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Protection of Non-Economic Intellectual Property Rights

Dr. A. David Ambrose**

"Intellectual Property" generally means knowledge or information that has commercial value. And the intellectual property rights aim at the protection of the application of the ideas and information of commercial value. Intellectual Property Rights are normally negative in nature and these rights are to stop others from doing certain things. Thus the main object of Intellectual Property Rights regime is to protect the economic interests. The economic rights include such rights that have pecuniary value. However, certain non-economic rights are also protected under the Intellectual Property Rights. For example, apart from the economic rights of the author the moral rights of the author are also protected under the copyrights law.

Copyright Law

Similar to other intellectual properties, the rights granted under copyright are also essentially negative in nature. These rights are to stop others from doing certain things and in some cases to stop even the third parties who have independently reached the same ideas from exploiting them without the permission of the right owner. In

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short copyright gives the right holder a right to control the activities of others. Thus copyright creates a monopoly, giving the right holder certain exclusive rights, such as, right to reproduce the work in copyright to make an adoption of the copyrighted work, right to perform or display the work in public etc. For these reasons it is often referred to as "bundle of rights". It is pertinent to note that only "expression" of the author is protected under copyright and not the "idea".[1]

The prime objective of copyright la is to protect a person who takes the initiative in creating a work and puts his hard labour and skill for the same. Such person is called the author and owns the copyright in the work he has created. The author can assign or transfer his copyright to any other person for publication and marketing for some consideration. Thus economic rights of the author are protected by permitting financial gain to the author in consequence to his/her work. The economic rights of the author under copyright are available to the author for a fixed duration[2]. In addition to such economic rights, non-economic moral rights are also available to the author under copyright law.

Moral Rights:

Moral rights have been conferred on authors as special rights as enumerated in section 57 of the Indian Copyright Act. In international law, Article 6 of Berne Convention confers on authors the moral rights known as *droit moral* separately as distinguished from the economic rights.[3]

Moral rights are the rights that relate to honour and integrity of the creator of the work. It is more personal than commercial in nature. Moral rights can be attributed only to those works where the author and his work are so interwoven and inseparable. Accordingly it exists

1. Dr. A. David Ambrose, "Doctrine of Fair Use in Online Software Copyright Protection", in Dr. K. Vikraman Nair (Ed) Copyright Law Emerging Trends and Challenges (Kottayam, 2001) at 17.
2. In the case of literary, dramatic, musical or artistic works (other than a photograph) when published during the lifetime of the author, copyright subsists during the lifetime of the author plus sixty years.
3. Art *6 bis* of Berne Convention 1886 states: "Independently of authors" economic rights and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of or other derogatory action in relation to the said work, which would be prejudicial to his honour or reputation".

only for literary, dramatic, artistic, musical works and films.

The moral rights have European origin (especially France), where copyright is regarded as rights of natural persons in their personal creation and not as rights in protected works. The notion that the author who is a natural person creates the work by his intellectual skill, paved the way for the protection of moral rights.

Need for the protection on Moral Rights :

The creative genius of individual authors and artists results in the enrichment of the society's culture. But quality creative genius is brought out only in an environment that provides adequate protection for creativity. Thus the authorship has a cultural function and therefore it must be protected in the best interest of the society/community.

Article 27(2) of the Universal Declaration of Human Rights says, "Everyone has the right to the protection of *moral* and material interest resulting from any scientific, literary or artistic production of which he is the author" (emphasis supplied).

In this fashion, the protection of moral interests of the author is recognized as a human right too in the individuals interest and also that of the society.

Kinds of Moral Rights

Generally speaking moral rights consist of four rights namely (a) right of paternity; (b) right against false attribution; (c) right of disclosure/publication; and (d) right of integrity.

Rights of Paternity: The right of paternity safeguards the creator's right to claim authorship of a published or exhibited work. Generally this right is perpetually unassignable and is not barred by limitations. The protection of right of paternity lies in the fact that the author must first assert it. Industrial designs, anonymous works and computer-generated works are excluded from the purview of this rights.

Rights against False attribution: An author's name should not be falsely attached to a work, which he/she did not create.

Right of Disclosure/Publication: This right gives the author the right to decide whether or not to publish the work. This right encompasses an artist's right to decide whether the work is completed and ready for publication. This right also enables the author to withdraw the published work from circulation.[4]

Right of Integrity: This right prevents alteration and other actions in the author's work that may damage the author's honour or reputation. This right gives the author the right to modify his/her work at the same time prevents the deformation of the work by others. Thus, this right provides the protection against, alteration or distortion of any artist's work without his/her permission.

