries is the expression of the will of the people through their representatives in the Legislature of the country, and hence, the principle that there can be no taxation except under the authority of law is only another form of the principle "no taxation without representation" for which the American war of Independence was fought.

Thus, taxation is a legislative and not a quasi-judicial function and hence persons affected need not be heard before a tax is levied by the legislature or other duly constituted authority.

IV. PRINCIPLES OF TAXATION

Every writer on public finance, from Adam Smith onwards, has attempted to describe the features or the characteristics of a good tax system. What constitutes a sound tax system will depend upon the nature of public expenditure and the people's ideas on the role of the government. In the modern welfare society. A sound tax system may be one which not only brings in adequate revenue to enable the Government to perform all the necessary functions of the state but also helps in the redistribution of income and promotes economic stability.

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12 The conception of sovereignty has been one of trouble spots in the field of Jurisprudence. Jethro Brown has very aptly described this position. He says that "the student who invades that dread, domain, the literature of the doctrine of sovereignty, finds himself in a world where difference of opinion are numerous and fundamental. One moment he learns that sovereignty is necessarily absolute, the next that it is eternally limited. Now he is to tell that in the nature of things sovereignty must be indivisible and inalienable. Now he is confronted with definite illustrations of sovereignty which have been divided or abducted..... . He is told by some that it is based on force, by others on will, by others on reason. If he rushes to ask where sovereignty resides he is referred to persons or bodies of all kinds to a visible rules, to governments, to constitution revising assemblies, to an electorate, to the popular majority or to the body politic..... ." ; See, Jethro Brown; *Austinian Theory of Law* (1906), p. 271.]

13 See also Constitution of Malaysia, Art. 96; Constitution of Japan, Art. 84.

14 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, IXth Edition 1952, P. 315.

A tax system (that is, the set of all taxes) for achieving certain objectives, chooses and adheres to certain principles which are termed its characteristics. A good tax system, therefore, is one which is designed on the basis of an appropriate set of principles, such as equality and certainty. Objectives of taxation very often conflict with each other and a compromise is needed. Therefore, usually economists select some important objectives and work out the corresponding principles which the tax system should adhere to Adam Smith was the first economist to attempt a general statement of the principles of taxation. He gave the following four principles or canons, which should be incorporated in any sound system of taxation[15].

(**1**) Smith's first canon of taxation was ability. "The subject of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the State." This canon tries to secure the objective of economic justice and dictates that in absolute terms the richer should pay more taxes because without the protection of the State they could not have earned and enjoyed that extra income. If we interpret this principle in terms of disutility, which the tax-payers suffer by paying taxes, it follows that the tax should impose equal marginal disutility upon every tax-payer. Two possibilities emerge in this case. If incomes are subject to constant marginal utility, then both rich and the poor should be subjected to proportional taxation-each person paying a given percentage of his income as tax. On the other hand, if we agree with the more realistic proposition that income is subject to diminishing marginal utility, then the richer should pay a larger proportion of their incomes as taxes (that is, the taxes should be progressive).

(**2**). Smith's second canon is 'certainty'. This canon is meant to protect the tax-payers from unnecessary harassment by the 'tax officials'. "The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person". The tax-payers should not be subject to arbitrariness and discretion of the tax officials, since that breeds a corrupt tax administration. With a scope for arbitrariness even an honest tax machinery will become unpopular. Smith is so emphatic about this principle as to claim "that a very considerable degree of inequality... is not near so great an evil as a very small degree of uncertainty."

(**3**). Smith's third canon is 'convenience'. The mode and timings of tax payment should be so far as possible convenient to the tax-payer. In Smith's own words, "every tax ought to be levied at the time, or in the manner in which it is most likely to be convenient for the contributor to pay it." The canon of convenience is quite simple. As a tax imposes a burden on the taxpayer, it should be imposed at such a time and in such a manner that the taxpayer feels

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15 Adam Smith, *The Wealth of Nations*, (Ed. Edwin Cannan), New York, The Modern Library, pp. 777-79.

minimum of inconvenience. This canon recommends that unnecessary trouble to the tax-payer should be avoided, otherwise various ill-effects may result.

(**4**). Smith's fourth canon is 'economy'. This canon recommends that cost of collection of taxes should be the minimum possible. It is useless to impose taxes which are too widespread and difficult to administer. These taxes entail an unnecessary burden upon the society in the form of additional administrative expense. The productive efforts of the people suffer due to this wastage. Realizing that the tax collections are being wasted, the tax-payers also tend to evade them.

The aforesaid Smith's canons of taxation have a sound philosophy behind them and exhibit an insight into the practical aspects of tax administration and its effects. However, in view of developments in economic philosophy and problems of a modern State, a few additional principles were also suggested by later writers. A brief description of these principles is as follows:

1. ***Canon of Productivity*** : It is also called the canon of fiscal adequacy. According to this principle, the tax system should be able to yield enough revenue for the treasury and the government should have no need to resort to deficit financing.

2. ***Canon of Buoyancy*** : The tax revenue should have an inherent tendency to increase along with an increase in national income, even if the rates and coverage of taxes are not revised.

3. ***Canon of Flexibility*** : It should be possible for the authorities, without undue delay to revise the tax structure, both with respect to its coverage and rates, to suit the changing requirements of the economy and of the Treasury.

4. ***Canon of Simplicity*** : The tax system should not be too complicated. That makes it difficult to understand and administer and breeds problems of interpretation and legal disputes.

5. ***Canon of Diversity*** : It is risky for the State to depend upon too few a source of public revenue. Such a system is bound to breed a lot of uncertainty for the treasury. It is also likely to be inequitable as between different sections of society. As the tax revenue comes from diversified sources, then any reduction in tax revenue on account of any one cause is bound to be very small. However, too much multiplicity of taxes is also to be avoided as it leads to unnecessary cost of collection and violates the canon of economy.

A little careful consideration of the above four canons of taxation by Adam Smith and of the principles added by later writers will show that all of them are not really basic or fundamental principles. In fact, they are not principles at all, but they are mostly administrative directions to the tax authorities. The only exception is the canon of ability which dictates that the tax system of the country should be based on the ability of people to contribute to the Government.

V. INTERPRETATION OF TAXING STATUTES :

Interpretation of law is an important branch of jurisprudence. In the light of special nature of taxing statutes, the general rule of interpretation is that a taxing statutes should be construed strictly, that is, a person should not be taxed unless the words of the statutes unambiguously impose the tax on him[16].Tax statutes are always strictly construed on their express language since they impose pecuniary burdens on the subject. They have to be interpreted by reference to the clear and unambiguous language of the statute because in some degree they operate as penalties. The subject is not to be taxed unless the language of the Act clearly imposes such obligation[17].In the off quoted extract from the judgment of Rowlatt, J., in *Cape Brandy Syndicate* vs *IRC*[18], it has been said in classical words:

> "In a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

In *IRC vs. Coutts & Company*[19], it was observed:

> "The language used is not to either stretched in favour of the crown or narrowed in favour of the taxpayer."

In *A.V. Fernandes* vs *State of Kerala*[20], the principle of interpretation in taxing laws has been explained by the Supreme Court in the following words:

> "In construing fiscal statutes and in determining the liability of a subject to tax, one must have regard to the strict letter of the law. If the Revenue satisfies the Court that the case falls strictly within the provisions of law, the subject can be taxed. If on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter."

It is notable that tax and equity are strangers and equitable construction cannot be put upon the words of taxing statutes. In fact, equitable considerations are irrelevant in interpreting tax laws. As the apex court has aptly observed:

> "Laws and equity are two things which God hath joined but man has put asunder..... Can a Court override law which effectuates what is conceived to be justice? Any legal system..... may permit

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16 *Lord Simons in Russel* vs. *Scot* (1948) 2 AER. 1 (H.L.)
17 *D'AVIGDOR Goldsmid* vs. *I.T.O.* 1953 AC 347.
18 (1921) 1 KB 4.
19 (1964) AC 1393.
20 A.I.R. 1957 (S.C.) at p.661.

> Judges to play a creative role and innovate to ensure justice without doing violence to the norms set by the legislation. But to ensure judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities."[21]

If the statute speaks on the subject, the Judge has to be silent and stop. In a contest between morality and legality. The Court in clear cases has no option. Judicial power is never exercised... for the purpose of giving effect to the will of the Judge, but always for the purpose of giving effect to the will of the Legislature, or in other words, to the will of the law. If the Legislature willfully omits to incorporate something of an analogous law in a subsequent statute or even if there is *casus omissus* in a statute, the language of which is otherwise plain and unambiguous, the Court is not competent to supply the omission by engrafting on it or introducing in it under the guise of interpretation, by analogy or implication, some thing which it thinks to be a general principle of justice and equity. To do so would be entrenching upon the preserves of Legislature, the primary function of a Court of law being jus dicere and not jus dare.[22] According to the apex judiciary "If a person sought to be taxed comes within the letters of the law, he must be taxed however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law, the case might otherwise appear to be". If the law fails and the taxpayers cannot be brought within its letter, no question of unjustness as such arises[23] "If the words of taxing statute are fair, so must the tax. The Courts cannot, except rarely and in clear cases, help the draftsman by a favourable construction".[24] The Court in construing the statutory provisions cannot take into consideration the hardships that may be caused in a particular case.[25]

As stated by the Allahabad High Court in *Swadeshi Polytex Ltd.* vs. *ITO*[26], "it is well established that where the language of a section is plain and unambiguous, it is not open to Courts to read into it limitations which are not there, based on a priori reasoning as to the probable intention of the Legislature. Such intention can be gathered from the words actually used in the Legislation and what is unexpressed has the same value as to what is unintended ".[27] If, on the other hand, a particular provision is ambiguous, in interpreting it, the principle of equity and justice cannot be ignored and the interpretation which favours the taxpayer should be given, even though, there is no equity about tax. That is, there is no place for interpretation or construction except where the words of the

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21 *R. J. Pratap Narayan Singh* vs. *C B D T*, (1975) I.T.R. 698 (S.C.).
22 *C.I.T.* vs. *Gupta & Sons (P) Ltd.* (1984) 146 I.T.R. 506 (M.P.).
23 *C.I.T.* vs. *Jalgaon Electric Supply Co. Ltd.* (1960) 40 I.T.R. 184 (S.C.)
24 *C.I.T.* vs. *Elphinstone Mills Co. Ltd.* (1960) 40 I.T.R. 142.
25 *C E D* vs. *Amar Lal* (1986) 147 I.T.R. 243 (Mad.).
26 (1981) 127 I.T.R. 287 (All);
27 See also *C.I.T.* vs. *S. Devi* (1957) 32 I.T.R. 615 (S.C.).

statute admit of two meanings. If the interpretation of a fiscal statute is open to doubt, the construction most beneficial to the subject is to be adopted. "Where there is an ambiguity in a taxing statute, it may be resolved in favour of the assessee"[28] but not so, if the language is clear. The Choksi Committee have also recommended the adoption of just and fair interpretation where two views are possible.

In the course of judgment, Krishna Iyer J. in *Montand Dairy & Farm* vs. *Union of India*[29] has summed up the problem of interpretation in taxing statutes in the following words:

> "Taxation consideration may stem from administrative experience and other factors of life and not artistic visualization or neat logic and so the literal, though pedestrian, interpretation must prevail."

VI. SOCIAL ENGINEERING THROUGH TAXATION

According to Roscoe Pound[30], 'Law is a process of balancing interest and jurisprudence is a science of law in this sense'. What Roscoe Pound has said about law in general is perhaps more true of tax laws which have a direct and far-reaching impact on the socio-economic fabric of society in a variety of ways. In modern times, taxation is increasingly being used as an effective instrument of socio-economic policy.[31] It has become one of the most important weapons through which the state can mitigate the two objectionable aspects of unrestricted private property, i.e., the concentration of wealth in fewer hands and its use for the detriment of the community at large.[32] The Government can implement its ambitious development schemes through taxation measures. It can regulate expenditure give a direction to consumption, encourage foreign trade and achieve self-sufficiency through taxation. In this regard the law of Income-tax is not only a prolific revenue yielder but it exerts a major impact on the economic and social life of the people. In India Income-tax was introduced in the year 1860 to meet the expenses incurred in the revolution of 1857.[33] Starting from necessity of collecting revenues this law has developed into a mechanism for varied

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28 *C.I.T.* vs. *Pohop Singh Rice Mill* (1981) 132 I.T.R. 390 (Ori.).

29 A.I.R. 1975 S.C. 1492

30 Roscoe Pound, the eminent jurist, who has been the chief exponent of the sociological school of jurisprudence, has propounded the thesis that law is a mode and instrument of social engineering which regulates social relation in politically organised societies by harmonising and synthesising private interests, public interest and social interests in the light of the jural postulates of civilised society.

31 M.C. Bijawat, 'Taxation as an Instrument of Economic Development and to Achieve Economic and Social Justice. C.T.R. 20(1981), 63.

32 This is also one of the most important Directive Principles of State Policy embodied in the Constitution of India under Article 39 (C).

33 The Income-tax was first introduced in Great Britain on 3rd Dec. 1779 as a war measure to finance war against the Emperor Napoleon of France.

objectives of public policy, like social justice, economic growth and stability. As Justice P.N.Bhagawati has observed in an important case of *M/S Rajapalayam Mills Ltd.* vs *C.I.T*[34] "....[T]he law of Income-tax in a modern society is intended to achieve various social and economic objectives. It is often used as an instrument for accelerating economic growth and development."

It may be submitted that law of taxation is one of the most important and effective instruments of 'social engineering'.

VII. CONCLUDING OBSERVATIONS

In the light of above discussion it may be submitted that the law of taxation is the vein which supplies blood to the heart of a government and any undue interference with, it would choke the heart and lead not only to economic but various disasters also. This aspect should be kept in mind by the authorities responsible for deciding the policies of taxation otherwise the golden dream of India becoming a developed and economic super power in coming twenty years of the present century will not become a reality.

34 A.I.R. 1979, SC 117 p.121.

34 Ban.L.J. (2005) 121 - 134

LAWS FOR ALL: JUSTICE FOR WHOM?

Abhitosh Pratap Singh*

& Madan Mohan**

Law cannot ever be meaningless and purposeless combination of words. The judicial system reaches its pinnacle when it serves the ultimate objective of all laws i.e. delivering justice to the recipient who deserves it, not shackled by pitfalls and landmines of technicalities. Within the four corners of legal framework, the relief can be moulded to achieve the ultimate objective that is to deliver justice.[1]

Justice Arijit Pasayat

INTRODUCTION

Law indeed cannot afford to be a dead and infructuous sequence of letters and purposeless combination of words. However, when it comes to third world setting, there is no match between 'what is' and 'what ought to be'-- where judgement and justice do not necessarily imply the same thing. Justice which according to Justinian[2] is 'rendering each his due is the prime objective of any legal setup, but unfortunately the rule of law in the third world setting has failed to achieve this objective and to render each his due, because the legal system that la's legalite establishes may be equal in-form but is not equal in-fact.

The Third world countries having inherited the colonial legal system may have lagged behind in development, but have not lagged in enacting Himalayan heap of paper legislations. Law in these countries has practically turned out to be not a device to achieve the ultimate objective of Justice, but an imperfect mechanism in which if you are fortunate to know how to push exactly the right buttons, you shall be blessed with justice. Did the law intend to be such a device? A device which is rolling over glittering wheels of monumental courtrooms having well groomed lawyers with crystal tongue at helper's seat and judges with their flowery and ornamental rhetoric at driving seat. In this grand legal set-up the litigant-- the engine of the system suffers maximum corrosion (in extreme cases to the extent of complete breakdown on ultimate death) because of the protracted journey extending to several years that is taken by it to reach its ultimate destination that is justice.

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1. *Angrez Kaur* v. *Union of India* (2005) 4 SCC 446.

2. *Honest vivere, non alienum leaders, suum cunique tribute* (To live honorably, not to injure another, to render each-his due) -An inscription on the wall of the Harvard Law school Library, taken from Justinian's 'institutes' Justinian codified the Roman Laws.

Various factors have cumulatively made legal proceeding a nightmare for the large section of population who once caught in the vicious chain of delays, adjournments, appeals, not only to have to suffer trauma and part with their little cash, but also fall prey to the speculative prospects created by contradictory court opinions in each court of appeal, with frequent reversal of prior decisions.

The existing situation in India--one of the largest Third World countries--has been best described by Justice V. R. Krishna Iyer as, "The judicial pyramid is untouchable and unapproachable for the common mortal wounds; asking for legal justice is like asking for the moon".[3] In the words of Justice D. M. Dharmadhikari, "Judicial process is ailing since long and requires intensive treatment in ICU".[4] According to the National Commission to Review the Working of the Constitution, "we have arrived at a situation where courts are deemed to exist for judges and lawyers and not for the public seeking justice".

Archaic and regressive laws, pyramidal hierarchy of courts of appeals, outmoded procedures, and questionable priorities, immobility of tribunals, interpretive opalescence, and prohibitive costs of competent counsels are some of the features that characterize the legal system in India. The system entrusted with the task of dispensing justice has been contaminated by its constituents itself. This paper focuses on the problems in the existing justice delivery system in India, the sections of the masses that have been particularly vulnerable and possible reforms which can be implemented without a major overhauling of the present system.

COMPONENTS OF THE LEGAL SYSTEM

A. Police

The Police is one of the most important components of the legal system. However blatant misuse of promotions, transfers and postings have led to a situation where some high ranking police officials are committed to certain political parties. Consequently 'rule of the law ' has nutated into 'rule of the ruling politician'. "The sad truth is that the police in several states have become the armed militia of the ruling party". As a natural corollary, police has become notoriously famous for human rights violations[5], differential treatment to the 'haves' and the 'have-nots', selective enforcement of law, gender biasness, inefficiency, and corruption.

1. First Information report (FIR)--- For the consumers of the legal system, especially the poor and the less affluent, the chain of trauma begins at the stage of First Information Report (FIR) itself. The police officials often simply refuse to

3. Justice V. R. Krishna Iyer, *Legally Speaking*, (2003 ed. Universal) 142.
4. Justice D. M. Dharmadhikari, *Nature of Judicial Process*, Journal section (2002) 6 SCC 1.
5. The Preface of the *Malimath Committee Report*, March 2003 states, "There are innumerable complaints of misuse of powers by the police including arbitrary arrests and unnecessarily long detention, not to mention the large scale violation of Human rights".

register the case or register it very late by making lame excuses. Such acts of the police tend to weaken the case in the initial stage itself because of possibility of destruction or loss of important evidence, especially at the scene of crime and/or on the body of persons.[6] Sometimes the registration of FIR is done in a very haphazard and incomplete manner. After lodging the FIR the police often refuse to give a copy of the report to the complainant even though they are legally bound to do so.

2. Investigation--- The police not only work at their own pace but the process of investigation that begins after FIR is often carried out in a casual manner . The statement of all the witnesses is not recorded and all the evidences are not collected or handled professionally. Poor investigation coupled with inefficiency and corruption leads to large-scale acquittals in criminal cases.[7] The Supreme Court and the High Courts have in several cases issued strong strictures against police for non-registration of cases and poor investigation.[8]

Investigation, normally to be completed within 90 days is seldom done so. entitling the accused to get bail who then uses all the means to delay of obstruct the proceedings. So far as bail is concerned the have-nots have to fight another battle here. "If you are rich enough and affluent you can get bail, however if you are poor then you have to go to the jail".[9] This is the popular jargon used by many stakeholders of the legal system itself. Many poor undertrials perish in the jails simply because they didn't have the means to pay the bond amount or were not released on their own recognizance.

B. Lawyers

Lawyers are no less responsible for delay in the administration of justice which is a dubious feature of the Indian justice system. The role of lawyers in the last six decades after independence has been more of professionals than as instrumentalities to reach justice to the needy providions of the Code of Civil Procedure and the Criminal Procedure Code are so much misused and abused by the lawyers that enormous delay is caused in the decision of the cases.[10] The learned counsels for the parties more often than not seek adjournments on grounds of writing statements. documents. settlement of issues etc.

Though under Order XVII of the Civil Procedure Code (CPC). non-availability is not a ground of adjournment, however most of the cases are

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6 BRANDED 22 (Renu Ghosh ed. 2001. Bridge).

7 The conviction rates in IPC (Indian Penal Code) cases in 1999 were 39.6% only . See Prison statistics, 2000, National Crime Records Bureau, Ministry of Home Affairs. Govt. of India.

8 *M. J. Cherian* v. *Union of India*, 1992 Sup. (1) SCC 653. *Kamel Singh* v. *State of Madhya Pradesh*, AIR 1995 SC 2472. *Lichhamadevi* v. *State of Rajasthan*, AIR 1988 SC 1785 , *Pramod Kumar* v. *State of U. P.* 1989 (2) HLR 421 *Menhon Gurbachan Singh* v. *Satpal Singh* 1990 (1) HLR 353.

9 James Vadackumchery, *Activism, Accountability and Justice* (2004 ed. Indian Publishers' Distributors) 187-188.

10 *Id* 4.

adjourned on this ground only. thus marking the observation of this provision of law more in its breach rather than adherence. Another provision that has become a viable tool of adjournment of the party interested in obstructing the proceedings is the provision under Order XXIII Rule3 (i) of the C. P. C. The interested party moves an application under the said provision of law, alleging that the matter has been amicably settled. The opposite party naturally denies compromise , and hence the court has to ascertain the factum of compromise by recording evidence.[11]

Justice can be examined at two levels-macro and micro. Justice at the macro level implies remedy for the problem that concerns the interest of the society at large while Justice at the micro level concerns the interest of an individuals. However, the demarcation fades as Justice at both level demands the cooperation of all the components of the legal system. In criminal jurisprudence the offence against an 'individual is considered to be an offence against the whole society, which necessarily follows the interlinked and intertwined interests of justice at both levels. Provisions regarding Legal aid in the Indian Constitution[12] and in U. N Basic Principles on the Role of Lawyers for Administration of Justice[13], show that the interest of individual is not separate from the interest of society at large.

The politicization of criminals has boosted the confidence of the law breakers who with money, muscle power, political support and access to competent and experienced political party lawyers manage bail and acquittals. The success of political party leaders in their vocation has encouraged criminals, crime syndicates and fraudulent companies to appoint their own lawyers. These 'money sharks' remain busy adding their bank balances and ensuring justice to their 'influential' clients by exploiting the loopholes prevalent in laws. The majority of the population of the country cannot afford their hefty fee. The 'have-nots' are naturally then dependent on the state for free legal aid. It is widely known that not many good lawyers extend their services to the state legal aid services authority because even the fixed fee provided by the government for the services in some states are not paid at the stipulated time. Lawyers who are unemployed or underemployed, are usually part of the legal aid services of the state and their services are qualitatively not as good as 'money sharks' . Inability to pay sureties for bail and non-affordability of expert defense lawyers are among the several

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11. Mohammad Shamim (Judge, Delhi High Court), *Panacea for the Delay that We are Suffering*, DLR XVI (1994).

12. Article 39 A-Equal justice and free legal aid- 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 in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

13. U. N. Basic Principles on the Role of Lawyers for Administration of Justice states: "All the persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings".

factors why majority of the persons serving sentences in jails are from poor background.

C. Prosecution

There are allegations based on reasonable belief of an unholy nexus between the Public Prosecutor and the defense counsel, which defeats the whole purpose of justice administration. Many Public Prosecutors and lawyers themselves believe that loyalty to a particular political party and susceptibility to political whims has replaced professional integrity and ability as the usual criteria of appointment of Public Prosecutors.[14]

D. Judges

The delay in the disposal of cases is often 'judge made'. Some judges are not conscientious [15]and earnest in attending to their business. Factors like lack of punctuality, laxity, non-deliverance of judgments quickly and timely after conclusion of arguments, grant of adjournments on frivolous grounds (often on mere asking), and conscious attempt to have verbosity in judgments, compound the delay in the dispensation of justice. Often no attempt is made to examine the parties in the first hearing, which may narrow down the controversy. Some judges do not deliver judgments even after months or years have passed after conclusion of arguments. In few cases the judge retired after reserving the judgments leaving the litigant in lurch.

E. Quality of Justice

Indian judiciary is one of the most free , and fair one in the world and no one would ever dare complain of corruption in the judiciary until recently. However in the recent past successive Chief Justices, have admitted of corruption, mostly at the lower levels of the judiciary. Recent probings into allegations of corruption and moral turpitude on the part of certain Judges by different in-house committees constituted by the Chief Justice of India and the action that followed in the case of a few judges involved have to some extent confirmed the suspicion that all is not well with the Judiciary too.[16]

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14. "Prior to independence and for several years thereafter, the practice was to appoint the most competent lawyer as law officers, public prosecutors and government pleaders and, in due course, consider the most deserving among them for elevation to the High Court . Since a few decades, political considerations came to prevail over considerations of merit and ability in the matter of appointment of government counsel. There have been several instances of appointment of undeserving and less deserving persons as High Court judges because of their proximity to the powers that be." See P. P. Rao, *Access to Justice and Delay in Disposal of Cases*, INDIAN BAR REVIEW XXX (2&3) (2003) 213.

15. "A careful examination of the files of judges will convince anyone that a more conscientious devotion to duty would have saved many adjournments and delays". See Justice G. D. Khosla, *Memories and Opinions*, (1973, Research) 107.

16. Rao, *supra* 14 at 210 , 211.

JUSTICE FOR WHOM.....?

A. Children

The section of the society that needs the most has the laeast protection of the Laws and is most vulnerable to bad treatment. In spite of different Child and Women specific legislations children and women continue to suffer from social in justice. Several Central and state laws[17] are applicable to children in various spheres of life, which are protective, regulatory or correctional in nature. However, studies reveal either the ineffectiveness or blatant violations of the existing laws. Child marriage though illegal is periodically reported from Rajasthan, Madhya Pradesh and other places. Children continue to be employed in hazardous occupations. India has probably the largest child labour force[18] including in hazardous occupations,[19] and the largest number of street children[20] in the world. Inhuman treatment of juvenile delinquents[21] , lack of infrastructure facilities, procedural violations, lack of proper orientation and training or the level of commitment on the part of the personnel of juvenile justice system and the voluntary agencies for differential treatment to juveniles, inordinate delay in disposal of cases, are the hallmark of juvenile justice system in India.

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17. Some of the important Acts are: Employment of Children Act. 1938 (to prevent employment of children in hazardous employments and certain categories of unhealthy occupations), Children Act, 1960 , Child Labour (Prohibition and Regulation) Act. 1986, Juvenile Justice Act. 2000. State Acts: Jammu and Kashmir Children Act 1970 , Rajasthan Children Act 1970, Assam Children Act, 1974, Bal Adhiniyam 1974.

18 It is estimated that 100 million children are forced to work in the organized and unorgnaized sectors. Child labour contributes to over 20% of India's G.N. P. See Rita Panicker, 'Reckoning with Child Labour, Present Day Strategies and Future Direction', *Journal of Center for Working Children*, 15 (1995).

19. Around two million children work in hazardous occupations. Satyam Mohapatra. *Allegation of Child labour refuted*, HINDUSTAN TIMES (Delhi), Nov. 6, 1996 at 11.

20. Human Development Report, U. N. D. P., 1993.

21. Justice P. C. Barroah of the Calcutta High Court visited the jail in the course of the proceedings in a writ petition (*Rajesh Khaitan* v. *State of West Bengal*, 1983 Cri. LJ 877, Calcutta) relating to violation of the jail code in respect of diet, medical treatment of a prisoner. He was shocked to find abandoned young children roughly 4 to 6 years old, confined together with spastics and lunatics. In *Sunil Kumar* (1983 Cri. L. J. 99) the judges found many illegalities and irregularities in the manner in which the neglected children were dealt with by the state machinery. Only one Magistrate signed the orders while the Children Act required the juvenile court to function as a bench of magistrates. The orders showed that no distinction was maintained between an observations home, a special school , and a children home. See ASHA BAJPAI, CHILD RIGHTS IN INDIA, LAW, POLICY AND PRACTICE. (2nd ed. 2004, Oxford University Press) 215.

