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CONTRA-FEDERAL CONSTITUTIONAL PROVISOS

J. VINCENT COMRAJ*, M.A.,M.L., P.G.D.F.T.M.,

The gist of federal principle is the distribution of powers between the central and state governments. In the Indian context, the distribution of administrative, financial and legislative powers are contained in Part XI of the Constitution of India.

* Articles 245 to 255 deal with the distribution of legislative powers.

* Articles 256 to 263 deal with the distribution of administrative powers.

* Articles 264 to 293 deal with the distribution of financial powers.

The legislative power is the main attribute of sovereignty. The true federal element lies in the manifestation of strict separation and distribution of legislative powers in the polity. As long as the separation and division of legislative powers is drawn up to the level of clear earmarking and distribution, it is accepted that the federal element is recognized.

In the Post Independence politico-cultural martix of Indian polity, it is visibly exposed that the sub-continental nature is the inevitable and inbuilt fabric woven in the minds of all Indians even though the "VOLKGEIST"[1] of democratic and united India is well knit politically for about six decades.

Strong Tilt in favour of the centre:

Even though the sub title of "Legislative Powers" is "Distribution of Powers", the distribution of legislative powers is not done from a strictly federalist approach. Truly speaking,

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[1] Savigny: Historical School of Jurisprudence.

the position of the states is clearly subservient to the centre. The idea expressed that the existence of co-ordinate authorities independent of each other is the gist of federal principle.[2]

The position of the states in India is not truly co-ordinative but subjected to subordinate position. This is amply evident from the non-obstante clauses in Art.246 which gives preponderance to the centre in legislative sphere. Art.246 (1), 246 (2) and 246 (4) give unassailable legislative power to the centre as far as the matters listed in List I and List III. Art.246 (3) shows clearly that the legislative power of the states is subject to 246 (1), 246(2) and 246(4). Apart from this patent tilt in favour of the centre, there are two provisos in Art 251 and Art 254 which ring the death knell to the federalist element in the Indian constitution.

Proviso:

A proviso is that part of a statute which plays havoc to the major prepositions in the main part or portion of the section. It is a clause, in the interpretation of statutes, to be construed as a restriction or limitation of the ongoing logical connotation. It completely takes away the crux of the principle enunciated in the foregoing proposition. It is held by an ultra realist American judicial view that "notwithstanding" provisos or other provisos would require one to believe that the Congress was more interested in testing our interpretative acumen than in clearly expressing its will on the important issues."[3] Thus the provisos lead to more complexities than clear expressions resulting in testing the interpretative acumen of the judiciary.

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[2] Prof. Wheare : The Nature of Indian Constitution.

[3] Decision of USA Supreme Court

Construction of Provisos:

While construing provisos, to avoid inconsistencies, the general rule that the words of a proviso are not to be taken "absolutely in their strict literal sense"[4] but that a proviso is "of necessity...limited in its operation to the ambit of the section which it qualifies."[5] A proviso is to be construed restrictively. As far as the powers conferred by a section is concerned "it would be contrary to the ordinary operation of the proviso to give it an effect which would cut down those powers beyond what compliance with the proviso renders necessary."[6]

If, however, the language of the proviso makes it plain that it was intended to have an operation more extensive than that *of the* provision which it immediately follows, it must be given such wider effect.[7] If a proviso cannot be reasonably construed otherwise than as contradicting the main enactment then the proviso will prevail on the principle that "it speaks the last intention of the makers."[8] Similarly, the main part of the section must not be construed in such a way as to render a proviso to the section redundant.[9] Due to the above approaches as manifested in decisions even in England the construction of provisos cannot be taken as mere otiose but as relevant for the purpose of inferring the True *Sententia legis.*

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4 R.V. Diblin [1910] p.57 (Maxwell: Interpretation of Statures, p.189).
5 Lloyds & Scottish Fin Ltd. V. Modern Cars & Caravan Ltd. [1966] 1 Q.B.764.
6 Re Tabrisky, ex p. Board of Trade [1947] Ch.568, per Lord Greene M.R. at p.568.
7 Piper V. Harvey [1958] 1 Q.B. 439.
8 Att. Gen. V. Chelsea Waterworks Co. (1731) Fitz.195.
9 R.V. Leeds Prison (Governor) ex.p. Stafford [1964] 2Q.B.625.

In the Indian context, a proviso qualifies the generality of the main enactment by providing an exception. The function of the proviso is to take out of a section a part of the category to which the section applies. A proviso shall not be treated as an independent section but as subsidiary to the main section and it is to be construed only in the light of the section to which it is a proviso. If there is a clear conflict between the enacting clauses and the proviso, or if the proviso is redundant, then the proviso will have to go.[10] A proviso shall never be construed in a manner which would nullify the effect of the main section to which it is a proviso.

Contra Federal Proviso in Art. 254.

In the Indian Constitution Art.254 deals with the inconsistency between laws made by the Parliament and laws made by the Legislatures of the states. 254(1) deals with repugnancy of both laws made by Parliament which Parliament is competent to enact and the laws with respect to one of the matters enumerated in the concurrent list. However this provision is subject to clause (2) of Art.254. But the proviso to 254(2) has wider import. It does not seem to be of restrictive suzerainty over state powers. In order to understand the full ambit of this proviso it is required to go to the history behind the Article.

Indian Constitution recognizes the right of both Parliament and the State legislature to legislate concurrently with regard to the subjects enumerated in the Concurrent List. Art.254 deals with the situation when there is conflict between a Central and a State law. Before we understand the real import of the article it is imperative to know the reasons which prompted the makers of the Constitution to incorporate a Concurrent List of subjects. According to the Joint Parliamentary Committee Report, there is a justification for such jurisdiction. It would, the Report held, be disastrous if the uniformity of

[10] The Oudh Sugar Mills Ltd, Hargoan v. The State of U.P. [1959 A.L.J. 754.F.B.]

law which the Indian Codes provided was destroyed or whittled away by the uncoordinated legislative actions.

The Pre Constitutional Imperial Provisions:

Article 254 is more or less on the same lines as Section 107 of the Government of India Act, 1935 Section 107 ran as follows:

(1) If any provision of a Provincial law is repugnant to any provision of a Federal Law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.

(2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to the matter, then if the Provincial law having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter:

Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved,

in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

(3) In any provision of a law of a Federated State is repugnant to a Federal law. Which extends to that State, the Federal law, whether passed before or after the law of the State, shall prevail and the law of the State shall to the extent of the repugnancy, be void.

Clause (1) enunciates the normal rule that in the event of a conflict between a Union and a State Law, the former prevails over the latter. It enacts that if any provision of the law made by the Legislature of a State is repugnant to any provision of a law made by Parliament, which Parliament is competent to enact, or to any provision of any existing law with respect to one of the matters enumerated in the Concurrent List, then the law made by Parliament, whether passed before or after the law made by such State, or as the case may be, the existing law shall prevail and the law made by the Legislature of the State shall, to the extent of repugnancy, be void.

The expression "existing law" means a law made before the commencement of the Constitution by any legislature, authority of persons having powers to make such law. Subjects like marriage and divorce, transfer of property other than agricultural land, criminal law, civil procedure, contracts and evidence are included in the Concurrent List. Laws on these matters, which were made before the commencement of the Constitution, will be "existing laws" within the meaning of this article.

Clause (2) enacts an exception to the rule laid down in clause (1). Where a State law with respect to one of the matters enumerated in the Concurrent List contains any provision

repugnant to the provisions of an earlier law made by Parliament, or an existing law with respect to that matter, then the law so made by the legislature of such state shall, if it has been reserved for the consideration of the President, and has received his assent, prevail in that State.

Accordingly, whenever there is any provision in a law made by the Legislature of a State repugnant to the provisions of an earlier Act of Parliament or of and existing law with respect to that matter, then in order that the law made by the State legislature may be effective and operative, the assent of the President has to be obtained with regard to it. The language of Article 254(2) appears to be quite plain, and full effect must be given to this provision of the Constitution. The result of obtaining the assent would be that so far as the State Act is concerned, the law will prevail in the State and overrule the provision of the Central Act in its applicability to that State.

For the application of clause (2) the important thing to consider is whether the legislation is in respect of the same matter. If the latter legislation deals not with the matter which forms the subject of the earlier legislation but with other and distinct matter, though of a cognate and allied character, then Article 254(2) will have no application.

Proviso to clause (2):—

The proviso to clause (2) lays down that Parliament may again supersede State legislation which has been assented to by the President under clause (2) by making a law on the same matter. When compared to Section 107 of the Government of India Act, 1935 we find that the proviso to Article 254(2) has enlarged the powers of the Parliament. Under Section 107, the Dominion Parliament had no authority conferred upon it to enact a statute repealing directly any

provincial Act with reference to the subjects mentioned in the Concurrent List. Under the present proviso Parliament can enact a law adding to, varying or repealing a law of the State when it relates to a matter mentioned in the Concurrent List. The position is that under the Constitution, Parliament can, acting under the proviso to Article 254(2), repeal a State law. Even where it does not expressly do so, the State law will be void under that proviso if it conflicts with a later law with respect to the same matter that may be enacted by Parliament. But it is important that the latter legislation must deal with the matters which form the subject of the earlier legislation. The proviso will not apply if the subsequent parliamentary legislation deals with other and distinct matters, though of cognate and allied character.

Doctrine of Implied Repeal in the Proviso:

- The case of Zaverbhai *V.* State of Bombay illustrates the application of the proviso. The facts of the case were as follows: In 1946 the Central Legislature passed an Act, the Essential Supplies (Temporary Powers) Act, Section 7 of that Act provided penalties for contravention of order made under Section 3 of the Act.The provision with regard to the penalties was that if any person contravenes any order made under Section 3, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both. The State of Bombay considered that the maximum punishment of three years imprisonment provided in the above section was not adequate for offences under the Act and with the object of enhancing the punishment provided therein, enacted Act 36 of 1947. By Section 2 of that Act it was provided that notwithstanding anything contained in the Essential Supplies (Temporary Powers) Act of 1946, whosoever contravenes an order made under Section 3 of the Act shall be punishable with

imprisonment for a term which may extend to seven years but shall not, except for reasons to be recorded in writing, be less than six months, and shall also be liable to fine. The Bombay Act thus increased the sentence to seven years and also made it obligatory to impose a sentence of fine, and further it provided for a minimum sentence of six months and the court was bound to impose this minimum sentence except for reasons to be recorded in writing. On the footing that the subject-matter of the Bombay Act fell within the Concurrent List, the Provincial Government obtained the assent of the Governor-General thereto and the Act came into operation in the Province.

Subsequent to the Bombay Act, amendments were made to the Central Act in the years 1948, 1949 and 1950. The amendment made in 1950 substituted a new section for Section 7 of the Act. The scheme of the new section was that for purpose of punishment, offences under the Act were grouped under three categories and the punishments to be imposed in the several categories were seperately specified. It was held that Section 7 was thus a comprehensive code covering the entire field of punishment for offences under the Act graded according to the commodity and character of the offence. It was held by the Supreme Court that the Bombay Act was impliedly repealed by Section 7 of the amended Essential Supplies (Temporary Powers) Act, 1957.

The proviso to clause (2) according to the above decision would enable Parliament to repeal impliedly a law made by the State Legislature with reference to a matter in the Concurrent List made with the consent of the President containing provisions repugnant to an earlier law made by Parliament. The proviso also empowers Parliament to directly repeal or amend such laws.

In Tika Ramji V. State of U.P., the contention was raised, though not decided, that under the proviso to Article 254(2) the power to repeal a law passed by the State legislature is incidental and analogous to enacting a law relating to the same subject matter as is dealt with in the State law, and that a statue which merely repeals a law passed by the State legislature without enacting substantive provisions on the subject would not be within the proviso, as it could not have been the intention of the Constitution that on a topic within the concurrent sphere of legislation there should be a vaccum. Bhagwati, J. held that there is considerable force in this contention, and there is much to be said for the view that a repeal simpliciter is not within the proviso. But it is unnecessary to base our decision on this point, as the petitioners must, in our opinion, fail on another ground."

In T. Barai V. Henry Ah Hoc, the Court held that provision of the West Bengal Prevention of Adulteration of Food, Drugs and Cosmetics Act, 1973 which through an amendment of the Prevention of Food Adulteration Act, 1954 provided for punishment of life imprisonment, stood repealed after Parliament in 1976 through an amendment of the 1954 Act provided for maximum punishment of three years' of imprisonment. The Court said that by virtue of the provisio to Clause (2) of Article 254, Parliament may repeal of amend a repugnant State law on concurrent subject having the President's assent either directly or by itself enacting a law, repugnant to the State law with respect to the 'same matter'.

Contra Federal Provisos Shall Go:

The Provisos in this Part and specific Articles clearly substantiate that with deliberate pre-thought and conscious covert intention the legislative powers of the states are kept at the mercy of the centre. The legislative power sphere is

completely bridled as far as the states are concerned. Not only the pre dominance of the central legislative powers but also the subservient position of the states imply that the states are mere subjugated agents to whom some powers are delegated and beyond the delegated sphere the states cannot go and they have to be always under the Democles' Sword of the contra federal provisos in this Part that deals with the legislative relations between the Union and the States.

The divided Sovereignty as was aimed by the constitutional set up is set at nought. This is not a healthy trend taking into account the futuristic, power sharing oriented and co-existence related demands of the different parts of this sub continent consisting of heterogeneous population. An ideal and federal set up is *sine qua non* for a country like India. For such an ideal, these contra federal constitutional provisos are definite stumbling blocks which may cause hazardous fissiparous tendencies. Shortly these provisos shall be removed for a better and healthy constitutional framework and for a stronger India.

CRIME, SOCIETY AND LAW

Dr. S.D. Purushothaman*, M.A (His)., M.L (Crime)., Ph.D (Law).

The history of crime in the society is as old as the human civilization. Every society and country has its own notions of crime. Crime is inevitable in every society, because man is a combination of good and bad, there is always some violation or other of a prescribed code of conduct for every society. This code of conduct may be some social binding custom, religious principle or a legal rule which declares any act or omission as crime. In the words of Emile Durkle there is no society that is not confronted with the problem of criminality. Its form changes, the Acts thus characterized are not the same everywhere and always, there have been men who have behaved in such a way as to draw upon themselves penal repression.[1] The society is always confronted with the crime either directly or indirectly. This is a problem even for an individual who lives in a society, because indirectly he has to pay for the maintenance of police and law enforcement agencies.

The period of Indian history from the Seventh Century BC to 320 AD is the age of imperial unity as well as of laws and philosophy. This age marked the beginning of planned social *life*. Crime was not unknown in the vedic age, but the first systematic attempt to classify it was made in the epic period. Among the serious offences were Treason, Arson, Theft etc.[2]

Now the basic question is, what is crime? What activities are taken as crime? Here again there is much conflict between

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the various societies. The definition of crime has been given by lawyers, sociologists and the criminologists differently. The definition of crime varies from person to person.

Modern criminological theory accepts the multi-disciplinary approach in which each discipline offers a valid reason for the commission of crime.

The legal definition of crime distinguishes a particular act from sin, moral or religious wrong. P. W. Tappan, defines crime as an intentional act or omission, committed witnout defence or justification, and sanctioned by the law as felony or misdemeanour. [3]

According to this definition no act is a crime unless it is made punishable by the law enforced even though it may be a henious wrong under moral code or according to some religious notion. For example sex relationship between adult unmarried man and woman is not offence according to most of the modern criminal laws, but morally and religiously a deplorable wrong. Such examples are not uncommon, but for the lack of time at our disposal, I shall leave the rest to the imagination of my readers.

Grafallo has given the "Natural Crime" theory which says that acts which offend the basic moral sentiments of pity and probity are crime. Westmarck says that customs and laws are based on moral ideas, and that crimes are such modes of behaviour as are regarded by a society as "Crime". I would not give a precise definition of the crime and this may lead us to the old controversy that acts forbidden by legislators are crime, and on the other side those who plead that this is a superficial view, and who insist that legislature cannot treat a thing as crime unless it is so in fact. We may say that crime is a wrong which is against the society and to which society shows some reaction either morally, socially or legally.

Crime Versus Society

Man is a social being who cannot live without social contacts. Away from the society man cannot survive and cannot find it possible to live well or fulfil his goals.