Protection of Moral Rights :

In India, in addition to economic rights moral rights are also protected. Section 57 of the Copyright Act, 1957 recognizes and protects such rights. The Copyright (Second Amendment) Act, 1994 reads as follows:

1) Independently of the author's copyright, and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right.

   (a) to claim authorship of his works; and

   (b) to restrain or claim damages in respect of any distortion, mutilation or other act in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation: Provided that the author shall not have any right to restrain or claim damages in respect of any adaptation of computer programme to which clause(aa) of sub-section (1) of section 52 applies.

Explanation: Failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section.

4. French law gives the author the right *le droit de repentir* i.e.the right to recall his/her work and amend it.

2) The right conferred upon an author of a work by Sub-Section(1) other than the right to claim authorship of the work, may be exercised by the legal representatives of the author.

These rights given under Section 57 are independent of author's copyright and remedies available to the author under Section 55. Thus under Section 57 the author can claim the authorship of his work. He/She also has a right to restrain the infringement of his moral rights and a right to claim damages for the infringement.

The three moral rights namely the paternity right, integrity right and the right of disclosure subsist so long as copyright subsists in the author's work. The other right i.e. the false attribution right continues to subsist until twenty years after the author's death.

Remedies :

An infringement of moral rights is actionable as a breach of statutory duty rather than an infringement of a copyright. Therefore the author of the work in such cases can claim injunction and damages.

The author's moral rights can also be enforced under other branches of law. Thus if the author's reputation has suffered it can be enforced under the law of defamation; if any person publishes the work without the author's consent then under the law of contract for breach of implied term of contract or breach of trust; and if some person has misled the public into the belief that he is the author of the work, then under the law of passing off. Section 57 gives statutory recognition to these moral rights, which were recognised under common law [5]. The non-economic moral rights can be claimed even after the author transfers wholly or partially his economics rights. Nevertheless, the assignee of the copyright is permitted to bring out editions with additions, corrections, alterations or omissions without injuring the author's reputation. The moral rights are also available to the legal representatives of the author.

5. R. Narayanan, *Intellectual Property Law* (Eastern Law House, 2000) at p.241

Conclusion

Intellectual property protection regime normally aims at protecting the economic interests of the owner of the Intellectual Property Right. However, in some cases non-economic rights of the owner are also protected. Thus, certain special rights popularly known as moral rights that are non-economic in nature are well protected under the copyright law. Today the exploitative (economic) interests and moral rights are considered to form a single right.

The protection of moral rights serves both the society's and the individual's interests. Moral rights are protected both at national and international levels. Waiver of moral rights is not generally permitted. It may be argued that the film industry and multimedia products require waiver. Otherwise, the full potential of such products may not be utilised. In such cases, the issues relating to moral rights cannot be dealt in isolation. It will have international ramifications too. For example if a waiver is made under English law of contract, (which allows such waiver) it may have effect only in U.K. and not in the countries that have strict moral rights and where moral rights are inalienable. Moral rights give special rights to the authors (and their representatives) to protect the author's reputation and claim the authorship. In the era of free trade under the WTO, it is important to ensure that moral rights do not create troubles to the normal course of the business activities. At the same time, this common-law principle should not be allowed to be eroded by the modern statutory principles as the enrichment of society's culture depends very much upon the protection of non-economic moral rights.

Press Law in India*

Prof. (Dr.) S. Sivakumar**

In a democracy, the electorate is said to be sovereign and the institution of Government is to reflect the will of this sovereign. The Government process inevitably includes law-making, law-implementing and law-interpreting. At the functional level, these three wings often exhibit deviance necessitating curative steps. Press enables the public to keep a constant vigil over the affairs of the State and to ventilate their views for corrective action when anything goes awry.

In this paper 'Press' is treated as a comprehensive term that includes both electronic and print media. Though often the word 'media' is used for 'Press' in legal parlance 'Press' is preferred. Hence is the title 'Press Law'. Press law can be understood mainly from four sources: Constitution or Basic law, the relevant statutes, the decisions of the Court in cases involving Press freedom and finally the guidelines evolved by the self-regulatory mechanism of Press Council.

The Constitution guarantees the freedom of speech and expression a *sine qua non* for a democratic system. Besides, free speech is a natural right which a human being acquires on birth. Article 19 of the Universal Declaration of Human Rights, 1948 reads thus:

> Everyone has the right to freedom of opinion and expression; the right includes the freedom to hold opinion without

* This paper is a modified version of a paper presented in the International Symposia on Journalism, Ethics and Society in the Age of Globalization held on the occasion of National Press Day on 16th and 17th of November, 2006 at New Delhi under the aegis of the Press Council of India.**

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interference and seek, receive and impart information on ideas through any media and regardless of frontiers.