B. Women

The substantive laws relating to protection and welfare of women are not very effective . Violence against women is on the rise.[22] The Dowry Prohibition Act enacted in 1961 and amended from time to time does not appear to have served much purpose as the menace of dowry continues.[23] The Immoral Traffic (Prevention) Act 1956 (amended in 1986) had been enacted to combat prostitution but in fact prostitution is thriving. Rapes in broad daylight have time and again shocked the nation. What is intimidating is that instead of the guilty being brought to books in cases of complaints of rape and sexual molestation women find themselves being objectified and treated with disdain.[24] Victims of crime who approach the court get re-victimized by psychological stress arising out of "aspersions cast upon their character by opposing counsel" and pressure to conciliate or compromise in the interest of protecting the family, which is deemed more important than dignity of the woman.

C. Scheduled Castes

Constitutional guarantees alone don't endure justice. Affirmative action sans basic pre-requisites[25] has led to the marginalisation of the Scheduled Castes(S.C.) Scheduled Casts people continue to face injustice in spite of enactments like Protection of Civil Rights Act, 1955 and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 . Low rates of conviction[26] and perception among many activists of imposition of stronger sentences[27] in the case of S. C.'s is eroding the faith of S. C.'s in the justice system .

The Constitution, the suprema lex, and the law made thereunder, though guarantee justice but the bitter truth is that the scales of justice are largely weighed in favour of the rich and the affluent. Justice delivery system remains inaccessible for a large section of the population . The inaccessibility factor

22. 142035 crimes against women recorded in 2004,44 raped everyday, 1 raped every 32 minute, 132 abused every day by husband or in-law, 5 abused every hour, 87 molested every day, 2 molested every 35 minute, 18 dowry deaths every day, 1 dowry death every 80 minutes- provisional figure for 2004, compiled by the National Crime Records Bureau. See SUNDAY TIMES OF INDIA (Delhi), July 3, 2005 at 6.
23. Justice A. S. Anand in *Kundula Bala Subrahmanyam* v. *State of Andhra Pradesh*, 1993 (2) SSC 684.
24. Delhi Domestic Working Women's Forum 1995 (1) SSC 14.
25. The issue has been dealt by the S. C. in the *ABSK Sangh case*, AIR 1981 SC 298.
26. Of the total number of cases registered under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, in the year 2000 only 7.83% cases were disposed off during the year and out of these only 11.04% ended in conviction See 7th Report of the Minister of social Justice and Empowerment at 64.
27. *See Report on Chennai Judicial Exchange on Access to Justice, November 5-7, 2004* at 14.

coupled with contamination of the justice delivery system by the stakeholders themselves, has resulted in 'double injustice'[28] and miscarriage of justice. Functionally viewed the Justice system has developed anti-people distortions and as such the masses have developed an 'alienation syndrome' with respect to court, law and justice.[29] In other words the adversary system has itself become an adversary of social justice.

JUDICIAL REFORMS

But all is still not lost. Behind the deep depressing ocean of problems lies a ray of hope. Enthusiastic reformers, Law Commission, and various other committees have from time to time suggested several judicial reforms for the treatment of the alienation syndrome, an exhaustive compilation of which can provide a threat to the epical ranking of *Mahabharata*. In this article those suggestions are being presented the implementation of which, is not likely to raise hue and cry and moreover which can be implemented without moving any cornerstone of the grand edifice of our legal system. Broadly speaking, the flaws in the judicial system can be enumerated under following headings and accordingly the reforms can be looked for:-

A. Criminal Justice reforms pertaining to Police & Prosecution

B. Reforms pertaining to civil suits

C. Mechanical reforms

A. Criminal Justice Reforms

The Malimath Committee has provided an elaborate report on criminal justice reforms which despite being worth implementing has attracted the accusation, of not being in accord with the international standards of human rights. A few suggestions which neither require major overhauling of criminal justice system and which are not susceptible to any like accusation are being suggested which can indeed bring a crucial and constructive change in the criminal justice system.

While pondering over criminal justice reforms , one has to begin from the foundation --the stage from where criminal proceedings get initiated--the lodging of FIRs in the police station. As being an inevitable rung in the stair-case police cannot be ignored. It is unfortunate that the department which ought to be the epitome of sincerity and professionalism is characterized by adjectives such as brutal, corrupt, immoral etc. irrespective of the state to which it hails.

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28. According to Professor Laurence Tribe of Harvard Law School "Law may be guilty of double injustice when it is too late and too costly, for it holds out remedial hopes which peter out into sour dupes and bleeds the anaemic litigant of his little cash only to tantalize him into a system equal in form but unequal in fact". See *id* at 129.
29. See *id*, at 133.

1. Attitudinal change--- Attitudinal change is vital and urgent, in view of the discourteous behaviour of the police which has a direct impact on non-filing of complaints. Common man is not able to muster enough courage and confidence to register F.I.R. because of the discouraging attitude of the police .The least (assuming there is no prompt action, which is generally the case) that a victim who approaches the police expects is that the police officer is alacritous and sincere to listen to his problems. Rude manners, filthy language are needed to be replaced by friendly behaviour, supportive and sympathetic attitude. In order to achieve this, the training curriculum of police trainees should provide for interactive sessions with motivational '*gurus*' and psychiatric counsellors and sociologists.

Training can be crucial to the inculcation of attitude of professionalism and cooperation in the future officials. Professionalism represents the qualitative dimension of a person in the service of society. It represents the value orientation of people and reflects the colour of an organization enhancing its credibility, esteem and image. Professionalism is a mindset and a thought process which compels a person to keep organization at the top slot of his priority list. When this organization is Police, the mindset and the approach can not be optional . It is rather a condition which is implicit in the intrinsic definition of Policeman

No one can deny that attitudinal change is partly dependent on material changes too. Prosecution and police must have some incentives to work efficiently. If this impetus is missing one cannot expect them to work with full intensities, devotion. Incentives for prosecution officer could be special promotions, awards, extra emoluments or anything else which has rippling effect of making good officers to stand out of their pot bellied counterparts.

2. Technical upgradation and Separation of wings--- Police and Prosecution should be periodically technically updated. Similarly, investigating agencies should be made well acquainted with the latest development in Forensic Science and other newer fields of investigative science like brain mapping , etc., to ensure international standards of investigation.[30]

Forensic is defined by Black's Law Dictionary as "belonging to courts of justice." Forensic science is the application of science to assist courts in resolving question of facts in criminal and civil trials. At the dawn of the new millennium , however, the jurisprudence of forensics applies a definition more broad than that of "forensic science." Forensic science is a scientific method of gathering and examining evidence. Crimes are solved with the use of pathological examinations that gather fingerprints, palm prints, footprints, tooth bite prints, blood and hair and fibre samples. Handwriting and typewriting samples are studied, including all ink, paper, and typography. Ballistics techniques are used to identify weapons and voice identification techniques are used to identify criminals.

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30. Malimath Committee Report, 2003.

Very unlike India, U.K. has a specialized agency 'Forensic Science Service (FSS) of the Home Office which is completely dedicated to the application of forensic science to aid law enforcement agencies. The FSS has a world-wide reputation for DNA research and development Its purpose is to serve the administration of justice principally be offering scientific support in the investigation of crime and expert evidence to the courts. The FSS provides a national service from seven labs across the UK , and works primarily for the 43 police forces in England and Wales, the Ministry of Defence Police and British Transport Police as well as the Crown Prosecution Service, HM Customs and Excise and HM Coroners. However, the main function of the FSS is to work within the criminal justice system to give impartial evidence for both the prosecution and defense.[31]

In India Central Forensic Science Laboratories (CFSL) is the body, the aid of which is taken by the law enforcement agencies for forensic related information. There are three CFSLs--one each at Kolkata, Chandigarh and Hyderabad headed by a Director, who is basically a scientist. Keeping in mind the vast size of our country and huge number of criminal cases registered per day, these numbers sound inadequate and immediately need to be increased.

Law commission in its 154th Report[32] recommended separate investigation wings with police officers trained in forensic methods of investigation to be in-charge of investigation. Malimath Committee report has also given certain suggestions regarding police investigation. Keeping in view the fact that criminality has undergone various changes quantitavely as well as qualitatively, the Committee has suggested separation of investigation wing from law and order wing. The Committee also has suggested for a crime branch having specialized squads for organized crimes and other major crimes. It has also recommended that adequate infrastructural facilities be provided to the investigating agency, especially with regard to accommodation, mobility, connectivity, use of technology, training facilities, which according to the report are presently grossly inadequate. These suggestions are worth implementing in view of the magnitude of the rising crime graph.

3. Isolation from political interference---Political forces guided by unfair considerations are playing a dubious game and influencing the police investigation. It is advisable that role and functions of police should be redefined to make it more accountable to the law of the land and the masses. There is a need to take a leaf from the book of several progressive countries where the police signifies a sensitive and sincere department. In U.K., every policeman has an original power vested in him. Once a law is passed by Parliament, no one can tell him how he should act in upholding it. In Japan,[33] there is a National Public

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31. *Available* at http://www.bbc.co.uk/crime/fighters/fss.shtml.
32. 154th Report of the Law Commission of India, available at www.lawcommissionreport.com.
33. P. P. Singh, *Police Reforms-Their Raison d'etre*, SVP NATIONAL POLICE ACADEMY JOURNAL 31, Jan.-June 2000.

Safety Commission which is an apex body. It is insulated from political pressure and the Prime minister is not empowered to give it any directions. In U.S. A.[34] following the reforms carried out in seventies, as stated by Jerome H. Skolnick and Candace McCoy, "political machines can no longer control the working of American Police Department nor can they protect police departments from public scrutiny."

Several Chief Justices of India have spoken in favour of police reform. Justice M.N. Venkatchaliah, in his inaugural address to the Criminological Congress held at Bangalore in 1996,[35] said that insulating the police from unlawful interferences required serious and immediate attention. Justice A.M. Ahmedi also said "the investigating agency needs to be relieved of extraneous pressures" and the time was ripe to "set up an independent agency which would be free of internal pressures."

The National Human Rights Commission[36] has urged "the insulation of the investigative functions of the police from political and other extraneous pressures as essential to restoring confidence in the police and reducing the complaints of human rights violations by the members of the force," and particularly recommended implementation of the Second Report of the Police Reforms Commission as it is felt that "an efficient, honest police force is the principal bulwark of the nation against violations of human rights."

B. Reforms Pertaining to civil Suits

Failure of the judiciary to deliver justice within a timeframe has brought about a sense of frustration amongst the litigants. Human hope has its limits and waiting for too long in the current life style is not possible. Speedy trial undoubtedly is the need of the hour. Speedy trial is an essential ingredient of reasonable, just and fair procedure guaranteed by Article 21 of the Indian Constitution. The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional obligation to ensure speedy trial.[37] To secure speedy and expedifious justice following steps need to be taken in the right earnest.

Some suggestions to plug the prevailing loopholes are as follows :

1. Law should be amended to compel the plaintiff to submit the copies of the documents on which he wishes to rely along with the plaint and if the plaintiff files any document thereafter, but before issues are framed, he should pay costs as may be imposed by the court which could go to the legal aid fund. If documents are filed after framing of issues and if admitted by the court subject to payment of

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34. *Id.*
35. *Id.*
36. *Id.*
37. *P. Ramchandra* v. *State of Karnataka* (2002) 4 SCC 578.

costs, it shall go to the defendants because now he is the person who is suffering [38]

2. Law should be amended to provide that adjournments shall not ordinarily be granted for more than 15 days in final disposal matter. Such legal provisions will discourage seeking of long adjournments with a purpose to delay the disposal of the suit.

3. One of the major caues behind the slow pace of court proceedings is age-old and outdated methods of sending notices and summons. System of summons and notices should be given a twist of modernity. The Courts should be made free to engage private agencies for these purposes.

4. Advocates, as being the officers of the court should be made answerable to the legal system. Delaying the proceedings by means of unnecessary adjournments, should be considered as misconduct. A ceiling must be imposed on the number of cases which one lawyer can deal simultaneously because one of the major reasons for taking adjournments is the engagement of the lawyer in other cases.

C. Mechanical Reforms :

Mechanical Reforms are reforms which have the effect of eliminating delaying facor. It includes reforms relating to procedural requirements, proper implementation of provisions which are already provided in existing laws to ensure speedy justice and increasing the strength of judges and introdution of new managerial techniques and devices. One of such managerial techniques is the case management technique[39] which had gained considerable importance after it has been tried and tested in other parts of the world and has been found to be a successful method of controlling the huge backlog of cases. This has now become a science involving not only court management but also case flow management which is the study of the time taken in various stages in litigation. This technique basically focuses on reducing the time consumed in each stage which cumulatively saves a significant amount of time.

Order XVII, Rule 2(a) and 2(b) of Civil Procedure Code and Section 309 of the Cr.P.C.[40] should be observed/implemented in both letter and spirit.

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38. A. K. Shrivastava , *Speedy Justice in Civil Suits: Appeals and Revisions -A Re-look*, JTRI Journal , (March 1997).

39. R. B. Mehrotra, 'Court Management', JTRI Journal , July-Sept. 1995.

40. Code of Civil procedure, 1908- Order XVII, Rule 2(a)- when the hearing of the suit has commenced, it shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds that, for exceptional reasons to be recorded by it, the adjournment of the hearing beyond the following day is necessary
Rule2(b) ---no adjournment shall be granted at request of a party, except where the circumstances are beyond the control of that party
Sec 309 (CrPC). Power to postpone or adjourn proceedings-(1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in

The situation in criminal litigation has improved to a great extent by the innovation of fast track courts but still there is huge backlog of cases owing to the low strength of judges. To combat the problem of delayed justice resulting from the inadequate strength of judges 120th Law Commisssion Report[41] has recommended a five fold increase in judicial strength at al levels. It has compared India's population to judge ratio with the ratio of other countries, to point out that it is one of the lowest in the world. While the US and UK have about 100 to 150 judges per million population India has a mere 10.5 judges per million population.

According to the 85th Report of Parliamentary Standing Committee on Home Affairs 435.4 lakh cases are pending in 18 High Courts. For reducing the burden[42] on existing courts two shift system may be introduced. In the second shift only retired judges need sit for disposal of final hearing appellate and writ cases. They may be paid honourarium per case.

Article 224 of the Indian Constitution provides for appointment of additional and acting judges by the President to cope with temporary increase in work. If it appears to the President that the number of judges of that court should be for the time being increased, he may appoint duly qualified persons to be additional Judges of the court for such period not exceeding two years. Now it is high time to use this provision effectively.

In 2003, in a meeting of Chief Justice and Chief Ministers, a proposal was made that the number of judges should be increased. As a result of several

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particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been exmined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

If the Court after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable and may by a warrant remand the accused if in custody.

Provided that no Magistrate shall remand an accused person to custody under this Section for a term exceeding fifteen days at a time.

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing.

Explanation 1- If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2 - The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused.

41. 120th Report of the Law Commission of India, *available at* www.lawcommissionreport.com.

42. V. K. Mehrotra, *Indian Judiciary, Points to Ponder, JTRI Journal*, July-Sept.1995.

attempts by the Central Government, the total number of High Court judges has increased from 655 to 749.

CONCLUSION

Laws are not enough to ensure Justice. The plethora of statutes, subordinate legislations, rules, notifications, byelaws serve no purpose sans Justice for "Law without Justice is blind and Justice without Law is lame". The fertilization of Law and Justice is vital for the continuance of faith in *fiat justitia*. Ubi jus ibi remedium is basic to the credibility of law. For Laws to be a dynamic instrument of justice in the Third world setting, Justice system must be inexpensively accessible, otherwise Laws would continue to apply to everyone but Justice shall be available to only a few.

It's high time that the Indian Justice system gets the treatment in the ICU by the implementation of various reforms which would then treat everyone equal not in mere form but in fact as well. Sweeping reforms in the police administration are necessary to shield it from political interference and corruption. Indian legal set-up cannot afford to ruin more hopes and shatter more confidences. To survive and to make the faith of masses to survive, it has to come out with optimum solutions. This temporary '*legal caligo*' over law reforms needs to be cured before gets degenerated into a permanent 'Legal Blackout'.

34 Ban.L.J. (2005) 135 - 142

THE FAMILY COURT IN INDIA: EQUALITY AND GENDER JUSTICE

B.P. Dwivedi*

Introduction

In the second half of the 20th Century, there was a shift of emphasis on women related matters the world over, in general, and in the developed countries of the west, in particular, as a result of the declaration of the equal status of women with that of men as envisioned in the Universal Declaration of Human Rights, 1948[1]. This was a seed for the emergence of feminist jurisprudence in the late seventies.[2] The declaration of seventies as the Decade of Women by the United Nations gave impetus to the adoption of various measures aimed at raising the status of women, and for that purpose, enacting special laws to deal with the women's related issues.[3]

Equality and Gender Justice: A Constitutional Perspective

The Constitution of India guarantees 'equality before law' and 'equal protection of the laws' to all persons as a fundamental right.[4] It means that men and women have equal status and opportunities in all matters. Equality here means not the formal but real equality, because men and women in society are not placed in similar circumstances. Women are recognized as an oppressed and weaker section of the society. Therefore, in order to bring about equality it is necessary to give some special privileges in favour of women.[5] The concept of equality demands that like should be treated alike and the unlike should be treated differently. In view of the above felt need for providing special privileges to women, the Constitution (1st Amendment) Act, 1951 amended Article 15 of the Constitution to include special provisions for women.[6] Thus this Article empowers the state to make special provisions in favour of women to improve their status and bring them equal to that of men.

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1. *See*, Article 2.
2. *See*, Feminist Jurisprudence, in M.D.A. Freeman, LLyods', Introduction to Jurisprudence, 6th Edn. 1994.
3. *See*, generally, The Immoral Traffic (Prevention) Act,1956; The Maternity Benefit Act,1961; The Medical Termination of Pregnancy Act, 1971; The Indecent Representation of Women (Prohibition) Act,1986; The Muslim Women(Prevention of Rights on Divorce) Act,1986;The Commission of Sati (Prevention) Act,1987; The National Commission for Women Act,1990; The Pre-Natal Diagnostics Techniques(Regulation and Prevention of Misuse) Act,1994; The Protection from Domestic Violence Act,2005; etc.
4. Article 14, the Constitution of India.

In order to realize the substantive equality of women, it is significant to mention here that 'means' is as important as the 'end' and the 'procedures' and the 'forum' are equally important in this respect, in order to vindicate one's own rights and obligations. The traditional justice delivery system has proved to be ineffective as the courts adopt a mechanical and technical approach.[7] The most important factor for enforcing a right is accessibility of court. Article 39-A was added to the Constitution in 1976 which imposes obligation upon the State for providing legal aid.[8] In furtherance of this directive principle, the Legal Services Authorities Act was enacted by Parliament in 1987, which came into force in 1995. Legal Services Authorities have been established throughout the country right from the National level down to the Sub-divisional (Taluka) level to perform the functions under the Act.[9] Accordingly, all women are entitled to receive legal aid. In cases where a woman is unable to afford the cost of litigation, she is entitled to free legal aid.[10] It is now a fundamental right of a woman and a mandatory obligation of the State to provide free legal aid to all women. Women can vindicate their rights only if they are aware about them. It is, therefore legal awareness which is the first and the foremost requirement for ensuring real equality and that would lead to gender justice. Further, there is need for gender sensitization of not only the common people in society but, in particular, judges also.[11] The task of ensuring gender justice is vast and can be achieved only by sharing the responsibility and eliciting support from all sections of society especially NGOs, sociologists, psychologists, etc.

The Constitution, thus, guarantees gender justice to women in clear terms. However, when we look at society, the situation is otherwise and quite different. The predominant position given to men in the family structure leads to discrimination against women members of the family in almost all matters that regulate their existence. The structure of the family and the social norms and values that are built around are thus completely against the principle of equality guaranteed by our Constitution. This system of gender based inequality, often referred to as patriarchy, does retard the growth of women's personality and affects them mentally, socially and psychologically. The inequality of women within the family extends to and is related with their socio- economic and legal position. The laws that affect women most closely are those relating to the family, that is, marriage, divorce, maintenance, custody of children, inheritance and women's right to property, etc and known in common parlance, as family or

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7. Chief Justice P. N. Bhagwati, Law as Instrument of Change.
8. The Constitution (Forty Second Amendment) Act, 1976, inserted Article 39-A which provides "The State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."
9. *See*, Section 11A.
10. *See*, Section 12.
11. *Vishaka* v. *State of Rajasthan*, AIR 1997 SC 3014.

personal laws.[12] Such laws, ever since their codification, are based on the religious practices of different communities. Even after five and a half decades of the implementation of the Constitution, the Uniform Civil Code has remained to be a dead letter till date.[13] As a result five sets of personal laws exist pertaining to the Hindu, Muslim, Christian, Parsi and Jewish Communities. The essential feature of these laws has been the assertion of male dominance over women. We are all aware that law is an important instrument primarily for administering and securing justice, resolving disputes and even ordering socio-economic relations in a manner conducive to development, in civilized societies, as envisaged by the collective will of the people in their respective Constitutions. Women, as a class, have been suppressed through the ages, using social sanctions, behaviour norms and religious cults, etc as parameters defining their boundaries. Gender equality can become a reality by removal of disabilities with special care through reverse discrimination. This discrimination would mean measures used by the state to protect the traditionally weaker and historically handicapped sections of society. This dynamic process of equalization is more than a mere declaration of equality.

The Institution of Family and Legal Protection

A series of social welfare legislations were enacted with the purpose of elevating the status of women in India. The Law Commission of India in its 59th report (1974) stressed that in dealing with disputes concerning the family, the court ought to adopt and approach radical steps distinguished from the existing ordinary civil proceedings, and that these courts should make reasonable efforts at settlement before the commencement of the trial. In 1975, the Committee on the Status of Women recommended that all matters concerning the 'family' should be dealt with separately.[14] Family is a social institution which is very important for the existence of the society as well as for the Nation. It has many tasks to perform in relation to procreation, protection, training, development, evolution of social norms and social sanctions, and in the long run, to make a balance between the individual and the State. As a social institution, the family refers to an organized, formal, and regular way of carrying out certain essential tasks in society as well as a wide system of norms that organises family units into stable and on going social systems. Family is one of the earliest experiences in the community and essential organisation in each and every society. It provides the child with his first instruction and shapes his character. This institution needs to be understood in terms of the interaction among its members in the context of their inter- related status and social expectations. Usually a family comes into being consequent upon marriage, and includes

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12. For example, the Muslim Personal Law (Shariat) Application Act, 1937; the Dissolution of Muslim Marriages Act, 1937; the Hindu Marriage Act, 1955; the Hindu Minority and Guardianship Act, 1956; the Hindu Succession Act, 1956 etc.
13. Article 44, the Constitution of India, says " The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India".
14. S. M. Imran Ali, A Background Note, Workshop on Working of the Family Courts, National Commission for Women, March 20, 2002, New Delhi.

people linked together by marriage, blood or adoptions and having some reciprocal rights and obligations to one another.

Family is a system where a group of individuals interact to ensure their biological, physical, emotional, economic and social survival in society. Functions of the family are nurture, economic activity, providing a residence, education, and transmission of culturally desirable values. Strategies to achieve these goals (or tasks) are through fight (work, reproduction and struggles), flight (avoidance or escape), pairing (securing alliances, resources and networking), and apathy or indifference (sheer helplessness or inaction).[15] These strategies are used severally and in combination to meet the developmental needs of each family perceived (or misperceived) by it, and the stage of development and the social situations which it finds itself in. For example, families form, grow, expand, contract, split, re-unite, and re-form.. These phases are related to the temporal and spatial dimensions of living in a family, and are marked by attendant changes in individual member's and group's social responsibilities – their accretion, suspension, division, transfer and withdrawal.

With the growth of industrialization and urbanization in the recent past, there has been significant change in the social structure, which has substantially affected the interpersonal relationships within the family. There are many situations and events throughout the life cycle that produce stress and strain which may sometimes result in matrimonial conflicts. In this situation such conflicts must be resolved otherwise it would destroy the social structure. The institution of family as a significant unit of social structure needs to be protected and preserved from the adverse forces of society. Therefore, all societies have some mechanisms or devices to resolve matrimonial and family disputes.

For the removal of disabilities faced by women and to provide them with easier access to justice, relevant changes in substantive and procedural laws were made. Laws concerning family matters affect women the most. The Code of Civil Procedure was amended to provide for special procedure to be adopted in law suits or court proceedings relating to matters concerning the family.[16] It is possible to have the desired result in this respect only if gender sensitized personnel including judges, social workers and other trained persons hear and resolve all family related issues through elimination of rigid rules of procedure. It is very difficult to achieve any result from the judges with male dominated attitude in this direction.

The Legislative Enactment and the Emergence of Family Courts

The subsequent changes made in substantive and procedural laws had hardly any significant effect and the courts continued to have the same adversary approach. Hence a great need was felt to establish family courts for speedy settlement of family disputes. To achieve the above objective the Family Courts

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15. R. R. Singh, Multi Disciplinary Collaboration in the Implementation of Family Courts Act, in Ratna Verma, Ed., *Family Courts in India*, (1999) at 80.
16. Chapter XXXIIA of CPC was added in 1976.

Act was enacted by Parliament in 1984.[17] Family Courts are specialized courts which were established with the objective of maintaining welfare of the family by utilizing multidisciplinary approach to resolve family problems within the framework of law.[18] These courts aim at securing the legal rights of the individuals on the one hand, and undertake the role of guide, helper and the counselor on the other, to enable families to cope with their problems and establish family harmony, following the principle of the dignity of the individual and equality of status of both the sexes. The basic premise of family courts emerged from the conviction that family being a social institution, disputes connected with family breakdown, divorce, maintenance, custody of children, etc. need to be viewed from a social rather than legal perspective. In the Indian context women and children, being weaker parties in family disputes, dispensation of justice required special attention, protection and special judicial arrangement.[19]

The main objective of the Act is to promote conciliation, and secure speedy settlement of disputes relating to marriage and family affairs through the establishment of Family Courts. Keeping in view the above objective, the appointment of judges of the Family Court is not only limited to the persons of judicial service but also includes persons holding any post under the Union or a State requiring special knowledge of law or a practicing advocate of a High Court who has been practicing for at least seven years.[20] It is a statutory requirement that in selecting persons for appointment as Judges every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage, and to promote the welfare of children, and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counseling are selected. Further, the Family Court (other qualifications for appointment of Judges) Rules, 1988, provides that a post-graduate in law with specialization in personal laws, or a post-graduate in social sciences with a degree in law having at least seven years experience of field work, research or teaching may also be appointed.[21] Strangely enough, many States Family Court Rules provide that the Family Court judge shall be drawn from the higher judicial service of the State (for example Rajasthan Rules).[22] The Act further requires the association of social welfare agencies with the Family Court.[23] The court can lay down its own procedure to arrive at the settlement of

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17. The object of the Act reads, "An Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith."
18. Ratna Verma, Ed., *Family Courts in India*, 1999, New Delhi, at 14.
19. *Id.*
20. Section 4(3) of the Act.
21. *See*, Rule 2.
22. *See*, Rule 3 (1) (a), the Family Courts (Rajasthan) Rules, 1991.
23. *See*, Section 5 of the Act.

disputes.[24] The court may receive as evidence any report, statement, document etc. although the same would not be relevant under the Evidence Act.[25]

The Act itself contains some provisions which indicate the informality of the procedure. The procedure prescribed under the Act does not suffer from either arbitrariness or being fanciful.[26] It is not obligatory for the Family Courts to frame issues. Even if the issues are framed by it, it would not be irregular or illegal. Thus the Family Court may receive as evidence any report, statement, document, information or other matter that may assist it effectually in resolving the dispute, irrespective of the fact that the same would be otherwise irrelevant or inadmissible under the Indian Evidence Act 1872. It is not obligatory on the part of the Family Court to record as the evidence of witnesses at length.[27] It would be enough if the judge records or causes it to be recorded a memorandum of the substance of what the witnesses have deposed. Such a memorandum is required to be signed by the Judge and the witness. And once that is done it would form a part of the record of the case.[28] Where the evidence of a person is of formal character it may be given by affidavit and it would constitute part of the evidence in the case.[29] The same informality is maintained about the judgment of the Family Court. A judgment of the Family Court should contain a concise statement of the case, the points for determination and the decision.[30] A decree or order of the Family Court may be executed by the court itself or any other Family Court or by an ordinary Civil Court in accordance with the convenience of the party concerned.[31]

No appeal or revision lies against the interlocutory orders. Similarly, no appeal or revision lies against the decrees or orders passed with the consent of the parties. Otherwise an appeal or revision lies to the High Court, both on facts and law. All the appeals must be presented within a period of 30 days from the date of judgment, order or decree of the Family Court. All appeals are to be heard by a bench consisting of two Judges.[32] No second appeal is provided, though of course, an appeal with the special leave of the Supreme Court under Article 136 will lie to the Supreme Court.