Being an essential thread in the fabric of the society he finds his own interests linked up with those of the society of which he is a member. In the present day political set up the society is represented by the state. The relationship between society and the crime is the same as the relation between the state and crime. The state is meant to provide the individual that protection which he could not expect to get otherwise than in a social organisation. A Criminal is often as a rule an egoist, self-centered, maladjusted or a victim of circumstances. His way of life is revolving round his own personality. He is out for an easy gain at the expense of others and in whose good he is hardly interested. At times therefore there are clashes of interests between the society and the individual, and results in delinquent behaviour. This clash of interest can be moral, economical, or even social.

Crimes may also be the outcome of the changed value judgments. The social change may not be bad in itself: but sometimes this results into advent of crimes, just because the value judgments of individuals or groups do not change. This has resulted in crime and disharmony. This is a matter of common knowledge that a number of penal statutes are not obeyed and has got right and power to punish the offender. In Veda also "Dhanda" was accepted and it was placed as a duty of a king i.e., preventing the social disorder and curtailing the menace.

The ultimate object of the criminal law is the prevention of crime. The purpose may be achieved both by preventive and punitive measures. I will however confine myself to the punitive measures and policies only and would like to give for

academicians and men in the field to put their heads on the intrinsic problem of criminality when the trends and forms of criminal behaviour are radically changing.

Punishment appears to have its roots in early attempts to placate deities who were though to be offended by the Acts contrary to the divine ideas of proper human behaviour and who were believed to be desirous of taking revenge.[5] Expiation of guilt by money payment was prominent among the early forms of Anglo-Saxon Punishments in the Pre-Norman period. The various theories of punishment were exercised in order to eliminate the crime.

In India, during British period even though both the Retributive and the Deterrent theories were prevalent, until 1860, the emphasis was more on Retribution particularly in those areas which were governed by the English criminal law. But with the advent of new ideas the approach changed and at present our criminal policy is mostly deterrent and partly reformative. The enactment of Children Acts, Probation of Offender's Act, etc., show that we have started adopting Reformative theory.

This basic question here is whether the present criminal policy is sound or it needs some change? In the present day context the basis of causation of crime is changing. Previously it was active that the crime generally were the monopoly of under privileged, the downtrodden individuals and groups.

The concept of "Born Criminals" given by Cesare Lombroso has long been discarded by criminologists, who assert that the criminals may be reformed by removing the strains from the individuals by improving their lot through education and other amenities. We may reform the criminals who belong to underprivileged class of society and this policy may hold good for them. Would this supposition hold good with the "White Collar" criminals? who belong to the higher strata of society and who are deficient neither mentally nor economically. What

about political corruption, tax-evasion, smuggling black marketing, etc. We may say that deterrent theory will work, but the experience has shown that this theory does not work because either on the one hand it may not be possible to determine the capacity of endurance of the offender to find out adequately deterrent punishment for him, on the other hand, the human nature as it is gets used to any option and suffering, however severe it may be. For them the present day punitive policy is not check and we will have to make a new policy to prevent the advent of crime. Let us therefore join hands to recast our approach and structure and to formulate new policies which may enable us to bring some, if not complete, harmony within the society.

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1. **Emile Durkleim,** *Crime as a Normal Phenomenon, P -27*
2. **S. V. Rao,** *Facets of Crime in India, P -16.*
3. **P.W. Tappan,** *Crime, justice and correction. P -10.*
4. **Sutherland,** *Criminology, P -47.*
5. **I-i.A. Block,** *Man, Crime, Society, P -435.*

THE HINDU SUCCESSION

(Tamil Nadu Amendment) Act, 1989

A FUTILE LEGISLATIVE EXERCISE

M.S. SOUNDARA PANDIAN*, M.A.. M.L.,

Introduction

The Hindu Succession (Tamil Nadu Amendment) Act, 1989 is a legislation which seeks to reform the uncodified Hindu Law relating to joint family system. The eloquent preamble to the said Act (hereinafter referred to as the Act) refers to the fact that the exclusion of daughters from the Coparcenary ownership is contrary to the fundamental right of equality before law proclaimed by the Constitution and that it cause to the of the pernicious dowry system which needs to be eradicated by positive measures which will simultaneously ameliorate the conditions of women in the Hindu society.

Highlights of the Act

On a careful examination of the provisions of the Act, it is evident that the Act makes the following changes in the Mitakshara Hindu law.

Firstly, the Act confers coparcenary rights on of the daughter of a coparcener by elevating her to the coparcener's status. The Act provides that notwithstanding anything contained in the Act, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall by birth become coparcener and have the same rights in the coparcenary property in the same manner as the son. The Act shall not apply if a daughter has got married on or before 25-3-1989 and the Coparcenary property has been partitioned among

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the coparceners before 25-3-1989 and when a Hindu family has no ancestral property and consequently a daughter would not get any benefit under the Act. The Act also recognises all the legal incidence of becoming a coparcener, namely right to joint tenancy, right to survivorship, right to alienation, right to testamentary disposition, right to partition, preferential right to acquire property and right to set aside partition effected between the date of commencement and the date of notification of the Act. Secondly, the Act makes the doctrine of survivorship applicable on the death of a daughter coparcener. Accordingly, the deceased daughter's coparcenary right will devolve upon the surviving coparceners provided she has not left any child or child of a predeceased child.

Thirdly, the daughter coparcener is also subject to the same liabilities or disabilities of a son and Fourthly, the share allotted to a daughter on partition will become her absolute property by virtue of Sec. 14 of the Hindu Succession Act, 1956 and the children of daughter coparcener cannot become coparceners. She could constitute an independent stock of descent in respect of such property.

All the above changes are desired by the legislature on their so called realisation that the retention of Mitakshara coparcenary resulted in discrimination against daughters and denial of right in coparcenary property against daughters was the reason for the continuance of dowry practice evenafter the passing the Dowry Prohibition Act, 1961.

This may be justified that with the preservation of the joint family system and the existence of coparcenary property, by virtue of the Act, even a daughter would get an equal share in the coparcenary property like a son. When a daughter has been assured of a share in the coparcenary property and such right can be enforced at any time even in future, the bridegroom or the family of the bridegroom might not, in all probabilities,

demand dowry from the bride's family. The practice of dowry thereafter would be mitigated.

Ancestral property A vanishing concept

The Act takes its operation in a joint Hindu family with coparcenary system which presupposes the presence of the ancestral property. The concept of ancestral property is a unique contribution of Hindu jurisprudence. A Hindu family may have ancestral properties of the following nature. Firstly, inherited property by a male Hindu from anyone of his three immediate paternal ancestors assuming the character of ancestral property and secondly, ancestral property already existing in a joint Hindu family.

"The rule of Hindu Law is well settled that the property which a man inherits from any of his three immediate paternal ancestors, namely his father, father's father and father's father's father is ancestral property as regards his male issue, and his son acquires jointly with him an interest in it by birth, such property is held by him in coparcenary with his male issue" [1]. As regards the first kind of ancestral property, namely, inherited property, contrary to the established principle of Mitakshara, the Hon'ble Supreme Court of India has changed the character of the property inherited by a son from his interstate father under Section 8 of the Hindu Succession Act, 1956 [2]. This may be understood as a desirable conceptual revolution made by the judiciary towards unification of personal laws relating to the Hindu law of Succession. A Hindu can inherit the properties of his father's only under Section 8 of the Hindu Succession Act and he cannot inherit the separate properties of the father in any other manner. If such property would not assume the character of ancestral property and remain as separate property of the inheritor even when he has a male descendant, it leads to an inevitable conclusion that no new coparcenary in a Hindu family can come into existence in future with the inherited property.

As regards the second kind of ancestral property namely the property existing in a coparcenary system of a Hindu family which devolved from the past generation to the present, the legislature, by interpreating the concept of notional partition in the Proviso to Section 6 of the Hindu Succession Act, 1956, has made an adverse effect in the coparcenary system. The effect is that the deceased coparcener's share in the coparcenary property shall be deemed to be the separate property of the intestate coparcener and his share shall be subject to succession and not survivorship provided the deceased coparcener has left behind any one of the Class I female legal heir or a Class I male legal heir claiming through a Class I female legal heir. When the existing coparcenary property is continuously subject to succession on the death of every coparcener, there would not be any coparcenary property at all after a considerable time. No human being is immortal and the chances are very remote for a Hindu dying without leaving any Class I female heir. This has not only made an inroad in to the coparcenary system but attempted to extinguish the coparcenary property though the legislature did not intend to do so.

It may be submitted that with the obstruction of any new coparcenary system in a Hindu family and the extinction of the existing coparcenary property, the Act seems to be a futile legislative exercise. In the absence of coparcenary property, conferment of equal rights to a Hindu woman may be come a promise of unreality.

The Act-A Wrong Move towards Dowry Eradication.

It appears in the Preamble that the proclaimed object of the Act is to eradicate the pernicious dowry system by recognising equal rights in ancestral property to a Hindu women, as denial of such right has given rise to the practice of dowry. The practice of dowry started as customary presents

to the bride and bridegroom at the time of marriage with love and affection. This practice started at a time when the girls were generally not verymuch educated, and, even if they were educated, they were unwilling to take up gain-ful employment[3]. They were given as a sort of security and provided her financial protection in adverse circumstances[4]. But unfortunately, over the years, new practice has developed. The bridegroom or his family members started demanding dowry as a matter of right.[5] The very fundamentals of dowry as in the ancient times do not apply in the present situation, but there has been evergrowing demand both at the time of marriage and even thereafter, which has gravely affected the status of women[6]. And now the practice of dowry has emerged as a major social evil and is a burning problem of our society[7]. A more interesting fact is that the demand for dowry is not confined to families which owns properties. It is equally the same in cases of families without any property. This social menace has even spread to other communities which traditionally were not taking dowry[8]. The families of other religious faith also suffer from this evil.

Going into the reasons of the demand for dowry, there is no doubt that it is purely an economic exploitation of the socially advantageous situation which the boy's parents find themselves in. It is nothing but greed. Those who demand dowry consider marriage also as merely another way of making money[9]. What is most surprising is that the spread of education has not helped in curbing the social evil of dowry, rather the educated youth has become more demanding[10]. The poor parents preferred to entertain the demand for dowry even by incurring debts with the expectation that their daughter would settle comfortably in the matrimonial home with a good bridegroom.

Despite the Dowry Prohibition Act, 1961 which has been on the status book over a period of four decades, the practice

of dowry has only continued unabated. This social welfare legislation is respected more in breach than in observance. Unless a serious attempt is made to enforce the legislation, it may prove to be a dead letter. The legislature before enactment of the Act has not taken into account the realities of the social conditions in the present context. The denial of right in ancestral property to Hindu women once considered the reason for the dowry practice, is nothing to do with its continuance at present. With disintegration of the joint family system and disappearance of ancestral property, the very object of the Act is defeated.

Social Education-A Right Move

It is a matter of fact that adequate legislative measures are already taken through the Hindu Succession Act, 1956 which recognised equal rights in favour of Hindu daughters in respect of separate property of the deceased parent. However, a daughter in most of the cases do not claim equal share in the property of the deceased parent for the reason that her parent or brothers have already performed all their duties by arranging her marriage and making necessary presents in lieu of her share in the property and her claim of share in the property thereafter would strain her relationship with the family of birth. It may therefore be submitted that the law of inheritance should be so framed that the daughters are not only assured of but also given a share in the property of their parents. To achieve this purpose, adequate social awareness and social education together with determination to support all measures designed to check this evil would be the best solution to effectively mitigate and finally remove the practice of dowry from our Indian soil. These efforts would create a sense of commitment among the youth not to demand dowry on marriage and a sense of justice and responsibility among the parents

to treat both son and daughter equally for the purpose of succession to their properties.

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ARMING WOMEN WITH RIGHT TO PRIVACY: THE JUDICIAL INITIATIVE

Dr. A. David Ambrose*, B.Sc., M.L., Ph.D.,

The object of human rights and its realization is to enable human beings to live with human dignity. The Preamble to the Universal Declaration of Human Rights, adopted by the UN General Assembly on 10th December 1948 (UDHR), emphasizes that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Further Art. 1 of UDHR proclaims that 'All human beings are born as equal in dignity and rights'. The preamble to the constitution of India promises to secure all citizens, fraternity, assuring dignity of the individual and the unity and integrity of the nation. In Francis Coralie Mullin v Administrator, Union Territory of Delhi[1] the Supreme Court held that the right to life home fund in Art. 21 of the Indian Constitution "should be taken to mean right to live with human dignity". This right to live with human dignity which enjoys international as well as constitutional recognition is also available to the fair sex, as gender equality is an important aspect of human rights. The General Assembly of United Nations recognised as back in 1967 "discrimination against women, denying or limiting as it does their equality rights with men, is fundamentally unjust and constitutes an offence against human dignity"[2]. The State

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1 AIR 1981 SC 746.

2 See Art. 1 of the Declaration on the Elimination of Discrimination Against Women:G.A.Res. 2263 (XXII) of 7 November 1967.

parties to the Convention on the Elimination of All Forms of Discrimination Against Women 1979, noted that the UDHR affirms the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights ....."[3]. More importantly in part IV-A of the Indian Constitution dealing with fundamental duties of citizens of India inserted by the 42nd Amendment in 1976, Art. 51A(e) imposes a fundamental duty on all citizens to renounce practices derogatory to the dignity of women. It therefore becomes clear that the right to live with human dignity is a fundamental basic human right of women.

Women's right to privacy has become one of the most important human rights of modern age as it underpins human dignity and other key values such as freedom of association, movement and speech. For the effective realization of women's fundamental human right to live with human dignity, the recognition and protection of right to privacy (of women) has become an indispensable one.

At the International level many Human Rights instruments give specific reference to privacy as a right. Art. 12 of UDHR[4] and Art. 17 of the International Covenant on Civil and Political Rights 1966 [5] have references recognizing the right to privacy as a human right. Nearly every country in the world recognises in one way or other the right of privacy explicitly in their

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[3] G.A.Res. 34/180 of 18 December 1979 Entered into force on 3 Sept. 1981

[4] Art. 12 reads as follows: No one shall be subjected to arbitrary interference with his privacy, family home or correspondence, nor to attacks upon his honour, and reputation. Everyone has the right to protection of the law against such in interferences or attacks.

[5] Text of Art. 17 of the ICCPR to which India is a signatory runs as thus:

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, human, family or correspondence nor to unlawful attack on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.

Constitutions or otherwise[6]. In USA, as many issues like family life and sexuality are discussed in the light of 'privacy', the right to privacy is well recognised as a constitutional right and the law relating to privacy is comparatively well developed. In Mapp v Ohio[7] 'the right to privacy' has been held to be (in connection with the Fourth Amendment) no less important than any other right carefully and particularly reserved to the people.

Inspite of these developments the law relating to privacy in India has not developed fully, as there is neither any expressed constitutional nor statutory provisions recognizing the right to privacy generally. In the absence of any express contitutional or statutory provisions recognising the-right to privacy, the Indian Courts have seized the opportunities whenever they came and tried successfully to bring the privacy right within the purview of fundamental rights. Even though right to privacy is not enumerated as a fundamental right in our Constitution it has been inferred from Art. 21.[8]

To discuss the positive role of Indian Judiciary in the development of right to privacy as a fundamental right especially of women is the main object of this short paper.

Concept of Privacy:

Definitions of privacy vary widely according to context, environment, setting and culture, since what is private varies from day to day and setting to setting[9] The local cultural and

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[6] See Dr. A. David Ambrose, "Right to Privacy: A Comparative Case Law Study" in Laws from All Horizons (Comparative Law Society, Pondicherry, 1998 pp 56-66.)

[7] 367 US 643 at 656 (1961).

[8] Dr. A. David Ambrose "Development of Right to Privacy as a constitutional Right in India", 20 A C R. 1997 at p194 at 197.

[9] 1967 Report of the panel on privacy and behavioural research to the US President's Office of Science and Technology Privacy and Behavioural Research (1961) at p 8.

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other sociological factors play a vital role in the definition of privacy. Deviating from the initial understanding of the concept to mean right to be left alone, today the privacy concept has undergone many changes thereby expanding its scope manifolds. As the scope of privacy concept has widened, the protection of privacy varies from setting to setting and society to society, depending upon the understanding of the concept. For example in India women are respected and patronised[10] right to individual privacy concerning with protection of personal life or affair against any intrusion is to some extent well recognized.