The Constitution of India declares through the Preamble the firm resolve to secure to all citizens liberty of thought and expression. This is reflected in Article 19(1)(a), which provides that all citizens shall have the right to speech and expression. It enables the public to keep a constant vigil over the affairs of the State and ventilate their views for corrective action when and where necessary. It also enables the people to demand positive action on the part of Government to ameliorate the condition of the society in general and of the poor in particular. Indian Constitution does not make any specific mention of the concept of freedom of Press or media. The court has interpreted the freedom of expression and given vide connotation that it includes the freedom of press also.[3] The role of the media is educating people, guarding freedom, watching the Government, challenging it, goading it, revealing it, forcing it into the open etc. A successful democracy is a Government of well-informed people. From this angle the media has a duty of more than watching the administration; it has a duty to educate the people.

Experiences tell us that media freedom involves an aspect of autonomy and public debate. Some writers stress the former aspect, i.e., the freedom to publish one's views without hindrance. Several others emphasize the latter aspect of public debate and collective self-determination. These writers argue that autonomy may be protected only when it enriches public debate and some of them

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1. Stanley Fish, There no such thing as free speech and it's a good thing. (Oxford University Press), P.102.
2. Life Insurance Corporation of India Vs. Manubhai D. Shah, AIR 1993 SC 171; 176. Ahamdi J., observed thus: Speech is God's gift to mankind. Through speech a human being conveys his thoughts, sentiments and feelings to others. Freedom of speech and expression is thus on natural right which a human being acquires on birth. It is, therefore, basic human right.
3. There are three decisions in 1950-51. In Romesh Thappar Vs. State of Madras, AIR 1950 SC 124, where Section 9(1)(a) of Madras Maintenance of Public Order Act, 1949 imposing restrictions on freedom of the press was struck down. In re Bharati Press, AIR 1951 Pat 12, the High Court held that the provisions in the press (Emergency Powers) Act, 1931 empowering Government to demand security from the press as ultra vires the Constitution; in Briju Bhushan Vs. Dehli AIR 1950 SC 129, the Court declared unconstitutional an order directing the editor and publisher of the newspaper organizer to submit for scrutiny in duplicate and before publication, all communal matters, news and views about Pakistan including photographs and cartoons.

even insist on state interference to protect public debate.[4] But one has to keep in mind that the role of media is not an anti thesis to rule of law and good governance when media undertakes its own way of the trial.[5] This paper attempts to analyze the issues involved in State intervention and consequent State-Media interaction. Here comes the question why the State?

Since *Romesh Thappar*[6] in many Press related cases the Indian Judiciary repeatedly upheld the free speech right of the Press. In *R.Rajagopal vs. Tamil Nadu*,[7] Justice Jeevan Reddy reiterated the indispensability of freedom of the press. In his lucid analysis he points out the jurisprudential desideratum thus:

> But what is called for today-in the present times-is a proper balancing of the freedom of the press and said laws consistent with the democratic way of life ordained by the Constitution. Over the last few decades, press and electronic media have emerged as major factors in our nation's life. They are still expanding - and in the process of becoming more inquisitive. Our system of Government demands - as do the systems of Government of the United States of America and United Kingdom - constant vigilance over exercise of governmental power by the press and the media among others. It is essential for a good Government.[8]

From the point of view of Constitutional Law there are three possible constitutional contexts in which a court is called upon to judge whether a particular exercise of freedom of speech is to be judicially protected.

1) Where there is no written Constitution, a host of statutes delimit the freedom.

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4. See Owen M. Fiss, 'Why the State?', 100 Harv. L. Rev. 781, 786 (1986-87).
5. State of Maharashtra Vs. Rajendra Jawanmal Gandhi, the Supreme Court observed that a trial by press, electronic media or public agitation was the very antithesis of rule of law. It can well lead to miscarriage of justice. Sometimes the publicity regarding sensational criminal cases makes it impossible to have a fair trial.
6. Romesh Thappar Vs. State of Madras, Supra n.3.
7. AIR 1995 SC 264.
8. Ibid at 275.

2) Where 'reasonable restrictions' are permitted to be imposed by the Constitution itself and the court is called upon to decide whether a particular restriction is reasonable or not.

3) Where written Constitution guarantees freedom of expression without any limitation.