With the growth of population, litigation has gone up tremendously, and some disputes are such that in order to protect the honour and position of the parties to the litigation, the proceedings should not be exposed to the public. Matters relating to families are such disputes, and therefore, provisions have

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24. *See*, Section 10(3).
25. *See*, Section 14.
26. Lata Pimple v. Union of India, AIR 1993 Bom. 255.
27. See, Section 15 of the Act
28. *Id.*
29. *See*, Section 16(1).
30. *See*, Section 17.
31. *See*, Section 18(3).
32. *See*, Section 19.

been made to hold the proceedings in camera.[33] When the proceedings are held in camera, possibility of settlement is greater.

The Family Courts Act does visualize some support services. Most of these services are to be brought into being under the rules. Some High Courts have already framed rules for this purpose[34] The Act stipulates the association with the Court proceedings of institutions or organisations engaged in social welfare[35] of persons professionally engaged in promoting the welfare of the family, of persons working in the field of social welfare, or any other expert in family law matters[36] It also stipulates for the appointment of counselors, officers and other employees necessary for the functioning of the Family Court system[37] The Family Court may also secure the services of medical experts or such other persons who specialize in promoting the welfare of the family to assist it in the discharge of its functions.[38]

Conclusion and Suggestions

For effective functioning of Family Courts, a vast manpower of trained persons to man the Family Court and the auxiliary services are needed[39] So it is necessary that a training and continuing education programme be arranged for Family Court Judges, and the staff of support services should be provided some training in family law, sociology, psychology and social welfare before being called upon to discharge their functions. They should participate at regular intervals in education programmes being arranged so that they could have proper understanding of family conflicts for better disposal of cases. For such guidance, there is need to establish some permanent family law training centers both at the state level and national level. Such centers may be located; it is suggested, in the law departments of the universities in the respective areas.

It is significant to note that the Family Courts Act, 1984 does not establish a Family Court on its own but enables the State Government to establish the court[40] In view of the gravity of the problem relating to marriage and family affairs and the enormous pressure from various women and other organisations, the establishment of the Family Courts has been comparatively very slow. However, within twenty years of the enactment, a total of 123 Family Courts have been established in 22 States.

The Central Government is providing 50% share to the State Government for setting up of the Family Court @ Rs. 10 lacks per court. The

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33. Section 11.
34. *See*, for example, the Maharashtra Family Courts Rules, 1987; the Family Courts (Karnataka) Rules, 1987; the Family Courts (Rajasthan) Rules, 1991; the West Bengal Family Courts Rules, 1994 etc.
35. Section 5(a).
36. Section 5 (b) & (c) and Section 12.
37. Section 6.
38. Section 12.
39. D. C. Manooja, *The Family Courts*, AIR 2001 (Journal) 115 at 120.
40. See, Section 3 of the Act.

states are expected to provide matching share. Under non-plan expenditure, a fund to the tune of Rs. 5 lacks per court is provided as running expenditure. It is desirable that Family Courts should be established in each district of all States.[41]

The Family Courts were established on the foundation to treat the family problems as a social therapeutic problem rather than legal. Therefore such courts should conserve and preserve family life and manage it, instead of penalizing the erring party. Further, the Family Court requires a less formal and more active investigational and inquisitional procedure. It means involvement of the parties, social workers, lawyers, welfare officers, psychiatrists and other related groups in finding out a solution to the family problems on humane considerations. It is different from the adversarial litigation as in the case of family dispute both parties litigate to ultimately resolve the dispute and solve the family problem. Let the Family Courts, thus, proceed in this direction to improve the lot of women by resolving family disputes.

No. of Family Courts Established : Position as on 31.8.2003

S.No.	Name of the State	No of Family Courts
1.	Maharashtra	16
2.	Delhi	15
3.	Uttar Pradesh	14
4.	Karnataka	10
5.	Kerala	9
6.	Andhra Pradesh	8
7.	Madhya Pradesh	7
8.	Gujarat	7
9.	Rajasthan	6
10.	Tamil Nadu	6
11.	Uttaranchal	5
12.	Jharkhand	4
13.	West Bengal	3
14.	Bihar	3
15.	Orissa	2
16.	Manipur	2
17.	Tripura	1
18.	Sikkim	1
19.	Pondicherry	1
20.	Jammu & Kashmir	1
21.	Chhattisgarh	1
22.	Assam	1
	Total	123

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41. *See*, the table at the end, for the position of the Family Courts established up to August 2003.

34 Ban.L.J. (2005) 143 - 151

AN INSIGHT INTO INTRA AND INTER COUNTRY ADOPTION LAWS

Ashok Kumar Srivastava*

INTRODUCTION

The great poet Milton has said, 'Child shows the man as morning shows the day'. Children of today are considered as the future of tomorrow. They are the national wealth and if this wealth is not given proper care, an attention during their budding age, they can't, blossom, they can't develop. The result would be an unhealthy society with weak foundation.

Today in many countries thousands of children are passing through the phase of darkness, where they don't , have any opportunity to flourish or develop as they are deprived of the very basic supporting hands of their parents or any of family members. Such a child loses not only his childhood but also loses all his or her dreams before they become reality. Thus, all such unfortunate children need the best that society can provide them. The best place where a child can develop his personality is the place called home. Which home? Is it the home meant for orphans or neglected ones, certainly not. It is the home where he can find love and affection of his or her mother and father, where be can pass his time with joy and peace by playing, learning and growing. But for thousands of children the reality of childhood, much to their dislike and distaste is quite different.

To meet the challenges of rehabilitation of such destitute or neglected children of our society, adoption has been regarded as one of the solutions. An "adoption", in theory, involves a complete severance of relationship of a child from the family of his or her birth and substitution or replacement of the same in a new or a stranger family. Thus, it is an act of affiliation by which the relationship of parentage is legally and permanently established between persons not so related by natural birth to the adoptive mother and father. Adoption, therefore can be regarded as useful to both of the parties.

CONCEPT OF ADOPTION : OLD AND NEW

The concept of adoption has traveled a long way from its ancient philosophy of having a son for four basic reasons i.e. 1) the natural desire for a son, 2) to have an old age help who can protect the property of the adoptive, 3) continuation of family progeny i.e. lineage and 4) the religious or spiritual desire to have the eternal benefit i.e. salvation after death, which can be performed by a son. The religious Hindu texts also express and recognize the spiritual and religious importance of the fourth reason mentioned above behind adoption. The ancient Hindu text writers clearly express in their text that a Hindu cannot get

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salvation without a son, a son is the means through whom a person gets abode to heaven from hell after his or her death.[1] So it is the foremost duty of a Hindu to have a son by any means if he is sonless.[2]

All these old considerations have taken a new approach in the present global context. Adoption is has considered important from the point of basic human rights as well as the welfare of the child. Inter-country adoption is the part of this approach. It considers that a neglected or parentless child can get back to his childhood by getting a home and adoptive parents.

An inter-country adoption, as was debated and discussed at an International Seminar on inter country adoption can be explained as an adoption in which the adoptive and the child do not have the same nationality as well as in which the habitual residence of the adoptive and the child is in different countries.[3] Such adoptions are based on certain international understandings between countries enshrined in international treaties. Such adoptions are also taking place as per the international norms which provide that the child should be adopted first in the country of his or her own birth and origin and when the adoption of a child is desired by a foreign parent, then he has to take the permission from the country to which the child belongs as per the rules of the country.

India has also allowed the inter-country adoption of children within the framework of the rules relating to such adoptions But the various hard truth revealing facts relating to various social organisations involved in inter-country adoptions and the plight of such adopted children by the foreign parents after adoption are an eye opener for all those concerned with child welfare and protection of the rights of the child.

Inter-Country Adoption Law in India

The ancient law of adoption prevalent among the Hindus was primarily based on spiritual motive. It authorized the adoption of only a male child. The ancient law was the Hindu Adoption and Maintenance Act, 1956, which allows the adoption of both male as well as female child. Adoption in India is permitted only among the Hindus by their personal law. Personal laws of Mohammedans, Christian's and Parsis don't allow adoption. The Hindu Adoption and Maintenance Act, 1956 does not speak about the inter-country adoption. Its authority is stretchable only to the extent of Indian territory excluding the state of Jammu and Kashmir.[4] Thus this Act deals only with intra country adoptions. As we don't, have any specific statutory enactment dealing with inter-country adoption of children resort can be made to the provisions of the Guardians And Wards Act, 1890 as well as the Juvenile Justice Act, 2000 for the purposes of

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1 *Aputrashya Gatirnasti, Punnam Narakat Trayate Iti Putrah.* (Yagyavalkya)

2 *Aputren Sutah Karyo Yadrik Tadrik Pyayatnatah.* (Manu)

3 European Seminar on Inter Country Adoptions, May, 1960. See, also UN Convention in the Rights of the Child, 1989; UN Declaration on the Rights of the Child, 1959.

4 Sec. 1(12) of the Hindu Adoption and Maintenance Act, 1956.

facilitating the adoption of a child by a foreign parent by filing an application through any registered child welfare agency of their country to an Indian social organisation registered by the government of India or to a District Court where the child is residing. On such an application by a foreign parent the court may or may not appoint such person as guardian of the child.[5] The Supreme Court of India has made this observation in the famous case of *Laxmi Kant Pandey* v. *Union of India*.[6] Where an application is made for the purpose of adoption and appointment as a guardian, by a foreign parent, the courts are guided by the provisions of Hague Convention of 1965, which lay down that the child should preferably be adopted by a parent belonging to the same country where the child was bor. The second consideration before the Court showed the Welfare of the child. When of the first option is not the court may grant permission for adoption by a foreign national. In spite of all these guidelines and rules the plight of such adopted children and violation of their basic human rights are being reported. Innocence of such children was subjected to maximum exploitation by the ill-motivated persons involved in the trafficking of such children for monitory benefit.

Constitutional Safeguards:

The constitution of India prohibits trafficking in human beings.[7] However, the news of rescue of about 150 infants by the officials of the women and child welfare from various unrecognized adoption agencies in Andhra Pradesh has largely focused the attention as to how trafficking in human beings has become a lucrative means of generating money. When Article 39 (e) prohibits the abuse of the tender age of children[8], clause (f) of the same Article mandates the state that the children shall be given the opportunity and facilities to develop in a healthy manner and in conditions of freedom and their childhood should be protected against exploitation.[9] The ground reality is that these directives are to a large extent being violated by many who are responsible for the welfare of such children. In Andhra Pradesh, many infants mostly girls below six months of age from the poor tribal lambda community and other areas like Nalgonda, Mahbubnagar and Ranga Reddy areas were kept by many unrecognized adoption agencies. A report published in a prestigious journal says that more than 400 babies were procured by two adoption agencies who were procuring children from poor tribal families through their routine brokers, who were buying such babies at a paltry amount of Rs. 1000-2000 for the purpose of giving them in adoption in foreign countries with a view to make money from the prospective adopting parents.[10] All such news are evidence of the fact that how constitutional rights of the children are abused.

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5 Sec. 9 of the Guardian and Wards Act, 1890.
6 AIR 1986 S.C. 272
7 Art. 23 : Prohibition of traffic in human beings and forced labour.
8 Art. 39(e) that the health..... and tender age of children are not abused.
9 Art. 39(f)
10 Economic and Political Weekly - 5-11, 2001, p. 1489

Regulatory guidelines by the Supreme Court:

The widespread procedural irregularities and abuse of power by various social organisations involved with the activities of giving children into adoption came into limelight before the Supreme Court of India in the famous case of *Laxmi Kant Pandey* v. *Union of India*[11], where the petitioner an advocate had drawn the attention of the Supreme Court through a writ petition, alleging about the malpractices exercised by social organisations and voluntary agencies engaged in the work of offering Indian Children in adoption to foreign parents. The petitioner had referred that Indian children given in adoption to foreign parents are not only given at the risk of their lives but were also forced to become beggars or prostitutes for want of proper care from their foreign foster parents.[12] The petitioner had sought the intervention of the court for issuing the directions to the Government of India, Social organisations like Council of Social Welfare and Council of Child Welfare to take up the function from the various unrecognised social organisations involved in trafficking of children for their business purposes.

The Court formulated certain guidelines for permitting such adoptions and laid down the procedure for that purpose. While formulating such guidelines, the Supreme Court of India had also examined the Adoption of Children Bills, 1972 and 1980, which had certain provisions relating to the inter-country adoption.[13] The Supreme Court also referred to the various international conventions while formulating the guidelines for the welfare of the adopted children by the foreign parents.

The basic idea behind formulation of the procedural guidelines by the Supreme Court was based on three principles-

1) Adoption is the best rehabilitative measure for a destitute or neglected child.

2) Child preferably should be given in adoption to an Indian parent so that the child's behavioral, psychological and cultural development may best be suited in an Indian atmosphere and when no parent from Indian society is found then only the child may be given to a foreign national.

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11 AIR 1986 SC 272. See, *Lakshmi Kant Pandey* v. *Union of India and another*, AIR 1986 SC 272; *Lakshmi Kant Pandey* v. *Union of India*, AIR 1987 SC 232; *Lakshmi Kant Pandey* v. *Union of India and others*, AIR 1992 SC 118; *Sunderlal Chhotalal Kamdar and others* v. *Asha Trilokbhai Shah (Miss) and others*, AIR 1995 SC 1892; *Karnataka State Council for Child Welfare and another* v. *Society of Sisters of Charity', St. Gerosa Convent and others*, AIR 1994 SC 658; *Indian Council of Social Welfare and others* v. *State of A.P. and others*, (1996) 6 SCC 365; and *Lakshmi Kant Pandey* v. *Union of India and others*, (2001) 9 SCC 379.

12 Based on news item published in "The Mail", a British Newspaper.

13 The adoptions of Children Bills, 1972 and 1980 could not be passed.

3) In all types of adoption - intra or inter country . welfare of the child should be given the prime consideration.

The procedural safeguards in case of inter-country adoption provided by the Supreme Court are that every application by a foreign parent desirous of adopting a child must be-

i) sponsored through a social child welfare agency which is a registered body in the country where the adoptive parent is residing.

ii) no direct application shall be made by the foreigner to any Indian based registered social organisation dealing with inter-country child adoption.

iii) along with the request application for adopting a child report regarding adopting parents home and his or her status in all fields like financial, social and moral must be accompanied with the application form with their home photographs.

iv) biological parents must be made aware of giving the child in adoption and at least three months time should be given to them to think for giving the child to a foreign national.

v) there should not be any force or compulsion on the parents to give the child in adoption.

vi) if the child is grown up and of mature understanding then his wishes should also be given due importance.

vii) Once the time allowed to biological parents expires or they consent for giving the child in adoption, court's opinion should be taken and the identity of the foreign parents should not be disclosed.

viii) All applications by a foreign national for adopting a child from India shall be made through a recognized India based social organisation, which will refer the matter to the court for appointing him a guardian under the Guardians and Wards Act, 1890.

ix) The proceedings regarding giving the child in adoption shall be made in camera and they shall be regarded as confidential.

x) after the approval by the Court the child should be given to the foreign national through adoption.

xi) after adoption is completed there must be a follow up action which shall be carried out by the mediating social organisation regarding the health, development and all together upbringing of the child either through the foreign social agency which had sponsored the application or shall be made by the concerned agencies through their own country's embassies.

xii) beside maintenance of the child till his repatriation to another country the foreign parent shall pay @ Rs.60/- per day to the organisation for

maintenance of the child, any extra amount for his medical expenses etc.

xiii)Only when the child had been repatriated to another country through adoption, the adoption father or mother may given some amount towards donation to the adopting agency.

Regulatory Authorities for Intra-country and Inter-country Adoption

After the decision of the Supreme Court of India in the Laxmi Kant Pandey's case a Central Adoption Resource Agency (CARA) was set up on 28th June , 1990 under the Ministry of Social Welfare to monitor the issues related with Intra-country and Inter-country adoption. CARA function as a clearance body for all other government recognized Voluntary Coordinating Agencies (VCA) which are engaged in the welfare programme related with intra-country and inter-country adoption of children . Besides the above, the other functions of the CARA are-

1) to prepare list of all recognized Indian as well as the foreign agencies engaged in the work of adoption. It also publishes the list of all the Indian agencies in three different news papers including a local one. It also sents the list of the agencies to the High Court of the State concerned where the agencies are working as well as to the District Courts of the State.

2) to maintain liaison with Indian embassies abroad in order to keep it informed about the interests of the children adopted by foreign parents against any neglect, malnutrition, exploitation or abuse etc. It is also the duty of the CARA to inform all such Indian diplomatic agencies outside India, wherever a child is adopted by a foreign national, regarding the full address of the foreign parents adopting an Indian child.

3) all application by a foreign parent for the purpose of adopting an Indian child shall be made through the CARA, which shall forward the same to the scrutinizing agencies for the purpose of forwarding the same before the competent court for necessary legal order.

4) the CARA will inspect the working of all the other recognized voluntary agencies engaged in the work of adoption, child welfare and will report to the Central Government regarding their working.

5)it will also have an annual progress report of the child adopted by a foreign parent through diplomatic missions as well as the counterpart voluntary agencies working in that foreign country.

Voluntary Co-ordinating Agencies (VCA)

Voluntary Co-ordinating Agencies are also working towards the welfare of the children. In every state several recognized voluntary agencies authorized by the CARA are working. The VCA is a registered society working with the help

of certain trained professionals towards the welfare of the children. The important functions of the UCA are-

1) To the promote the in-country adoption.

2) To maintain the list of all prospective adoptive parents.

3) To have a record of all such children who are legally free for giving in adoption.

4) To co-ordinate with any other voluntary agency if any application is placed for inter-country adoption and keep inform to the CARA.

5) To organise meeting of member agencies.

Scrutinizing Agencies

For the purpose of scrutinizing the applications received for the purpose of adoption, the court can appoint certain reputed child welfare agency as a scrutinizing body or all such applications received from the prospective adoptive parents.

CARA maintains a panel of agencies suitable to be choosen as a scrutinizing agency. The main criteria for any child welfare agency to be empanelled as a scrutinizing agency are that the agency, besides being an independent an reputed social child welfare agency, must also be a body of experts in the child welfare activities, who must also be the Indian nationals. The agency should also be a registered non-profitable or non-commercial body.

At present there are two scrutinizing agencies, viz. Indian Council of Child Welfare (ICCW) and Indian Council for Social Welfare (ICSW) . At present there are 58 recognized Indian agencies and 277 foreign enlisted agencies working in the area of child welfare activities.

Review of Adoption Procedure :

In pursuance of the Supreme Court directives, the Ministry of Welfare wide its resolution dated 4-7-1989 formulated a set of guidelines to regulate, monitor and supervise programs pertaining to adoption. The existing guidelines provided by the Supreme Court in Laxmikant Pandey's case was thoroughly reviewed by the Supreme Court in their subsequent judgments dated 19th Sept. 1989, 14th Aug. 1991, 29th Oct. 1991, 14th Nov. 1991 and 20th Nov. 1991 respectively.[14] The Ministry of Welfare after a careful study of all the judgements of the Supreme Court of India and existing laws of the land and the past and current functioning of voluntary agencies and the changing social realities, decided to modify the existing guidelines. The Ministry constituted a Task Force consisting of members representing various voluntary agencies under the chairmanship of Mr. Justice P.N. Bhagawati, former Chief Justice of India. On the

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14 See AIR, 1986, S.C. 272, AIR (1990) 4 SCC, 532, AIR 1992, SC 118 and recently in *Smt. Anokha v. State of Rajsthan and others*, AIR, 2004, S.C. 2820.

basis of the recommendations of the Task Force the Govt. of India issued a revised guidelines on Adoption of Children in December 1995.

Observations and Conclusion

In spite of the guidelines provided by the Supreme Court in the case of inter-country adoption certain basic and fundamental doubt still remain there in our mind with regard to the true application of those guidelines in their real spirit. This has to be examined in the light of the adopting child.

As is evident from the facts submitted by the petitioner in the *Laxmikant Pandey's* case[15] the inter-country adoption involves, in many cases, the risk of life of the child given in adoption to a foreign, parent. The lack of proper factual information about the adopting parents socio-cultural and financial status works as a negative approach towards the child's welfare activities. One of the most basic problem, associated with the inter-country adoption is the fact of racial difference. It obviously raises the question particularly, in the circumstances where we have witnessed the division of society on racial grounds exists as to how a black can be given a place of love and affection in a family of white and vice-versa.

There are many constitutional as well as the legislative provisions for the welfare of the children in India. But various news reports that the children after adoption were used in begging, prostitution and in sports like camel race etc. indicate the failure of the monitoring agencies and shows a connivance on their part as an abettor to the cause of ill-treatment. Indian children whether neglected or destitute are the liabilities of the Indian society as well as the government. So, why should we throw our burden or responsibility on any other country? It is not only morally embarrassing but also seems constitutionally invalid as violating the right of a child to live in the country of his birth. The measure barrier in the implementation of the ideology of adoption within our own country appears to be the lack of uniform adoption laws. In our country adoption is allowed only amongst the Hindus. The personal laws of other Indian national does not permit for adoption of child. The Hindu Adoption and Maintenance Act, 1956 is the only Act which specifically mentions about the adoption of a child whether male or female by a person who is a Hindu. This Act has many anomalies also. It restricts the adoption only under certain condition , for example, adoption of a Hindu child by a Hindu parent. It also restricts the right of a female Hindu to adopt in the presence of her husband except under certain circumstances.[16] In the presence of the adoptive husband, wife merely is a consenting party to such adoption

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15 AIR, 1986, S.C. 272

16 Section 8 of the Hindu Adoption and Maintenance Act, 1956 - Capacity of female Hindu to take in adoption - Any female Hindu -
(a) who is of sound mind.
(b) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind has the capacity to take a son or daughter in adoption.

rather as a co-party to such an adoption along with husband. Adoption of a child by a childless parent is the need in every society belonging to any religion. so why not should we have an uniform adoption code under which every childless may have a right to adopt . This will not only widen the area of adoption as well as the problem of neglected and destitute child but will also reduce largely the inter-country adoption and promote in-country adoption.[17] This argument also gets the strength from the fact that in inter-country adoption any parent of a foreign national may request under permissible circumstances for adoption. So when we don't see the religion in such situation then why should there be restrictions in our own country with regard to uniform law of adoption. The Law Commission of India in its 153rd Report has also suggested for a uniform adoption code but nothing has been done in this regard.

Another point for consideration in case of inter-country adoption is concerned with the basic human rights of the child i.e. the right to live in the country of his own birth and origin, amidst the people of his own country , subject of course to the exception that where the adoptive foreign parents belongs to the same country to which the child belongs. In case of infants or children below three years, where they cannot express any desire of their own, inter-country adoption even in the name of their welfare, may be regarded as an absolute check to their wish with regard to their choice for place of residence. It is only the innocence of the child which brings him completely abandoned in foreign family which a child of mature understanding may exercise either affirmatively or negatively . In this regard I believe that the opinion of the Hon'ble Supreme Court that the child should preferably be given in adoption within the country of his birth must be observed fully except in exceptional case as mentioned earlier.

Further, in case of Inter-country adoption the fact of follow up action after the adoption of the child, seems a burden and practically superficial condition, the observance of which may not be strictly followed. This is quite evident from various news reports that the children, after adoption, were being exploited through various means. It shows the failure of the monitoring agency engaged with the follow up action and taking any step in checking such menace.

It is proposed that we should make our adoption network broad in our own country and in-country not the inter-country adoption should be encouraged.

17 The Adoption of Children Bill, 1980, placed before Parliament also had such recommendations.

34 Ban.L.J. (2005) 152 - 165

ENFORCEMENT MECHANISM OF INTELLECTUAL PROPERTY RIGHTS

R.K. Chaubey*

I. INTRODUCTION

The enforcement of Intellectual Property Rights, has become a serious challenge to the law enforcement authorities, particularly in the make of development of newer technologies which facilitate the copy of Intellectual creations easily rapidly and without leaving a trace of the copying. The enforcement of these rights has acquired the position of top priority, as is evident from the TRIPS agreement which has devoted one full chapter to the enforcement aspect of Intellectual Property Rights. The legislative wisdom the innovative approach of the Judiciary in copying up with the newer challenges of technology has ensured that the remedies for violation of T.P.R. are provided from but a lot depends on the detection, Investigation (enforcement) of J.P.R. for a fuller and complete realisation of the goals reflected in the TRIPs agreement.

Technology stands out in sharp contrast to science. Science is open and its discoveries are publicized from house top - not kept secret. There are no commercial gains to be made if they are kept confidential. But technology is not open and is kept as a close secret as it gives its owner economic and commercial advantage. Moreover, it may be added that the uniqueness of technology is that "it has grown cumulatively over the centuries. The technology once obtained, cannot be used up by consumption, once mastered, it has long life and once adopted, it appreciates".[1]

Technology is guarded as private property. Intellectual Property Right is a monopolistic right granted by a government to the inventor for a fixed period, to exclude other persons from imitating, manufacturing, using or selling a patented product or from utilizing a patented matter or process to improve upon. Thus, intellectual property system has become an important instrument of economic and trade policies worldwide. The protection of Intellectual Property Right enables countries to participate more actively in international trade as well as influence investment decisions. In a nutshell economic progress is becoming increasingly technology- driven. The importance of the intellectual property system is evident from the new year message at the commencement of 2002 by the Director General of WIPO where he says " Intellectual Property is a tool of economic development and ..... it is a powerful driver of economic growth. It helps in stimulating creativity and innovation..... generating revenue, promoting investment and nurturing overall economic health".

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1. Surendra J.Patel, "Intellectual Property Rights and National Development", *Journal of Scientific and Industrial Research*, Vol. 52, April 1993, PP 212-218.

II. SPECIAL FEATURES OF INTELLECTUAL PROPERTY RIGHTS SYSTEM :

One special feature of Intellectual Property Rights is that they are property rights granted over immaterial creation of the human mind granted by the Law. Unlike property in the traditional sense which can be identified and demarcated with petition by the half of physical posts, it is very difficulty to identify and demarcate the boundaries of Intellectual property. This task of identification is made feasible by the law in the field of patient by patent specification, in the case of copyright by the test of originality and in the field of trade marks by the test of "distinctiveness" etc. It is these special features of the IPR system that pose serious challenge to the "enforcement" authorities. Hence, there is a great need for understanding the intricacies of the subject, which alone can ensure an effective implementation.

While copyrights do not require a registration, patents and the designs etc. need to be registered without which there would be no protection. Moreover, while patents are protected for 20 years only, trade marks may be protected perpetually provided the owner cares to renew it. Moreover, what is protected by copyright is the originality of the expression in an idea whereas the patent protects a workable and novel idea.

Intellectual Property Right holders have to be very cautious and diligent while issuing rights to third parties. If the licensé agreements are worked inadequately and improperly, it can land the owner in litigation as intellectual property rights system is a specialized field. It is imperative to seek appropriate legal counsel to deal with the intellectual property rights issues. In this way he would be able to guard and protect his rights and save the cost of litigation. It may also be mentioned that intellectual property rights are, "of course the basis of many contractual dealings.[2] The fundamental characteristics is to constrain those who have no relationship with the right owner. They are rights that depend for their effectiveness..... upon the speed and cheapness with which they can be enforced. "[3]

Moreover, remarkable advances in information storage and copying technologies have opened the flood gates of piracy and counterfeiting and unscrupulous trade in the various branches of intellectual property rights and the degree of piracy is posing a great challenge to the right owners. In some cases they have to fight grim battle for the protection of the rights and have to run from pillar to post.

III. ENFORCEMENT UNDER TRIPS AGREEMENT

In order to protect the Intellectual Property Rights, effective judicial remedies are available in the form of enforcement mechanism. These include civil actions seeking injunction orders against the infringers, coupled with damages and criminal sanctions in the form of fines and imprisonment in

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2. W.R. Cornish, *"Intellectual Property"*, *Universal Law Publishing Co. Pvt. Ltd.*, Third Edition, Second Indian Reprint, 2003, at 41.
3. *Id.* at 42.

case of infringements. These remedies are in accordance with the provisions of the TRIPs agreements, which are as follows :

(1) Article 41 Section 1 of TRIPS agreement specifies the enforcement procedures "so as to permit effective action against any act of infringement of Intellectual Property Rights covered by this agreement, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringement.....".