Women are respected in India from the beginning. The practice of worshiping female goddesses is still prevalent in most parts of India. The kings had separate dwelling places for their queens called "ANTHAPURAM". According to Hindu mythology, Lord Krishna came to the rescue of Draupathi when her modesty was violated in public.

Right to Privacy as a General Right:

Historically, the right to privacy as an independent distinct concept originated in the field of tort law only. The right to privacy in India has been recognized by the Allahabad High court as early as in 1880 itself. In GOKUL AND PRASAD, V. Radho [11]an injunction was granted restraining the defendants from constructing a building overlooking *Zinna* of the plaintiff. Edge, CJ categorically stated "owing to differences in the conditions of domestic life this custom (parda) is perfectly reasonable in India. A neighbour should not be allowed to open new doors or windows in such a way as would substantially interfere with those parts of his neighbour's

[10] Art. 15(3) of the Constitution empowers the state to make special provisions for women and children. This inclusion of women with children shows the patronizing attitude of the Constitution.

[11] 1880 ILR 10 All 358.

premises which are used by *pardanashin* women of laters family". Thus the court recognized the right to privacy of pardanashin women centuries ago.

In order to protect the privacy of women, intruding upon the privacy of women is made as an offence and is punishable under Sec. 509 of Indian Penal Code. Sec 509 runs as thus:

"whoever intending to insult the modesty of any women, utters any word, makes any sound or gesture or object shall be seen, by such women, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year or with fine or with both". (Emphasis supplied).

Thus criminal action is envisaged by Sec. 509 of IPC for violating the privacy of woman. Further tranquility in family (married) life is protected by Indian Evidence Act. Sec. 122 of the Indian Evidence Act contains a rule of privilege protecting the disclosure of communication between spouses made during the marriage. The obvious reason for this provision is not to disturb the peace of families. It is thus the right to privacy in family life is indirectly recognized. From the above discussion, it is possible to conclude that the law relating to general right to privacy is to some extent recognized and protected in India.

Right to Privacy as a Fundamental Right:

The origin of the right to privacy as a constitutional and fundamental right can be traced back to Kharak Singh v State of U.P.[12] Subba Rao J (as he then was) writing for himself and Shah J as minority was of the opinion that the word liberty in Art. 21 was comprehensive enough to include privacy also. He said that although 'it is true our constitution does not expressly declare a right to privacy as a fundamental right but the right is essential ingredient of personal liberty'[13]. The

[12] AIR 1963 SC 1295.

[13] Ibid at p 1306.

minority view in Kharak Singh was further strengthened and elaborated by the Supreme Court in Govind v State of M.P.[14]. Justice Mathew after observing that right to privacy may have the same status of fundamental rights held that privacy primarily concerns the individual, it therefore relates to and overlaps with the concept of liberty and any right to liberty and any right to privacy must encompass, must protect the personal intimacies of the home, the family marriage, motherhood, procreation and child rearing'. He further held that "many of the fundamental rights of citizens can be described as contributory to the right to privacy"[15].

The hopeful observation of Govind's case that the old rules and the regulations verging perilously on unconstitutionality would yield to the essence of personal freedom, came true in the Supreme Court decision in State of Maharashtra v Madhukar Narayan Mardikar[16]. In this case departmental proceeding was initiated against a police inspector for entering the apartment of the complainant and trying to ravish her. The police officer took the defence that the woman was of easy virtue and he had simply raided the house for illicit liquor. On the basis of the recommendation of inquiry officer, who found out that the charges were true, the police officer was issued with an order of dismissal. When the order was challenged, the High Court of Bombay opined that since the complainant is an unchaste woman it would be extremely unsafe to allow the future and career of a governmental official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person. While reversing the Bombay High Court's judgment, the Supreme Court through Justice Ahmadi held that even a woman of easy virtue is entitled to privacy and

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[14] AIR 1975 SC 1378.
[15] Ibid at p 1375
[16] AIR 1991 SC 207

no one can invade her privacy as and when one likes. So, also it is not open to any and every person to violate her person as and when one wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to protection of law.[17] In this case the Supreme Court placed emphasis on the traditional cultural status of women by holding that it is not open to only and every person to violate the person of women even of easy virtue; as and when he wishes. By this landmark judgment the women's right to privacy was recognised, expanding the scope of Art. 21.

Right to Privacy in Work Place:

In Neera Mathur v Life Insurance Corporation of India and another [18], the Supreme Court held that declaration seeking disclosure from a lady candidate regarding personal problems are embarrassing and improper. In this case the petitioner was appointed by the Life Insurance Corporation without the knowledge that she was pregnant. After joining her post she applied for maternity leave. On coming back, she was served with a termination notice. When she complained against such termination, the LIC pleaded that she had not supplied them with the information, which had been sought through a questionnaire. In the Supreme Court the Judges were flabbergasted to learn the questionnaire sought information about the dates of the menstrual periods and the past pregnancies. The Supreme Court observed that particulars to be furnished in the columns are indeed embarrassing if not humiliating. The modesty and self respect may perhaps preclude the disclosure of such personal problems like whether her menstrual period is regular or painless, the number of conception taken place how many have gone in full term etc. Though the court did not touch upon right to privacy it advised

[17] Ibid at p 211
[18] AIR 1995 SC 392

the corporation to delete such columns in the declaration[19]. In this case the Supreme Court indirectly upheld the women's right to privacy in the working place. The Supreme Court did not touch upon right to privacy directly because the termination order was not challenged before it on that ground.

Right to privacy in family life:

The Supreme Court's view in Govind's case that right to privacy encompasses and protects the personal intimacies and the family marriage, etc., has been further strengthened in several subsequent decisions. In Sareetha *v.* Y. Venkata Subbiah[20] there the petitioner attacked Sec. 9 of the Hindu Marriage Act, 1955, on the ground among others that granting of restitution of conjugal rights violates the petitioner's right to privacy guaranteed under Art.21. The Court through Justice P.A. Choudary after observing that a decree of restitution of conjugal rights deprived a woman of control over choice as and when and by whom the various parts of her body should be allowed to be sensed and the woman loses her control over her most intimate decisions, held that the right to privacy guaranteed by Art. 21 of our Constitution is flagrantly violated by a Decree of restitution of conjugal rights and therefore Sec.9 of the Hindu Marriage Act providing remedy for restitution of conjugal rights violates the right to privacy guaranteed by Art. 21 of the Constitution, is constitutionally void.[21]

The Court after discussing the limitations on the right to privacy further held that, there are no over whelming state interests to justify the subordination of the valuable right to privacy to any state interests[22]. In effect the Court conceded

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[19] Ibid at 395

[20] AIR 1983 AP 356

[21] *Ibid* at p. 369, para 25 and p. 371 para 31.

[22] *Ibid* at p. 371 para 30.

that in the interest of the state, restrictions could be imposed on the right to privacy.

However, in Harvindur Kaur *v* Harmander Singh Choudhary [23], the Delhi High Court disagreed with the Andhra Pradesh High Court . The Delhi High Court opined that Sec. 9 of the Hindu Marriage Act does not in effect violate a person's right to privacy, as the object is to preserve marriage.

The Supreme Court in Saroj Rani *v.* Sudarshan Kumar Chanda[24] overruling the Andhra Pradesh High Court's decision upheld the Delhi High Court's decision. It is pertinent to note that inspite of difference of opinion among the courts regarding the constitutional validity of Sec.9 of Hindu Marriage Act they were unanimous regarding right to privacy with respect to married or family life.

Right to privacy with respect to procreation:

The Supreme Court of America in Jane Roe *v.* Henry Wade[25] held that the right of privacy of a woman is protected by the Due Process Clause of the fourteenth Amendment and that right enabled her to decide whether or not to terminate a pregnancy[26]. In Planned Parenthood of Central Missouri *v.* John C. Danforth, Attorney General of the State of Missouri, the Supreme Court dealt with the rights of an unmarried woman under the age of 18 years. The Court held that the right of privacy gave an individual, married or single, the right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

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[23] AIR 1984 Delhi 66.

[24]. AIR 1984 SC 1562

[25] 410 US 113 (1973).

[26] For more UK and USA cases on Right to Privacy generally see Dr. A. David Ambrose, "Right to Privacy":
A Comparative Case Law Study in Laws from All Horizons (Comparative Law Society, Pondicherry, 1998) pp 59-66.

In India for the first time a women's right to privacy with respect to procreation was recognised by the Madras High Court. In V Krishnan *v.* G. Rajan alias Madipu Rajan and others[27]. In an application for direction in a writ of habeas corpus preferred by the father of a minor girl aged 16 years to terminate the pregnancy of the girl on the ground of her having been kidnapped and made pregnant and the girl resisting the father's application and pleading for normal continuance of pregnancy until delivery, the Madras High Court has held that Fundamental Rights can be enjoyed even by a minor and therefore the minor girl under Art. 21 has a fundamental right to decide about her pregnancy. The Court further held that it is the girl's fundamental right to have child having become pregnant. Since the Madras High Court decision still holds good and the law relating to privacy has developed considerably since then, it may be safely said that in India too due to the judicial initiative the women's right to privacy relating to procreation is recognised.

Conclusion:

The object of human rights protection is primarily based on the need to protect the individual against the state actions. However, it is not sufficient to protect him/her against the actions of the state alone; many violations of our rights, in the modern world, result from the acts of private persons. This is especially true in the case of right to privacy with regard to which protection is particularly necessary against interference by other individuals. In the age of scientific and technological development, the increasing sophistication of information technology with its capacity to collect and disseminate information on individuals stresses the need for the protection of privacy. Under these circumstances the Judiciary's

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[27] 1994 (I) Law Weekly p.89.

contribution in the development of right to privacy in India is of great significance.

Right to privacy concerns with individuals and is essential for both sexes. However, in a male dominated society like ours, right to privacy is much needed for women and their development. Because right to privacy as it emerges from life and liberty relates to human dignity, it encompasses many rights like right to be left alone, right to family life, right to home and marriage, right to procreation, motherhood and child rearing, etc. Most of these rights are very much necessary for preserving the dignity of women. Thus protection of privacy of women may in turn help in the realization of gender equality.

The judicial boldness in holding that even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when one likes will no doubt have a telling effect on the evolution of women's rights in India.

Conferring the right to privacy on women will assist them in their emancipation. In this aspect the judiciary's initiative in conferring such right on women that too in the absence of any general codified law of privacy has to be complemented. The Courts have so far recognized the women's right to privacy regarding personal life, married life, and procreation and to some extent privacy in working places.

The law relating privacy is always in the process of evolution as what is private varies from day to day and setting to setting. Moreover, from the initial understanding of the concept to mean the right to be left alone, privacy has undergone and still undergoing many changes, resuling in the widening of its scope. As the scope of right to privacy is widening day by day, the protection accorded under such right would also correspondingly expanding. For example recognition of right to privacy in work places and offices, in course of time, may

help in the protection of women employees against sexual harassment, eve teasing, molestation, etc. The recognition of the right to privacy in fact has resulted in the recognition of many women related rights. The judicial initiative in conferring privacy related rights on women would definitely influence the growth of feminist jurisprudence in India.

AUDIO & VIDEO PIRACY

—*REMEDY FOR THE MALADY*

S. Shanthakumar[1]

Copyright is one form of what is popularly described today as "Intellectual Property Right". 'Copyright' is the right conferred by law on creators of original works including literary, dramatic, musical, and artistic and other intellectual works. Justice Chinnappa Reddy observed "an artistic, literary or musical work is the brainchild of the author, the fruit of his labour and so, considered to be his property. So highly is it prized by all Civilized Nations that it is thoughtworthy of protection by National laws and International conventions".[2]

1. Object of copyright:

The Primary Objects of conferring Copyright are:

1. to encourage authors, composers and artists to create original works by rewarding them with the exclusive right for a limited period to reproduce the works. The exclusive right refers to the right to prevent others from copying or reproducing the work;
2. to protect the creator of the Copyright work from unlawful reproduction or exploitation of his work by others; and
3. to encourage exploitation of Copyright work for the benefit of the public. Entrepreneurs like publishers, film producers or sound record producers also enjoy

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[2] *Gramophone Co. of India Ltd. v Birender Bahadur Pandey and Others*, AIR 1984 SC 667 at p. 676.

Copyright, to whom the owner of Copyright assigns or licenses the particular rights. If these entrepreneurs are to recover the capital invested and earn profits out of the investments made, they will have to be protected from unauthorized reproductions.

Otherwise, a pirate would reproduce the work at a fraction of the original cost of production and sell it at a very less price when compared to the price fixed by the lawful producer. Especially, in the case of sound recordings and cinematograph films, a pirate could ruin the producer by his piracy. Therefore, no entreprenueur will be prepared to publish books or produce films or sound recordings, if adequate legal protection is not accorded to them.

2. Legal and moral basis of Copyright:

Lord Atkinson had observed that the moral basis for protection under Copyright Law rests in the Eighth Commandment:"*Thou' Shall Not Steal*[3]." The very foundation and philosophy of Copyright law is "the Law does not permit one to appropriate to himself what has been produced by the labour, skill and capital of another.[4]"

A Committee appointed under the Chairmanship of Justice Whitford to review the existing law on Copyright in U.K. pointed out that "*Copyright* protection finds its justification in fair play. A person works and produces something. The product of his skill and labour ought to belong to him (or possibly his employer). It has long been recognized that the original author of a book ought to have the right to reproduce the book and sell copies thus reproduced. If other people were free to do this they would be making a profit out of the skill and labour of the original author. It is for this reason that the law has long

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3 Macmillan & Co., Ltd. v Coopere (1924) 40 TLR 186 at p, 187.

4 Walter v Lane (1900) AC 539 (HL) ef. Narayanan. P., Copyright Law, 1986, Eastern Law House, Calcutta, p.4.

given to authors for a specified term certain exclusive rights in relation to so called literary works. Such rights were recognized at common law at least as early as the fifteenth century.[5]

The Universal Declaration of Human Rights declares, "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author .[6]" The International Covenant on Economic, Social and Cultural Rights proclaims, "the States parties to the present Covenant recognize the right of everyone.....to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[7]" From the above two Articles of Interanational Instruments on Human Rights, it is explicit that the right to protection of Copyright is a basic Human Right and States have an obligation to secure the universal and effective recognition of these rights by progressive measures.

In India, the Copyright Act was enacted in the year 1914 and that was almost a copy of the Copyright Act, 1911 of U.K. with necessary modifications to make it applicable to the then British India. That Act was in force till the Indian Parliament enacted the present Act in the year 1957. Thereafter the Copyright Act, 1957 has undergone many amendments.

2.1. What does the Copyright Act do?

The Copyright Act declares that, Copyright shall subsist throughout India in the following classes of works:[8]

(a) original literary, dramatic, musical and artistic works;

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5 Whitford Committee's Report on Copyright and Designs Law, 1977, P.3.

6 Article 27 (2), Universal Declaration of Human Rights, 1948.

7 Articel 15(1), International Covenant on Economic, Social and Cultural Rights, 1966.

8 Section 13, The Copyrigt Act, 1957.

(b) cinematograph films; and

(c) sound recording.

The Copyright Act provides the meaning of 'Copyright'. "Copyright" means[9] the exclusive right to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely—

(d) in the case of a cinematograph film,-

(i) to make a copy of the film, including a photograph of any image forming part thereof;

(ii) to sell or give on hire or offer for sale or hire any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the film to the public.

(e) in the case of a sound recording—

(i) to make any other sound recording embodying it;

(ii) to sell or give on hire, or offer for sale or hire any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the sound recording to the public.

The Copyright Act also provides for a fixed term during which the Copyright shall subsist with the owner of Copyright. In the case of a cinematograph film, copyright shall subsist until sixty years from the beginning of the Calendar year next following the year in which the film is published.[10] In the case of a sound recording, Copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the sound recording is published.

[9] see section 14, The Copyright Act, 1957.

[10] Sec. 26, Ibid

2.2 What does the Copyright law prohibit?

The Copyright Act prohibits 'infringement' of Copyright. Copyright in a work shall be deemed to be infringed [11] .

(a) when any person, without a license granted by the owner of the Copyright or the Registrar of Copyrights under this Act are in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Act -

i. does anything, the exclusive right to do which is by this Act conferred upon the owner of the Copyright, or

ii. permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the Copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of Copyright; or

(b) when any person—

i. makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

ii. distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the Copyright, or

iii. by way of trade exhibits in public, or

iv. imports into India, .

any infringing copies of the work.