The first context is available in the U.K. Since 1973 a citizen of the U.K. may seek the protection of this freedom by seeking the help of European Human Rights Court.[9] India is an example for the second situation.[10] Here also much depends upon how the judges view the restriction.[11] Thirdly, it is available in USA, where the judges have more leeway either in restricting the exercise of the freedom or in upholding a moral standard the limits of which they themselves have to set.[12]

In the context of judicial techniques in evaluating the restrictions imposed on the exercise of this freedom of speech, one may appreciate the relevant and effective role the judiciary plays in sustaining democracy. In these instances judges may make their own doctrinal prescriptions. The jurisprudence concept fettering free speech have been identified and dealt with appropriately as follows:

i) Obscenity[13]

ii) Offending speech[14]

iii) Hate speech[15]

iv) Workplace harassment[16] etc.

This is an attempt to analyse the working of courts towards the

9. In Minister of Finance Vs. Simenthal, (Case 106/77)(1978) E.C.R. 629.
10. Articles 19(1)(a) and 19(2) of the Constitution of India.
11. In K.A. Abbas Vs. Union of India, (1970) 2 SCC 780, 729 the Court restricted the scope of widely worded statutory provision through interpretation.
12. Mari J. Jatsuda et al, Words That Wounds: Critical Race Theory, Assaultive Speech, and the First Amendment (Westview Press 1993), p. 36.
13. In K.A. Abbas Vs. Union of India (1970) 2SCC 780, 729 the Court stated that censorship of press, art and literature is on the verge of extinction except in the evershirinking areas of obscenity.
14. Chaplinsky Vs. New Hampshire, 315 US 568, 572 and K.C. Chandy Vs. R.Balakrishna Pillai, AIR 1986 Ker, 11.
15. R.A.V. Vs. City of St. Paul, 505 US 377 (1992).
16. Vishaka Vs. Rajasthan (1997) 6 SCC 241. The Supreme Court issued guidelines, which amounted to judicial legislation. And also see Apparel Export Promotion Council, Vs. A.K. Chopra, AIR 1999 SC 625.

protection of the right and upholding the freedom guaranteed by the Constitution by applying these doctrines. Under Article 19(2) of the Constitution, incitement to offence is one of the grounds for legislative interference with the freedom of speech and expression. In this connection three general rules have been laid down, viz.,

i) Except in the case of statutory offences the desired crime must be an indictable one;

ii) Incitement to crime is at common law unaffected by the refusal or failure of the incited person to accede to suggestion, or by his failure to achieve more than an unsuccessful attempt to accomplish the deed; and

iii) There must be a causal relation between the incitement and the commission thereof.[17]

Offending speech involves mainly four factors. They are (a) who used the expression; (b) the content; (c) the way in which it is expressed; and (d) the nature of the audience or to whom it is addressed.

Depending on these factors 'expression' may incite readers or viewers to illegal action against targets selected by the speaker. In some other context a particular expression may excite others to break order and cause breach of peace, the speaker being the target of attack.[18] The content of such offending expression may be described as offensive, hateful or harassment. Thus there is a close nexus among the concept of obscenity, hate speech and harassment. Fighting words, which may constitutionally be prohibited, are words directed to any person and have a tendency to cause acts of violence by the person to whom, individually, the remarks are addressed.[19]

The term 'expression' has two limbs. First comes the physical act of expressing. Use of public address system and electronic media

17. Sirdar D.K. Sen, A Comparative Study of the Indian Constitution (1966) Vol.2, p. 560.
18. The State may in the interest of public order prohibit and punish utterances tending to incite breach of peace or riots and use of threatening, abusive, insulting words, indecent behaviour in any public place or meeting with intent to cause brerach of peace. See K.D. Gaur, 'Constitutional Rights and Freedom of Media in India', JILI 429, 433 (1994).
19. See Black's Law Dictionary (5th Ed. 1981), p. 565.

come under this. Second aspect is the content. A person may have a good idea that he wants to propagate. But he needs either a loudspeaker or any such means to reach his audience. Thus for an effective exercise of the freedom of speech one must also have freedom to use an appropriate means of propagation; and without the latter the former becomes ineffectual.[20] Press is a vehicle to carry the speech to a larger audience.

Often offending statements made by leaders of political parties appear in the newspaper during elections. But such offending speeches are not construed as corrupt practice because they are made by acknowledged political leades who play a responsible role in the polity. The Supreme Court gave direction to the Election Commission to frame guidelines to stop surrogate political advertisement in Television channels.