(2) Section (2) of Article 42 of TRIPs agreements provides civil and administrative procedures and remedies.

(3) Section (5) of Article 61 of TRIPs agreement requires 'Members' to provide for criminal procedures and penalties to be applied in cases of willful trademark counterfeiting or copyrights piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials, and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringements of Intellectual Property Rights, in particular where they are committed willfully and in a commercial scale.

In a nutshell, the TRIPs agreements provides three different methods of protecting Intellectual Property Rights - civil actions, criminal proceeding and administrative procedures. It may be emphasized that all these remedies are distinct and independent and can be availed of simultaneously. The provisions of the TRIPS agreements are in consonance with the famous saying "*Ubi jus, ibi remedium*" meaning that where there is a right there is a remedy. Nobody is at liberty to take away the result of another man's labour or his property. Out of these three remedies, civil actions are the most central as most claimants make use of civil process due to following reasons. *First* "its technique and atmosphere are appropriate to the assertion of private property rights amongst businessman. And the types of civil remedies - injunction and damages are more useful than punishment in the name of state.[4] *Secondly*, the right owner prefers the civil remedy as there is no possibility in criminal procedures of securing an interim order to desist from conduct, pending the trial. Besides there is a high burden of proof on the prosecution in the criminal proceedings... the defendant must be shown to be guilty beyond reasonable doubt. It is hard to prove that he knew or had reason to believe that he was committing an infringing act.[5]

The Indian enforcement agencies are working effectively to protect the intellectual property rights in the various fields.

IV. ENFORCEMENT OF THE INDIAN PATENTS ACT, 2005

(i) **Civil Remedy** : When an infringement of right is committed, the patent holder can bring a suit of infringement in a court not below the District Court.

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4. *Supra* note 2, at 49.
5. *Supra* note 2, at 50.

However, if a counter-claim is made by the alleged infringer for revocation of patent, the suit along with the counter-claim is transferred to the High Court. The burden of proof lies on the defendant and he has to prove that the process used by him (in case of process patent) is different from the patented process.

In a suit of infringement the court may grant relief's including injunctions and either damages or an account of profit at the option of the plaintiff. In case the validity of a patent is contested in a High Court or Appellate Board and the same is upheld the Board or High Court shall furnish a certificate to this effect. The court may appoint an independent scientific advisor to assist the court if it thinks necessary.

(ii) **Criminal Proceeding** : The Indian Patent Act, 2005 provides punishments for violation of its provisions. If a person fails to comply with any direction under section 35 (Secret patents) or submits an application for grant of patent in violation of Section 39 he shall be punishable with a maximum term of 2 years or fine or both. In case of falsification of entries in the register of patent, the punishment is the same. An unauthorised claim of patent rights is punishable with a fine upto Rs. 1.00 lakh and a wrongful use of the word "Patent office" is punishable with an imprisonment that may extend upto six months or with fine or with both. Section 100 of the Patent Act pertains to the power of the Central Government to use inventions for the purposes of government. Sub section (5) provides that the Central Government shall notify the patentee from time to time about the extent of the said use of inventions and if the use has been made by a government undertaking, the Central Government may call for such information from the said undertaking. Section 146 relates to the power of controller to get information from a patentee any time during the continuance of the patent regarding the extent to which the patentable inventions has been commercially worked in India. Section 122 provides that failure to furnish the information under section 100(5) or Section 146 is punishable with a fine upto Rs. 1.00 lakh. Moreover, if he provides false information under these sections, he shall be punishable with imprisonment of upto 6 months or fine or both.

Practice by non registered patent agent is punishable with fine upto Rs. 1.00 lakh in case of first offence and with Rs. 5.00 lakhs in case of second or subsequent offence. In case of offence under the Act by a company, the company plus the man incharge of and responsible to, the company for the conduct of business at the time of commission of offence shall be deemed to be guilty and shall be liable to the punishment.

(iii) **Administrative Remedy** : The Appellate Board established under Section 83 of Trademarks Act 1999 shall also be Appellate Board for the purpose of the Patent Act, except that the technical members of the board shall have the following qualifications.

(a) he has been or has acted as controller under the Act for at least five years or

(b) he has at least 10 years experience as a registered patent agent and possesses a degree in Engineering or Technology from a recognized university.

The Appellate Board cannot hear appeals against any decision, order or direction issued under this Act by Central Government or from any act or order of the Controller for the purpose of giving effect to any such decision, order or direction. Barring this the Board can hear appeals under the Act. Section 117A provides that appeals shall lie before the board from any decision or order or direction of the controller under Sections 15, 16, 17, 18, 19, 20, 23 (4), 28, 51, 54, 57, 60, 61, 63, 66 69(3), 78, 84(1) to (5), 85, 88, 91, 92 and 94.

V. ENFORCEMENT OF COPYRIGHT

The meaning of copyright must be understood clearly. The subject matter of copyright protection is the original expression of an idea in literary, artistic and other works. Copyrights protection is not confined to books, music, painting or film only but it now extends inter alia to computer, software and compilation of data.[6] The copyright law is not concerned with the idea but with the expression of the ideas as expressed in *Donoghue* v. *Allied Newspapers Ltd...*[7] Copyright prevents the copying of the original work and not the ideas contained therein. TRIPs agreement envisages that member states should revise and amend the copyright act in their respective states accordingly. Hence Indian Copyrights Act 1957 was amended. The new Act (the Copyright Amendment Act 1994 and the Copyright Amendment Act 1999) provided the inclusion of computer programmes and technological development in the present act.

If a copyrighted work is exploited by any person for profit, he is guilty of infringing the copyright. There is no infringement of copyright if a defendant has borrowed an idea and uses his mental faculty and labour and skill and has revised and altered it in such a way as to produce an original work. The general principle in determining the infringement is "that there has been reproduction of plaintiff's work in substantial form". In this regard the Supreme Court of India in *R.G. Anand* v. *Delux Films*[8] has adopted the "doctrine of dominant impact". In this case the Supreme Court has laid down that "In order to be actionable the copy must be substantial and material one..... ". In other words infringement occurs only when the defendant's work closely resembles the plaintiffs work and the features of the plaintiff's work have been substantially used in defendants work.

In this connection, it is worthwhile to point out that the burden of proof regarding infringement lies on the plaintiff. It is he who has to prove that the defendant is guilty of violating the copyright. Moreover, in order to maintain his suit for infringement, the plaintiff has to prove that his own work was original and he had not copied from any other source as copyright protects only the original work.

(i) Civil Remedies for Violation of Copyright :

Main remedies available to a copyright owner are an injunction - to restrain the continuation of the infringement and damages to compensate the copyright owner for the depreciation caused by the infringement to the values

6. See, Article 10 of the TRIP's Agreement.
7. 1937, 3 All ER 503.
8. AIR 1978, Supreme Court, 1613.

of his copyright. But if the defendant proves that at the time of infringement, he was not aware and had no reasonable ground for believing that copyright subsisted in the work, the plaintiff will be entitled to only an injunction and a decree of the whole or part of the infringing copies. Plaintiff will not be entitled to any conversion of infringing copies.

There is also a provision for interlocutory injunction. A plaintiff may apply for an interlocutory injunction[9] pending the trial of action or further orders to secure immediate protection from a threatened infringement or from continuity of infringement. But the plaintiff has to establish a *prima facie* case and in granting interlocutory order the court must weigh the pros and cons of the claim and the strength of the case and then decide what is to be done. The court may order the plaintiff to furnish an undertaking in this case before granting interlocutory order if it so decides.[10]

(ii) Damages in Accounts of Profits :

Two types of damages are available to successful plaintiff :- (1) under 55 of Copyright Act 1957 under infringement (2) under 58 of Copyright Act 1957 for conversion.

The copyright owner is entitled to treat all infringing copies of his work as if they were his own property. So he may take recourse to civil proceeding for the recovery of possession there of or in respect of conversion thereof as an alternative to damages the successful plaintiff may claim account of profit.

In the case of piracy, these remedies are not effective as it is not possible to lay hands on all outlets of sale simultaneously. Moreover, after receiving the notice of the writ, the vital documents may be destroyed and the financial resources and other assets of a pirate may be removed and the copyright owner may be deprived of the possibility of recovering the damages. In order to overcome this problem and provide relief to the copyright owner remedy in the form of Anton Pillor[11] order is available and is granted by the court permitting the inspection of the premises on which it is believed some action is carried on which infringes the right of the plaintiff. However, it may be noted that this order is not a search warrant. It has been clarified by Lord Denning of the Supreme Court of U.K. that it only authorises the inspection by permission of the defendant. The plaintiff is not entitled to enter the premises without permission. The courts in England have emphasized that Anton Pillor order should be made only in the most extreme circumstances.

(iii) Criminal Proceeding under the Copyright Act :

In addition to civil remedies the copyright owner can initiate criminal proceeding against the infringer. These two remedies (civil and criminal) are distinct and independent and can be availed of simultaneously. The

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9 The law governing interlocutory injunction is contained in the Civil Procedure Code, 1908. Order 29. Rules 1 & 2.

10. See. Halsbury's *Laws of England*, 4th Edition Vol. 9, Para 944 and *American Cyanamid* Vs. *Ethicon* (1975) RPC 513 at PP 539-542. (H.L.) (Lord Dipplock).

11. *Anton Pillor K.G.* Vs. *Manufacturing Process and others* (1976) Ch. 55 (In short Anton Pillor).

Copyright Act 1957, prescribed mandatory punishment for piracy of copyrighted matter. Section 63 of the Copyright Act provides that infringement of Copyright or other rights conferred by the act, shall be punishable with imprisonment which may not be less than 6 months but may extend to 3 years and with fine which shall not be less than Rs. 50000.00 but may extend to Rs. 2.00 lakhs. Section 63A provides for an enhanced penalties on 2nd or subsequent conviction of imprisonment which may extend to 3 years and with fine which shall not be less than Rs. 1.00 lakh and may extend to Rs. 2.00 lakhs. Section 63B provides that any person who knowingly uses on computer infringing copies of a computer programme, shall be punishable with imprisonment for a term which may not be less than 7 days but may extend to 3 years and with fine which shall not be less than Rs. 50000.00 but may extend to Rs. 2.00 lakhs.

Under the Copyright Act, 1957 a Presidency Magistrate or Magistrate of First Class can try this offence. The court trying this offence may order that all infringing copies and instruments for making such copies, in possession of the defendants may be delivered to the Copyright owner without any further proceeding. The court may also order a police officer not below the rank of Sub-Inspector to seize all the infringing copies and all other instruments and produce them in the court.

It is worthwhile to note that there have been very few prosecutions under the act. The High Courts do not view the Criminal Prosecution for infringement of Copyright with due seriousness. The attitude of the court is to treat Copyright infringement a civil right rather than a serious offence. Illustrations are given below : -

(i) The Delhi High Court in *Sita Ram Silk Mill* v. *State*,[12] quashed the FIR and criminal proceedings subject to the payment of Rs. 10000.00 as cost to the legal aid and advised Board Patiala House on a petition under Section 482 of Criminal Procedure Court for compromise of Criminal case.

(ii) In *Gufam Export and others* v. *Saved Hamid*.[13] Bombay High Court was reluctant to invoke criminal jurisdiction when civil suit was pending.

(iii) Even the Supreme Court in *State of A.P.* v. *Negotivenkatraman*,[14] changed the punishment from minimum imprisonment of six months and fines to only enhanced fines even though it upheld the findings of the trial court that the accused was guilty under section 52a of Copyright Act 1957 read with Section 63 of the Copyright Act, 1957.

(iv) Administrative Remedies of Copyright Act

The Copy Right Act of 1957, provides under section 53, effective and speedy administrative remedy to the Copy Right Owner to prevent importation into India of copies of a work, made out of India which if made in India, would infringe the Copy Right in the work. Section 53 (i) of the Act empowers the Registrar of Copy Right to make an order prohibiting the

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12. (2001) PTC (21) 600 (Del).
13. Recently, the Bombay High Court quashed the Criminal Complaint on the ground that the Copyright was not registered and the Civil Suit against the accused was pending.
14. (1996), 6 SCC 409.

importation into India of such copies in the application of the owner of the Copy Right in any work, after making such enquiries as deemed fit.

The remedy available under section 53 of the Copy Right Act is quasi judicial in nature and an appeal can be made to the Copy Right Board under section 22 of the Act. The Supreme Court has held[15] that the powers conferred by the section can be exercised by the registrar even when goods are at the Indian Port in the Course of transit enroute to a destination outside India.

For collective administration, copyright societies have been set up for different classes of work. At present there are three registered copyright societies - the Society for Copyright Regulations of Indian Producers of Films and Television (SCRIPT) for cinematography films, the Indian Performing Rights Society Limited (IPRS) for musical works, and the Phonographic Performance Limited (PPL) for sound recordings.

These societies, particularly the PPL and the IPRS, have been active in anti-piracy work. The PPL has even set up a special anti-piracy cell headed by a retired Director General of Police and it has been working in tandem with the police.

VI. ENFORCEMENT OF TRADE MARKS

(a) Violation of Trade Marks - The trademarks are now recognized as intellectual property and every modern state has made legislation required to treat the rights of trademarks owner as owner of intellectual property and the government of India has not lagged behind. It is worthwhile to note that the trademarks and service marks, unless registered, do not get legal protection save a few remedies in law of Tort under the common law like passing off good and wrongful misrepresentation. However a trade name may be protected, irrespective of whether it is registered or not provided that it has got the distinctive feature. Distinctive feature is the powerful qualification for a trade name and hence the presence of this qualification makes trade name protectable.

The function of a trade mark is to work as an indicator that distinguishes the goods or services of one enterprise from those of other enterprises. Section 11 of the Trade Marks Act, 1999 provides that a trade mark which is identical or similar to an earlier trade mark one which covers individuals or similar goods and services, covered by an earlier trademark, shall ordinarily not be registered.

(b) Infringement of Trademark :

A registered proprietor has exclusive right to use his trade mark in connection with goods or services covered by it. If any other person, without the consent or license of the registered proprietor uses that mark or a mark similar to it in relation to either similar or identical or different class of goods or services which has the tendency to create confusion among the public as regards the registered trademark or which may be detrimental to the

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15. *Grammophone Co. of India Limited* Vs. *Birendra Bahadur Pande* (1984) 2 SCC 534.

distinctive character or repute of the registered trademark then the other person may be held guilty of infringement of the registered trademark.[16]

However, if a trade mark is used by a person other than the registered proprietor in accordance with an honest practices in industrial or commercial matter or in a manner which is not detrimental to the distinctive character or repute of the trademark, it should not constitute an infringement of the registered trademark.[17]

The Supreme Court of India observed that "To establish a case of infringement, the exact similarity of the two marks was not necessary and that it would be enough if the impugned mark bears an overall similarity to the registered trademark as would be likely to mislead a person usually dealing with one to except the other if offered to him."[18]

According to Section 104 of Trade Marks Act 1999 applying false trademark, trade description etc. is punishable with imprisonment of 6 months to years or fine of Rs. 50000.00 to 2.00 lakhs or both. However, in special circumstances the court may impose a sentence of imprisonment for a term less than six months or a fine of less than Rs. 50000.00 (Section 103 Trademark Act 1999).

The Delhi High Court granted an injunction restraining the defendant from using his domain "yahooindia.com" because it was deceptively similar to "yahoo" the well known trademark of the American Company.[19]

Indian Courts have strictly enforced trade mark rights. Courts have looked at underlying principles of trademark law and at global precedent if specific protection provisions in Indian law are absent. The courts have also extended pecuniary penalties for infringement and passing of trademarks beyond statutory provisions in case of undue exploitation by infringers which result in loss of business to the rightful owner.

Distinguishing between compensatory and punitive damages in "*Time Incorporated* vs. *Lokesh Srivastava*"[20] the Delhi High Court awarded Rs. 5.00 lakhs as punitive damages and also awarded Rs. 5.00 lakhs as compensatory damages for loss of reputation and goodwill to the plaintiff.

In *Microsoft* v. *Yogesh Pant*,[21] the Delhi High Court awarded damages of Rs. 19.70 lakhs, the highest so far for trademark and Copyright infringement.

(c) Administrative Remedies :

Apart from the civil remedies the Trade Marks Act, 1999 vests certain powers in the various administrative authorities to grant relief's and remedies to the aggrieved person. These powers may be exercised in respect of -

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16. Section 29, The Trade Marks Act, 1999.
17. Section 30, The Trade Marks Act, 1999.
18. *Parle Products (P) Ltd.*, v. *J.P. and Co. Mysore* (AIR 1972 SC 1359).
19. *Yahoo Inc* v. Akash Arora, 1999 PTC (19) 2001, Delhi.
20. Diljeet Titus, "Effective Enforcement Leading to Growth of IPR Services" *The Financial Express*, Friday, April 21, 2006.
21. *Ibid.*

(i) classification of goods and services for the purpose of registration.[22]

(ii) publication of alphabetical index of classification of goods /services.[23]

(iii) granting of or refusing to register a trade mark.[24]

(iv) correcting and amending the register.[25]

(v) renewal, removal and restoration of registration.[26]

(vi) assignability and transmissibility of registered trade marks.[27]

(vii) registration of assignments and transmission[28] and other aspects of relating to trade marks.

The Trade Marks Act, 1999, provides for the establishment of the Appellate Board to be appointed by the Central Government. It is known as the Intellectual Properties Appellate Board.[29] The board has Appellate jurisdiction to hear appeals from the orders or the decisions of the registrar, to the exclusion of other courts. The Board is not bound by the procedure laid down under the civil procedure court. But it shall be guided by the principles of natural justice. The Board has the power of a civil court while trying a suit in respect of the following matters namely -

a) receiving evidence

b) issuing commissions for examination of witnesses

c) requiring any public record and the any other matter which may be prescribed.

The board has the power to make interim order apart from the power to transfer cases from one Bench to another and to itself. This is a novel feature introduced by the 1999 Act which goes a long way in making the procedure simple and the decision more professional.

VII. ENFORCEMENT OF GEOGRAPHICAL INDICATIONS

Geographical indications are based on collective traditions and traditional practices, nurtured and kept alive for ages by the indigenous and local communities and farmers. Geographical indications reflect the traditions, culture, human effort, resources and environment of particular regions.[30]

The expression "Geographical Indications" under the Trade related Aspects of Intellectual Property Rights Agreement has been defined as

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22. Section 7, The Trade Marks Act, 1999.
23. Section 8, The Trade Marks Act, 1999.
24. Sections 9-16, The Trade Marks Act, 1999.
25. Section 22 and Chapter VII of the trade marks Act, 1999.
26. Section 25, The Trade Marks Act, 1999.
27. Section 38,The Trade Marks Act, 1999.
28. Section 45, The Trade Marks Act, 1999.
29. Sections 83-100 and chapter XI of the Trade Marks Act, 1999.
30. See, Dr. R.K.Chaubey, "Geographical Indications under TRIPS Agreement - Course or Boon for developing countries like India, 2006 (3) Supreme Court Journal 11th May, 2006.

"Indications which identify a good as originating in the territory of a member or a region or locality in that territory, where a given quality, reputation or other characteristics of the good, is essentially attributable to its Geographical Origins".[31]

'Geographical Indications' as defined in Geographical Indications of goods (Registration and Protection Act 1999) of India Sec. 2(1) is similar to Art. 22(1) of of TRIPs Agreement but more broad based. India has extended the Act to all goods, agriculture, natural manufactured, handicrafts industry or food stuff and hence provided better protection than the minimum standard as laid down in TRIPs agreement.

It may be mentioned that the provisions of TRIPS agreement on Geographical Indications have become a bone of contention since the very inception.[32] Seeds of jealousy and heart burning, conflict and confrontation are contained in the provisions of the TRIPs Agreement. Article 22 of the TRIPs Agreement provides protection to the Geographical Indications in general and Art. 23 of TRIPS agreement provides additional protection to Geographical Indications for wines and spirits. In other words TRIPs Agreement provides for two types of protection - minimum standard of protection and higher level of protection for wines and spirit. This disparity in the two levels of protection is detrimental to the developing countries. The developing countries including India, Egypt, Indonesia, Cuba, Kenya, SriLanka and a host of other countries are clamoring for extension of higher level of protection to Geographical Indications for products other than wines and spirit. The countries which favour the extension of higher protection argue that additional protection will deliver enhanced benefit via increased trade opportunities. Another plea advanced by this group is that if higher level of protection is extended to 'Geographical Indications', such they will be protected from becoming generic names. The countries opposing the move of extension argue that the reopening of TRIPS agreement would involve a lot of unnecessary and unending debate and discussion and heart burning amongst the members state. Moreover, this will involve cost for implementing the new law. Therefore, no extension of higher protection should be allowed. It may be added that the U.K. Commission[33] on Intellectual Property Rights has justified the demand of India and other WTO members regarding the extension of higher protection of Geographical Indications to others goods and products. The Commission has remarked about the grant of additional protection of Geographical Indications to wines and spirit as follows :

(i) It has no legs

(ii) It does not refer to unique characteristic of wines and spirit.

(iii) It is merely a compromise reached in a negotiation.

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31. Art. 22 (i) of the TRIPS Agreement.
32. WTO- TRIPS Agreement : The battle between the old and the new world over the protection of the Geographical Indications. Jose Mannel Cortes Martin. Journal ofWorld Intellectual Property. 2004 (May); 7(3); 287-326.
33. Report of the U.K. Commission on Intellectual Property Rights. http:11www.iprocommission.org/papers/text/ final-report/ chapter 4htmfinal.him.

Our indigenous[34] and traditional knowledge is very rich. Our traditional knowledge system in the area of medicine, healthcare, biodiversity, conservation, environment, food and agriculture, are well established. Had we put in place a strong Intellectual Property Right Regime early, our *Basmati*, Turmeric and *Neem* etc. would not have been pirated. We have to meet the challenge by putting in place a strong Intellectual Property Right Regime in our national interest. The patents system should be improved and brought to the International level, so that we may prevent our goods, being patented elsewhere. Dr. B.L. Wadhera has rightly said, "Our heritage of resource, products and knowledge, does not merely need a continuation of their existence but statutory protection and preservation".[35]

We have to fight tooth and nail, for our cause, i.e. for according a high level of protection to the geographical Indication of our goods and products. The discrimination in the level of protection is too glaring and totally unjustified. Patenting of Basmati Rice, Turmeric and Neem by other countries, has caused serious damage to our economy and we should go on fighting till we achieve our object.

(1) In order to protect the traditional knowledge, government should take bold and forceful steps to establish various offices like Registry of Geographical Indications, national Biodiversity Authority and Natural Gene Fund and they should be asked to work on a war footing, effectively and promptly, shedding nervous and halfhearted, approach. The existing laws should be more vigorous comprehensive and dynamic. The only valuable solution for better protection of traditional knowledge is to enact SUI GENERIS LAW to preserve & promote it for benefit of future generation.

(2) A data based on all kinds of traditional knowledge available in the country must be created and before any patent or trade mark or design is granted, this database should be searched in order to ascertain that there is no prior use or prior knowledge or prior art.

(3) All intellectual property related laws in India may be amended to ensure that any knowledge which is a part or result of traditional knowledge, can not be protected in the form of patent design and trade mark.

(4) It should be borne in mind that whatever may be drawbacks of the Intellectual Property Right Regime, it cannot be done away with and hence developing countries like India which are heavily dependant on agriculture should use the existing framework of Intellectual Property Rights to ensure that the rights and livelihood of farmers, tribal people and marginalized communities are protected. The Government should enact laws to promote appropriate biotechnologies - genetic engineering that is environmentally safe and socially, economically and culturally acceptable. The needs of societies must be addressed. Incentives for equitable sharing of benefits from plant

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34. Paul Kuruk, 'Bridging the Gap between Traditional Knowledge and Intellectual Property Rights : Is Reciprocity an Answer?" *Journal of World Intellectual Property*: 2004 (May): 7(3):429-46.

35. See, B.L. Wadehra *Law relating to Patents, Trade Marks, Copyright, Designed and Geographical Indications*, 3rd Edition, 2004, p. 16.

generic resources should be introduced as the "farmers" rights[36] are intrinsically based on the links between innovation and rights over knowledge, biodiversity conservation and sustainable use of biodiversity.

VIII. CONCLUSION

The continuous advancement in science, new breakthrough in biotechnology, intensive research and development in knowledge based pharmaceutical sector, have led to stronger protection of Intellectual Property Rights in the developed countries. The new order of trade agreement and policies has led to a situation in which stakes are high, competition is stiff, technology is changing fast and new products are replacing old and absolute ones at amazing pace. In such a situation the challenges lying ahead are formidable and nerve breaking and the importance of a sound patent regime needs no exaggeration for a country like India. The Indian Legislature has risen to the occasion to ensure that the interest of scientists and other inventors as well as the people, are protected to the fullest extent and the interests of the nationals of the countries with whom India is a party to any bilateral, multilateral or international treaty or agreement, are well taken care of. The Indian Patents Act tries to strike a balance between national requirement and global obligation under the TRIPS agreement.

The protection of intellectual property rights in India continues to be strengthened. There is a well established statutory, administrative and judicial framework to safeguard rights, whether they relate to patents, trade marks, copyright or industrial designs. Well-known international trade marks have been protected in India even when they are not registered in India. The Indian trademarks law has been extended through court decisions to service marks in addition to trade marks for goods. Computer software companies have successfully curtailed piracy through court orders. Computer databases have been protected. The courts has under the doctrine of breach of confidentially, accorded an extensive protection of trade secrets. Right to privacy, which is not protected even in all developed countries, has been recognized in India.

As regards, copyright laws in India, it has been brought at par with the modern world laws. It is well founded and is flexible to meet all the exigencies of the situation. It is competent to safeguard the interests of the copyright holders who play important role in the social and economic development of the nation. As the piracy of copyright material is increasing day by day the government should ensure that the provisions of the Copyright Act are enforced in a proper way, forcefully and vigorously to secure the desired result can be achieved.

The law relating to trade marks has undergone a sea change since the days of common law. It is still growing as a branch of intellectual property law. It has all the qualities which go in to making it an asset in the world of trade and commerce.

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36. For an interesting discussion of farmers' rights, see B.C. Nirmal, 'Farmers' Rights : International and National Perspectives', *J.T.R.I.* 21(2004), 58-85.

Geographical Indications is a valuable tool in the growth of economic development and holds the key for future prosperity of India. Indian traditional knowledge is varied. It consists in traditional agricultural wealth, diversity of local knowledge, traditional knowledge about usages of plants, plant conservation, strategies and traditional selective breeding methods.

But our intellectual property regime specially in the field of geographical Indications is not upto international standards and the result is that our traditional knowledge and usages in various fields for example HALDI, NEEM, JUTE, BASMATI and a host of other items had been pirated by foreigners and plundered by the foreign multinational corporations. It is true that we have won the cases in respect of Jute, Neem, Haldi and Basmati, but after a long tedious litigation and incurring heavy expenditure in fighting these cases. So we must be very watchful and bring the patent system in the case of traditional knowledge to the international standard. In this respect we should be guided by the supreme national interest and should not allow others to exploit our weakness in this field.

At the same time, there is a very urgent need to concentrate on the ground level measures which form the focal point for an effective implementation and enforcement mechanism. The police offers must be trained properly to understand the intricacies of IPR law as it is ignorance of the law and its intricacies that has become a major impediment to its effective implementation. The same thing applies in a relatively lesser degree to the judiciary also. Awareness programmes with regard to IPR issues is the need of the hour to strengthen the enforcement . There is also a need to train and equal the administrative officers and the personnel with the latest paraphernalia, so as to enable them to discharge their duties in an effective manner. This would further strengthen the enforcement mechanism of the IPR regime.

34 Ban.L.J. (2005) 166 - 186

VALUATION OF PATENTS ON PLANT BREEDERS- A DISCUSSION IN THE CONTEXT OF IP PROTECTION OF AGRICULTURE IN INDIA AND THE DEVELOPING COUNTRIES

Natasha Nayak*

I. INTRODUCTION

Food shortage is almost an endemic disease of the poor in general as those of the developing countries in particular. Over years of shortage, other ingredients of food security also show up in their deficiencies spelling doom for health and life of the vast masses of the poor. Agri-biotechnology has emerged of late as a solution in providing GM food on a quantum jump basis. But this new revolution has unfortunately been driven mainly by the demands of the seed industry and worse, by few MNCs. MONSANTO the US seed multinational, for instance, accounts for 91 per cent of GMOs used in India in 2001 and it was fined $1.5 million under the (US) Foreign Corruption Act in January this year (2006) for its wrong doings in Indonesia. Bt. cotton crop failed in Andhra Pradesh and some other States leading to farmers committing suicide in large numbers. Read together, these developments give rise to the question of acceptability of these GMOs. Given the volume and the technology input of these genetically modified crops, they have given rise to a 'hybrid form' of IP protection.