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[11] Sec. 51.ibid

2.3 What are the remedies for infringement?

Where Copyright in any work has been infringed, the owner of the copyright shall, be entitled to all such remedies[12] by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right. However, it has been held [13] that the relief of injunction is the normal remedy. In addition to this, further relief of damages or accounts, but not both, may be given, as may be elected by the plaintiff. It was also held that proof of actual damage is not necessary for the granting of an injunction if plaintiff proves that his copyright has been infringed. [14]

2.4 What are the punishments for infringement?

The Copyright Act makes the infringement of Copyright an offence punishable under the Act[15]. It also declares that the making of false entries in Register of Copyrights, producing or tendering false entries as evidence, making false statements for the purpose of deceiving or influencing any authority or officer, an offence punishable. [16]

Section 63 of the Copyright Act provides that any person who knowingly infringes or abets the infringement of the copyright in a work shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand' rupees but which may extend to two lakh rupees. The Copyright Act also provides for enhanced punishment for second and subsequent convictions. [17]

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[12] Section 55, ibid.

[13] P. Lakshmikantham *v* Ramakrishna Pictures AIR 1981 AP 224.

[14] Smith *v* Johnson (1863) 33 J Ch. 137 cf. Iyengar's Copyright Act & Rules, 4th Ed. p. 277.

[15] Section 63, ibid.

[16] Sections 67 & 68, ibid.

[17] Section 63A, ibid.

2.5 what the police can do to curtail piracy?

Any police officer not below the rank of a sub-inspector, may, if he is satisfied that an offence of infringement of copyright in any work has been, is being, or is likely to be, committed, seize without warrant, all copies of the work, and all plates used for the purpose of making infringing copies of the work, wherever found, and all copies and plates so seized shall, as soon as practicable, be produced before a Magistrate.[18] Jurisdiction to try for an offence belongs to the court within whose jurisdiction the offence is committed. [19]

3. Audio and Video piracy—what does it mean?

Piracy of the work in which the copyright subsists is a phenomenon prevalent worldwide. In terms of value pirate sales (in US $) India is in the eighth position.[20] In terms of units, pirate sales India is in the third position.[21] Piracy refers to the

unauthorized—

1. making of copies for sale or hire;
2. selling or letting for hire;
3. display or offer for sale or hire, by way of trade;
4. distribution of infringing copies;
5. exhibition in public, by way of trade;
6. importing into India.

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[18] Section 64, ibid.

[19]. Mobarak Ali *v* State of Bombay AIR, 1957 SC. 857

[20] Source: International Federation of Phonographic Industry (IFPI), London. The order of Top Ten Pirate Territories in terms of Value is:
1. Russia 2. USA 3. China 4. Italy 5. Brazil 6. Germany 7. Mexico 8. India 9. Pakistan 10. France.

[21] Ibid. The order of Top Ten Pirate Territories in term of units is:
1. Russia 2. China 3. India 4. Pakistan 5. Mexico 6. Brazil 7. USA 8. Italy 9. Romania 10. Turkey.

Copyright piracy is thus like any other theft of property which results in loss to the owners of the property. Not only piracy results in economic loss but also adversely affects the creativity of the members of a given society since it denies to the creators their legitimate dues.

The copyright piracy takes place through different and numerous methods. The nature of piracy and the extent of piracy vary depending on the segment of the copyright Industry.

3.1 Video piracy

Copyright in cinematographic works is very complex in nature due to the existence of a variety of copyrights in a single work and due to the overlapping nature of these rights. The producer of the cinematographic film is the owner of the copyright. Normally piracy of cinematographic works takes two main forms, namely 'video piracy' and 'cable piracy'.

- When a film is recorded in a video cassette/CD without getting authorization from the copyright holder (producer), it is referred as 'video piracy'. Normally, the producers of films sell the video rights to a party who is thereby authorized by the producer to make copies of the said film by recording it in a video cassette/CD. He is also authorized to sell or lend the video cassettes/CDs. However the video cassettes that are sold are meant only for home viewing. Commercial use of such cassettes/CDs in video parlors/theatres results in Copyright violation. In India video piracy is committed by following two main methods:

1. Where the producer of the film does not sell the video rights of a film but still video cassettes/CDs is available in the market for buying or borrowing immediately after the release of the film in theatres;

2. Where the producer of the film sell the video rights of the film to a person but video cassettes/CDs are made, sold and lent by other persons as well.

The second form of video piracy is 'cable piracy'. Cable piracy refers to the unauthorized exhibition of films through local cable network by the cable operators in a particular locality. Unauthorized broadcasting of video films over cable T. V. network to subscribers will amount to infringement of copyright.[22] In such cases, even an occupier of premises who provides receiving equipment for broadcasts or apparatus for playing records is treated as performing any literary, dramatic or musical work that is put out in consequence. [23] Many times, newly released films will be exhibited through cable network without acquiring authorization from the copyright holder. This has now become very common in all most all parts of this country and this is rampant in rural areas than in urban areas.

These forms of piracy of cinematographic films results in heavy monetary loss to all the parties involved in the making, distributing and exhibiting the film *viz.*, the producers, distributors and theatre owners. Apart from these individuals, this piracy results in loss of revenue to the government because the activities of video pirates will not fetch any revenue in the form of entertainment tax from theatres and excise duty and sales tax at the points of legitimate production and sale.

3.2 Audio piracy

Audio piracy in India is as old as the cassette industry itself. The sound recording industry is facing three types of piracy.

1. The most rampant practice is, the owner of the Audio Shop (small shops owned by individuals where recording

[22] AIR 1989 Bom.331

[23] Vigneux v Canadian PRS [1945] A.C. 108 at p.123; Phonographic Performances (N.Z.) v Lion Breweries [1980] F.S.R. 1; of W.R. Cornish, Intellectual Property: Patents, Copyright, Trade Marks and Allied Right, p. 355.

of songs of consumer's choice is done for a fee and where pre-recorded audio cassettes/CDs are made available for sale) picks popular songs from different legitimate Cassettes/CDs and copies it in a single cassette/CD. This Cassette/CD is packed and labeled and displayed for sale in the shop.

2. Second form of 'audio piracy' is counterfeiting. The pirates copy the songs of a legitimate cassette/CD in a blank cassette/CD, print and pack the cassette/CD in such a manner to resemble the original whereby they mislead the consumer and sell the pirated version as original.

3. The third and latest and worst form of audio piracy is selling MP3 CDs. Songs are recorded in CDs using computer software and then sold at a very low price. When this becomes very popular, it will definitely sound a death knell to the Sound Recording industry.

4. FACTORS RESPONSIBLE FOR AUDIO & VIDEO PIRACY.

Though Audio and Video Piracy are prevalent for many decades only recently it has drawn the attention of the concerned. Piracy amounts to theft of intellectual property and hence it is made as a crime. But in practice the society does not treat it as a serious crime even though it has far reaching consequences. This is perhaps one of the greatest problems associated with the effective control of piracy. Though the motive behind piracy is economic gain, the societies' outlook towards the crime influences piracy.

In an empirical study[24] conducted by the author on the topic "Audio Piracy" in the city of Madurai, the data provided by consumers of cassettes/CDs discloses that 76% of the

[24] Research project on Intellectual Property Law sponsored by the Tamil Nadu Dr. Ambedkar Law University, Chennai during May-October 2002.

consumers are aware of the fact that piracy is illegal and an offence punishable under the law. In spite of that, the consumers prefer pirated versions of cassettes/CDs due to reasons like lesser price and satisfaction they derive out of the collection of songs of their choice. Some respondents even indicated that only because the pirated cassettes/CDs are freely available in !he market, the consumers are enticed to buy the pirated work.

The most interesting finding of the study is that 100 % of the Respondents (Sound Recording Centre Managers/Pirates) are fully aware of the fact that piracy is an offence punishable under the Copyright Act. They have responded that, only because the is not enforced effectively and the attitude of the society treating piracy as not a serious crime, the business (?) flourishes.

From the demographic details supplied by the respondents (Sound Recording Centre Managers) of the study it was found that:

1. All the pirates are literates (100 %);
2. 77% of the pirates are graduates and post graduates;
3. 73% of the pirates are in the age group of 18-34.

From the above data it could be inferred that most of the pirates involve themselves in the illicit trade due to *unemployment problem* prevailing in the society.

Yet another interesting finding of the study is that, out of the 100 Respondents (Sound Recording Centre Managers) only 8 have said that there were police interventions in the business. Remaining 92 respondents have not faced the police even once since the commencement of business. Out of the 100 Respondents only 5 of them faced criminal

prosecution. Of the 5 respondents who faced prosecution, 2 pleaded guilty and 3 escaped prosecution by providing "mamool" to the police.

The other important factor that may attract unemployed people to piracy industry is the laxity in the country's copyright enforcement machinery. The laxity in enforcement is the result of slackness on the part of the enforcement machinery, viz., the police on one hand and the passive attitudes on the part of right holders on the other. The copyright holders are also to be blamed for their "not so serious" attitude towards the piracy phenomenon. No body could deny the fact that catching the pirates is not among the priorities of the police. A plausible reason for this is the greater involvement of the force in more demanding areas like controlling murders, riots, terrorist activities, robberies, dacoits, etc. The strength of the police force and the enforcement infrastructure are also not adequate to tackle effectively the problems pertaining to Audio and Video piracy.

5. Conclusions and suggestions

The Copyright law in India is as good as the copyright laws in other developed nations like America and Europe, where concern for copyright is at a very high level. Punishments prescribed for violations are also very stringent and comparable to those of many countries in the world. But laws alone can do little justice unless enforced properly. The enforcement scenario of copyright law in India is very pathetic.

In spite of the stringent legal provisions under the Copyright Act to prevent Audio and Video piracy, going around any city/ town/village, one can find the mushrooming growth of Sound Recording Centres and Video libraries. These Recording centres display their name board which also contains an

"invitation to offer" for recording any song from any film either old or new, Tamil, English, Hindi or any other language for that matter. Through these display boards, it is made public that on payment of a nominal charge, sound recording of copyright works are made.

Whatever it may be, the bold and beautiful display boards of these Sound Recording Centres display one more thing implicitly. That is the inefficiency of the law and the law enforcers in India to handle this problem viz., piracy.

What prompts the entrepreneurs and consumers to prefer infringed copies of copyright work than the original version of copyright work? What are the problems associated in waging a war against infringement of copyright? Why the authorities under the Act are so non-operative? What steps are to be taken to eliminate these kinds of infringements? How the copyright law should be made more efficient and pro-active?

Inquiry into all the above issues will point mainly to "improper/ insufficient policing". The trend in India is to comply with a law only on the sight of a police. In the absence of police on site, the level of compliance stoops down far below the tolerable level. It is a common saying that "people fear police and not the law". Therefore, violation of any law could be curtailed by sufficient and efficient policing. It is said that the British ruled India just with the help of two laws, the Revenue Recovery Act and Section 144 of the Criminal Procedure Code, whereas the present governments in India, with hundreds of laws on the statute book are unable to either recover their revenues or control law and order Whatever may be the reasons; no excuse for non-enforcement of a law will be appreciated.

Producers of films publicize the inefficiency of the enforcement machinery to protect the copyright of creators by pasting posters at conspicuous places of the city carrying the image of Shihan Hussaini' - a Karate fighter. The producers of cinematography believe that the image of Hussaini on posters will deter violation of copyright much better than informing and seeking the help of police. Now, the copyright holders, instead of relying on statutory authorities are protecting their rights with the help of private agencies. The emergence of parallel private law enforcers is a bad trend and this trend could be stopped, only by efficient policing.

Though in theory, the producers of phonograms and cinematograph films are assured of protection of their copyright, in practice, they face unchecked infringements. The Copyright Act may assure protection in more than one way but only efficient policing can accord actual protection. The remedy for the malady lies in improving policing by sensitizing the police troops on the need for protection of Copyright or in creation of a separate "Copyright Brigade" with a whole time responsibility of enforcing copyright and other laws aimed at protection of Intellectual Property Rights.

NEWSPAPER AND COPYRIGHT

Dr. S. Sivakumar*, B.Sc., LL. M., Ph D.

Ownership of intellectual property in India is governed by a set of statutes. The Copyright Act, 1957 regulates the acquisition, transfer and relinquishment of ownership and other rights in works of another. The Trade and Merchandise Marks Act, 1958 and the Patents Act, 1970, govern the trademark and patent respectively.

The Copyright Act speaks little about the copyright of the news reporter or the question of newsgathering or investigative reporting. The issue of the copyright of reproduction and the report of lecture delivered in public is determined Section 52(m) and (n) of the Act. In certain contexts the proprietor of the media and in certain circumstances the author becomes the owner of the copyright.

Proviso (a) to Section 17 of the Copyright Act reads:

> In the case of a literary, dramatic or artistic work made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical or to the reproduction of the work for the purpose of its being published, but in all other respects the author shall be the first owner of the copyright in work.

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The owner of a newspaper must however fulfill certain conditions for the acquisition of copyright[1].

(i) The author of the work must be employed under the newspaper owner, under a contract of Service;

(ii) The work must be done in the course of such employment; and

(iii) In the cases, unless there is an agreement to the contrary, the author-employee is deprived of his copyright in the work, wholly.

Copyright does not protect ideas or information. It protects only the material form or manner of expression. The same news event, therefore, may be reported in different form. Similarly, if a speech delivered by a person is reported in verbatim, the reporter infringes the right of the person who delivered the lecture.

In British law "There is no copyright in facts, news, ideas, or information. The copyright exists in the form in which information is expressed and the selection and arrangement of material all of which involves skill and labour"[2] This is the case in India too. Thus the British law as well as Indian law strikes a balance between the right of authors and public need for information.

A question may be asked whether an article in the newspaper could be treated as literary work Copyright Act gives a wider connotation. The definition given to 'literary work' in Section 2(o) of the Copyright Act runs thus:

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1. D.D.Basu, Law of the Pre,\'s (1986), pp.408, 409

2. Tom Welsh and Walter Greenwood, Mc Nae's Essential Law for Journalists (15th edn. 1999), p.262.

> "Literary work" includes tables, compilations and computer programmes, that is to say programmes recorded on any disc, tape, perforated media or other information storage device, which, if fed into or located in a computer or computer based equipment is capable of reproducing any information.

Literary merit is not a criterion for including a work as literary work. According to Tom Crone "Literary work includes newspaper article or features, books, plays, songs, and poems, in fact almost any words written down or recorded will qualify...Thus railway time tables and logarithmic tables are both literary works[3]".

The copyright of the proprietor of the newspaper over the works of persons employed by cases when they leave the service. This came to be asserted by the Kerala High Court in V.T. Thomas *v.* Malayala Manorama[4], Sukumaran J, observed:

> The artistic work of an author made as an employee, while in the course of his employment; pass on to the employer in contingencies postulated, interalia in.17(c). This process comes to an end in certain situations. The termination of employment is one such situation.

The proviso (a) to Section 17 of the Act[5], shall have no application where a freelance' journalist or a contributor, without any contract of service under the newspaper, sends papers or articles for publication in the newspaper on terms agreed. In this situation, contributor is not deprived of his copyright, unless the agreement otherwise provides.

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[3]. Tom crone, Law and the Media (3rd edn.1995), p.l00.

[4]. (1988) K.L. T. 433. 436.

[5]. See Section 17 proviso (a) of the Copyright Act, 1957.

There could be violation of copyright in publishing photographs in newspapers. For example in 1960 *Williams v.* Settle[6], the defendant photographer took the photographs at the wedding of the plaintiff. Two years later the plaintiff's father-in-law came to be murdered. The defendant supplied press reporters with photographs of the murdered man among a wedding group. The copyright in this photograph vested with the plaintiff. The publication of the photographs caused distress to the murdered man's daughter and the son-in-law who was the plaintiff. The plaintiff brought an action for damages for breach of copyright. It was observed thus:

> "....in the circumstances in which the defendant, in breach of the plaintiff's copyright, handed these photographs to the press knowing the use to which they were going to be put, we award substantial and heavy damages of a punitive nature. Quite apart from the ordinary law of the land, the power so to do is expressly given by statute.[7]

The Bombay High Court has had an occasion to deal with a similar issue in *Kesari Maratha Trust v. Devidas Tukaram Bagul*[8], the respondent a writer in Maratha took an artistic photograph of a Marathi poet, Shri. Suresh Bhat. He claimed that his study of poems of Suresh Bhat helped him to understand his personality and with this back ground, he tried to show high lights, and version and had produced artistic effects in the said photograph by a strong and peculiar background with focus in a particular manner. The appellants used this photograph to cover news of award giving function arranged by the Gosh to the writers in Marathi and they did not indicate that the photograph was taken by the respondent despite his demand.

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6. [1960] 2 All E R 806.

7. Ibid.

The trial judge awarded damages to the respondents. On appeal the Bombay High Court upheld the order of the appellants to pay damages to the respondent who initiated action only to establish his ownership of copyright rather than monetory benefits.

These decisions indicate that one cannot publish photographs in newspapers violating copyright of others.

The copyright issues concerning publication of certain items in the newspapers are inevitably associated with the question of professional ethics and code of conduct evolved by the journalists in course of time. At present the Press Council of India plays the pivotal role of overseeing the practices of newspapers to ensure that they observe the ethics or follow the code of conduct, which have not grown to be law.

In fact at present what our Press Council treats as ethics involves copyrights. However since all concerned do not care to take upon them as copyright issues, law or courts do not deal them with.

In consonance with this view is the general impression that news reports on publication in newspapers assume the Status of public property. As such it does not have copyright. The Press Council observed[9] that a newspaper lifting an item from another should say 'courtesy to so and so'. But even this acknowledgement is not sufficient in the case of articles and features.

Using or passing off the writing or ideas of another as one's own without acknowledging the source is violative of journalistic ethics.[10] A decision in such matters is difficult process, as the Council has to embark upon an inquiry resembling copyright complaints. However, in case of interviews conducted by two

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[8]. IPLRI999Jan.71.

[9]. B.K.Tiwari v. Navabharat, (1993-94) A.R.75.

[10] Ravi Kumar v. Times of India, (1987) AR. 101.

separate publications with an eminent personality on the same issue, similarities and repetitions are inevitable. Such close identity is not sufficient to establish the charge of plagiarism This was decided by the Council in *Sruti v. Illustrated Weekly*.[11] In this case the editor of Sruti, a magazine on art publication, complained that the *Illustrated Weekly* had stolen and published fifty five lines from an article in one of its issues published two months earlier on a blind violinist. According to the complainant, the Weekly had also turned down his advice to acknowledge the source of the matter. But in reply the respondent claimed that the said matter was the report of an interview with the violinist carried out by one of its correspondents. It was also asserted that the correspondent had taped the interview. The complainant had not responded to the offer of the respondent to hear the tape of the said interview. The Inquiry Committee verified the legitimacy of the interview from the violinist himself. Satisfied with his explanation the Council dismissed the complaint.

In Bindu Bhama v. Jansatta [12] the facts show that Ms.Bindu Bhama, a freelance journalist, had sent an article and transparencies to the editor of *Janasatta* on 'Sex Change: Limitations and Possibilities'.Inspired by the newspaper reports on change in sex by operation, she wrote the article after carrying out thorough research for one and a half months. She submitted that the respondent editor had assured its publication. Later she was shocked to find an article under the caption 'Better truth of a Fairy Tale' having the same content but worded differently by Mr.Alok Tomar, the principal correspondent of the paper. Two of her transparencies had been published along with the article. On inquiry, the editor denied plagiarism.

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11. (1989-90) A.R 107, the publication of a photograph may violate copyright. See Pablo Bartholomew v. Sunday,(1992-93) A.R. 190.
12. (1989-90} ARI15.

She sent a letter of protest to the editor who later mentioned her name in a correction. The principal correspondent submitted that he had neither seen nor was inspired by the complainant's article. He asserted that he had been a writer on science for five years and was already investigating the subject, collecting materials for an article. The Council held that it was unethical on the part of the editor to have retained the manuscript after finding it unfit for publication. On comparison it was found that the article was materially different. But. it was held that publication of the transparencies along with the article was an unethical conduct. The decision shows that in such cases the editor ought to have informed the complainant that they were investigating the same subject matter and ought to have returned the manuscript.

In *Harishankar Nigam v. Dainik Bhaskar,* [13] the complainant alleged that. the respondent had lifted word to word from Deshbandu. It hurt the complainant, as the report was prepared after immense endeavours and sincere efforts and industriousness. The Press Council held that this was a case of blatant plagiarism condemning the respondent and reminded him that the practice of lifting news from other newspapers and publishing them subsequently as their own, will conflict with the high standards of journalism. To remove its unethically, the lifting" newspaper must duly acknowledge the sou ce of the report. Indeed what the lifting newspaper does is violative of copyright of the other still the Council preferred to treat it differently.

The Copyright law stands for protecting the individual interest. It also provides incentives to the authors to encourage creative new works. Here the protection is available to the

13. (1996-97) A.R.176 the Press Council's No.52 and 53 of the Norms of Journalistic Conduct.

expression of the ideas. In *R.G. Anand v. Delux Films*,[14] the Supreme Court discussed various aspects and formulated seven propositions. The Court observed thus:

> There can be no Copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of the copyright in such case is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.....
>
> Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.[15]

Thus the Copyright Act, 1957 lays down an elaborate legal framework for the exercise of the above right and seeks to strike a delicate balance between allowing the creator of a work the ruits of his labour and making it possible for the society as a whole to enjoy the benefits of the creation.[16].

The present law regarding journalists' copyright is inadequate. The news *per se* does not enjoy any copyright. If the journalist has given his own comments or used his skill in the manner of presentation, he can claim copyright. But that also is the right of the employer i.e., the newspaper owner. But the Freelance journalist stands on a different footing.

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[14]. A.I.R. 1978 S.C. 1613. The plaintiff is an architect by profession and also a playwright, Dramatist and producer of stage plays. The defend of had requested the plaintiff to supply a copy of the play so that the defendant may consider the desirability of making a film on it. In this case the plaintiff alleged that the picture released by the defendant 'In Delhi' was very much like his play 'Hum Hindustani'.

[15]. *ibid.* 1627.

[16]. K.S.Venkateswaran, *Mass Media Laws and Regulation in India* (1993), p.51.

INTERNATIONAL ENVIRONMENTAL LAW PRINCIPLES:

NATURE AND SCOPE IN INDIA

Bhat Sairam [1]

Introduction:

Much of the law to protect the environment has roots, that are deep in history, but the conceptual basis of environmental law is still developing. It is guided by distinctive principles, but there is as yet no 'Grand Theory' and it remains characterised by ad hoc- theory, without even agreement as to its boundaries. Legal evolution, like social and biological evolution, proceeds by fits and starts immediately pressing problems. This relatively undeveloped quality of environmental law means it is still possible to shape it. An optimistic view is often taken of environmental law; that a new law will cure our environmental ills, whatever these are perceived to be. However this optimism is frequently absorbed into the shadow between aspirations for a better life and reality. It is therefore important that environmental law is read critically and that the inherent limitations of relying on law alone are acknowledged.

Almost all national laws deal with, environmental problems in the same way it has traditionally dealt with other problems; in an individualist manner and favouring property.[2] To approach the law in a critical, but constructive way we draw upon a wide

[1] Senior Research Officer, CEERA, National Law School of India University, Bangalore.

[2] Sue Elworthy & Jane Holder, Environmental Protection, Butterworths, London, 1997 p.3

range of disciplines, periods and media. Understanding environmental problems requires making forays into other disciplines because the sources of environmental harm are diverse, multi-casual and themselves cross disciplinary boundaries.[3]

Early Developments:

Environmental law is a relatively new field; other branches of law have historically been used to remedy environmental problems. In the common law system, tort law-which provides remedies for harm caused by one individual to another-provided the necessary legal foundation in early cases. Nuisance actions were the most popular, because they allow a successful claimant not only to receive compensation, but also a court order to abate the nuisance, such as a smell or smoke. In the civil law system claimants invoked tort and property law in much the same way. Historically, however, tort law, based as it is on the protection of individual rights and the need to prove specific injury, has not been a significant means of preventing environmental degradation.

The inadequacy of tort and property law convinced governments, including local authorities, to adopt measures to tackle the most pressing environmental problems. There is some debate regarding the true nature of the first local ordinances regulating odours, smoke, and wastewater. Some scholars argue that they are early environmental statutes, while others see them simply as health-based policies having the effect of regulating environmental problems. Most of these early measures were, in fact, enacted after sporadic crises that endangered public health.[4]

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[3] *Ibid* p.4.

[4] Http://www.worldbank.org/legal.

International initiatives:

Classical international law regulates relations between sovereign States. The developing field of international environmental law faces challenges because it is concerned with natural systems. It follows the forms and procedures of international law and so is constrained by national frontiers but it also seeks to mediate the relationship between people and nature, safeguarding the integrity of ecosystem. International Environmental Law links individuals and their local government into a worldwide network, because each country's own legislation and institutions are assigned the job of applying the shared environmental rules. However when one considers how the weather, transports pollution, how species migrate, how trade of a food product like coffee can carry pesticide residues, how tourists, business staff, or visitors move daily around the world, it is evident that each country needs to undertake roughly equivalent environmental protection measures. Law is the mechanism for defining and applying those services.

Thus environmental rules cut across all artificial national boundaries, just as watersheds or wide pattern do. Environmental law functions wherever nature's systems are found, and adapts human behaviour to work within the constraints of the environment.[5]

Legal Dilemmas:

It was in 1970 that the world started to look at protecting the Earth and its environment. It started with the observation of the Earth Day in America. Later the UN convention on Human Environment in 1972 took the worlds attention towards conservation and preservation of the human environment. The uncertainity of scientific proof and its changing frontiers from time to time have led to changes in environmental

[5] Ibid, p. 124.

concepts between the Stockholm Conference of 1972 and the Rio Conference of 1992. The emphasis shifted to the 'Precautionary Principle', from the 'assimilative capacity' rule, at the U. N. general Assembly resolution on World Charter For Nature, 1982. This was reiterated in the Rio Conference of 1992 in Principle 15.[6]

Major instances of environmental harm, whether or not accidental, are likely to have transfrontier connotations. The sources of the damage, or the persons responsible for it, may be in countries other than those where the damage occurs: there may be victims or defendants from several countries, and so on.

Domestic, or national, law refers to the legal system applicable to a defined territory over which a sovereign power has jurisdiction. International law, on the other hand, regulates the conduct of states and other international actors. Over the years domestic and international systems of law have evolved in parallel. In certain fields and regions of the world, international law has shaped and significantly contributed to the development of domestic environmental law. Yet international environmental law also reflects domestic experiences considered successful by the Community of Nations. The result is a complex relationship in which the two levels of environmental law mutually contribute to and reinforce each other.

Principles of international environmental law:

International environmental protection, though largely developed in the last decades, confronts two major problems: the feebleness of international law considering its enforcement,

[6] principle 15: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage; lack of full scientific certainty shall not be used as a reason for proposing cost effective measures to prevent environmental degradation.

and the need for economic development in many countries. International environmental law is at a very early stage of development and has evolved at a time when the heterogeneity of the international community has rapidly intensified and when economic problems have correspondingly increased and the needs and aspirations of the poorer States have become urgent.

The traditional sources of international law are international treaties and customs. However, other texts, such as UN General Assembly Resolutions or Declarations, which, in principle, have no binding effect, could be considered atleast as guidelines towards a rational interpretation of international environmental law. Treaties must be ratified by States in order to bind them legally.

No equivalent to the Universal Declaration on Human Rights or the International Covenant on Civil and Political Rights or Economic and Social Rights has yet ben adopted or appears imminent. Any effort to identify general principles and rules of international environmental law must necessarily be based on a considered assessment of state practice, including the adoption and implementation of treaties and other international legal acts, as well as the decisions of international courts and tribunals.

The rights and obligations of States pertaining to the protection of the environment constitute the essence of international law, since its rules are *letterae mortae* if they have no power to impose their respect or to be enforced. Certain rules imposing the respect of environmental. protection regulations are included in UNEP principles, in the UN Convention on the Law of the Sea (UNCLOS), and in the projects of bodies such as the International Law Commission (ILC), the International Law Association (ILA), the World Commission on Environment and Development (WCED) and

in the UN's Conference on Environment and Development (UNCED) Rio Declaration. The main principles of international environmental law include:

Duty to prevent, reduce and control environmental harm:

The responsibility or obligation, not to cause damage to the environment of other states or of areas beyond the limits of national jurisdiction is one of the fundamental objective for the development of international environmental law. According to this customary principle, the States are required by international law to take adequate steps to control and regulate sources of serious global environmental pollution or trans boundary harm, within their territory or subject to their jurisdiction. Principle 21 of the 1972 Stockholm Declaration on the Human Environment imposes to States the obligation to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or to areas beyond the limits of National jurisdiction.[7]

The responsibility of states not to cause environmental damage in areas outside their jurisdiction pre-dates the Stockholm Conference and is related to the obligation of all states 'to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and war'. The obligation was subsequently relied upon and elaborated by the Arbitral Tribunal in the much cited Trail Smelter case,[8] which stated that : under the principles of international law... no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another of the properties or persons therein, when the case is of serious consequences and the

[7] The Principle of sustainable development which was to be read with the precautionary principle and all other principles which gave lexical priority to protecting the environment and bio-diversity.

[8] United States v. Canada, 3 R.I.A.A [1941] 1907.

injury is established by clear and convincing evidence'. Although the Trail Smelter case involved a closely circumscribed arbitration proceeding, it is cited frequently as the genesis for the rule against causing environmental damage in a foreign state or the global commons.

The development of this principle can also be traced to earlier environmental treaties besides the Stockholm treaty. The 1951 International Plant Protection Convention in its preamble expressed the need to prevent the spread of plant pests and diseases across' national boundaries. The 1963 Nuclear Test Ban Treaty in Article I(1)(b) prohibits nuclear tests if the explosion would cause radioactive debris 'to be present outside the territorial limits of the state under whose jurisdiction or control such explosion is conducted' and the 1968 African Conservation Convention in Article XVI(1)(b) requires consultation and co-operation between parties where development plans are 'likely to affect the natural resources of any other state'. Under the 1972 World Heritage Convention in Article 6(3) the parties agreed that they would not take deliberate measures which can directly or indirectly damage heritage which is 'situated in the territory' of other parties. Article 30 of the Charter of Economic Rights and Duties of States, which provides that: 'all states have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction'. It was endorsed by the 1975 Final Act of the Helsinki Conference on Security and Co-operation in Europe, Principle 3 of the 1978 UNEP Draft Principles, which requires states to ensure that 'activities within their jurisdiction or control do not cause damage to the natural systems located within other states or in areas beyond the limits of national jurisdiction' and the 1982 World Charter for Nature, which in Paragraph 21 (e) declares the need to 'safeguard and conserve nature in areas beyond national jurisdiction'.

Even more compelling is the reference to Principle 21 in many treaties. It has been referred to, [as in the 1992 Baltic Convention] or wholly incorporated [as in the 1972 London Convention; the 1979 LRTAP Convention; and the 1985 Vienna Convention], in the preamble to several treaties. It was fully reproduced in the operational part of a treaty, for the first time, as in Art. 3 of the 1992 Biodiversity Convention. Principle 2 of the Rio Declaration is incorporated into the Preamble of the 1992 Climate Change Convention.

Other treaties have also echoed this principle. The 1978 Amazonian Treaty in Art. IV declares that 'the exclusive use and utilisation of natural resources within their respective territories is a right inherent in the sovereignty of each state and that the exercise of this right shall not be subject to any restrictions other than those arising from International Law' . The 1981 Lima Convention in Art. 3(5) requires that activities be conducted so that " they do not cause damage by pollution to others or to their environment and that pollution arising from incidents or activities under their jurisdiction or control does not, as far as possible, spread beyond the areas where [they] exercise sovereignty and jurisdiction. The 1982 UNCLOS transforms the 'responsibility' into a duty". Under Article 193 of UNCLOS states have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment. UNCLOS shifts the emphasis from a negative obligation to prevent harm to a positive commitment to preserve and protect the environment. The 1985 ASEAN Convention goes further, by recognizing in Article 20 the responsibility not to cause environmental damage as a 'generally accepted principle of law'.