Plant Variety Protection falls short of Patents which is why the former is less confident of its own and usually follows the latter. Pursuant to 27(3)(b) of the TRIPs Agreement, India has passed Plant Varieties and Farmers Rights Act (**PVPFRA**) in 2001 which has created a Plant Breeders Rights (PBRs) system as well as a Farmer's Rights platform. But the PVPFRA is yet to emerge out of legal infirmities and ambivalences, though as evidences show, commercial use of plant breeders is tremendously on the rise. In the year 2004-5 only, the acreage under GMO cultivation has more than doubled over its previous level. This calls for clearing the grounds for stable plant varieties protection and going by current experience for judicious integration of all the three national streams—plants, biodiversity, and environment—for better IP Protection dedicated to sustainable development.

Patenting of plant breeders needs serious consideration in view of its perceived necessity and growing emergence of the phenomenon. Valuation of patenting of plant breeders is an important aspect of the developments in IP protection in the developing countries in general and India in particular, to which this article turns for a discussion.

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II. IPR REGIME AND PLANT VARIETIES PROTECTION

Intellectual Property Rights (IPRs) constitute a form of property rights and as such they are largely individual private property rights. While there is a general recognition that IPRs are not absolute rights (since they are 'statutorily granted' in nature), they however share some characteristics in common with the private property rights. They are both *exclusive* and *alienable* in their essential nature. Spread on the international matrix, IPRs offer a considerable measure of complexity to handle, given a host of regional and international regimes, and bilateral and multilateral treaties and agreements criss-crossing the arena.

Though IP protection acquired a significant intellectual law dimension in the 19th century, critical developments in the field had to wait till the 1990s which marked the advent of the current globalization era. The foremost statement on this subject is the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement signed in 1994, as the Annex IC of the WTO Agreement. Two crucial implications worth-noting in this connection are: (i) introduction and strengthening of IP protection in most developing countries and (ii) imposition of minimum levels of protection with enforcement sanctions attached from the WTO. Apparently, the focus on this global spread of IP protection has been due to the increased reliance of the developed countries on the knowledge based industries including the rapidly developing genetic engineering industry.[1]

Despite their global domination, the developed countries had to yield to a compromise formula with the result that the TRIPS provides for a *sui generis* system to protect plant varieties in the developing countries which steadfastly opposed to expose agriculture sector to the extension of IP protection through Patenting. Such a differential treatment given to the developing countries for agriculture led India to enact the Plant Varieties Protection and Farmers Right Act in 2001 which however remains inoperative as the envisaged Plant Variety Authority remains to be created by the Govt. of India.[2] Such a differential treatment to agriculture in general and the farmers in particular (in the developing countries) is based on a rationale that the 'farmer's rights are intrinsically based on the link between innovation and rights over knowledge, biodiversity conservation, and the sustainable use of agro-biodiversity."[3]

Cullet has brilliantly argued for observance of bio-safety regulations which indeed should be made a pre-condition of patentability. According to him, the liability regime should also be extended to cover damaged caused by genetically modified organisms. Bio-safety measures including those for assessing health and socio-economic impacts of biotechnology should be applied while evaluating the overall impact of IPR in agriculture sector in the developing countries like India.[4]

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1. Phillipe Cullet: *Intellectual Property Protection and Sustainable Development*, Lexis Nexis, 2005.
2. Siddharth Narrain, "Patents and Development", *The Hindu*, 24th January, 2006.
3. *Ibid.*
4. Cullet, *Supra* note. 1.

As regards law and policy governing agriculture, particularly in developing countries, past few decades have witnessed far-reaching changes. These changes have fallen into a pattern: whereas earlier local, national and international efforts to increase food security were undertaken on the basis that "the relevant knowledge should be in the public domain, the situation has significantly changed and is still rapidly changing" of late, in the developing countries.[5] The pattern, in simple terms, has changed from one of 'sharing' in the past to one of 'appropriating' now, with the help of advanced biotechnology. There is a particular inequity associated with this change in the realm of IP protection. Soon after India's independence, it was widely understood that the developing countries would share their germplasm with the international community while receiving in return improved varieties developed in international agricultural research centres. With this new shift towards appropriation strategy, it will be difficult to repeat a Green Revolution, for example, in India or other developing countries in the prevailing circumstances now.

Emergence of biotechnology as a field of significant commercial potential has dramatically impacted the laws governing IP protection of these inventions. In a mutually reinforcing process of evolution, the biotechnology revolution which began in 1970s got a fillip with the famous US Supreme Courts' Judgement in the *Diamond* v. *Chakrabarty* case which paved the way for biotechnology patents in US where patents were not granted to genetically engineered inventions before. Over years, this famous decision opened the doors, besides micro-organisms, for patenting of genes, proteins, and through recombinant technology, to multi-cellular animals and plants. In India, the patenting of microorganisms has been the subject matter of further investigation. A Technical Expert Committee on Patent Issues was approached before finalizing the matter for inclusion in the 2005 Patent Act. Like India, many developing countries are grappling with the uses and abuses of biotechnology which has always been considered as an improvement over the traditional plant breeding methods. Improvements that can be brought about by agro-genetic engineering (which is agriculture-specific biotechnology widely in use) include plant varieties that produce higher yields by enhancing the capacity of the plant to absorb more photosynthetic energy into grain rather than stem or leaf, varieties that have the capacity to combat pests and varieties modified to grow faster through enhanced efficiency in the use of inputs such as fertilizers, pesticides and water.[6]

Conventionally IPRs were not recognized in agriculture. However, with the development of plant varieties in an era when genetic modification is becoming predominant, a new form of IP is fast emerging. The plant breeders seeking rights on their produce have established 'a hybrid form of IPR' which is a compromise resulting out of a big push by the seed industry for patenting and different type of oppositions from the developing countries to bring agriculture under patents. This has provided strong incentives to

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5. *Id.*, at *p* 207.
6. Sachin Chaturvedi: "Agricultural Genetic Engineering and New Trends in Intellectual Property Rights Regime – Challenges before Developing Countries", *Economic & Political Weekly*, 37 (2002) P. 1212

breeders to develop and introduce new plant varieties. Today, all developed countries grant PBRs for new plant varieties. These rights which are specifically designed to protect new plant varieties are widely used by plant breeders to protect their work. As in the case of patents, they provide a monopoly on the commercial exploitation of protected plant varieties for certain duration. Varieties are eligible for PBR protection if they are novel, distinct, uniform and stable. PBRs, however, are not same as patent rights, though the former shares a lot in common with the latter. Some primary features of PBRs are briefly listed as below:

- Provision of compulsory licensing. i.e. a holder of plant breeders' rights can neither refuse any applicant nor offer unreasonable terms for this.
- Works to promote breeders' rights. It gives patent- like rights to breeders.
- Criteria for protection are different from patents and they are novelty, distinctiveness, uniformity and stability.
- Provides for breeders' exemption. Grant of PBRs gives to the owner exclusive rights
- To produce or reproduce the material
- To condition the material for purposes of propagation
- To offer the material for sale
- To sell the material
- To import or export the material ; and
- To stock propagating the material for any of the above purposes.

PBRs protect the plant variety, not the process or the products resulting from use of the plants. They can extend to varieties predominantly derived from another variety Unlike Patents, PBRs are exhausted when propagating material is sold. The exhaustion of material is confined to one production cycle only. 'The exhaustion rights' principle doesn't apply when the propagating material is exported to a country which has not subscribed to the Convention relating to the PBRs and the propagating material is used for purposes other than final consumption.

PBRs and Patents, it may be noted, however, are not mutually exclusive even in their composition. A transgenic plant variety protected under PBRs may contain patented technology. This is because transgenic plants are both the germplasms (cultivar, variety etc) and the transformed gene(s). Since patents offer much stronger protection, even if a PBR is obtained, patents are normally used to create powerful legal protection[7]

There are certain exemptions usually granted to the PBRs:

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7. Zakir Thomas. "Agricultural Biotechnology and Proprietary Rights", *The Journal of World Intellectual Property*. (Nov. 2005, Geneva), P. 713

- Private non-commercial use of the propagating material or used for experimental purposes or breeding of other plant varieties.
- If the farmer harvests a crop and saves the propagating material and uses it for conditioning that propagating material for reproductive purposes or reproduction.
- Use of propagating material as food, food ingredient or fuel.

However, the owner of the PBRs must take reasonable steps and ensure reasonable public access to the benefits of the plant variety. Willful withdrawal of the rights leading to artificial stock piling and subsequent hijacking of prices is considered un-ethical and punishable.

Pursuant to the negotiated compromise, the TRIPS Agreement does not impose the introduction of patents but it requires that plant variety protection must be legislated in every member-state (Art. 27(3) b). Developing countries that are WTO member states but did not want to introduce plant variety patents were left with the choice of adopting a plant breeders rights (PBRs) regime or to devise their own plant variety protection (PVP) system. Though some developing countries joined UPOV since 1994, a majority of them have gone for their own PVP laws.

Article 27.3 of TRIPs provides for protection by way of patents or a *sui generis* system or a combination of both. Nowhere is it mentioned what should be the requirements of an 'effective *sui generis* system'.[7α] In the absence of that, the generally accepted system adopted world over is UPOV (International Union for the Protection of New Varieties of Plants) as an alternative to patent protection.

However, on closer analysis, certain drawbacks of the UPOV model become clear:

- Under the UPOV type of PVP, rights of farmers to save the seeds have been reduced to a 'privilege'.
- Breeders' protection extends to harvested material products which can mean direct control of the breeders on the trade of processed food.
- UPOV is biased towards the needs of industrial agriculture.

Thus it is anybody's guess that UPOV stimulates 'corporate take over' of plant breeding. A good example is the U.S. based Monsanto which is a leader in the seed market. Besides, Article 15.2 of UPOV mentions about compensation and remuneration to the breeder but nowhere is it mentioned how those sums are to be computed.

7α '*sui generis*' is the Latin word for 'unique' or 'of its own kind'. In a legal context, the reference to a sui generis system involves an alternative or a modified framework to the existing law with fundamentally different principles and mechanisms.

III. PLANT VARIETY PROTECTION IN INDIA

India has passed its Plant Variety Protection & Farmers Act **(PVPFA)** n 2001.[7b] Two important features of this Act may be noted at this stage: (a) it creates a system of PBR and (b) it also introduces the concept of farmers' rights to counterbalance breeders rights.

One of the early laws in the field is the US Plant Patent Act 1930 and the Plant Variety Protection Act 1970 which established plant breeders rights for new plants and plant varieties. It does not have 'process labelling', one of the reasons why genetically modified organisms don't carry its label.

After ***ex parte Hibberd*** case, the law created space for utility patents. This was a breakthrough as utility patents can protect all parts of the plants. Utility patents have a larger coverage than PVPs in terms of *variety* and *claims*.

Though India's PVPFA represents a progressive sui generis PVP regime, it remains incomplete without the crucial linkages it has with (i) The Patents Act 2002 and (ii) Bio-Diversity Act, 2002. Together these three constitute a complete picture of IP protection and sustainable development. The Patents Act now allows patentability of micro-organisms and Biodiversity Act focuses mainly on access to, and control of biological resources. In India, however general coordination among the three is missing. This can be illustrated by a couple of examples.[8] The subject matter PVP does not fall under Biodiversity Act (it is under the focus of an Environmental Act) though the definition of biological resources refers to plants, animals and micro-organisms. Though there is one-to-one equality among national authorities created to implement these three Acts, on the ground, one can see considerable amount of insensitivity and wastage of resources owing to separate handlings by the Ministries of Commerce and Industry (patents), Agriculture (plant variety issues) and Environment and Forest (biodiversity issues). But what cannot escape attention is a general characteristic of the new legal regime made up of these three Acts which collectively help increase the attractiveness of economic exploitation of the biological resources and the related knowledge.

International legal system, particularly the TRIPS, provides sufficient guidance to states on ways in which they must re-orient their IPR policies in agriculture. However, major concerns of developing countries like farmer's rights or protection of traditional knowledge do not figure in this scenario while they are required to be TRIPS- compliant on most counts. In India, for instance, the suggestion for farmer's rights came only at the second stage when the Bill was re-drafted. Overall, it can be said that patent protection is available for biotechnological inventions and Plant Breeders' Rights (PBRs); but, this protection is offered either by UPOV Convention or a Sui generis Protection like India's PVFRA.

A brief legal history of plant protection in India reveals huge public sector presence in agricultural management under Patents Act 1970. The

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7b For an interesting analysis of the provisions of this Act, see B.C. Nirmal', Farmer's Rights : International and National Perspectives', *J.T.R.I.*, 21(2004), 58-85.

8 *Supra* note. 1 at p. 281

prohibition on the patentability of life forms and specifically, methods of agriculture or horticulture was one of its hallmarks. But things changed from 1980s onwards in response to the lobbying pressure from the private sector seed industry. With the deadline for India's compliance of the TRIPS Agreement under Article 27(3) (b) approaching (1.1.2000), the first draft of the PVFRA was introduced in the Parliament in 1999. It was on the whole largely a plant breeders rights legislation. This draft was referred to a Joint Parliamentary Committee (under the Chairmanship of Shri Sahib Singh Verma) which held a number of hearings all over the country before it was finally passed in 2001. The Act maintains, on the whole, provisions which were envisioned in the first draft, namely a plant breeders' rights regime but it added a substantially new chapter on farmers rights. Clearly, the PVFRA has been vested with twin mandates: (i) to recognise and protect the rights of farmers[9] in respect of their contribution made at any time in conserving, improving and making available plant genetic resources for the development of new plant varieties[10] and (ii) to protect plant breeders rights to stimulate investment for research and development, both in the public and private sector, for the development of new plant varieties. In general, the aims of the Act are much broader in scope than those of the UPOV Convention which focuses exclusively on the recognition and protection of the rights of the plant breeders.[11] The legal regime spawned by PVFRA is currently treading uncertain grounds and considering emerging trends favouring private appropriation, it is likely to become UPOV-compatible which would entail shedding some of its sui generis features.[12]

The developing countries are quite aware that the TRIPs furthers the interests of the advanced countries much more than the developing countries. For example under the TRIPs, protection is there for high-tech. fields but traditional knowledge and folklore are excluded out of scope.

Developing countries are not only having to pay high premium for patented products reintroduced in their countries but they are also unable to use the IP framework to protect against the piracy of their own indigenous and local resources and knowledge. Thus, the so-called advanced intellectual property regime or the 'stronger' intellectual property regime is strong for those usually from the developed industrial countries of the west.

As said earlier, PVPs do not offer protection comparable to patents which is why patenting is an important issue. There has not been desirable level of progress in patenting of Plant Breeders though, according to one estimate acreage increase has gone from 500,000 hectares in 2004 to 13, 00,000 hectares in 2005 in the adoption of Bt Cotton Crop. There is the

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9. India law now insists on granting of rights and not providing exemptions to farmers. Similarly farmers are to get compensation if poor quality seeds lead to crop failure etc.
10. Paras 1 & 2, Preamble of *Protection of Plant Varieties and Farmers Rights Act*, 2001.
11. Supra note 1, at p. 274.
12. *Ibid.* Even after adoption of the Act in 2001 as a *sui generis* legal measure, GOI has taken a decision in May 2002 to seek membership of the UPOV Convention under the 1978 Act which is not so stringent as compared to its 1991 version.

danger of huge concentration in one MNC[13] for which Swaminathan Committee was set up in July 2003. It has given a set of guidelines but to forestall recurrence of what Monsanto did in Indonesia, a diversified understanding of this fast emerging phenomenon is urgently necessary.

It is therefore timely that one should understand various methods of valuation of patents on PVPs and issues associated with it. Before proceeding to discuss the valuation of patents it is necessary to highlight the value of intellectual property as an intangible asset and discuss the methods of evaluation of intellectual property.

IV. VALUATION OF INTELLECTUAL PROPERTY ASSETS

A firm normally has two types of assets: tangible and intangible. Tangible assets are properties which are physically determined. An intangible asset is however defined as a capital asset having no physical existence. And its value depends on the rights that are conferred on the owner. It is an incorporeal asset. Each intangible is different and cannot be compared with other similar items; and because of this uniqueness, price indexes are not available to compute scientific replacement costs. The only practical purpose of valuation is the actual input value. Some intangibles relate to the development and manufacture of a product e.g. patents and copyright; and others relate to the creation and maintenance of the demand for the product e.g. trade marks and trade names. All, however, represent benefits that are highly uncertain and difficult to associate with specific revenues or periods.

With the growth of intangibles in enterprises, intellectual property has gradually surfaced as a species of assets. The distinguishing feature of IP is that the tangible element is an insignificant component of the total value. A book may have negligible component of value in terms of paper, printing, and binding but it accounts for enormous value in terms of thought, precepts, or information contained therein.

An intellectual property is a product by itself having the elements of utility, scarcity and transferability. It is primarily the outcome of an individual's creative instinct which finds a place of value in the market. Intellectual properties are a special class of intangible assets. They are different from other intangibles in the sense that they manifest all the economic existence and economic value attributes of other tangible assets. And unlike intangible assets which are created in the normal course of business operations, intellectual properties are created by human intellectual or inspirational activities.

Generally, appraisers and economists categorize intangible assets into several distinct categories. Those with similar valuation methods are grouped together into one category. As a subset of intangible assets, intellectual properties are often grouped into like categories. Similar valuation methods apply to the intellectual property assets in each category.

In earlier times the diffusion of knowledge was so slow that an invention could be fully exploited by the inventor long before others were

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13. 91 Percent of all GM seed planted in India (in 2001) belonged to the leader of the seed industry MONSANTO, a US multinational.

about to copy it. But with the advent of advanced technology, qualitative changes have overtaken reproduction of books, films, video tapes and so forth opening up flood gates for pirating once the product becomes available in the market. It is because a product of intellectual creativity has come to be seen as a financially valuable asset to be exploited for economic purposes, the society has taken cognizance of it and indeed, created laws for its protection.

In business valuation, the contribution of intangibles to business is taken into account for estimating the value thereof. However for an intellectual property, since it is a product by itself, it has to be valued as per the market approach or the income approach depending on the contingency or the purpose warrants.

It is important to reiterate here that as a property type, intellectual properties are not different from intangible assets. As assets intellectual properties are not separate and distinct from the intangible assets. Rather, intellectual properties are a specially recognized subset of intangible assets. In other words, all intellectual properties are intangible assets but not all intangible assets need be intellectual properties. As a subset of intangible assets, intellectual properties are often grouped into like categories. Similar valuation methods apply to the intellectual property assets in each category. However a common characterization of intellectual property types reveals two distinct features:

1 Creative (trade marks, copyrights, computer software)

2 Innovative (patents, industrial designs, trade secrets)

With regard to the creative intellectual properties these property owners need legal protection. With regard to the innovative intellectual properties (like patents), the owners need motivation so they can commercialize their innovations in an economically friendly way.

The concept of property is fundamental to valuation. Property may be either tangible or intangible. Ownership and the rights to use it or to derive benefits out of it constitute the property. These rights are the subject matter of valuation. The bundle of rights attached to a property allows holders to sue, exploit or dispose of the thing held; each of these rights is capable of being valued in accordance with the applicable method.

It is very difficult to draw up a statistical model for the valuation of intellectual property as such valuation is not computable. However intellectual property has some distinguishable attributes which may be related to the totality of future benefits arising out of them. These attributes have some positive physical effects so as to affect the economic analysis of all future benefits that may accrue to them. Such benefits may include the "accelerator effect" as also the "multiplier effect" induced by goodwill and/or other motivational inspirations.

Normally, in statistical models we try to explore an empirical equation whose form is inferred from the results of observations and in which the constants are determined from observed data. In case of linear growth, a linear equation may be devised to fit in the observational data. But all types of growth, especially growth of benefits accruing from intellectual property may

not be that simple linear. The valuation of intellectual property depends on a number of factors such as, specified legal life, balance economic life etc. We may treat these factors as variables in a non-linear equation for the valuation of intellectual property.

Valuation of intellectual property depends on the following factors: (i) specified legal life/balanced economic life; (ii) External commercial exploitation geographically; (iii) Industry-wise transfer involving higher market value and (iv) Pricing multiples. These factors may be considered as variables in a **non-linear equation** for valuation of an intellectual property. More often than not, an IP is unique so that valuation comparisons with another IP are difficult to justify.

Valuation methods for IP must be verifiable, transparent and they should give best estimates on a reliable basis. There are four main approaches:

1) Market value of company less the Net Tangible Assets

2) Cost based

3) Comparative Market Valuation

4) Economic Benefits Approach

Intellectual property is a subset of intellectual assets for which various forms of ownership are protected by law. These forms of ownership are accompanied by specific legal rights that have created a market place for trading intellectual property, making the valuation and extraction of value from IP a well established practice.

Intellectual property valuation has the following components – legal enforceability, transferability, separability, economic life and extent of novelty. It must be capable of being transferred to purchasers. As the intellectual property must be capable of legal enforcement and legal transfer of ownership, it must be possible to isolate the benefits it generates from those derived from other intangible assets such as reputation , workforce and distribution networks .i.e. enterprise's goodwill. So far as the economic life of the intellectual property is concerned it may be totally different from its legal or contractual life because of a host of outside forces such as legislation, end product, economy, government regulations etc. The less the intellectual property has a proven established track record, the more difficult the valuation will be because of lack of historical track record, demonstrated market acceptance and information of industry required rates of return.

V. IMPACT OF PATENTS ON INDIAN AGRICULTURE

India has modified its patent laws in 2005 to conform to the TRIPs requirements. Among other changes, the modified laws recognize patents on techniques and material commonly used in biotechnology research.

India is engaged in large research projects to develop transgenic plants of rice and cotton. In both cases the researchers are using CRY 1Ab and Bt CRY 1Ac genes. Both are proprietary genes. Also, the transformation techniques such as plant bombardment and selectable markets used for developing transgenic crops are also patented.

Only a fraction of these inputs have been received under formal material transfer agreements (MTAs). In most instances techniques and material are being used without permission from patent holders. After its compliance with TRIPs, the companies who own the technology will be able to get patents in India. Indian research institutes can obtain licenses to use proprietary techniques and material to continue their work

In addition to its impact on freedom to carry out research, recognition of patents in agriculture may also affect the relative role of the public and private sectors as sources of agricultural technology. While the position of the public sector is weakened, that of the private sector is strengthened as they are better placed to access proprietary technologies through joint ventures.

The public sector's weakness in agricultural biotechnology can have serious implications for India's ability to use biotechnology for poorer farmers, especially most of them who grow the so called 'orphan' crops and live in unfavourable agro-chemical regions. As these farmers are poor, they do not form a substantial seed market. Therefore, we cannot expect the private sector to develop transgenic plants of the crops which are grown by these farmers. In order to fulfill its mandate, the public sector will need to explore various alternatives to get access to biotechnology based technologies and products. An obvious strategy will be to get access through licenses to proprietary technology for use in crops grown by small and marginal farmers and suitable for harsh agro-economic climates. This may be possible for two reasons:

1) By giving a license to the public sector, the technology owners will not incur a big loss of market as their purchasing power is small.

2) The licensing of these technologies will provide biotechnology companies with an opportunity to improve their public image.

Then, the recognition of IPRs will have important implications for Indian farmers. Firstly, it is likely to affect the supply and price of seeds. The recognition of PBR will provide incentives to the private firms to do research to develop these varieties. However the PBRs will also provide the firms with monopoly over their varieties. This may enable them to charge high prices for the seeds. Thus, while introduction of PBRs provides the farmers with greater choice of varieties, it also leads to higher seed prices in the same vein.

VI. VALUATION OF PATENTS

After having gone through the previous section on the impact of patents on agriculture, it is imperative to pay attention to the techniques employed in the valuation of patents in the modern times.

Brand Valuation

Brand valuation as the most visible form of intangible asset valuation has resulted in an elegant theory and practice that is nearing final formalization with the imminent *imprimatur* of the Financial Accounting Standards Board. The same however cannot be said regarding patent valuation where the whole body of knowledge seems so inchoate, confusing

and inadequate. The "hard science" of asset valuation which follows the traditional assessment of cost, market and income is again not applicable to patents because of innumerable special situations and considerations under which they may need to be evaluated e.g. set value for a licensing arrangement, segmenting market capitalization or monetarizing a patent.

However the following generally accepted accounting practices allow patent valuation decidability. These factors are:

- Degree or scope of Invention.

There are three categories of invention: breakthrough inventions, major inventions and minor inventions. Their value on scale is in the same order.

- Market and Industrial Application

The number and value of markets and industries for which patent has significance are leading indicators of potential value of the patent.

- Term

Early term patents are generally more powerful than those that have been in force beyond a few years.

- Third Party Citations

While clearly a "lagging indicator", the degree to which other patents have been issued around the technology of a given patent is a measure of the significance of the patent.

- Special Considerations include ability to expand scope, use in bracketing /clustering strategies and tactics, patent equity transfer into a brand.

As we consider and balance these various perspectives, we derive the value of the patent.

With patents increasingly sharing the spotlight with brands in the world of intellectual capital assets and market capitalization analyses, it has become essential that patents join brands in lining up against traditional approaches to setting asset values. Despite the many factors impacting the value of a patent, the methods successfully pioneered by brand valuation provice the model for patent valuation methodology and the key to intangible asset valuation. A composite valuation consisting of the three core elements of asset valuation coupled with a patent strength assessment provides a reliable method for setting patent valuations.

When valuing patents on plant breeders, we need to look into all the active players involved and the various methods of valuation affecting them. In this section we discuss valuation methods applicable to biotechnology companies which form an active sector (private) while valuing patents on PBR.

Until a biotechnology company has commercial products on the market, the commercial value of that company is dependent upon its intellectual property portfolio and the name and recognition of key scientists in the company. Patents, pending patent applications, trade secrets and

licenses to these assets are the most important types of intellectual property these biotechnology companies possess. A company's intellectual property portfolio is often extensively evaluated before a round of financing, corporate partnership or strategic licensing arrangement, a sale or merger, or, if the company fails, when the company is in receivership. A value is typically placed on the portfolio by both the company and the other entity participating in the potential transaction. The two parties often arrive at significantly different valuations.

During due diligence, the potential investor, purchaser or licensee, will evaluate whether the patent portfolio covers the technology it purports to cover, whether there are errors or omissions in the portfolio that can either be corrected or which would affect the value of the patent portfolio if they cannot be corrected, whether trade secrets provide any other supplemental or additional coverage, and whether appropriate preparations have been followed to protect trade secrets. Likewise, licenses will be evaluated to determine whether the rights obtained give the company the right to fully pursue its strategic objectives for the intellectual property covered therein. A lapse or failure in any of these areas may result in significant reduction in the value of the IP portfolio and the company. As a result, the biotech company should regularly evaluate these objectives in light of evolving business plans and the strategic objectives of its own or a prospective partner or licensee.

Value is the representation of all future benefits of ownership, compressed into a single payment. Value is continually changing --- the value today will not necessarily be the value tomorrow. Value cannot be calculated without defining who the owners are and what the purpose of the valuation is. Patent valuation is a complicated process, and takes into consider a variety of factors, including the time, place, potential owners and potential users. In other words, the ***who, what, how, when*** and ***where*** are all matters which need to be clarified for a comprehensive understanding of value.

The value of a patent depends on who is seeking to determine its value. The patent will have a different value to the patent owner than to a potential licensee or purchaser, a potential infringer, or the bankruptcy courts.

The value to a company depends on whether they plan to:

- develop and market products themselves;
- form a joint venture with someone already in the business; or
- license it to others.

A university professor is likely to be unable to fully exploit a patent to its fullest. A small company may be able to license a patent or sue for patent infringement, but may not have the resources to take a product to market. A large company may have the resources to use the patent to its fullest. The value of the patent in each party's hands is entirely different.