Transboundary co-operation[9] *in cases of environmental risk and the Principle of Preventive Action:*

This principle expects from States to co-operate with each other in mitigating transboundary environmental risks.[10] Closely related to this principle in the 'Principle of preventive action, which obligates nations in preventing damage to the environment, or to otherwise reduce, limit or control activities which might cause such damage. The preventive principle seeks to minimise environmental damage as an objective itself. The preventive principle requires an activity which does or will cause damage to the environment in violation of the standards established under the rules of international law to be prohibited and has been described as being of 'overriding importance in every effective environmental policy, since it allows action to be taken to protect the environment at an earlier stage. It is no longer primarily a question of repairing damage after it has occurred. The preventive principle is supported by an extensive body of domestic environmental protection legislation which establishes authorization procedures, as well as the adoption of international and national commitments one environmental standards, access

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[9] The Indus Waters Treaty Between India and Pakistan, 1960 is a classic example on a successful bilateral agreement on sharing of water resources of the Indus.

[10] The North American Free Trade Agreement 1992 [NAFTA] between Mexico, US and Canada is a best example of balance of trade and environmental protection. The agreement through Art. 2015 provides and obligates States to :

1. To publish State of their environment annually.
2. Declare any emergencies.
3. Promote Environmental education.
4. Conduct E.I. Audit.

It also creates mechanism that gives trade experts facing an environmental issue with scientific and environmental expertise to make a 'full informed decision'.

to environmental information and the need to carry out environmental impact assessments in relation to the conduct of certain proposed activities. The current focus on pollution prevention, both by industry and policy makers, reflects a growing knowledge that avoiding or reducing pollution is almost always less expensive than attempting to restore a contaminated area. The preventive principle may, therefore take a number of forms, including the use of penalties and the application of liability rules. 'If it is not possible to make a decision with some confidence, then it makes sense to on the side of caution and prevent activities that may cause serious or irreparable harm. An informed decision can be made at a later stage when additional data is available or resources permit further research. To ensure that greater caution is taken in environmental management implementation of the principle through judicial and legislative means is necessary'. [11]Thus the principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity Precautionary duties must not only be triggered by the suspicion of concrete danger but also by justified concern or risk potential. The principle is still.evolving, for though accepted as part of the international customary law' 'the consequences of its application in any potential situation will be influenced by the circumstances of each case'.[12] The principle suggests that where there is an identifiable risk of serious or irreversible harm, including, for example, extinction of species, widespread toxic pollution in major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment, and where there is uncertainty as to the

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[11] Charmian barton, Vol. 22, Harv. Envtt.L. Rev. [1998]. P. 509 at 547.

[12] Dr. Sreenivasa Rao Pemmaraju, [Special Rapporteur], International Law Commission, first Report, dated 3-4-1998, paragraphs 61 to 72.

extent or nature of the damage, the burden of proof be placed on. The importance of the principle was stressed in A.P Pollution Control Board v. Prof M. V. Nayadu[13] in a Division Bench Judge by J. Jagannadha Rao and M. B. Shah, wherein, following the 'reasonable man' test, the exemptions under Sec. 19 of the Water Act, 1974, were held to have dangerous potential, as they clearly ignored the precautionary principle, which could be 'catastrophic'.

In Re Delhi Transport Departmenr[14] the precautionary principle, it was stated by Kuldip Singh, J., himself and Saghir Ahmad, J., which is a part of the concept of sustainable development [15] has to be followed by the State Government in controlling pollution and this constitutes an obligation on their part.

In the case of Narmada Bacchao Andolan v. Union of India[16], the corresponding burden of proof with regard to the precautionary principle was placed on the person who wants to change the status quo and who applies to the Court, where the extent of the damage is not known. On the other hand, where the effect on the ecology or the environment, of the Industry is known, the foremost task is of taking steps to mitigate the same. Where the effect of the Industry on the environment is known, the principles of sustainable development and precautionary principle will have to be applied.

In Vellore Citizens Welfare Forum[17] the Court referred to the 'precautionary principle' and the 'principle of burden of proof in environmental matters'.

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[13] [2001] 2 SCC 62.
[14] [1998] 9 SCC 250.
[15] S. Jagannath *v.* Union of Indai, AIR 1997 SC 811.
[16] [2000] 10 SCC 250.
[17] [1996] 5 SCC 647.

Obligation to Co-operate:

Principle 24 of the Stockholm declaration reflects a general political commitment to international co-operation in matters concerning the protection of the environment and Principle 27 of the Rio Declaration states rather more succinctly that 'States and people shall co-operate in good faith and in a spirit of partnership in the fulfillment of the principles embodied in this Declaration and in further development of international law in the field of sustainable development'. The importance attached to the principle of co-operation and its practical significance, is reflected in many international instruments, such as the Preamble to the 1992 Industrial Accident Convention, which underlined in support of the specific commitments 'the principles of international law and custom, in particular the principles in good neighbourliness, reciprocity, non-discrimination and good faith'.

The obligation to co-operate is affirmed in virtually all international environmental agreements of bilateral and regional application[18] and global instruments.[19] The obligation may be in general terms, relating to the implementation of the treaty's objectives, such as in the Art. XVI(1) of the 1968 African Conservation Convention, or relating to specific commitments under a treaty, such as in Art. 14 of the 1989 Rome Convention.

The general obligation to co-operate has been translated into more specific commitments through techniques designed to assure information sharing and participation in decision making. These specific commitments include rules on environmental impact assessment, rules ensuring that neighboring states receive necessary information [requiring

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[18] The 1933 London Convention in Art. 12(2); 1940 Western Convention in Art. VI; and the 1991 Alpine Convention in Art. 2(1).

[19] The 1985 Vienna Convention in Art. 2(2); and the 1992 Biodiversity Convention in Art. 5.

information exchange,[21] prior notification[21] and prior informed consent[22] consultation[23] and notification in the case of an emergency[24]], the provision of emergency information and emergency.

assistance,[25] transboundary enforcement of environmental standards and the requirement to co-ordinate international scientific research.[24] The extent to which these commitments are interrelated is reflected in Principle 7 of the 1978 UNEP Draft Principles.

"Polluter Pays" principle:

Polluter pays principle holds the polluter who creates an environmental harm liable to pay compensation and the costs to remedy that harm. The principle of polluter pays means whoever has contributed to the environmental degradation or contamination; the responsibility is on that individual:

* to pay for the damages

* Or to install costly environmental equipments to prevent happening of environmental degradation.[27]

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[20] 1982 UNCLOS which describes the exchange of data related to pollution of the marine environment.

[21] Confirmed by Principle 19 of the Rio Declaration.

[22] 1989 Basel Convention.

[23] Illustrated by Principle 6 of the UNEP Principles for Shared Natural Resources.

[24] Codified by Principle 18 of the Rio Declaration.

[25] The 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency is designed to minimise international response time by opening direct channels for requesting assistance and readying the international community for prompt and effective action.

[26] The 1985 Vienna Convention's ability to co-ordinate scientific research is major reason for the ultimate success of the Parties in phasing out ozone destroying chemicals in the Montreal Protocol and subsequent revisions.

[27] A. Kiss, Introduction to International Environmental Law, United Nations Institute for Training and Research, Geneva, 1997. P. 82.

This principle means that the polluter should bear the expenses of carrying out the measures decided by public authorities to ensure that the environment is in an acceptable state.[28]

The OECD's[29] definition of this principle is that the polluter should bear the expenses of carrying out measures decided by public authorities to ensure that the environment is at an "acceptable state," or, in other words, that the cost of these measures should be reflected in the cost of goods and services, which cause pollution in production and/ or in consumption. According to eminent commentators, the "Polluter Pays" principle is essentially a principle of economic policy and its primary object is economic, not environmental, that is the restitution of cost of pollution.[30] This principle has been held to be a sound principle by the Supreme Court in Indian Council for Enviro Legal Action [31] and the Kamal Nath case. In Vellore Citizens case the Court held that any principle evolved in this behalf should be simple, practical and indigenously suited, and that once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the nature

[28] According to Art. 2(2)(b) of the Convention fro Protection of the Marine Environment, 1992, polluter pays principle means: 'the cost of pollution prevention, control and reduction measures are to be borne by the polluter'.

[29] Most literature available states that the polluter pays principle first arose in the International OECD document. But it was Alfred Marshall Pigou, who developed the concept of externalities, costs imposed or benefits conferred and coined the notion of 'pollution cost'. To discourage the activity that caused the negative externality, Pigou advocated a tax on activity.

[30] The Indian Judiciary has applied the principle in Vellore Citizen's Welfare Forum v Union of India AIR 1996 SC 2715. Also see the MoEF, Policy Statement for Abatement of Pollution, para 3.3, 1992

[31] AIR 1996 SC 1069

of the activity. The Court stated the rule to have derived from the Common law rule of absolute liability. So in this case, the polluting industries were held absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to underground water, and were bound to take all necessary measures to remove pollutants in the affected areas. The 'Polluter Pays' principle was interpreted to mean that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of 'sustainable development' and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology. [32] This recognizes that the polluter should pay for nay environmental damage created and that the burden of proof in demonstrating that a particular technology, practice or product is safe should lie with the developer, not the general public. Unfortunately, when and how much the polluter should pay is often unclear.[33]

The seeds of the polluter pays principle was laid in the Shriram gas leak case,[34] wherein the Supreme Court unconsciously brought to fore the premises and imposed liability in the form of 'absolute liability'. In Indian Council for Enviro Legal Action v Union of India[35], an action was bought to stop and remedy the pollution caused by several chemical industrial plants in Bichhri village, Rajasthan. The Respondents operated heavy industrial plants there, producing chemicals

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[32] Dr. Nilima Chandiramani, Effectiveness of Environmental Legislation in India: Role of Judiciary; 'http://wwwxcom.it/licef/abstracts.html

[33] Polluter pays principle states that the polluter should pay: but who is the polluter? Is it producer or is it consumer? Increased cost of pollution prevention may be transferred by the producer on the consumer.

[34] M. C Mehta v Union of India AIR 1987 SC 1086

[35] [1996] 2 SCC 212

such as oleum and the highly toxic 'H' acid [the manufacture of which is banned in western countries]. toxic waste water was untreated and left to be absorbed into the earth causing underground supply of water to be polluted. The soil also became polluted and unfit for cultivation. The Court while imposing absolute liability, held the Company liable not only to compensate the victims of pollution but also the cost of restoring the pre-environmental degradation position.

In Vellore Citizens Welfare Forum case, the Court while closing down tanneries which polluted agricultural lands making them totally unfit for cultivation, the Court held that constitutional and statutory provisions make the 'Polluter Pays principle' part of the law of the country. More recently the Supreme Court while imposing exemplary damages on Mr.Kamal Nath of Rs.10 lakh reserved its right of imposing polluter pays principle on further review.

Principles of equal access and non-discrimination

The principle of non-discrimination obliges the States to give equivalent treatment to the domestic and transboundary effects of pollution and requires that polluters causing transfrontier pollution should be subject to standards no less severe than would apply to pollution with domestic effects only. [36]

Principles of sovereignty over natural resources [37]

The rules of international environmental law have developed within the context of two fundamental objectives polluting in opposing derections. One of these is that states have sovereign

[36] See generally provisions of The Basel Convention of Transboundary Movement of Hazardous Waste 1998

[37] Un resolutions. General Assembly resolution 626 [VII] stipulates that States may exercise their rights freely to use and to exploit their natural wealth and resources 'wherever deemed desirable by them for their own progress and economic development';

right over their natural resources. This objective is set out in principle 21 of the Stockholm Declaration. Principle 21 [38] is the cornerstone of international environmental law. In fact, even thirty years after its adoption states negotiating the WSSD or Rio Declaration were unable to significantly improve upon, develop, scale back or otherwise alter the laguage in adopting Principle 2. Two words were added to recognize that states have the right to pursue their own environmental and developmental policies.

One State sovereignty: The principle of permanent sovereignty over natural resources dictates that natural resources are allocated to Sovereign States according to the boundaries established to delimit their respective land territory and territorial seas. The UN General Assembly, in Article 1 and 2 of the Charter of Economic Rights and Duties of States, affirmed this priniciple as follows: "Every State has the sovereign and inalienable right to chose its economic system, as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever. "It also declared, expressly, that "every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its natural resources."

Shared natural resources: As for the shared natural resources, that is the resources which do not fall wholly within the exclusive control of one State, 19 Article 3 of the Charter of Economic Rights and Duties of States decrees that." in the exploitation of natural resources shared by two or more countries each State must co-operate on the basis of a system

[38] Principle 21 provides that: States have, in accordance with the Charter of the United nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other Sates of aresa beyond the limits of national jurisdiction.

of information and prior consultation in order to achieve maximum use of such resources without causing damage to the legitimate interests of others."

The importance placed by States on the principle of permanent sovereignity over natural resources is also reflected by its frequent invocation, in various forms, in international environmental agreements and during thier negotiation. The 1933 London Convention in Article 9(6) affirmed that all animal trophies were 'the property of the Government of the territory concerned'. The 1971 Ramsar Convention in Article 2(3) emphasised the inclusion of national wetland sites in its list of Wetlands did not prejudice the exclusive sovereign rights of... the party in whose territory the wetland is situated'. The 1983 International Tropical Timber Agreement in Article 1 recalled the 'sovereignity of producing members over their natural resources'. Recent treaties also refer to the sovereign right of states over natural resources in their territory: the Preamble of the 1989 Basel Convention recognised that'all states have the sovereign right to ban the entry or disposal of foreign hazardous wastes and other wastes in their territory'. The preamble of the 1992 Climate Change Convention reaffirmed'the principle of sovereignity of states in international cooperation to address climate change'. The 1992 Biodiversity Convention more specifically reaffirmed that states have sovereign rights... over their natural resources, and that according to Article 15(1)' the authority to determine access to genetic resources rests with the national governments and is subject to national legislation'.

Sovereignity and extraterritoriality: The sovereign right to exploit natural resources includes the right to be free from external influence over their exploitation. This aspect of Principle 21/Principle 2 is brought into question in the increasingly frequent disputes which are occurring over extraterritorial application of environmental laws of one state to activities

taking place in areas beyond national jurisdiction. In the absence of generally accepted international standards are likely to extend their application to activities carried out in areas beyond their territory, particularly where they; believe such activities cause significant environmental damage of affect vital econonic interests. Examples of these are the Fur Seals Arbitration case and the ban of import of yellow fin tuna, both instated by the USA. In such circumstances it is unlikely that the principle of territorial sovereignity or permanent soverignity over natural resources, can provide much assistance in allocating rights and responsibilities of state over environmental policy.

Good Neighbourliness:

The Principle of 'good neighbourliness' enunciated in Art. 74 of the UN Charter in relation to social economic and commercial matters has been translated into the development and application of rules promoting international environmental cooperation. The principle is reflected in many treaties and other international acts and is supported also by state practice, particularly in relation to hazardous activities and emergencies such as in the Trail Smelter case [1941], the World Charter for Nature [1982] and the ILC Draft Articles in International Liability [1990].

Principle of Sustainable Development:

The ideas underlying the concept of sustainable development have a long history in international legal instrument. The term itself began to apear in treaties in the 1980 and the general principle of sustainable development appears to have been first referred to in a treaty in the preamble to the 1992 EEA Agreement. The term 'sustainable development' is generally considered to have been coined by the 1987 Brundtland Report, which defined it as' development that meets the needs of the present without compromising the

ability of future generations to meet their own needs'. Since then many treaties and other international acts have supported directly or indirectly, the concept of sustainable development and the principle that states have the responsibility to ensure the sustainable use of natural resources.

Common property and the "reasonable use" principle: Common property, in international law, refers primarily to areas beyond national jurisdiction, of which the high seas and superjacent airspace are the most important examples. The principle of international law is that these common spaces are open for legitimate and reasonable use by all states, and may not be appropriated to the exclusive sovereignity of one state. Thus, for example, according to an ICJ decision, all states that fish in the high seas must make a rational use of their fishing capacities in order to preserve the natural resources of the sea for other states.

Equity and equitable utilisation: The concept of "equity" is fundamental in law. However, pertaining to its use in international environmental law and, in particular, in the use of shared natural resources or common property its contents are not clear. The "equitable" utilisation of resources entails a balancing of interests and taking into account of all relevant factors. What these factors are and how they can be balanced depends entirely on the context of each case.[39]

In relation to the allocation of shared natural resources, equity is likely to play an important role. The Preamble to the 1987 Montreal Protocol reflects the aim of controlling' equitably total global emissions of substances that deplete the ozone layer', an aim usually translated into specific obligations through the process of intergovernmental negotiations -as reflected in the 1990 and 1992 Adjustments and Amendments to the 1987 Montreal Protocol. The 1992 Climate Change Convention will

[39]H ttp://business.hol.grbio/allfile/HTML

require the equitable allocation of emission rights and the Biodiversity Convention will require the determination of what constitutes an equitable sharing of the benefits arising out of the use of genetic resources.

Intergenerational equity: Is among the newest norms of international environmental law. It can best be understood not so much as a principle, but rather as an argument in favour of sustainable economic development and natural resource use. If present generation continue to consume and deplete resources at unsustainable rates, future generations will suffer the environmental; [and economic] consequences. It is our children and grandchildren who will be left without forest [and their carbon retention capacities], without vital and productive agricultural land and without water suitable for drinking or for sustaining cultivation or aquatic life[40] It is also referred to in many of the early environmental treaties, including in the Preamble of the 1946 International Whaling Convention, the Preamble of the 1968 have sought to preserve particular natural resources and other environmental assets for the benefit of present and future generations. These include wild flora and fauna, such as in the Preamble of the 1973 CITES; the marine environment, such as in the Preamble of the 1978 Kuwait Convention; essential renewable natural resources, such as in the Preamble of the 1976 South Pacific Nature Convention; the environment generally, such as in the Preamble of the 1977 ENMOD Convention; the resources of the earth, such as in the Preamble of the 1979 Bonn Convention; natural heritage, such as in the Preamble of the 1985 Nairobi Convention; natural resources, such as in the Preamble of the 1985 ASEAN Convention; water resources, such as in Art. 2(5)(c) of the 1992 Transboundary Waters Convention;

[40] In State of Himachal Pradesh v Ganesh Wood Products AIR 1996 SC149, the Supreme Court recognized the significance of Intergenerational equity and held a government department's approval to establish forest-based industry to be invalid because 'it is contrary to public interest involved in preserving forest wealth, maintenance of environment and ecology and considerations of sustainable growth and Intergenerational equity'.

biological diversity, such as in the Preamble of the 1992 Biodiversity Convention; and the Climate system, such as in Art. 3(1) of the 1992 Climate Change Convention.

Common but different responsibilities: The 1992 Rio, Earth Summit articulated the norm of common but different responsibility. With regard to global environmental concerns such as global climate change or stratospheric ozone layer depletion, all nations have a shared responsibility, but richer nations are better able than poorer nations to take the financial and technological measures necessary to shoulder the responsibility[41]

Sustainable Development: In October 1982, the UN General Assembly adopted the World Charter for Nature and Principles of Sustainable Development. The Agreement expressly recognized the principle of sustainable development, defined as using living resources in a manner that 'does not exceed their natural capacity for regeneration' and using' natural resources in a manner which ensures the preservation of the species and ecosystems for the benefit of future generations'. The Bruntland report on 'Common Future' also endorse the view by stating 'humanity's ability to ensure that [development] meets the need of the present generation without compromising the ability of future generations to meet their needs.[42]

The Public Trust Doctrine:

This doctrine was coined in the Indian Jurisprudence by J. Kuldip Singh [43] in the Span Motel case. A certain portion of land on the banks of the river Beas was leased out to an

[41] Environmentalists stress the need for incorporating the same view in the WTO round of negotiations.

[42] The Government of India has adopted the principle of Sustainable development through the MoEF policy statement on National Conservation Strategy and Policy Statement on Environment and development, para 8.7,1992

[43] He opined that while the public trust doctrine under the English Common law extended only to certain traditional uses, American Courts had expanded the doctrine to the effect that protection of ecological values was among the purposes of public trust.

entity known as Span Motels Private Ltd in 1972. The ownership and control was taken over in 1981 by a Company in which Mr. Kamal Nath [an Ex Minister for Environment and Forest in the Central Government]. In 1988 the Motel encroached upon some land adjoining the leasehold and built extensive embankments, while a grant was made the ownership on this land remained with the Forest Department. This leased land was part of the protected forest. The State Government can subject to certain conditions, lease out land, which is part of the protected forest area. The court cannot thus ordinarily interfere with this power except on grounds of procedural irregularities or abuse of discretionary powers. The issue before the court was to devise a manner in which it could impose substantive restrictions on the powers of the Government so as the ensure that areas of immense natural beauty and ecological value would not be converted for private, commercial use. For this, the Court adopted the common law doctrine of Public trust' as it had developed in the United States.[44] This doctrine has its origins in ancient Roman law. It basically enjoins the following restrictions on governmental authority:

1. The property subject to trust must not only be used for a public purpose, but it must be available for use by the general public.

2. It may not be sold.

3. It must be maintained for particular types of uses.[45]

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[44] The Court placed great reliance on the following article to cut, out the basic principle in American Law regarding the doctrine of Public Trust: Joseph L. Sax, 'Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', Michigan Law review, Vol. 68, Part I, p. 473

[45] Ibid p. 473

As the Court said, the basis for this doctrine lies in the belief that 'certain resources like air, sea, water and the forests have such a great importance to the people as a whole, that it would be wholly unjustified to make them the subject of public ownership' [46] Applying this doctrine to the facts of the Kamalnath case, the Court held that the State Government committed patent breach of public trust by leasing the ecologically fragile land to the Motel management. As relief the Court quashed the prior approval granted by the Government of India, and the lease deed in favour of the Motel. Furthermore, the Court directed the State Government to take over the area and restore it to its natural condition.[47] The classic struggle' between protecting the environment and carrying on activities which further public welfare activities though not illustrated in the Kamalanath case, was perfectly brought out in the subsequent case of M. I Builders v Radhey Shyam.[48] In this case the court relied on the public trust doctrine as laid down in the Kamalnath case, to strike down the decision of a Mahapalika to construct an underground parking lot under a park of historical importance which was said to be held in public trust. Here there was a conflict between the statutory duties of the Mahapalika to maintain the park on the one hand and to construct parking lots on the other hand.

Development of the Doctrine in US:

In USA, this doctrine was initially developed as a safeguard for certain inheres like navigation and fishing which were to

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[46] This property was to be distinguished from general public property which the Government could routinely grant to private owners.

[47] The Court further held that the resolution of this conflict was in the hands of the legislature, but in the absence of a law in this regard, it was up to the courts to ensure that the public trust was not eroded, unless it is necessary for public good and is done in good faith.

[48] [1999] 6 SCC 464

be preserved for the public interest.[49] The doctrine was later expanded and made applicable to changes in the use of lands dedicated to the public interest as well.[50] The next stage in the development of the doctrine was when the court was confronted with projects, which have public justification and advantage. Since these are not purely for commercial purposes, the need for balancing different concerns arises. All these issues were addressed in the 'Mono Lake case[51] which came up before the Supreme Court of California. The Court traced the development of the Public Trust doctrine from being defined in terms if navigation and fishing to more and more expansive interpretations. As the Court pointed out, 'In administering the state is not burdened with an out moded classification favouring one mode of utilization over another'. Thus moving beyond the paradigm of traditional public utilization, the court recognised that one of the important public uses of tidelands, was the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study; as open space, as ecosystems, etc., the court emphasied that the 'public trust' was an affirmation of the duty of the state to protect the people's common heritage. However the court also recognised that this was not an absolute doctrine, and that even if in rare cases, appropriations might be practically

[49] United Central Railroad Co. v People of the State of Illinois, 36 L Ed 1018 [1892]. In this case, the Government had given a grant of land along lake Michigan to a railroad company, and later sued to quit title. The Court accepted the stand of the state, and outlined the principle that the state's title on land which is used for navigation, fishing and other commercial purposes was of a different character than that which was open to pre-emption and sale. The Government held these waters in trust and was required to preserve them.

[50] Gould *v* Greylock Reservation 350 Mass. 410 [1966].

[51] National Audubon Society *v* Supreme Court of Alpine County, 33 Cal. 3d 419. The brief facts of this case are as follows:- The waterworks department of Los Angeles had ben granted the permit to appropriate and divert a large part of the lake. As a result the lake level dropped and the ecological habitat and natural beauty of the lake were threatened.

necessary, the State must bear in mind its duty as trustee and the effect of the action on the public trust.

Principle of Integration of Environment and Development:

An element of 'sustainable development' is the commitment to integrate environmental considerations into economic and other development, and to take into account the needs of economic and other social development in crafting, applying and interpreting environmental obligations. In many ways this element is the most legalistic its formal application requires the collection and dissemination of environmental information and the conduct of environmental impact assessments. Principle 4 of the Rio Declaration provides that 'In order to achieve sustainable development, environment protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. An integrated approach to environment and development has significant practical consequences, most notably that environmental considerations will increasingly be a feature of international economic policy and law.

The New Environmental Philosophy: Globalization

In the growing jurisprudence and ethos of sustainable development, the key words are "globalization" and "equity". Several forms of environmental damage extend across national borders to the degradation of the global commons, affecting a global society. Therefore, the concept of a global society involves the need for global perspectives which, in turn, call for new definitions of jurisprudential, economic, and social relationships. Definitions which arose from the old order tend to lose their validity when reckoning with human society in a global dimension.

With the development of new philosophic systems in modern international law, such as human rights, the individual is now treated as the direct beneficiary of the law. The members of a global society, in the final analysis, are individuals, and individuals are the beneficiary of both state law and international law. Because some areas of legal rights and obligations are common to both the state and international legal systems, one can conceive of the individual as positioned in the center of two concentric circles, an inner circle embodying the operation of state law and a larger circle embodying the operation of global law. With that metaphor, in common legal areas, such as environmental law, one may envisage global values flowing into the content of state law. In such areas, global perspectives need to be considered to arrive at a true and comprehensive interpretation of individual rights and obligations. The globalization of human society and of human values has been developing during the second half of this century, and has taken a vitally significant and irreversible direction. All over the world, a stirring of global consciousness has occurred, from the theate of armed conflict to the institutions of humanitarian relief.

This is not to say that the doctrine of state sovereignty has lost its basic validity. Developing nations, including India, insist on their right to development, both in terms of the right to freely determine their economic, social, political, and cultural priorities, and in terms of their right to the use of their natural and other resources. Upon attaining independence, the new States realized that, among other things, poverty and low standards of living at home led to comparatively weaker bargaining positions in the arenas of international diplomacy and international economic opportunity.

Conclusion:

In international law, a distinction is often made between hard and soft law. Hard international law generally refers to agreements or principles that are directly enforceable by a national or international body. Soft international law refers to agreements or principles that are meant to influence individual nations to respect certain norms or incorporate them into national law. Although these agreements sometimes oblige countries to adopt implementation legislation, they are not usually enforceable on their own in a court.

India has obligation under numerous international treaties and agreements that relate to environmental issues. As a contracting party, India must have ratified a treaty, that is, by adopting it as national law before it came into force, or by acceding to it after it has come into force.[52] The Supreme Court has strongly accepted the view of Polluter pay principle in the Bichhri case[53]. Like wise the Constitution and statutory provisions protect a person's right to fresh air, clean water and pollution free environment[54] but the source of the right is the inalienable common law right of clean environment.[55]

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[52] All the above mentioned principles have taken strong roots in the legal jurisprudence of the Indian environmental laws.

[53] Indian Council for Enviro-legal Action v Union of India, 1996 (3) SCC 212.

[54] Subhas Kumar v State of Bihar, The SC interpreted Rt. To life to mean clean and healthy environment.

[55] Blackstone's commentaries on the Laws of England [1876] in respect of nuisance], Also see Vellore Citizen's welfare forum case.

INSURANCE OF MOTOR VEHICLES AGAINST THIRD PARTY RISKS - AN EXCELLENT EXAMPLE OF WELFARE MAXIMISATION THROUGH STATUTORY RISK MANAGEMENT

By

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In this article, an attempt has been made to show how the statutory provisions concerning insurance of motor vehicles against third-party risks offer an excellent example of welfare maximisation through finely-balanced statutory risk management. In the opinion of the authors, the Legislature, by enacting Chapter XI of the Motor Vehicles Act, 1988, Wherein are contained these statutory provisions, has taken adequate care of the interests of all the three concerned parties namely, the victims of motor vehicle accidents, the insured and the insurer of the offending motor vehicles. The authors respectfully submit that the decision of the Supreme Court in *British India General Insurance Co. Ltd., v. Capt. Itbar Singh* tends to upset this delicate balance by strengthening the insurer at the cost of the accident victim.[1]

Motor Vehicle Accidents and Compensation to Third Parties

Motor vehicles have been a blessing as well as a curse to mankind. On the one hand, they give man unprecedented

[1] 1958-65-1 (SC), at p.4.

freedom of mobility and on the other, they cause untold human misery and suffering by killing or maiming thousands of people every year. The fatalities arising out of road accidents in our country have been showing a steady increase over the years. Justice Krishna Iyer, in his inimitable style, describes the situation thus: "An explosive escalation of automobile accidents accounting for more deaths than the most deadly diseases, has become a lethal phenomenon on Indian roads everywhere."[2]

Every death and disablement caused by an automobile accident imposes both financial and non-financial losses on the victims and their defendants. It is fair and just that these losses be compensated by the tortfeasor. That's why, the law entitles the victims of motor accidents and/or their dependants to claim compensation from the drivers and owners of the offending vehicles by filing claim applications before the Motor Accidents Claims Tribunals which have been specifically set up for that purpose in accordance with the provisions contained in the Motor Vehicles Act.

It is fairly obvious that the drivers of motor vehicles, who in most cases are the paid employees of the owners of the said vehicle, do not have the financial capacity to pay compensation to the victims of their negligent driving. Ofcourse, the law comes to the aid of the driver by making his master, that is, the owner of the offending motor vehicle, vicariously liable for the monetary consequences of the motor accident. In many cases, it has turned out that even the owners are not sufficiently sound financially to satisfy the judgment of the court or tribunal in this regard. And what is more, they are also not found prudent enough to protect themselves against such risks by taking suitable liability insurance. This state of affairs was highly detrimental to the interests of the claimants of compensation who were unable

[2] *Concord of India Insurance Company Limited, v.Nirmala Devi, 1980 Act ,55.*

to realise the compensation awarded by the courts from the drivers and owners of the offending motor vehicles. Even where the owner did have such liability insurance, the claimant had no right to proceed against the insurer.

It is to remedy this sad situation that the Legislature had added certain provisions relating to the compulsory insurance of motor vehicles against third party risks into the Motor Vehicles Act, 1939. These provisions, with some alterations and deletions have been carried into Chapter XI of the Motor Vehicles Act, 1988 (hereinafter called 'the Act'). A look at the scheme of these provisions reveals that the Legislature has very effectively balanced the interests of all the three concerned parties, namely, the claimants (who are referred to as "Third Parties" in the context of the contract of insurance between the insurer and the insured), the insured and the insurer.

Taking care of the Interests of Third Parties (Claimants of Compensation).

1. Compulsory Insurance Against Third-Party Risks:

Section 146 of the Motor Vehicles Act, 1988 makes it obligatory for all motor vehicles plying in public places to be compulsory insured against third party risks. This compulsory motor vehicles insurance provides for protection to the owner of the motor vehicle against loss of three kinds: (1) against loss or damage to the vehicle and its accessories: (2) against loss arising out of personal injury to the owner; and (3) against loss arising from liability for death or injury caused to third parties or for damage to the property of third parties. Regarding the third species of protection, the insurance policy is a contract of indemnity under which the insurer agrees to reimburse the assured to the extent of the amount of damages which the latter may become liable to pay for the death or injury to a third party. Even though on the face of it, it might

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appear that this provision forces the owner of a motor vehicle to be prudent and thereby save himself from financial ruin in case of an unfortunate accident resulting in the death of or injury to a person, in effect, it is actually a welfare measure through which the hapless victim is assured of compensation from the financially viable insurer.

2. The Amount of Liability of the Insurer is Unlimited:

Sub-section (2) of Section 147 of the Act makes the liability of the insurance companies in such third-party claims unlimited. This is a welcome departure from the 1939 Act, where there used to be limits on the liability of the insurer. If the compensation awarded was higher than those limits, then the claimant had to realise such higher sum only from the insured and not from the insurer. As stated earlier, in many cases, such attempts would prove futile. So, by removing such limits and by making the insurer liable to the full amount of compensation, the law-makers have served the interests of the claimants.