A patent provides a bundle of rights, including the right to exclude others from making, using, selling, offering for sale and importing into the United States the subject matter claimed by the patent. Patents also include

a variety of claims. The patent owner can license or sell any combination of these rights. For example, the right to make, but not to sell or offer for sale, can be licensed to a potential manufacturer. The right to sell and offer for sale, but not to manufacture, can be licensed to a potential distributor. Rights to one type of product covered by one set of patent claims can be licensed to a first entity, and rights to a second type of product covered by another set of claims can be licensed to a different entity. Accordingly, the value depends on what portion of the bundle of rights is being considered.

The value also depends upon what is claimed. A patent that protects a process for preparing a chemical is generally less valuable than a patent that protects the chemical itself, since these types of process claims are relatively easy to design around. In the pharmaceutical world, patents which cover new methods of using old drugs often have considerable value, particularly if they can be used to extend the monopoly on an existing drug. The economic life of such patents is often as long as the patents are in force. In the biotechnology world, there are many pioneering inventions that can be enforced broadly on future developments. While this imparts tremendous value on the pioneering inventions, it can lower the value of the future developments, because patents protecting the future developments often cannot be practiced without also obtaining rights to the pioneering inventions.

How the patent will be used is extremely relevant. The "best" use brings the highest net return. The best use, however, depends on who exploits the patent, how it is exploited, and when it is exploited. How the patent will be used depends in large part on who the owner is and what the market is.

The value of a patent also depends upon when the patent is valued. A patent has a finite term. A patent near the end of its lifetime (the legal lifetime or the economic lifetime) has a different value than one which has just recently issued. A patent covering existing commercial products has a different value than one which covers products that have not yet been marketed.

The economic life of the products covered by a patent is related to the economic life of the patent or patents that support it. The economic life of a patent is not longer than the life of the products it covers in the marketplace.

The following factors can have an adverse effect on the economic life of a patent:

- The supply or price of a raw material changes in a way that renders the process uneconomic;
- The cost of energy increases in a way that renders the process uneconomic;
- Governmental legislation adversely affects the manufacture or sale of the product;
- Competitors design around the protected process.

- Better products, outside the scope of patent coverage, are developed by competitors; and
- Competitors challenge the validity of the patent;

An interesting twist in the area of biotechnology patents is that in some cases, a patent may have more value at the end of its lifetime if dominating patents covering broader and pioneering inventions have expired. The need to share royalties with the owners of such patents terminates or is at least significantly reduced when such dominating patents expire.

U.S. patents protect against competition in the U.S. While they do not protect against manufacture or sale in foreign countries, they provide protection against importation of good covered by a U.S. patent. For this reason, many companies obtain foreign patent protection in addition to U.S. patent protection.

VII. VALUATION METHODS

There are several valuation techniques that could be applied to valuation in a biotech company like a seed company. These include the cost approach, the income approach, and the market approach. The income method is a preferred valuation method, followed by the market method, followed by the cost method.

The Income Method

The income method considers the income-producing capability of the patent. The income value of the patent is the present worth of the net economic benefit to be received over the life of the patent. Present value is calculated by determining how much money it would take, in today's dollars, to arrive at the total income of the patent over the life of the patent. It is often difficult to estimate the economic life of patents related to new technology.

The income method starts by projecting the income-producing capability of the company. The value of the company depends on the ability of the patent to earn a reasonable return. The projection considers revenue, cost of goods, operating expenses (including R&D), other expenses, and taxes. The income stream can be calculated by taking earnings before taxes and interest, subtracting income taxes, adding depreciation and other non-cash expenses, subtracting capital expenses, and subtracting cash required to increase net working capital (e.g., build new plants).

Very often, patents contribute to corporate income by reducing processing or manufacturing costs. For example, the patented technology can reduce materials costs or improve yields.

In considering future income, the following questions are relevant:

- What is the potential market?
- Who are the competitors?
- What are the further development costs?
- What product or service is being replaced?

- Are financial resources present to see the project through?
- What is the level of protection (patents, applications or trade secrets)?
- What is the cost of market entry?

The Market Method

The market method values the patent on the basis of how the marketplace has valued the products and/or processes claimed in the patent. This type of valuation is only relevant when there is an active, public market in the relevant area of technology, and when it is possible to compare the claimed products and/or processes with others in the marketplace. While no patents are identical, if the market for the particular product is large enough, it is often possible to make meaningful comparisons.

The market valuation method can be more readily used if similar patents have been marketed. It may be difficult to use the market method to value early stage biotechnology. However, it is often possible to compare the technology to existing products in the market, estimate how much market share will be obtained using the new technology, and assign a value in this manner.

One factor in deciding value using the market approach is the degree of market penetration. Are there commercially viable ways to design around the patent? Are there competing products in the market? If so, the value will be less than if there are no competing products or commercially viable ways to design around. Another factor is where the patent is to a pioneering invention, or to a narrow improvement. However, the breadth of patent claims is not always indicative of value. An extremely narrow pharmaceutical patent, which claims a drug with a market of $100 million a year, is more valuable than a patent with a broad claim scope but with no marketable products.

Drug patents provide pharmaceutical companies with a monopolistic market position, at least for a certain period of time. The "excess" profits flowing from the sale of a drug can be directly attributable to the patent(s) covering the drug. In such a case, the market approach can be used to determine the value of a pharmaceutical patent.

When a patented product feature finds favor in the marketplace, it can provide an economic benefit. The "premium" pricing or incremental sales attributed to the special product feature are included in the determination of the market value of the patent.

The market value goes down when there is a question about the strength of the patent. Accordingly, when patent litigation seeks to invalidate a patent, the market value declines. However, if the patent validity is reaffirmed (in court or in a reissue or reexamination proceeding), the value of the patent increases.

The market value also declines if the patented technology can be "designed around." Accordingly, pioneering patents covering an entire

industry is more valuable than a patent covering a small aspect of the industry.

Patents are often valued by capitalizing those economic contributions specifically attributed to the patents. Research and development (R&D) expenses not related to the patents being valued should be eliminated from the expenses charged to the valued patents. This way, the patents being valued will not be burdened by current research expenses associated with future patents. However, research and development costs related to adapting the patented technology for additional uses should reflect the additional research costs required to do so.

While a market approach for patents and technology has many positive aspects, the data needed to conduct a valuation using a market approach are rarely available. The market factors needed for a proper evaluation include:

- Transactions of similar property;
- Exchange between unaffiliated entities;
- Disclosure of pricing information;
- Reasonable knowledge of all relevant facts known to the transacting parties; and
- Transaction parties willing to complete the transaction.

If this information is not available, it is better to use the income approach.

The Cost Method

The cost method measures the future benefits of ownership by quantifying the amount of money required to replace the future service capacity of the subject patent. In other words, the cost method values the cost of replacement. It is difficult to value the cost of replacement in the patent context. However, various costs which can be considered include:

- salary and benefits for the research group;
- capital expenses associated with research and development, including setting up a pilot plant or building a prototype;
- establishing quality control testing procedures;
- gaining regulatory approvals; and
- patent prosecution fees, including attorney fees, government fees, and translation fees.

The cost analysis does not consider factors such as commercial profits, investment risk, economic life, market factors, or potential earnings. For these reasons, the cost approach is the least favored approach for determining the value of a patent.

Direct and Indirect Exploitation

As discussed above, one of the factors in valuing patents is who is using the patent. The discussion below focuses on whether the patent is being directly exploited by the patent owner or indirectly exploited by a licensee.

A patent owner can directly exploit its own patents. Reasons for direct exploitation of a company's patents include:

- The patents cover the subject matter of the company's business;
- The business is in a position to fully exploit the intellectual property;
- There are valid business reasons for avoiding using outside organizations to assist in exploiting the patents;
- The company is afraid of potential liability if it were to have others assist in exploiting the technology;
- The patents have value to the company as "trading cards" in infringement litigation;
- The exploitation of the patents might be difficult to control in the hands of others; and
- The potential royalties may be too low to justify the costs and/or risks of transfer.

When valuing a patent being directly exploited by a company, one must consider whether the company is in an economic position to fully exploit the patent. That is, can the company use the patent for its best and highest use? If successful, direct exploitation can reduce capital or labor cost, result in premium pricing, and/or enhance market position. These all lead to increased profits.

A patent owner can indirectly exploit patents by transferring all or a portion of the bundle of rights to others who exploit it, in return for a share in the profit. The bundle of rights can be split in a variety of ways. The number of rights transferred the form of the transfer, and the means of sharing the benefits all vary depending on the particular agreement between the parties.

Vehicles for transferring rights include:

- Outright sale (a "fully paid-up royalty")
- Licensing
- Joint ventures
- Franchises

Valuation of licensed intellectual property may follow the valuation models described above, with the following additional considerations:

- Term of license remaining
- Geographic scope/markets
- Field of use for license

- Expense of royalty payments to licensor
- Expense of other payments (development fees, pass-through of equity or other consideration received)
- Rights to control defense of claims the licensed intellectual property infringes a third party's patents and sharing of costs of damages.
- Rights to control pursuit of claims against infringers and rights to share in aware of damages.
- Rights to participate in patent prosecution

Government Regulations

If government regulations will be expected to result in additional expenses or potential risks to the manufacture or sale of patented products, this will have an adverse effect on the amount of royalty a licensee will be willing to pay. The effect upon royalties can be estimated by accounting for the expense of governmental regulations in the production and administrative expenses. These costs reduce the amount of expected profits, and the royalty will directly reflect these added costs.

If government regulations are pending, and additional operating expenses are expected, the added risks can be reflected in a lower royalty, reflecting the negative effect of governmental regulation.

Thus from the point of view of the private sector, the abovementioned methods of valuation may be applied. These, however, differ in a great deal when we need to value assets from the point of view of the farmers and the nation as a whole.

VIII. VALUATION METHODS EMPLOYED IN THE PUBLIC SECTOR

From the discussions previously held, it becomes clear that the social, economic and ecological impacts of monopolization of agriculture by the private sector are serious. Monopolisation may also affect the economy owing to biotechnology boosted exorbitant prices of the IPR protected items. The farmers having lost their traditional diversity and having no right to replant the protected seeds have no option but to purchase the costly seeds from the company. IPRs may also restrict exports. The rose growers from Bangalore have been exporting flowers raised from stocks without paying the license fee to the plant breeders in the Netherlands. The Dutch breeders therefore forced their government to ban the import of rose flowers from India. Meanwhile, the breeders are employing newer means to curtail farmers from replanting through technological innovation, dubbed by some as "terminator technology".

The adverse consequences associated with monopolization have prompted many to advocate that India must not allow patents on life forms and their derivatives on the grounds that these are immoral and socially unacceptable. But this is unrealistic. We don't appear to be in a position today to dictate terms during international negotiations. While our intellectual and political leadership continues to call for rejecting the IPR regimes, in actuality the Government merely surrenders. From a country's point of view,

valuation is an important exercise which can throw light on the desirability of framing policies and perpetuating systems conducive to a desired goal.

The fallout of a system calls for the relevance of a different approach in the field of valuation and this may be called the 'Benefit Approach'.

Benefit Approach

Valuation is not a mere accounting exercise of price but a reasonable estimate as to what the price ought to be after taking into account all relevant considerations. It involves an estimate of the total benefit on the economic front and its spread effect on the social front measurable in value. This is where the relevance of the benefit approach comes into being. The methodology of the benefit approach should trace the 'accelerator' effect as well as the 'multiplier' effect induced by investment. This process of valuation should take into consideration the subsequent stages of economic development which the conventional cost benefit analysis may not capture always.

When the development is assessed on a single direction, the rate and quantum of growth at different stages may be computed by taking into account the 'accelerator' effect on the single track of value addition. As multiple avenues of growth are identified and in different stages, the 'multiplier' effect comes into consideration.

On the face of it, the valuation of intellectual property assets may not be computable . But they have some attributes which may be related to the totality of future benefits arising out of them. These benefits have some positive physical effect which may include the accelerator effect and also the multiplier effect. It is because of these physical effects which are computable that it is possible to set up statistical models for benefits arising out of the intellectual property. Hence in the public sector (i.e., from the nation's point of view) the benefit approach may be employed to value the intellectual property assets like plant variety and transgenic seeds, as we keep in view the interests of the poor farmers.

IX. CONCLUSION

Conventionally, IPRs were not recognized in agriculture. But a massive growth in the GMOs has called for some IP protection (i.e. PVP) which falls short of patenting. Patenting of plant protection has thus become an 'intriguing' phenomenon in the sense that more and more of it is under use when there is less stability in its knowledge base. This article outlines one way of evaluating patents on plant breeders, which represents only one aspect of this emergent IP regime.

Though the Indian laws (PVPFRA) provides for a role, and rights of the farmers, it is the plant breeders who are calling the shots in the agro-industrial markets. Farmer's suicide in Andhra Pradesh and other states leading to cancellation of three varieties of Bt cotton crop and fines imposed on Monsanto under the (US) Foreign Corruption Act for its unlawful activities in Indonesia raise the vital question of the State to remain alert and bring this growing phenomenon of plant breeders capturing most of the agro production—marketing space under some regulations. The Swaminathan Committee set up in July 2003 has prepared some guidelines which can be

used as regulations to conduct these transactions. Three important gaps however remain to be addressed soon:

a. What all are going to happen with the May l2002 decision of the GOI (after the adoption of PVPFRA) seeking membership of UPOV under the 1978 Act. The later version of UPOV has already come into existence with the 1991 Act which has more stringent conditions to abide by.

b. The plant variety Authority needs to be created at the earliest for effective governance.

c. At a macro-level, a good deal of synergic benefits would accrue if a marriage of these three National Acts dealing with plants, biodiversity and environment can be worked out. Supporters of GMOs often complain that the mishaps associated with the Bt cotton crops and others may also be due to inhospitable saline and drought conditions in India which therefore calls for effective state regulations. The Swaminathan Committee has a ready blazed the trail in this direction. Besides regulations, valuation of patenting the plant breeders is becoming all too important in view of their most current and voluminous use.

Valuation, however, is not a mere accounting exercise of price; it is a reasonable estimate as to what the price ought to be after taking into consideration all variables like total benefit on the economic front and its spread effect on the social front. With fast increasing perception of the importance of IPRs as contributing factors to the gross valuation of national assets, this paper has tried to shed some light on various methods used in private and public sectors. Patent valuation is a complicated process which demands a detailed understanding of the input factors like *who*, *what*, *how*, *when* and *where* for a correct estimation of value. In such an exercise, impact assessment of biodiversity, environment, agro-climate and overall, equitable considerations in trade are crucial and they should be reflected in the valuation of patents on the plant breeders in the interest of justice for IP protection of agriculture in developing countries in general and India in particular.

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MORAL RIGHTS: MOVING FROM RHETORIC TO REALITY IN INDIA

Satish Chandra*

INTRODUCTION

The orthodox theory of moral rights is that authors of copyrightable works have inalienable rights in their works that protect their moral or personal interests[1] and that supplement the set of economic rights traditionally granted to copyright holders in all jurisdictions.[2] The non-economic interest of authors are found worthy of protection because of the presumed intimate bond between authors and their works, which are almost universally understood to be an extension of author's personhood.

In material world, laws are geared to protect the right to equitable remuneration. But life is beyond the material. It is temporal as well. Many of us believe in the soul. Moral rights of the author as flowing from Section 57 of the Copyright Act, 1957 (which speaks of "author's special rights") are the soul of his works. The author has a right to preserve, protect and nurture his creations through his moral rights.

When an author creates a work of art or a literary works, it is possible to conceive of many rights, which may flow. The first and foremost right, which comes to one's mind, is the "Paternity Right" in the works i.e. the right to have his name on the work. It may also be called the 'identification right' or 'attribution right'. The second right which one thinks of is the right to disseminate his work i.e. the 'divulgation or dissemination right'. It would embrace the economic right to sell the work for valuable consideration. Linked to the paternity right, a third right, being the right to maintain purity in the work can be thought of. There can be no purity without integrity. It may be a matter of opinion, but certainly, treatment of a work which is derogatory to the reputation of the author, or in some way degrades the work as conceived by the author can be objected to by the author. This would be moral right of "integrity". Lastly, one can conceive of a right to withdraw from publication one's work, if the author feels that due to passage of time and changed opinion it is advisable to withdraw the work. This would be the author's right to "retraction". Except for the 'divulgation or dissemination right'

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1 See, Lionel Bently and Brad Sherman, Intellectual Property Law 231 (2nd ed. 2004)

2 The term "moral right" derives from the French expression "*droit moral*" and is a misnomer in the sense that moral rights are neither the opposite of immoral rights nor of legal rights. Instead, moral rights are meant to be the opposite of economic rights, which is what the traditional set of copyright entitlements is often called in Continental Europe.

which perhaps is guided by commercial considerations, the other three rights originate from the fact that the creative individual is uniquely invested with the power and mystique of original genius, creating a privileged relationship between a creative author and his work. This is the source of the last three rights and therefore, could be captioned under the banner "The Author's Moral Rights".[3]

The significance of 'author's special rights' has been articulated by Prof. Upendra Baxi.

> "The Act reaches out, in its solicitude for author's rights, even after part or whole assignment, and "independently of author's copyright" to confer upon her certain special rights. An author will have the special right to claim the authorship of the work as also the right to restrain, or claim damages in a situation where there occurs any "distortion, mutilation or any other modification" of the work and "any other action in relation to said work which would be prejudicial to his honour or reputation. This right is also made exercisable by the legal representative of the author".[4]

II "AUTHOR'S SPECIAL RIGHTS" IN INDIA

Though our copyright statute is of British mould, we took a step ahead of Britain in incorporating Section 57 in the Copyright Act, 1957 and thereby giving recognition to moral rights of the authors. The British copyright law has given specific recognition to these rights in 1988.[5] The bundle of rights and remedies provided by Section 57 is in tune with the modern development in law relating to protection of intellectual property of author and the international agreements and treaties in this regard.

Section 57 of the Copyright act, 1957 as amended by Act 38 of 1994 runs as under:

1. Independently of the author's copyright and even after the assignment either wholly or partially of the said copyright, the author of the work shall have right

    a. to claim authorship of the work; and

    b. to restrain or claim damages in respect of any distortion mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation;

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3 Vide opinion of Mr. Justice Pradeep Nandrajog in Amar Nath Sehgal v. Union of India, 2005 (30) PTC 253 (Del.) at 260-61

4 Upendra Baxi, "Copyright Law and Justice in India", 28 J.I.L.I 497 (1986) at 523

5 The Copyright, Designs and Patents Act, 1988

Provided that the author shall not have any right to restrain or claim damages in respect of any adaptation of a computer programme to which clause (aa) of subsection (1) of section 52 applies.

Explanation – Failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section.

2 The right conferred upon the author of work by sub section (1), other than the right to claim authorship of the work, may be exercised by the legal representatives of the author.

Section 57 speaks of "author's special rights". It does not speak of publishers or owner's rights". Action prejudicial to his honour or reputation" within the ambit of section-57 (1) (b) is also referable to the author only.[6]

Under Section 57 the author shall have a right to claim the authorship of the work. He has also right to restrain the infringement or to claim damages for infringement. These rights are independent of author's copyright and the remedies are open to the author under Section 55. In other words Section 57 confers additional rights on the author of a literary work as compared to the author of general copyright. The special protection of the intellectual property is emphasised by the fact that the remedies of a restraint order or damages

can be claimed" even after the assignment wholly or partially of the said copyright".[7]

Section 57, thus, clearly overrides the terms of contract of assignment of copyright. To put it differently, the contract of assignment would be read subject to the provisions of Section 57 and the terms of contract cannot negate the special rights and remedies guaranteed by Section 57. This is a special provision for the protection of special rights of the authors. The object of this section is to put the intellectual property on a higher footing than the normal objects of copyright. The language of Section 57 is of widest amplitude. It cannot be restricted to 'literary' expression only; Visual and audio manifestations are also directly covered.[8]

Under the Copyright Act, 1957 no particular mode is prescribed to acquire special rights. The author of work inheres these rights independently of copyright in his work in which he has copyright. The special rights are inalienable but sub-section (2) of Section 57 permits the exercise of rights conferred upon an author of a work by sub-section (i) by legal representatives of the author except to claim authorship of work.

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6 *Wiley Easter Ltd. V. Indian Institute of Management*, 1995 PTR 53

7 *Smt. Mannu Bhandari* v. *Kala Vikash Pictures Pvt. Ltd.* A.I.R. 1987 Del.13 at pp.15-16

8 *Id.*

In substance, Section 57 confers two special rights on the author of the work. Firstly, to claim authorship of the work and secondly, to

restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work which is done before expiration of term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation.

One peculiar feature of these rights is that though they exist independently of ownership of copyright and vest only in respective authors, yet there can be no occasion for them to arise unless there is or has been a copyright in any particular work.[9]

INFRINGEMENT OF AUTHOR'S SPECIAL RIGHTS:

This section (Sec. 57) provides an exception to the rule that after an author has parted with his rights in favour of publisher or any other person, the latter alone is entitled to sue in respect of infringement. The author retains the special right even after the assignment of the copyright. The principle underlying this section is that damage to the reputation of an author is something apart from infringement of the work itself.[10]

III JUDICIAL DELINEATION OF SECTION 57

Although many authors complain of the distortion, very few have sought judicial protection. The Delhi High Court in the case of *Mannu Bhandari v. Kala Vikash Picture Pvt. Ltd.*[11] got an occasion to interpret infringement of author's special right as enshrined in Section 57 of the

Copyright Act, 1957 after 30 years of the commencement of this Act.

In this case, plaintiff Smt. Mannu Bhandari brought a suit against M/s Kala Vikash Pictures Pvt. Ltd. and its producer and director. Kala Vikash had produced motion picture 'Samay Ki Dhara' under assignment of filming rights of the plaintiff's novel 'Aap ka Bunty'. Her complaint was of mutilation and distortion of the novel. She pleaded for permanent injunction against the screening and exhibition. Although before the court's decision, parties entered into a settlement agreement, the court passing the final order made some important observations:

> "The court does not sit as a sentinel of public morals or super sensor in exercise of its powers under the said section. It cannot impose its own views (prudish or liberated) on sex or its depiction in the works of Art. The concern of the court is to examine how for the new 'avatar' is true and authentic and what changes are necessary due to constraints of a medium.[12]

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9 Iyengar's, "The Copyright Act, 1957, (6th Ed.), New Delhi, Butterworths India,2000 at p. 11.

10 Anurag K. Agrawal, "Moral Rights in Copyright Law", (2003) 8 S.C.C.(J) at 3.

11. AIR 1987 Del.13

12 *Id.* at P.19

It is pertinent to note that since the plaintiff preferred to settle her dispute with the defendant film producer out of court before judgement was pronounced by the High Court, it became unnecessary to decide the dispute between them. Nevertheless, at the request of the parties S. B. Wad J., delivered his "judgement', giving us the benefit of his considered views on the scope and applicability of Section 57. Interpreting Section – 57 (as stood before amendment in 1994) the court observed:

> The words 'other modification' appearing in sub clause (a) will have to be read ijusdem generis with the words 'distortion' and 'mutilation'. The modification should not be so serious that the modified form the work looks quite different work from the original.[13]

Dealing with the purpose and ambit of Section 57, the learned judge points out that the object of that Section is to put intellectual property on a higher footing "than the normal objects of copyright"[14], lift author's status beyond the material gains of copyright and give it a special status.[15]

Again a suit for the infringement of the author's special right under Section 57 (as amended in 1994) came before the court in *Phoolan Devi v. Shekhar Kapoor*,[16] where the plaintiff sought restraint order against the defendants from exhibiting publicly or privately, selling, entering into film festivals, promoting, advertising, producing in any format or medium, wholly or partially, the film 'Bandit Queen' in India or elsewhere. She (the plaintiff) claimed to be a public figure, rather a legendary figure and contended that the basis of the film being a novel dictated by the illiterate plaintiff herself had been considerably mutilated by the film producer in their film bearing the title 'Bandit Queen'. It was held that from the documents on record it can not be said that plaintiff had consented and given licence to the defendants to make the film in any manner they liked including exhibiting sexual abuse which has been shown in graphic detailed by the defendants in the film. It was observed:

> "... the defendants have no right to exhibit the film as produced as has been filed in this court violating the privacy of plaintiff's body and person. ... No amount of money can compensate the indignities, torture, feeling of guilt and shame which has been ascribed to the plaintiff in the film".[17]

In *K. P. M. Sundaram v. Rattan Prakashan Mandir*,[18] the plaintiff and his co-authors entered into an agreement with the defendant giving them sole and exclusive licence to print and publish their works. The plaintiff claimed that the defendants mutilated and distorted the original works by publishing

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13 *Id.* at P.16
14 *Id*
15 *Id*
16 1995 PTC Del 131
17 *Id.* at p. 132
18 AIR 1983 Del. 461

various books in modified form. The defendants admitted the modifications made. The plaintiff revoked the agreement. It was held that with the revocation of agreement by the plaintiffs, no right was left with the defendants to continue to publish and sell in works. Interim injunction was also granted. Therefore, the moral rights remain with the author and are enforceable even if all the economic rights have been licensed or assigned.

In *Ganapati Prasad v. Parmanandi Saroja*,[19] the plaintiff claimed to be the writer of a TV serial. She objected to the telecast of serial without referring the name of the plaintiff as writer. The court held that it is not established that reputation of the plaintiff will be affected in such a case. Also it cannot be said that she would suffer mental agony or anguish. If ultimately the plaintiff succeeds in establishing that she got a copyright and due to the act of defendants there was infringement of her copyright, she can be compensated. It is not unreal for the writer to sell her stories for production of a picture or a TV serial. So she can be sufficiently compensated by way of damages if she succeeds in the suit. Accordingly, temporary injunction restraining the further telecast of the serial was refused.

The question whether author's special rights are independent of any contractual assignment of economic rights in an artistic work came up for consideration before the Delhi High Court in *Amar Nath Sehgal v. Union of India*.[20] The case involved a bronze mural, and acclaimed piece of artistic work, created by Amar Nath Sehgal, the plaintiff, for the Government of India for display at Vigyan Bhawan, one of New Delhi's prominent buildings accommodating many important public offices. The plaintiff had assigned his copyright in the mural to the Union of India, the defendant. In 1979, during partial reconstruction of Vigyan Bhawan, the mural was pulled down without the permission of Amar Nath Sehgal and dumped, impairing its aesthetic and market value and resulting in its dismemberment with part of the Sehgal's name disappearing altogether. Failing in his attempts to seek redress through written and verbal representations, Sehgal was constrained to file a suit seeking damages for infringement of his special rights or moral rights as embodied in Section 57 of the Act. The Union of India principally relied upon its unfettered rights as the copyright owner pursuant to Sehgal's assignment of the copyright in their favour. Rejecting the defence raised by the Union of India, Pradeep Nandrajog, J. held that the defendants have not only violated the plaintiff's moral right of integrity in the mural but have also violated the integrity of the work in relation to the cultural heritage of the nation.[21] The learned judge passed four directions as under:[22]

a. A mandatory injunction directing the defendants to return to the plaintiff the remanents of the mural within 2 week from today.

b. Declaration is granted in favour of the plaintiff and against the defendants that all rights in the mural shall

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19 1990 (1)Andh. L.T.624, at pp.629-630
20 2005 (30) PTC 253 (Del.)
21 *Id.* at 268
22 *Id.*

henceforth vest in the plaintiff and the defendants would have no right whatsoever in the mural.

c. Declaration is granted in favour of the plaintiff that he would have an absolute right to recreate the mural at any place and would have the right to sell the same.

d. Damages in sum of Rs. 5 lacs are awarded in favour of the plaintiff and against the defendants. If not paid within one month from today, the damages shall carry simple interest @9% p.a. from today till date of payment.