3. Duty of Insurer to Satisfy Judgments and Awards:

Section 149 of the Act casts a duty on the insurer to pay to the claimants the decretal amount as if he (the insurer) were the judgment debtor, notwithstanding that he might be entitled to avoid or cancel the policy. In other words, the insurer has step into the shoes of the insured and satisfy judgments and awards made against persons insured in respect of third party risks.

4. Rights of Third Parties against Insurers on Insolvency of the Insured:

Section 150 of the Act provides that in the event of the insured becoming insolvent, and if the insured, before or after such insolvency, incurs any liability to third parties, then his

rights against the insurer in respect of such liability shall be transferred to and vest in the third party to whom the liability was so incurred.

5. Duty to give Information as to Insurance:

Section 151 of the Act makes it obligatory on the part of the insured to give, when asked for, such particulars with respect to the insurance policy as are specified in the certificate of insurance.

6. Settlement between insurer and the Insured:

Section 152 of the Act states that no settlement made by an insurer in respect of any claim which might be made by a third party in respect of any liability shall be valid unless such third party is also a party to the settlement.

Taking Care of the Interests of the Insured.

1. Compulsory Insurance:

Because of compulsory insurance against third-party risks, the insured is forced to be diligent in the management of his financial affairs and thus save himself from a total loss situation in case of an unfortunate motor accident resulting in the death of or injury to a person.

2. Unlimited Liability of the Insurer:

Similarly, by making the liability of the insurer unlimited, the statute has come to the aid of the insured.

Taking care of the Interests of the Insurer.

1. Insurer's Right to be made Party to the Proceedings:

Sub-section (2) of section 149 of the Act stipulates that the insurer is not liable to pay any sum in respect of any judgment or award unless he is given notice of the bringing of the

proceedings by the claimant against the insured. And the insurer to whom such notice is so given shall be entitled to be made party thereto and to defend the action on any of the grounds listed therein. Under the common law, an insurer has no right to be made a party to the action by the injured person against the insured. But such a right has been given to the insurer by the statute.

2. Insurer's Right to raise Statutory Defences

The insurer has also the right to defend himself on certain grounds. Sub-section (2) of section 149 mentions the grounds on which the insurer is entitled to defend a third-party claim. These grounds are firstly, that there has been breach of a specified condition of the policy, and secondly, that the policy had been obtained by non-disclosure of a material fact or by representation of a fact which was false in some material particular, thereby rendering the policy itselfvoid.

2 (a) Breach of a specified condition in the Policy

Clause (a) of sub-section (2) of section 149 of the new Act deals with a defence on the ground of breach of a specified condition of the policy. But it is not the breach of each and every condition embodied in the policy by the insured and the insurer that would provide the insurance company a defence to disclaim its liability. The said clause makes it clear that the condition which according to the insurance company has been violated should be one that is mentioned in the clause itself. Three kinds of conditions are mentioned therein. The first is a condition excluding the use of the vehicle for certain purposes and in certain ways; the second is a condition excluding driving of the motor vehicle by a named person or by certain specified categories of persons; and the third is a condition excluding liability of the insurer in times of war, civil

war, riot, or civil commotion. Unless, therefore, the insurer establishes that the breach of the condition of the policy that he complains of comes within any one of the sub-clauses mentioned in clause (a) of sub-section (2) of section 149, the insurer cannot succeed, since the breach of any of the terms of the policy not mentioned in clause (a) would not be a defence to the insurer. It is significant that even violation of any of the provisions of the Act, violation of any of the rules framed under the Act, or violation of any of the terms of the permit under the Act, cannot to be a defence, except when it falls within the ambit of sub-clauses (i), (ii) and (iii) of clause (a) of section 149 (2) of the 1998 Act.[3]

2 (b) Policy Being Void

As per clause (b) of section 149 (2), the insurer is entitled to defend the third-party action on the ground "that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular". Sub-section (6) of section 149 states that the expressions "material fact" and "material particular" mean respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions.

In *Gandham Nagesh* V. *Pokala Nageswara Rao,* 1990 Act 257 (AP), the accident took place at about 9.20 a.m. and the insurance policy was taken at about 10-10 a.m. without disclosing that the accident took place on the very same day.

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[3] See *National Insurance Co.Ltd.,* V. *T. Elumalai,* 1990 ACJ 426 (Mad), at P.429.

It has been held that the non-disclosure of the material fact about the accident amounts to fraud on the insurance company and, therefore, the insurance company is not liable to pay the compensation amount. "In this case, as there is a malicious intention on the part of the owner in obtaining the policy by suppressing the material fact, the lower Tribunal is right in fixing the liability on the owner and the driver after giving a finding that there is no valid cover at the time of the accident."

In *Oriental Fire and General Insurance Co.Ltd.* v. *Ram Singh,* 1995 ACJ 26 (MP) (DB), it was contended on behalf of the insurance company that the owner having concealed the material fact of accident to the vehicle half-an hour before the issue of the policy, and the policy having been obtained by playing a fraud and misrepresentation, the cover note which is followed by the policy was vitiated since its inception and, therefore, there being no insurable interest, the appellant insurance company could not have been made liable to indemnify the owner. A Division Bench of the Madhya Pradesh High Court held that a charge of fraud has to be proved by the insurance company beyond all reasonable doubt and that it cannot be based on suspicion and conjectures.

Usually the non-disclosure pertains to the fact that the vehicle had met with an accident sometime prior to the issue of the cover note. In such cases, the time of commencement of the policy becomes crucial to decide the liability of the insurer.

3. Protection to Insurer Against Collusion

Where an insurer finds that it has not reserved such a right but that the insured and the claimant have colluded with each

other as it is a possibility that cannot be ignored, it is open to an insurer to bring that fact to the notice of the Tribunal and seek its permission under section 170 of the Act to contest the claim on all the grounds available to an insured. On being satisfied that there is such a collusion, the Tribunal would grant permission and on such permission being granted, the insurer steps into the shoes of the insured and defends the claim on all available grounds, if the award goes against the insurer, it can challenge it in appeal also on the such ground on which it had contended the claim before the Tribunal.

Conclusion

This then is the scheme of the statutory provisions contained in Chapter XI of the Motor Vehicles Act, 1988, wherein the Legislature has achieved welfare maximisation through balanced risk management. But, in our humble opinion, this delicate balancing act has been jeopardised by a proposition laid down by the Supreme Court in a case reported in British India General Insurance Co.*v.* Itbar Singh.[4] The Court stated thus:

> "The insurer has the right, provided he has reserved it by the policy, to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged by him".[5]

The above-referred observation of the Supreme Court means that the insurer would be entitled to all defences if the policy contains a condition reserving to the insurer the right to defend in the name of the insured. Such a condition reads as follows:

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[4] AIR 1959 SC 1331=1958-65 ACJ1 (SC).

[5] Id, at p.at 1335

"No admission, offer, promise or payment shall be made by the insured without the written consent of the Company which shall be entitled if it so desires to take over and conduct in the name of the insured the defence or settlement of any claim or to prosecute in his name for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings or in the settlement of any claim and the insured shall give all such information and assistance as the Company may require. If the Company shall make any payment in settlement of any claim and such payment includes any amount not covered by this Policy the insured shall repay to the Company the amount not so covered."[6]

The effect of this pronouncement by the Supreme Court is that the insurer would be entitled to by-pass the statutory limits on his right to defend himself by just incorporating a condition similar to the one mentioned above and thus strengthen himself as against the hapless claimant. It is therefore suggested that the Legislature ought to bring in an amendment to the Motor Vehicles Act, 1988 and nullify the effect of this pronouncement and thereby restore the original balance amongst the three contending parties. Only such a step would truly fulfil the intent of the Legislature which was to maximise welfare through balanced risk management.

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[6] Id. at p. 351.

A LAW STUDENT LOOKS AT RAMAYANA AND MAHABHARATHA

Dr. K.N. CHANDRASEKHARAM PILLAI*

An Indian law student may be familiar with separation of powers not only from Anglo-Saxon treatises, but also from his age-old concept of separation of functions of his Gods-Brahma, Vishnu and Maheshwara, the authorities of *Srishti, Stithi* and *Samhara*, respectively. Brahma creates, Vishnu maintains and Lord Maheshwara destroys. This concept of Trinity is present in the Judo-Christian religions also. In a sense in our administration system, we would perhaps equate legislature with Brahma. Executive with Vishnu and Judiciary with Maheshwara the last resort. Today, on many matters of vital importance, it is noticed that the last word is that of the Judiciary.

If one examines the functioning of our Trinity from the puranas and traditions, one finds that there was mutual respect and comity between them. Indeed at times Lord Maheshwara and Lord Vishnu crossed swords and registered victory over the other. Lord Maheshwara once destroyed Yama and tilted everything. Likewise Lord Vishnu defeated Lord Maheshwara in the fight with Banasura, the devout devotee of Lord Maheshwara. However, generally speaking, the three *Moorthies* complemented each other's function and maintained *Dharma,* which was above them. Though they would not have been accused of violating *Dharma,* as it emanated from them, they meticulously avoided violating it. In this connection, it is interesting to see how Lord Maheshwara had to save himself from a fatal touch from Padmasura after he gave him such a boon. At last Vishnu had to come to His rescue! The moral is that a boon or gift once given cannot and should not be

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taken back. That is the higher law-the *Dharma*-that governs even the Trinity.

Ramayana is replete with instances wherein Lord Rama tries to protect the *Rajadharma* even at the cost of losing all worldly pleasures of a man. In fact his birth as a man itself is with the mission of purging himself of the curses of Bhrigu, whose wife came to be killed by Lord Vishnu. Bhrigu cursed him to suffer separation from wife. And a reading of *Ramayana* will reveal what kind of sufferings Rama was subjected to take penance. He had to purge himself of the sin after paying a heavy price though he was He-the incarnation of Lord Vishnu.

Another interesting aspect one may notice in *Ramayana* is that the *Maryadapurushothama* Rama is constrained, probably because he is in human form, to commit adharma-the most important being the killing of Bali by concealing himself from the latter's vision. Indeed, Bali's interrogation makes Him uncomfortable though he justifies his action on the *adharmic* deeds of Bali. But, He takes penance for the sin. In the next incarnation as Lord Krishna. He allows himself to be killed by a tribal person, who is none other than the rebirth of Bali. Here again, the moral seems to be the supremacy of law-the Dharma that is above even the Lord.

The stories related in the *Mahabharatha* epic are pregnant with higher ideals of Indian legal thought. In a way, *Bharatha* depicts the social and cultural values of the Indian society more intensely than any other *purana or ithihasa*. The Indian legal thought also gets excellent treatment in this epic in the teachings given by Vidhura, Bhishma and Lord Krishna. *Geetha*, the treasure of Indian philosophy, is a part of Mahabharatha.

The general message *Bharatha* gives is the futility of war as a mode of settling disputes. After all at the end of Mahabharatha war, who is the winner? All the sons of the five Pandavas-the winners, are ultimately murdered by Aswathama, the son of Dhronacharya. And Aswathama is cursed to be alive with a permanent injury! Indeed, the Pandavas could claim that Pareekshit, the son of Abhimanyu, a descendant of theirs, got the throne. But, he was also bitten to death by a serpent again a retaliatory act for Pareekshit's grandfather's act of burning *Khandavavana* and killing serpents there.

It is interesting to examine the *Mahabharatha* story in the present day context of caste wars. it is the war of the descendants of Vyasa-the son born of a fisherwoman for Parasara. This story tells that a King married from fisherman tribe. This also tells us that the Lord took incarnation in a community-Yadava caste-which did not have throne or Rajdand and despite his being blessed with extraordinary yogic powers, he was ridiculed and dishonoured by many on the basis of his community. still he had the power and the tactical ability to win over all Kings and make them to indulge in a very destructive war which resulted in the grandson of his sister being enthroned as the King. In carrying out the overhauling of the Indian society, He had to incur the wrath and curse of Draupadi, which destroyed the hegemony of his family and community. His divine powers could not save his people. And ultimately he succumbed to the arrow of Chandala turned Bali and thus paid the price for his *adharma,* which he could not avoid, being in human form.

The story of Vidhura is really pathetic-though quite relevant for the present day lawyers. It is said that Vidhura is none other than the rebirth of Yama who had to take *janma* in a Dasi's womb due to the curse of a *Maharshi* who came to be

punished by the King as a result of mistake committed by Yama. The Maharshi was put on a sharp edged pillar by the King due to a misunderstanding. When the Maharshi asked Yama as to why he was made subject to that punishment, he answered that when the Maharshi was 12 years old he killed a small fly by piercing a pin through its body and that he had to purge himself of that sin. Since a child below 12 is absolved of any sin for non-compliance of Dharmasutras, the Maharshi cursed Yama to be a human and to suffer. And a perusal of Vidhura's plight would reveal in what paradoxes he spent his life. He had always to make hard choice between right and wrong and at times was constrained to fall in line with the wrong ways of *Kauravas*. But his sense of justice always made him a haunted soul. His life depicts how perilous the path of justice is.

Bhishma also took birth to purge himself of the sin he committeed in torturing the wife of a *Maharshi* and in the forcible taking of his divine cow. Probably, because he ill-treated the *Maharshi's* wife he had to remain a bachelor. He was also torn between right and wrong but sided with wrong ignoring justice though felt bound by *Dharma* of observing the terms of his firm promise to the *Rajmatha*. In fact, in a sense he did not observe the higher *Dharma* by siding with the right because he honoured more his personal commitment to the Kingdom, which was in the hands of the wrong. Since he realised that the right should win he kills himself for its success by suffering but at the same time showing that he was observing an aspect of *Dharma* by fighting for the sustenance of the Kingdom.

The crisis of conscience experienced by Bhishma is shared by Karma, Salya, Vidhura and Dhronacharya. They are torn between what they felt in their personal capacity to be *Dharma* and what they did consider to be *Dharma* independent of their

personal positions. They are all convinced that injustice has been done to the *Pandavas* and in fact they should win the war for the establishment of *Dharma*. Simultaneously, they feel bound by obligations, which their official positions attach to them, as an aspect of Dharma of their occupation, They gave importance to the latter while silently praying for the success of the former and sacrificed their lives for it.

It may be fair on the part of a law student to attempt to clear Dhronacharya from the cloud of unjutified suspicion. He is accused of discriminating against the tribal disciple Ekalavya. It has become fashionable for some scholars to say that this Brahmin discriminated a tribal student because of his caste prejudices and that his royal disciple Arjuna should get the prime position. In fact this is misplaced criticism.

In those days every profession had its own code of conduct for its practiitioners. Professionals were to observe this Dharma in their dealings with others. Even today, in our country, it is customary for the teachers of martial arts to seek an oath before initiation from their disciples that they may not employ their skills against innocent people.

Dhronacharya had his best critic in his son, Aswathama, who interrogates the father as to whether he was not ensuring the prime position for Arjuna by disabling Ekalavya. The father denies discrimination by reminding his son as to how he came to meet Ekalavya as his disciple. It was in fact a mute creature like a dog with mouthful of arrows that caused Ekalavya to be made known to Dhronacharya. The guru felt that Ekalavya did not deserve to be his disciple as he violently violated the Dharma of the art of archery.

Thus, a student of law gets a feeling that rule of law was writ large in every aspect of Indian life. Even Gods were bound by the law. The relationship between Karma and Dharma is

emphasised in the decriptions of earlier births and the inclinations manifested in the subsequent briths of persons. It could also be said that even the God, when in human form, is constrained to commit some acts which are not in accordance with *Dharma*. And they are destined to suffer for these acts.

Mahabharatha also seems to give a message that it is the complex culture of different communities, high and low, that may have sway in the Indian environment.

One cannot deny the tremendous influence these stories have on the character formation of Indian children. Their attitude towards the state and the legal system are developed on the basis of these stories. It is perhaps this glorious tradition which made our forefathers to look upon the law as the King of Kings and that to-day makes us feel at home with the conecept of rule of law.[1]

[1] See Brhadaranyaka upanished (1-4-14) which States:-

तदेतत क्षत्रस्य क्षत्र यदृर्म:
तस्माहर्यात्परं नास्ति

Meaning:- That Dharma is the King of Kings and there is nothing above Dharma.

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