Nandrajog, J., made an important observation articulating physical condition of the mural when he pointed out:

> "I am of the opinion that the mural, whatever be it's form today is too precious to be reduced to scrap and languish in the warehouse of the Government of India. It is only the plaintiff who has a right to recreate his work and, therefore, has a right to receive that broken down mural".[23]

The learned judge perceptively held that authorship is a matter of fact. It is history. Knowledge about authorship not only identifies the creator, it also identifies his contribution to national culture. It also makes possible to understand the course of cultural development in a country. Linked to each other, one flowing out from the other, right of integrity ultimately contributes to the overall integrity of the cultural domain of a nation. Language of Section 57 does not exclude the right of integrity in relation to cultural heritage. The cultural heritage would include the artist whose creativity and ingenuity is amongst the valuable cultural resources of a nation. Through the telescope of Section 57 it is possible to legally protect the cultural heritage of India through the moral rights of the artist.[24]

It is highly significant that the learned judge has referred and relied upon India's Vision for Art and Culture (10th Five Year Plan – 2002 – 7); Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopted by 102 States Parties on 14th November 1970; Declaration of the Principles of International Cultural Cooperation proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its 14th Session on 4.11.1996; Convention Concerning the Protection of the World Cultural and Natural Heritage of 16.11.1972 and International Covenant on Economic, Social and Cultural Rights, 1966 and reminded the Government of India of their minimum obligations, India being a signatory to aforesaid Conventions. Further, the learned judge has relied upon the decision in *Vishaka & ors v. State of Rajasthan*,[25] where the Supreme Court read international

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23 *Id.*
24 *Id.* at 263
25 (1997) 6 SCC 241

conventions not being inconsistent with our laws to interpret the guarantee of gender equality under our Constitution and in the absence of domestic law occupying the field, formulated guidelines.

It is submitted that this is indeed a very important and welcome enunciation of the protection of moral rights both in its rationale and provenance. This decision, further, assumes significance for the fact that it is the first time that an Indian High Court has dealt with the moral rights of the author of an artistic work.

IV EXCEPTIONS OF THE INFRINGEMENT

Section 57 itself provides the exception to the special rights of the author. By amending Act 38 of 1994 a significant change was made in Section 57 when by substituting old subsection (1) a provisio was added to it which reads – that the author shall not have any right to restrain or claim damages in respect of any adaptation of a computer programme to which clause (aa) of subsection (1) of Section 52 applies. The said clause (aa) which was inserted by Act 38 of 1994 reads as under:

(aa) The making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme, from such copy -

i) in order to utilize the computer programme for purpose of which it was supplied; or

ii) to make back-up copies purely as a temporary protection against loss, destruction or damages in order only to utilize the computer programme for the purpose for which it was supplied.

Also, the explanation appended to sub-section (1) of Section 57 serves as a saving provision, stating that failure to display the work or failure to display the work to the satisfaction of author shall not be deemed to be an infringement of the rights conferred by this section.[26]

Further, if an employee is paid for his work during the employment he cannot claim special rights in those works as he has no copyright in such work.

V CONCLUSION

Copyright may augment our cultural patrimony by granting authors significant incentives for creativity. At a different level, moral rights complement national heritage laws by allowing individuals to vindicate the public interest in cultural heritage preservation. For instance, the right of integrity outlaws prejudicial changes to cultural treasures while the right of attribution or paternity identifies authors of important cultural icons thereby facilitating informed and sympathetic conservation of these works.

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26 *Supra* n 9 at p.491

To conclude, it may be observed that the Indian High Courts have interpreted Section 57 in ways which redeem the Indian law of copyright as an authentic protector of the author's moral stature and let us hope the present trend will be followed by all other Courts in the country.

34 Ban.L.J. (2005) 196 - 207

TRANSFER OF MOVABLE PROPERTY UNDER PRIVATE INTERNATIONAL LAW

Rajat Rana[+]

I. INTRODUCTION

The transfer of a tangible moveable property raises a number of complex questions. As North and Fawcett point out : 'The questions which arise in relation to a transfer of tangible movable may include a variety of matters, such as whether the transfer is void for incapacity, whether it is formally or essentially valid, whether it is voidable for misrepresentation or other cause, whether the transfer or has a lieu on the goods or a right to stop them in transit, and what is the nature of the interests, created by the transfer. Some of these questions are of contractual, others of a proprietary character'.[1] The contractual questions involve the basic terms and conditions of the contract while the proprietary questions involve instance of transfer of property i.e, delivery of possession of property. According to English private international law the contractual rights and obligations fall to be determined by the proper law of the transfer. But the solution is not so obvious. However, where the question relates not to the purely contractual rights but to claims to some possessiory or proprietary right in the chattel itself.[2] In such a case, it is quite possible that the law of the situs and the proper law of the transfer do not coincide. Which law is to prevail in this case?

English private international like, many other legal systems, makes a distinction between movable and immovable property[3] and between choses in possession, i.e. tangible physical objects, and choses in action, such as debts, patents, copyright, goodwill, stocks and shares[4] and proper law to govern intangible things is based on different considerations than those that are relevant to physical things. The first and foremost task of the court in a private international case when required to decide some question of a proprietary or possessory nature is to decide whether the item in dispute is a movable or an immovable property.[5] The legal system that will be applicable to the case depends on this preliminary decision.[6] But the determination of whether the subject matter of ownership is a movable or an immovable property generally presents no difficulty for English law, and most other legal systems, excpet that interests in land are interests in an immovable.[7]

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1 P.M. North & J.J. Fawcett, *Cheshire and North's Private International Law* (First Indian Reprint 2004), 942.

2 *Ibid.*

3 *Id.*, at 923.

4 *Id.*, at 927. Private international lawyers usually prefer, however to classify movables as either tangible or intangible.

5 *Id.*, at 923.

6 *Id.*, at 924.

7 *Ibid.*

So far as choice of the law applicable to immovables is concerned, in the United States and in most European Countries the general rule is that rights over immovables are determined by the law of the situs.[8] But rights over movables are not necessarily governed by that law. This in turn gives rise to the problem of determination of the proper law in the case of transfer of movable property.[9] But rules and principles governing the subject are under-developed, ambiguous and speculative in nature. In fact, to quote Cheshire and North, this is 'one of the most intractable topics in English private international law because most of the few relevant authorities are antiquated and they do not reveal with any certainty what principles govern the subject as a whole'.[10] J.H.C. Morris also points out that, "The English law on this subject is rudimentary in the extreme. The cases are scanty, old and inclusive. There is only one case in which the problem was squarely considered, but that case, besides being some eighty years old, turned on very special facts. In the United States, the problem has been worked out in large numbers of cases which are however difficult to reconcile".[11] Moreover, English Private International law and the continental legal systems have approached the subject differently, while the focus of English Private International Law is on formulating conflict rules on the basis of judicial decisions and on their application to situations which may arise in future, the stress of the continental approach is on the theoretical justification for the rigid and universal application of the choice of law rules.

In the course of time various theories on the proper law governing the transfer of movable objects have been advanced by the judges and jurists. This paper discusses and examines these theories and highlights their relative merits and demerits. This paper however is not concerned with what are usually called general assignments. Rather, our inquiry is confined to particular assignments intervolves of isolated or individual movables of which the commonest examples are sales, gifts, mortgages and pledges. Further, this paper is limited to tangible movables. In particular, it considers issues relating to determination of proper law in the following situations : (i) when the

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8 See *Birthwistle* v. *Vardill* (1840) 7 Cl & Fin. 895; *Coppin* v. *Coppin* (1725) 2 PWms 291; Re Duke of Wellington (1947) Ch. 506, (1947) 2 All E.R. 854, affd (1948) Ch. 118. The law of the situs rule has come under increasing criticism. It has been coodemned as a Taboo' See Hancock, 'In the Parish of St. Maryle Bow, in the Word of Cheap' *Stan Law Review*, 16 (1964) 561; 'Equitable Conversation and the Land Taboo in conflict of Laws', *SLan.L.R.*, 17(1965), 1095; 'Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation : The Supreme Court and the Land Taboo' *Stan. L.R.* 18(1966), 1299; 'Canceptual Devices for Avoiding the Land Taboo in Conflict of Laws : The Disadvantages of Disingenuousness' *Stand L.R.* 20(1967), 1; Morris, 'Intestate Succession to Land in the Conflict Law' LQR, 85(1969), 339.

9 On this subject see. Lalive, *The Transfer of Chattels in the Conflict of Laws*, Japhirou, *The Transfer of Chattels in Private International Law*, Falconbridge, Conflict of Laws. 2nd Edn., 442 et seq Morris, n 11 Chesterman 'Choice of Law Aspects of Liens and Similar Claims in International Sale of Goods' *ICLQ*, 22(1973) 213.

10 North and Faweeth, n. 1, at p. 938

11 Morris, 'The Transfer of Chattels in the Conflict of Laws', BYBIL, 22 (1945) 232.

chattels[12] situated in one state are transferred to another state,[13] and (ii) when chattels are taken out of one state by someone not the owner and dealt with in a second state.[14]

II THE THEORIES

This section aims to explain different theories governing the transfer of movable properties under the private international law. The problem of the determination of the proper law governing the transfer of chattels can be can understood by the following illustration.

If A domiciled in country P, purports to transfer in country X to B, domiciled in country T, a chattel situated in country Y, the court must decide whether the law of country P, T, X or Y is applicable to the transfer of chattel.

There are four theories regarding the determination of the law governing the transfer of chattels. These are lex domicilli theory, lex actus theory, lex situs theory and lex loci actus theory. According to the *lex domicilii* theory, the law of the transferor's domicile will govern (law of country P) The *lex actus* theory selects the dominant connecting factor in accordance with the facts of each individual case and favours therefore the application of law of the country with which the transfer is most closely connected. This might conceivably be the law of country P,T,X or Y. The *lex situs* theory which selects as the salient connecting factor for the creation of proprietary rights in the chattel, the place of chattel's situation and favors, therefore, the application of the law of the country in which the chattel is situated at the time of the transfer.(i.e. law of country Y). And finally, the *lex loci actus*[15] theory favours the application of the law of country where the transfer was made(i.e. law of country X)

We now propose to discuss these theories in detail:

(a) The *lex domicilii* Theory :

This theory was first developed by the Italian Statutists who classified *statutes* into two categories : *statuta peronalia* (laws concerning persons) and *statute realia* (laws concerning things).The law dealing with movable

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12 The term 'chattel' as per J.H.C.Morris can be used interchangeably with movable property but it excludes intangibles and negotiable paper. Questions relating to capacity to transfer and the formalities of transfer are also excluded. Further for the purpose of this research paper, the author is concerned only with the particular assignments inter vivos of isolated or individual movables of which the commonest examples are sales, gifts, mortgages and pledges.

13 Zaphirou, *Transfer of Chattels in Private International Law* (1956), 232.

14 *Ibid.*

15. (1791) Hy Bl 665 at 690; *c.f* Zaphirou, G.A., *Transfer of Chattels in Private International Law- A Comparative Study,*(Athlon Press: London), 1956, at p.18. This case was with regard to general assignment on bankruptcy and this was merely *obiter dictum.* Support for this theory can also be found in cases such *Re Ewin, Bruce v. Bruce* and *Liverpool Marine Credit Co. v Hunter. It has been said by the Privi Council that this maxim means, not that movables are deemed to be situated where their owner is domiciled, but merely that their devolution on the death is governed by his personal law. P.M. North & JJ. Fawcett, Chashireaed Norths Private. International Law (Indian Reprint 2004), 939. Also see Alberta Provincial Treasurer v. Kurr (1933) Al 710 at 721*

> goods belonged to the first category while the law dealing with immovables fell under the latter. According to Statutists, movables follow the owner and their transfer has to be governed by the law of the owner's domicile. This was expressed by the two famous maxims *mobilia sequuntur personam* and *mobilia ossibus inherent*[16].

This theory was further justified by the French and Dutch schools as according to them movables in the contemplation of law have no *situs*. This theory was presumably adopted by Lord Loughborough in *Sill* v. *Worswick,* who formulated this in these words :

> It is clear proposition, not only of the law of England but of every country in the world where the law has the semblance of science, that personal property has no locality; the meaning of that is, not that personal property has no visible locality, but it is subject to that law which governs the person of the owner. With respect to the transmission of it, either by succession or by the act of party, it follows the law of the person.

This theory was particularly applied to the general assignments such as in the cases of bankruptcy, marriage or death etc. It is now generally accepted that to allow either party to invoke the law of his domicile in case of a dispute arising out of the transfer of chattels would be commercially impracticable and contrary both to natural justice and to the normal expectations of the parties themselves.[17] Moreover, the application of the application of the maxims might result in prejudice to innocent third parties and there may be cause in which no decision is possible on the basis of the law of domicile.[18]

(b) The Le*x Loci Actus Theory :*

As mentioned earlier, this theory favours the law of the country where the transfer was made. For example, if in England A agrees to sell to B a car situated in Germany, the law of England is the *lex loci actus* while the law of Germany is the *lex situs*. The agreement to transfer is made in England while the chattel is situated in Germany. The true meaning of the *lex loci actus* theory as applied to the transfer of chattels is that whether B has become owner of the car will be tested according to the law of England irrespective of the relevant provisions of the law of Germany. There are three important cases[19] which discuss the *lex loci actus* but it wont be discussed

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16. North, P.M & Fawcett, J.J.(Ed.), *Chesire& North on Private International Law,* (Butterworths : London), 1987 at p. 789.
17. North and Fawett, n. 1, at 939
18. Id., at 939
19. *North Western Bank* v. *Poyneter,* (1895) AC 56; *Alcock* v. *Smith,*[1892] 1 Ch. 238; *Embiricos* v. *Anglo-Austrian Bank,* [1904] 2 K.B. 870. *In Alcock v. Smith, Romer J. said : 'Generally the rights of transferor and transferee, on a transfer in one country of a document of title to a debt or to an interest in personal property, are governed by the law of the country where the transfer takes place, although the debt may be due from persons living in, or the personal property may situate in, a foreign country'. (1892). Ch. 238 at 255. On appeal, Kay LJ in terms said the same thing . It seems from the illustrations he gave that he had in mind lex loci actus and lex situs coincided.*

here as all the these cases involve general assignments which are outside the scope of this paper.

This theory suffers from ambiguity. The ambiguity from which this theory suffers can be explained with reference to the following example :

"A in India agrees to sell to B in Pakistan ascertained goods in India. Let us further assume that the acceptance of the offer to transfer these goods was posted in Pakistan and that A while on a visit in Nepal fraudulently sold the same goods to C. A becomes insolvent. The goods are on their way to Nepal. Both B and C claim the ownership in the goods against A's trustee in bankruptcy. Is the *lex loci actus* of the first transfer Pakistan or India? Assuming that according to the law of Pakistan B has a better title and that according to the law of Nepal C has better title, which of the two laws will determine the question?"

(c) The Lex Actus Theory

The *lex actus* has been defined as the legal system with which the transfer has the most real connection'. It was laid down in the case of *Inglis* v. *Usherwood*[20] that questions between the parties to the transfer are governed by the *lex actus*. In the instant case, a factor acting on the instructions of B, a merchant in England, delivered goods a St. Petersburg on board a ship chartered by B, the consignee of the goods in England. B became bankrupt and A wanted to retake possession of the goods. According to English law delivery to the master constitutes, in these circumstances, delivery to the consignee and consequently the goods cannot be stopped in transit. According to the Russian law the seller in case of the bankrupty of the vendee is able in these circumstances to retake the goods. The master of the ship was requested and agreed to sign the bills of lading in his possession to the order of A. If the master had refused he would have been compelled to do so by process of law in Russia. The assignee of the bankrupt brought an action of trover against the master of the ship. The question was whether English or Russian law applied. It was held that the question was governed by Russian Law. Lord Kenyon C.K and Lawrence J. said that Russian law governed because the 'transaction' was made in Russia. From Grose J.'s judgment it appears that by 'transaction' was meant the delivery to the buyer which was made in Russia and which coincided with the *situs* of the goods. The prevailing view is that the case was based on the *lex situs* which was identical with the place of delivery. It is worth noting that in the instant case Russian law was the law of the *situs*, the law of the place of acting, and also apparently the proper law of the transfer.

There are certain limitations to this theory. *First* is an increase in the intervention of the modern state in the regulation of the transfer of chattels. The transfer of various categories of chattels is subjected to registration and other formalities and the reasonable man who is, obviously, interested in acquiring a good title must comply with the formalities which are imposed by the *lex situs*. *Secondly*, this theory cannot be applied to original acquisitions by prescription or finding. For example, If A finds a chattel in country X and

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20. (1801) 1 East 515. *c.f.* Zaphirou, G.A., *Transfer of Chattels in Private International Law- A Comparative Study* (Athlon Press, London), 1956, at p. 33.

removes it to country Y and there he possesses it for three years and if according to the law of Y this adverse possession confers a good title on A, it is the law of Y as *lex situs* that applies. There is neither an 'act' nor a transaction and no possible *lex actus*.

(d) The Lex Situs Theory

The essence of this theory stated in very general terms is that the transfer of movables is governed by the law of the place where the movable is situated at the time of the alleged transfer. This theory was primarily proposed by Savigny who gave a decisive blow to the theories of statutists by introducing the *theory of voluntary submission*. According to Savigny there is no difference between the transfer of immovables and transfer of chattels; all things can be perceived by the senses and have therefore a locality in space which is the seat of their legal relations. The parties to the transfer by voluntary submission adopt the application of the local law. The salient features of the *lex situs* theory are as follows:

- It is in consonance with *the principles of public international law* according to which the state of the territory in which the movable is situated exercises an exclusive jurisdiction over the movable.
- It is based on more *practicable grounds*.
- The *security of transaction* demands the applicability of this theory.
- The transfer of property affects *third parties* and definition of the applicable law cannot be left to the parties or to the discretion of the court.
- It is based on public policy. One must here take note of the fact that the public policy argument for application of this theory is only according to the modern continental thought. It is not the ground for application in English Private international law since as per English courts, public policy cannot lead to application of foreign law, and it can only be the basis of a decision in favour of the application of the *lex fori*.[21]

English Private International law applies the *lex situs* rule on the basis of the following two grounds:

1. ***Third Party rights***. Third parties are affected both because the chattel may be subsequently transferred to them and title will normally depend on the validity of the transferor's title, or because they may be creditors of the transferor or the transferee. The nature of a real right as potentially affecting third parties i.e. its operation when acquired or lost against the world at large, makes the application of the *lex situs* necessary even *inter partes*. The centre of gravity of the transfer of ownership and of the creation of a proprietary interest is the place where the movable is situated at that time.

2. ***Effective Control***. The legal system of the *situs* has usually the effective control over the chattel and this control appears in two ways:

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21. *Bank voor Handel* v. *Slatford*, [1951] 2 All E.R. at p. 792. The *lex situs* rule is neither of exceptional application nor does it operate in favour of the *lex fori*.

a. The courts or other authorities of the *situs* have jurisdiction to attach the chattel, sell it judicially etc.

b. Even if the party has obtained judgment in England and seeks to recover the goods situated in a foreign country, he will have to induce the courts of the *situs* to recognize and enforce the English judgment.

The leading case on *lex situs* is *Cammell* v. *Sewell*[22] decided in 1860 by the Court of Exchequer Chamber. In this case a Prussian ship was wrecked in Norway. The cargo came from a Russian port and was destined to the consignees, an English firm in Hull, who were already in possession of the various documents. Notice of abandonment of the cargo was given by the consignees to the plaintiffs, underwriters, who accepted the abandonment and paid for a total loss. The master in the meantime without authority sold the cargo in Norway by public auction. This sale was confirmed by the Diocesan Court in Norway in a suit instituted by the agent of the underwriters. The goods were consigned by the purchaser to the defendant in London against whom an action in trover was brought by the underwriters. It was proved that under the law of Norway the purchaser had acquired good title. There were two relevant questions in the case: i. Had the master authority to transfer the goods? Which law had application to the transfer, English or Norwegian Law?

The second question was discussed at great length in the Exchequer Chamber where counsel for the plaintiff argued that the law of the domicile of the consignees, i.e. English law, should govern the validity of the transfer. He quoted in support passages from *Sill* v. *Worswick*. He further contended that even if the law of the situs applied it could not have extraterritorial effect and that the right acquired would not subsequently be recognized when the goods were transported to England.

The Court of Exchequer gave judgment for the defendant on the ground that the decision of the Norweremgian Law was a judgment in which vested the property in the person who purchased the cargo at an auction as against the whole word. On appeal, a mayjesty of the Court of Exhequer Chamber were of the opinion that the judgment was not a judgement in rem but they decided that the title conferred on the purchaser (claimant), 'We think the law on this subject was correctly stated by Lord Chief Baron...when he says, 'If personal property is disposed of in a manner' binding according to the law of the country which it is that disposition is binding everywhere.

Now, let us look at the five specific exceptions laid down by Slade J. in the case of *Winkworth* v. *Christie Manson and Woods Ltd.*[23] which are as follows:

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22. (1858) 3 H & N 6n appeal (1860) 5 H & N 728: *c.f.* Webb, P.R.H. & Brown, D.J.L., *A Casebook on the Conflict of Laws.*(Butterworth: London), 1960 at p. 372.

23. [1980] AC 744. The facts of the case are: Works of art were stolen from the plaintiff in England, where he was domiciled. They were later taken to Italy where they were sold to the second defendant under a contract made there and governed by Italian Law. The second defendant subsequently brought the works of art back to England and delivered them to the first defendants, who were auctioneers, with a view to their being sold. The plaintiff then brought an

1. In case of *goods in transit*, their *situs* being causal or unknown: the validity and effect of a transfer will then seemingly be decided by reference to an objectively determined proper law.[24]

2. In case in which a *statute of the forum* has on its true construction an *overriding effect*: this simply acknowledges a principle which applies right across the board in English private International law and derives from the supremacy of Parliament.[25]

3. The rules applicable to the general assignments of movables on bankruptcy or succession[26].

4. When the purchaser claiming title has not acted *bona fide*[27]

5. Where the English court declines to recognize the particular law of the relevant *situs*, because it considers it contrary to English public policy. This exception however has been severely criticized by P.B.Carter[28] as according to him the doctrine of public policy denotes a reserve power of a forum to decline to apply a particular rule of the relevant *lex causae* either on ground of the total unacceptability of its content or on the ground that the fact of enforcement of a particular rule would be liable to unacceptably detrimental to the national interests[29]

III

SPECIFIC SITUATIONS

Now having analyzed disparate theories governing the transfer of movable property under the private international law, let us discuss and analyze the two typical situations with regard to transfer of chattels under the private international law, as mentioned in the beginning of this paper namely :

1. When the Chattels situate in one state are *transferred* in another,

2. When chattels are *taken out of one state* by someone not the owner and dealt with in a second state.

1. Transfer in one State of Chattels in another

This situation can be best explained by referring to two cases, one English and the other American i.e. *Inglis* v. *Robertson*[30] and *Green* v. *Van*

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and seeking inter alia a declaration that the works of art had at all been his property. The second defendant pleaded that he had title under Italian law and he counterclaimed for a declaration were therefore his property. The court held that the proprietary effect of ...movables is governed exclusively by the *lex situs* at the time of transfer, but that this rule is not one of universal application and is not to be applied in any of the five exceptional cases mentioned.

24. Carter P.B., "Decisions of the British Courts During 1981", Vol. *52 B.Y.I.L. p. 329*
25. *Id*
26. *Id*
27. *Id*
28. *Id*
29. *Id.*
30. [1898] A.C. 615

Buskirk[31] where the paramount controlling influence of the *lex situs* in case of no change of *situs* is well illustrated. In *Inglis* case, G, a London wine merchant, bought whiskey from the respondents, who were wine and spirit merchants in Glasgow. The whiskey was stored in bonded warehouse in Glasgow, and G held warrants from the warehouse company stating that it was held to his order "or assigns by endorsement hereon". He borrowed £ 3,000 from the appellant an English merchant, and purported to hypothecate the whiskey as security for the loan by endorsing the warehouse warrants to the appellant in England. The appellant did not give notice to the warehouse company as required by the Scottish law, the *lex situs*. G having failed to pay the balance of the purchase price to the respondents, they arrested the whiskey in the hands of Warehouse Company. The House of Lords held that the respondents' Scottish title prevailed over the appellants' English one because the *situs* of the goods was in Scotland[32].

In the *Green* case, certain iron safes in Illinois were mortgaged in New York. Two days later, before possession was delivered to the mortgagee, they were attached in Illinois by a creditor of the mortgagor who obtained a judgment in his favour. By Illinois law mortgages of chattels were void against third parties unless recorded. The mortgagee sought to assert his rights in New York, but the Supreme Court of the United States held that since the *lex situs* governed, the New York courts must give full faith and credit to the Illinois judgment.[33]

The rationale for the above two decisions seems to be ability of the officers appointed by the court of the *situs* to effectively and lawfully deal with the goods.[34] Suppose an Italian in London assigns goods situated in Paris to another Italian.[35] It has hitherto been assumed that English courts should apply French Law because only French officials can lawfully control the goods so long as they remain in France. But suppose the French Courts apply the domestic rule of England because the assignment was made there, or of Italy because the parties were domiciled there, then it is clear that the object of the situs rule will not be attained unless the English court will do the same.[36] It follows that the reason for the *situs* rule has no application if the court is itself sitting at the *situs* of the goods.[37]

As per J.H.C.Morris, if the court is sitting at the *situs* of the goods, there is nothing to prevent it from applying some other than the domestic rule of *situs*, for instance *lex actus*.[38] Instead of abandoning the *situs* rule altogether, Morris suggests that the necessary flexibility would be furnished if the rule were laid down that the validity of a transfer in one state of chattels situated in another is governed by the proper law of transfer, that is, by the

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31. (1886)5 Wall. 307; *c.f.* Morris, J.H.C., "The Transfer of Chattels in the Conflict of Laws", *22 B.Y.I.L. 236.*
32. As per Lord Watson who was the only Lord who dealt with the conflict aspect of the case.
33. Morris, "The Transfer of Chattels in the Conflict of Laws", *22 B.Y.I.L. 232.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*

system of law with which the transfer has the closest and most real connection, and that the proper law of the transfer is presumed to be the *lex situs* of the goods.[39]

2. *Questions arising when chattels are removed out of the State*

This situation arises when the chattels are taken out of one state by someone not the owner and dealt with in the second state in such a way that it is claimed that the owner's title is lost. The problem arises when the law of the second state says the owner's title is lost, while the law of the first state says that owner retains his title. This situation can be further classified into situation- a. *Where the law of the second state says the owner's title is lost;* and (b) *Where the first state says the owner's title is lost.*

a. *Where the law of the second state says the owner's title is lost*

Let us look at the following illustrations:

- A steals B's watch in Nepal and sells it in market overt in India.
- A finds B's ring in Nepal, takes it to India, and possesses it there for a period sufficient to bar B's title by the law of India but not by law of Nepal.
- A hire-purchases a car from B in India on the terms that title is to remain in B until the price is fully paid, and A takes the car to Pakistan and sells it to a purchaser.
- A mortgages a ship to B in Mauritius and takes it to Sri Lanka where it is seized by A's creditors.

The above mentioned illustrations show the obvious problems in the conflict of laws the solution to which as per Morris should be sought while keeping the following distinctions in mind:

Firstly, there is a distinction between the cases where the chattel is removed out of the state with the owner's consent, and cases where the removal is without the owner's consent[40].

Secondly, there is a distinction between cases where it is attached by the remover's creditors[41].

Thirdly, there is a distinction between the creditors who claim a lien on a specific chattel, and creditors who merely seek to exercise a general right of execution against what they believe to be their debtor's property[42].

Fourthly, it may be material to consider whether the purchaser or creditor acted in good faith or bad faith[43].

The question remains as to why does the law of the second state say that the owner's title is lost? As per Morris, the second state may do so either because (i) it regards the events which occurred in the second state as

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39. *Id.*
40. *Morris, n. 11 at p. 332.*
41. *Id.*
42. *Id.*
43. *Id.*

overriding all former titles, either wholly or partially; or because (ii) If all the events had occurred in the second state, it would not have regarded the owner's reservation of title effective.

i.) ***Where the law of the second state shuts out prior title:*** The cases decided under this head are not numerous but they seem to very clearly support the view presented above. Thus, a well known English case of *Cammell* v. *Sewell*, the owner of the deals lost his title to them because the sale in Norway shut out all prior titles, even though a sale under similar circumstances in England would not have had this effect. In an American case of *Universal Credit Co.* v. *Marks*[44] , a motor car was hire-purchased in New York on the usual terms that title was to remain in the seller until the price was fully paid, and that the car was not to be taken out of the state. In breach of his contract and without the owner s consent, The buyer took the car to Maryland, where it was repaired by a garage man. The garage man claimed under Maryland law that he had a lien on the car for the cost of the repairs. The Maryland court held that the garage man's lien took priority over the owner's title. The decision seems to be entirely correct for commercial convenience surely requires that a contractor who does necessary work on a chattel should be entitled to be paid for it, irrespective of where the title to the chattel lies, if the law of the place where the work is done gives him such a right.[45]

Further, *bad faith on the part of the purchaser* may also have an effect on the determination of the title. Morris and Carter seem to disagree on this point. While Morris is in favour of allowing the second state to determine the effect of bad faith in determination of owner s title, Carter disagrees as it allows for injection of domestic notion of *bona fide* into a foreign *lex causae.*[46]

ii. Where the first state says that the owner's title is lost

In all the situations so far considered, it has been assumed that the law of the second state accords greater protection to purchasers and creditors than the law of the first state. The reverse side of the usual picture is presented when chattels are taken into a second state and dealt with there in circumstances which deprive the owner of his title by the law of the first state, but not by the law of the second state[47] This is clearly illustrated in *Marvin Safe Co.* v. *Norton*[48]. The plaintiff company sold an iron safe to Schwartz in Pennsylvania on the terms that the plaintiff was to remain owner until the price was fully paid. Schwartz took the safe to New Jersey and sold it to the defendant, who bought without notice of the plaintiff's rights. By Pennsylvania law the plaintiff's reservation of title was good between the

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44. (1932) 164 Md. 130.
45. A distinction is drawn by Beale between liens which increase the value of the chattel and liens which do not. He suggests that the former should and the latter should not take priority over the owner's title. As per Morris, it is entirely a matter for the law of second state to determine which particular liens should take priority over the owner's title. Only if the law of the second state made such a distinction would it be relevant.
46. *Supra*, note 34.
47. *Id.*
48. (1886)48 N.J.L. 410.

parties, but void as against subsequent creditors or purchasers of the buyer. By New Jersey law the reservation of title was good as against third parties. Thus if all the events had taken place in Pennsylvania, the defendant's title would have prevailed, but if they had all taken place in New Jersey, the plaintiff's title would have been upheld. The court in a well considered opinion held that as the defendant bought the safe in New Jersey, the law of that state applied, and therefore the plaintiff's reservation of title was effective.

IV CONCLUSION

It cannot be denied that the conflict of law rules governing the transfer of movable property are still in a nascent stage well settled legal principles. The three legal systems- the Continental, English and American run parallel to each other, where the continental private international lawyers are driven with urge to develop a sound jurisprudential basis for resolving the issue of transfer of movable property under conflict of rules, the English and American private international lawyers are keen to deduce the same from the judicial pronouncements which unfortunately are barely a few to count.

Further, this area under private international law shows the explicit links with the public international law and subsisting ambiguities, speculations and complexities around this area. It is to resolve these ambiguities only that different legal theories have been proposed by well known jurists to decipher a proper law to govern the transfer of chattels. However, all these theories have them own shortcomings and different expectations per se. While examining different theories, it is important to understand the difference between the contractual questions and proprietary questions as mostly the judiciary and also different private international law lawyers have tried to confuse the same. It has been the trend of the judiciary as well as the private international law lawyers to rely on the *lex situs* and this has been argued strongly in English Private International law system.

The question whether a transfer in one state of chattels situated in another state passes a good title to the chattels is governed by the proper law of transfer. The proper law is presumed to be the *lex situs* because in the last resort only this law can effectively control the chattel. This presumption may be rebutted if the surrounding circumstances would make it inappropriate to apply the *lex situs* for instance because the *situs* of the chattel is casual or not known. The *lex situs* means for a court not sitting at the *situs* of the chattel, that system of law which the courts of the *situs* would apply will be the lex situs. If chattels are taken out of one state by someone not the owner and dealt with in a second state in circumstances which by the law of the second state deprives the owner of his title, the question depends on the reason why the law of the second state says that the owner's title is lost. On the other hand, if the law of the second state says that the owner's title is lost, not because it shuts all prior titles, but because it denies the efficacy of the owner's reservation of title, the law of the first state governs and the owner retains the title. It is for the law of the first state to determine the effect of consent on the part of the owner to the removal of the chattel.

34 Ban L J. (2005) 208 - 215

IDENTIFICATION & ANALYSIS OF CHANGE OF IMEI NUMBERS IN MOBILE PHONES

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I. INTRODUCTION :

With the invention and development of the mobile phones and cellular technology the world has seen a new age of connectivity. At present mobile or cellular phone networks not only serve as means of connection but also in various other purposes such as mobile commerce – which may include buying a ticket for a theatre or an airplane ticket to shopping for everyday needs like grocery and stationary. However, the mode of payment is usually based on the subscriber's identification by the network service provider. More importantly the theft of mobile phones followed by its misuse pose a threat to law and order in various ways, and also to innocent owners of the mobile phones who might be held liable in some cases. In such a condition the requirement of mobile security is of serious concern. In a number of offences like terrorism and myriad other crimes, mobile phones are used to facilitate commission of these offences worldwide. And stolen or lost mobiles are preferred to avoid detection of the user and the criminal in question is likely to go undetected and free due to lack of the detection of the actual offender. For this only the mobile phones are identified.

IMEI (International Mobile Equipment Identity) numbers are used in GSM (Global System for Mobile Communications) network usually (a Second Generation mobile phone system)[1]. However, IMEI numbers are also used in the UMTS (Universal Mobile Telecommunications System) which is one of the Third Generation (3G) mobile phone technologies[2] and is also referred to as 3GSM sometimes. The format nature and use of IMEI numbers are discussed in this study along with an idea of GSM network and security issues. The object of this paper is to understand the issues of mobile security, especially those relations to IMEI, the nature of IMEI, its use, and the change of it and its legal and practical consequences.

II. BASICS OF GSM NETWORK AND IMEI

In early 1980's each European nation developed its own analog telephone network which was region specific and was incompatible with each other. Keeping certain targets in view, such as - cost efficiency, spectral efficiency, high subjective speech quality, support for handheld terminals (mobile stations), international roaming facilities and other new facilities and

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1 Global System for Mobile Communications [http://en.wikipedia.org/wiki/GSM]

2 Universal Mobile Telecommunications System [http://en.wikipedia.org/wiki/UMTS]

services, the Conference of European Posts and Telegraphs (CEPT) (1982 formed a study group called the Group Special Mobile (GSM)[3]. Later the acronym was changed to Global System for Mobile communications.

The First GSM service was launched in Finland by Radiolinja ir 1991. By the end of 1993 GSM was already being operated in 48 countries by 70 carriers. The GSM service is probably the most popular networking system for mobile communications with more than 2 billion people using it ir more than 212 countries throughout the world. Advantages of GSM include digital voice quality and SMS (short messaging service) etc[4]. Three mair services offered in a GSM network are telephone services (includes basic telephone services with fax and emergency service) bearer service (transfe of data), and supplementary services (including caller identification, cal diversion, multi-party conversations, call holding, calling line identificatior presentation or CLIP, closed user groups, call restriction).

GSM uses a radio based interface and is a digital mode o communication. Three broad *parts of GSM network architecture are* Mobile Station (MS) essentially consisted of the mobile equipment and the mobile Subscriber Identity Module (SIM); Base Station Subsystem (BSS) which contains the radio transceivers that define a cell and handles the radio-link protocols with the Mobile Station; Network Subsystem includes the Mobile services Switching Center (MSC) and its is also known as the 'core network'[5] Moreover, there might be an optional GPRS core network which provides fo packet based internet connections[5].

The *three Identifiers of GSM network* which helps to identify a single mobile phone vis-à-vis its user are:-

- Unique15 digits code: International Mobile Subscriber Identity (IMSI) includes home country code, home GSM network code, mobile subscriber ID, national mobile subscriber ID. (Note: this is a part o the SIM card which also contains the *Ki*)
- Unique 15 digits code: International Mobile Equipment Identity (IMEI) presently consisting of the TAC (Type Allocation Code), Seria Number, Check Digit and the SVN (Software Version Number) if any.
- The 32-bit Temporary Mobile Subscriber Identity (TMSI): if assigned by Visitor Location Register (VLR) to uniquely identify a mobile station within a VLR's area

Of these three, the IMEI numbers are looked into in details in the following.

III. IMEI (International Mobile Equipment Identity)

The IMEI (International Mobile Equipment Identity) is a unique 15 digit code used to identify an individual GSM mobile station to a GSM network. It is also used in a Universal Mobile Telecommunications System

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3 http://www.cse.iitk.ac.in/users/cs698t/Lecture_notes/introgsm.html
4 Global System for Mobile Communications [http://en.wikipedia.org/wiki/GSM]
5 http://www.cse.iitk.ac.in/users/cs698t/Lecture_notes/introgsm.html
6 Global System for Mobile Communications [http://en.wikipedia.org/wiki/GSM]

(UMTS)[7]. The IMEI number has to be validated to be used in a network. The validity of the IMEI number can be examined with the help of the codes in the IMEI number and also by comparing it to the Equipment Identity Register (EIR) which is a database containing the IMEI numbers of all the valid mobile equipment.

To display this number the following keys should on the mobile handset must be pressed * # 0 6 #. Alternately it can also be found in a sticker/ label under the battery of the handset.[8]

The purpose of IMEI is to identify stolen or lost mobile equipment and invalidate the same if necessary by blacklisting it. It is the handset's fingerprint that helps also to track down a lost/stolen mobile handset.

It is to be noted that the counterpart of IMEI in the CDMA networks which functions similarly as the IMEI is the Electronic Serial Numbers (ESN); however at present Mobile Equipment Identifiers (MEID) are being used instead of ESNs[9].

However before going into the details of the use and analysis of IMEI numbers in security purpose to prevent and track mobile theft and misuse it is important to look into the details of IMEI numbers as to its nature and what information it contain.

IV. FORMAT OF IMEI

It is to be noted that the format of IMEI has been changing since it is been used. Here basically two formats are discussed that valid until 31/12/02 (since some phones still have these IMEI numbers and a transition period is required) and that valid from 1/1/03. The transition period was required for the Operators to modify their systems to use the eight digit TAC instead of a six digit one and make any necessary changes to production. Also the Reporting Bodies to make any changes to their IMEI allocation systems. Time for changes the GSM Association is to make to their databases and systems and even the Contractor to make any changes to its systems[10].

(i) The Format valid until 31/12.02 was :

NNXXXX-YY-ZZZZZZ-A, where,

- NNXXXX is the 6 digit Type Allocation Code (formerly known as the Type Approval Code); NN is the Reporting body identifier and XXXX is the ME Mobile Equipment Type) Identifier as defined by the reporting body.
- 2 digit FAC (Final Assembly Code) denoted by YY; this depends on the Reporting body and controlled by the same. It is usually used to indicate the manufacturing site; if only the production is more than 1000,000 ME then more than one FAC should be allowed per site.

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7 Ibid

8 How to Find the IMEI Number on a Mobile Phone [http: www.wikihow.com Find-the-IMEI-Number-on-a-Mobile-Phone]

9 Mobile Equipment Identifiers [http: en.wikipedia.org wiki MEID]

10 IMEI Allocation and Approval Guidelines [http://www.gsmworld.com/documents/twg/tw06.pdf]

- 6 digit SNR (Serial No.) identifies each ME and a particular ME type. The valid range is 000000 – 999999 and usually should be allotted sequentially.
- Check Digit – not to be transmitted through the network; initially it was a spare digit usually zero, later it became the Luhn Formula being the function of all other IMEI digits[11]

(ii) Current Format of IMEI: at present (with effect from 1/1/03) the format of IMEI is:- NNXXXXYY-ZZZZZZ-A, where,

- 8 digit TAC (Type Allocation Code) which includes-
  - Reporting Body Identifier – NN (valid range 00-99)
  - ME Type (Identifier defined by Reporting Body) – XXXXYY

  6 digit Serial No. (Allocated by Reporting body but assigned by ME manufacturer) – ZZZZZZ
- 1 Check digit (defined as a function of all other IMEI digits) – A (calculated by Luhn Formula vide GSM 02.16 / 3GPP 22.016.)
- 2 digit Software Version No. if any (range – 00 to 99)[12]

Since 08/04/2000 allocating bodies for IMEI numbers are only the PTCRB (PCS Type Certification Review Board) in North America and BABT (British Approvals Board for Telecommunications) in Europe both acting on behalf of the GSMA.

V. CHANGE OF IMEI NUMBERS AND ITS ANALYSIS

This chapter will briefly introduce the basic areas of mobile security and the application and use of IMEI in mobile security. There are three main areas in mobile security as par the GSM specification 02.09, namely:

- Authentication of a user,
- Data and signaling confidentiality (ciphering),
- Confidentiality of a user.

However, the present endeavor is to examine the importance of IMEI in mobile security and analyzing the change in IMEI, what for, and how done along with the possible consequences for such change and ways to prevent IMEI change and mobile theft. The primary purpose of the IMEI is to detect and to take measures against the use of stolen equipment or against equipment of which the use in networks cannot or no longer be tolerated for technical reasons. IMEI has also certain secondary functions such as special network handling of specific ME types, the tracking and tracing and

11 *Ibid*
12 *Ibid*

prevention of malicious call use. IMEI is also helpful in fraud investigation and configuration management and setting up of the customer equipment base[13].

As already mentioned hereinbefore there should be a database of IMEI numbers, the EIR (Equipment Identity Register) which is manages the identities of mobile equipments. The management and control is achieved mainly through black, white and grey lists on the Equipment Identity Register (EIR) in a state level and the Central Equipment Identity Register CEIR. The standardization of IMEI format and validation system is integral to the viability of CEIR and EIR and related mechanisms.

The MEs in the white list are allowed to be used normally and without any strict supervision, being in this list implies that the phone has been used legally. In case of suspicious activity or if some complaint has been lodged the network operator can grey-list the ME and henceforth a close watch is maintained by the network operator as to when, how and where the phone is being used (this is, however, subject to the available facilities and technology in the network system. And most importantly the black listing of a phone is the extreme measure, where –

1) either the network refuse to send a signal to the phone i.e. no signal strength at all is provided.

2) or the network although supplying signal but bar all outgoing and incoming calls

In case of blacklisting either the mobile is invalidated or the SIM card registration fails[14].

There are certain *guidelines by the GSM Association* for *security and integrity of IMEI* such as –

- Each IMEI shall uniquely identify one single mobile equipment.
- IMEI shall not be changed after final production process, no tampering can be done, and by physical, electronics or software means.
- IMEI shall not be replicated in new hardware component for reasons whatsoever, including repair. In case the hardware containing IMEI needs to be changed a new IMEI should be used.
- Where the ME can be used in different bands/modes precaution should be taken as not to allow interchanging of components to permit the IMEI being swapped between the variant bands/modes[15]

VI. FEW OBSERVATIONS ON CHANGING OF IMEI AND MISUSE OF MOBILE EQUIPMENTS

- At present stealing of mobile phones is a global phenomenon and increasing gradually.

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13 *Ibid*

14 Blacklisted or Barred Handsets [http://www.unlockme.co.uk/blacklist.html]

15 IMEI Allocation and Approval Guidelines [http://www.gsmworld.com/documents/twg/tw06.pdf]

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- Stolen mobile phones can be used/misused by changing the IMEI number or registering the phone in a foreign country in a different network. E.g. many mobile phones stolen from UK, France etc are been known to work fine in Italy, Spain etc. therefore theft and consecutive smuggling of the mobile phones are regular phenomena.
- It not only compromises the confidentiality of the original user, but also is used for illegal purposes. Also great inconvenience, loss of personal information, Liability for call charges until the theft is reported and the hassle of reporting the theft etc are the disadvantages for the original lawful owner of the mobile phone.[16]

(i) Change of IMEI Numbers

Changing of an IMEI number is a usual phenomenon worldwide now and about 10% of valid IMEI numbers are also not unique[17] as it is which helps in covering up the illegal changed IMEI numbers. There are illegal software and kits available for changing the IMEI numbers. For as much as $50 or less these IMEI changing kits are available. The software are freely available on the internet often under the name of research and educational purposes. There are even public forum where miscreants or misguided individuals have discussed about change of IMEI.[18] The process of such change are as easy as connecting the phone to a computer through the kit and just typing in a new IMEI and changing it just like that.[19]

(ii) Laws and Procedures to Prevent Changing of IMEI

Mobile Phones (Reprogramming) Act 2002 of UK prescribes for punishment of up to five years imprisonment for changing the IMEI for changing of IMEI or processing equipment that can change it.[20] According to Mr. Jack Wraith, head of the Mobile Industry Crime Action Forum in UK it is not difficult to change the IMEI of the mobile phones, although there are hardly any legal reasons for doing so. According to him there are various chipping software available in the internet for this purpose and different chipping programs changed different parts of the International Mobile Equipment Identity. Similar to credit card number certain strings are valid and such software that use algorithms chalk out a valid combination of numbers[21].

In Australia almost 200,000 mobile phones are reported lost or stolen. There is a pending legislation prescribing penalty of 2 years imprisonment for changing of IMEI numbers. It is to be noted that Australia is the first country to implement IMEI blocking across all digital GSM networks and implementing Inter-Carrier IMEI blocking.[22]

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16 Australian MTA - Mind Your Mobile [http://www.amta.org.au/default.asp?id=210]
17 International Mobile Equipment Identity [http://en.wikipedia.org/wiki/IMEI]
18 Nokia IMEI change procedures [http://www.gsmhosting.com/vbb/archive/index.php/t-247010.html]
19 Mark Ward – "How to Hack your Mobile Phone" [http://news.bbc.co.uk/1/hi/sci/tech/1966381.stm]
20 International Mobile Equipment Identity [http://en.wikipedia.org/wiki/IMEI]
21 Mark Ward "How to Hack your Mobile Phone" [http://news.bbc.co.uk/1/hi/sci/tech/1966381.stm]
22 Australian MTA - Mind Your Mobile [http://www.amta.org.au/default.asp?id=210]

(iii) Identifying Changes in IMEI Numbers – issues:

- Forensic Experts by use of advanced software can extract information from the firmware of the mobile phone if the
- Mobile Tracker devices are attached to many new generation mobile handsets that send SMS immediately identifying the location to the network operator as soon as a different SIM is inserted. (this is of course subject to whether such service is available in the said network). [23]
- There are software solutions to track down the mobile phones by keeping a record of the IMEI numbers (e.g. Quicksoft Trak IMEI[24])
- There are certain limitations to track changed IMEI numbers as sometimes the changed IMEI numbers appear to be valid, used under some other operator or in another country altogether.
- In general the IMEI is compared to the CEIR (Central Equipment Identity Register) database to identify a changed or invalid IMEI number

VII. THE INDIAN SCENARIO

In India Rs 500 crore worth of cellular handsets are stolen or lost each year out of the huge subscriber base of more than six million subscribers. The Information Technology Act 2000 considers that theft/ hacking of mobile phone can create potential problem for the aggrieved party including liability for criminal or terrorist activities.

The GSM Association is introducing plans to cut cost on setting up Equipment Identity Registers (EIR) and local databases to blacklist stolen phones and also the mobile handsets manufacturers are developing user-friendly technology that provides safety against phone theft; e.g. Samsung has introduced 'Mobile Tracker' (SMS informs two pre-specified numbers), Emergency SMS and Privacy Lock.

IIT Mumbai has developed Linux based software that tracks mobile phones having an accuracy of within 10-100 meters which though it is meant for other purposes it can also be used in the tracking of lost mobile phones by the network operator.

By identification and analysis of change of IMEI numbers in India and IMEI tracking forensic experts in India have cracked various cases in India in various crimes, including terrorism, homicide cases, etc. In *Jayanth Jadav Case*, (1996) ACP, Central Region, Sridhar Wagal, used IMEI tracking technology to track the murderers of Jayant Jadhav (who have used cell phones for planning), a close confidante of Shiv Sena supremo Bal Thackery

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23 Mobile security: a long way to go {http://living.oneindia.in/insync/mobile-security-050207.html}

24 http://www.quicksoftservices.com/software-management-solutions-mumbai-india/retail-management-pos-software/mobile-management-software/index.htm

on April 30th of 1996[25] In *Tejas Chandani murder case* (2005) in Vadodara, the corpse of 29-year-old executive of a pharma company named Tejas Chandani was discovered in a Hotel room. The Police used the IMEI of the stolen mobile phone to trace the suspect. Although the suspect Taufiq Mirza got a new pre-paid Airtel number 9898963522 the IMEI no. 352627003948720 helped the Police to trace him[26].

VIII. CONCLUSION:

The three basic procedures in case of loss or theft of mobile phones are – lodging a FIR (First Information Report) with the Police, deactivation of the handset by informing the network operator who eventually will blacklist and deactivate the phone, tracking of the phone if supported by the mobile handset technology and the network has such technology (Use of Mobile Tracker mechanism). Compulsory registration of IMEI numbers with a CEIR (Central Equipment Identity Register), and setting up a CEIR is the precondition in this process.

If possible an International Equipment Identity Register, should be set up if not just now, then in near future. This will require a standardized network system throughout the world and a shared worldwide database. There is also a need to generate public awareness about possible safeguards against theft and misuse of mobile. The mobile users should note the IMEI number of the phone, use the security features in the phone like PIN number and other codes. Recording the handset serial number along with IMEI and preserving them might prove useful in case of loss or theft of mobile phone. Other common safeguards include *inter alia* engraving of initials/ driving license number of phone and battery and last but not the least immediate notification of loss or theft to the Police and the network service provider.

It should be noted that although the IMEI tracking and analysis of changed IMEI is a very useful and developed technology, there are certain loopholes which are misused by the criminals and wrongdoers as with any other technology. In conclusion, the ultimate challenge is using this technology for the benefit of civil society. In the ultimate analysis generating social, political and scientific awareness about mobile crimes and a meaningful collaboration between the law and technology are the only ways to deal with the increasing menace of mobile thefts and other mobile crimes.

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25 Ten days on, police to track missing cell phone [http://cities.expressindia.com/fullstory.php?newsid=216890]

26 IMEI landed him in police net [http://cities.expressindia.com/fullstory.php?newsid=161773]

BOOK REVIEW

34 Ban.L.J. (2005) 216 - 218

A.K. KAUL, THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)/WORLD TRADE ORGANIZATION (WTO), LAW, ECONOMICS AND POLITICS, Satyam, New Delhi, 2005), pp. 630, Price Rs. 695

The establishment of the World Trade Organization (WTO) is a significant development in the history of international trade law. The WTO came into existence as a result of the Marrakesh Agreement which consists of a preamble and XVI Articles, four Annexures and Declarations, Decisions and Understanding Annex I comprises GATT, 1994, twelve side Agreements and the vast schedule of tariff concessions. The objectives of the WTO are : (i) That international economic relations should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volumes of real income and effective demands; (ii) Expanding the production of trade in goods and services; and (iii) while allowing for the optimal use of the World's resources in accordance with the objectives of sustainable development, seeking both to preserve the environment and to enhance the means of doing so in a manner consistent with their respective needs and concerns at different levels of economic development. That the WTO is an international organization of far-reaching significance to the international economic community can be understood from the functions assigned to it under the Marrakesh Agreement. These functions are as follows : (i) to facilitate the implementation, administration and operation, and further the objectives of this Agreement and of the Multilateral Trade Agreements, and also to provide framework for the implementation, administration and operation of the Plurilateral Agreements, (ii) to provide the forum for negotiations on matters dealt within the Annexures to the Agreement and also a forum for further negotiations concerning multilateral trade relations as may be decided by the WTO Ministerial Conference, (iii) to administer the arrangements in Annex II for the Settlement of Disputes; (iv) to administer arrangements in Annex III (Trade Policy Review Mechanism)for the review of trade policies; and (v) to coordinate with IMF and IBRD for achieving greater coherence in global policy making.

The WTO has a secretariat located in Geneva and presided over by a Director General who is appointed by the Ministerial Conference. Its structure consists of Ministerial Conference, General Council, Specialized Councils, Additional Councils and Committees to oversee the Plurilateral Trade Agreements. In addition, the Ministerial Council has established a Committee on Trade and Development, a Committee on Balance of Payments and a Committee on Budget, Finance and Administration.

As is to be expected the GATT/WTO has attracted a great deal of attention from scholars, jurists, economists and international trade experts. The result is a huge mass of literature which coupled with a large volume of GATT/WTO jurisprudence make the subject very complex and unwieldy for students and practitioners of GATT/WTO jurisprudence. There was thus a long felt need of a user friendly book a book which makes accessible the vast and diverse materials

on WTO in a systematic and coherent manner. The book under review fulfils this long felt need by providing a comprehensive account of the WTO, its organization and structure, multilateral trade agreements and the Plurilateral Agreements, implemented and administered by it, dispute settlement mechanism and collateral issues that have come up to the WTO for negotiations, such as competition policy, labour standards, trade and environment. Penned by Prof. A.K. Kaul, who is an eminent scholar of international trade law, this book aims to unfold the convergence of economics, politics and international economic law and to show how international trade law principles as evolved by the international economic institutions have interfaced with municipal legal principles and social, cultural and political context. The book also makes a useful study of the impact of decisions rendered by the international economic institutions. It also provides the reader a useful insight into how the settlement of disputes by the dispute settlement systems of WTO has opened up the municipal economic and legal systems of member nations to the jurisdiction and surveillance of WTO, and its standards and norms.

This well researched and well organized book has been divided into 17 Chapters and contains a huge wealth of information on the GATT/WTO. A separate chapter is devoted to the concerns of developing countries vis-a-vis the multilateral agreement of the GATT/WTO. The author aptly and rightly observes that 'various Multilateral Agreements, the developing countries obligations and law in WTO/GATT is a curious mix of little 'special and differential treatment' and full obligations' (p. 601). In his view developing and least developed countries obligations in the GATT/WTO law 'should not be onerous to the extent that the developing and least developed countries may be accused of winding up the GATT/WTO in the future'.

The book contains a very interesting and useful discussion of the trade and environmental issues by offering an analysis of environment related provisions of the GATT, TBT Agreement, the SPS Agreement, Agreement on Agriculture, Agreement on Subsidies and Countervailing Measures, Agreement on Trade Related Aspects of Intellectual Property Rights and General Agreement on Trade in Services and by providing an interesting account of decisions in *Tuna I* and *Tuna II*, *Gasoline Shrimp Turtle* and *Asbestos case*, while the first two decisions reflected the pro-trade bias in the Panel's interpretation of Article XX of the GATT, the Appellate Body in the *Shrimp/Turtle case* was anxious to dispel, to the existent possible the perception that the GATT/WTO system was indifferent to the concerns of the environment. The *Asbestos* rulings and the AB Report in the *Shrimp case* (Recourse to Article 21.5 of the DSU by Malaysia) have created a legitimate expectation that in future the AB would be more willing to adopt a more realistic and pragmatic approach to trade related environmental measures. Notwithstanding this positive development, there is a need for the WTO to give specific recognition to environmental values. To this end the author offers the following suggestions : *First*, Article XX(b) and (g) of the GATT 1998 might be amended to provide a general exception for trade measures that are reasonably necessary for the protection of the domestic environment. *Secondly*, Article XX

may be amended to provide a 'safe harbour' for 'multilateral environmenta agreements that employ trade measures, which are reasonably necessary and reasonably related to the subject matter of the agreement'. *Thirdly*, a clear policy on the international use of environmental taxes should be adopted.

Perhaps the most tangible contribution of the WTO is to be seen in its dispute settlement machinery. It has brought the rule of law to international trade. The author is therefore correct when he observes that the DSU of the WTO is a jewel in the crown of the WTO trading system'. Yet the WTO dispute settlement machinery is far from perfect. According to the author the main flaws from which the DSU suffers are (i) contradiction that exists between transparency, participation and the prompt settlement of disputes; (ii) non-existence of integrated mechanism for the application of Panel and Appellate Body decisions (iii) provisions for LDCS in the DSU are too general to promote effective enforcement and (d) due to its strict rule based system the performance of DSB functions have been limited.

It is true that the GATT and the WTO have not done all that they could for developing countries. But then there is really no alternative to multilateral trade and the WTO, the institution that represents it. It is generally acknowledged that despite its shortcomings the WTO is a unique forum to frame and interpret rules aimed at enhancing of the benefits of multilateral trade. It is for this reason that despite painfully slow pace of negotiations on key issues after the Hongkong Ministerial meet of the WTO (end 2005), all members decided to continue with the Doha Round.

In conclusion, the book under review makes a valuable addition to the existing literature on the GATT/WTO and must find a place in the shelf's of every library. It should prove useful to academics, law teachers, scholars and all those who want to know about the GATT/WTO, globalization and international trade law.

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