Another ground upon which the matter is to be analyzed is as follows: a speech might contain an expression, which is not offensive ordinarily but it may become offensive in other situations where it has an emotional content. Such expressions are protected provided they have little effect on persons hearing the same. In *Kallara Sukumaran Vs. Union of India,*[21] a Minister in the Kerala State made a speech at his party convention. He was critical of the neglect of the development of the State by the Union Government and exhorted for a 'Punjab model agitation' against Union Government. Taking into consideration the contemporary situation in Punjab, this phrase was regarded as something against the integration of India. Thus it became an offending speech.

Judiciary has an important role in deciding whether a particular speech is a protected fundamental right or not when such a speech is alleged to be violative of accepted norms. In accepting constitutional provisions and related laws judiciary comes forward with certain principles so that it could decide whether a particular speech is violative of any legal code or norms. One such principle is the 'fighting words' dectrine.

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20. For example, Section 123 of The Representation of People Act, 1951 relating to currupt practices.
21. Kallara Sukumaran Vs. Union of India, AIR 1986 Ker. 122.

When a court tries to assess the impact of words to decide whether it is harmful or not, it must take into consideration the following elements viz., source (the communicator of hate speech), message (the hate words or symbols), channel (the avenue or vehicle through which the message is conveyed), and receiver (the audience or target of the message).[22] Thus a court has to assess the impact of the speech on the actual listeners taking into consideration whether it was made in a hall in front of a selected audience, whether the speech was made in a public place where even a passerby could listen, and the effect of the speech on the audience and readers when the speech was reported in a newspaper. The matter assumes significant dimensions with the advent of electronic media because the visual media may give added meaning to the speech because the body language of the speaker is visible. The existing laws are inadequate to put palisade around them.

While applying these doctrines, it is to be understood that words in particular context may have a different meaning. This becomes all the more important when a speech is reported in press. There are different aspects of newspaper reporting:

i) whether the report is true;[23]

ii) whether the reporter has made any observations regarding the speaker, the speech or the circumstances in which the speaker delivered the speech;

iii) whether the editor has used his editorial discretion in colouring the speech by way of editing in accordance with his political bias; and

iv) whether the reporter or the editor has ever thought of the reaction of the readers in general or any group of readers who might react violently.

If the above aspects are not looked into, a precise assessment of

22. Kallara Sukumaran Vs. Union of India, AIR 1986 Ker. 122.

23. A. Suresh Vs. Tamil Nadu, AIR 1997 SC 1889, 1892, the Court observed 'Where the freedom of speech gets intertwined with business it undergoes a fundamental change and its exercise has to be balanced against societal intrests'. Justice Holmes in Abrams Vs. U.S. held thus: ... that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

fighting words cannot be made. For instance, the press has the duty not to misrepresent or distort or over emphasize certain portions out of the context and thereby creating a wrong impression in the minds of the reader who may think the speaker used an offending expression. If the editor does not discharge his duty faithfully, it means that he is committing two wrongs. Firstly he creates wrong impression in the minds of the people about the speaker and thereby violates editorial ethics. Secondly, the editor makes the speaker violate the exception to free speech. Thus the editor becomes responsible for the fighting words.

The media freedom has two dimensions: the absence of arbitrary power of interference and the ability to express oneself. But the unregulated freedom has its defects. Media may become selective in publishing news and views for they being organized, have their own interests to safeguard. It may try to distort public opinion and create opinion so that their interests may be protected.

Media, in general, and press in particular enjoy the fundamental right of free speech, which is given to individual citizen. But press is more powerful than ordinary citizen. Therefore it can act powerfully. It can gather information and spread them. In short, its prime function is information dissemination. But press often goes beyond this function by taking the role of watchdog. It watches carefully the State and criticizes and the administration of Governments. Hence the press rightly enjoys the free speech right. But there are also certain negative aspects, which we cannot forget or ignore.

What can be done in this context? The function of law must be to find out ways and means to restore public debate and free flow of information through the media. Law must also look into the problem of media violating the individual's right. More often media publishes matters infringing privacy and sensationalizing issues to increase the readership. The present legal institutions could regulate media only to a certain extent. Hence we need more effective legal mechanism to check these tendencies.

'Press' is also governed by a host of statutes. A list of the post independence Acts would offer a glimpse of regulations the

Government has made.[24] And some of the colonial laws also are relevant. Most important among them is the Indian Penal Code which includes provisions regarding defamation etc. There are also laws that affect the Press indirectly.[25]

Today the freedom of expression has developed into unknown proportions. Cyber world has become a mystery to many, but familiar space for the new generation. New breeds of Citizens are articulate and they even impact the decisions in governance. But would they not - at least some of them - misuse the freedom they enjoy. How are they to be regulated? This is the million dollar question that every State faces today.

24. The legislation like, the Delivery of Books and Newspapers (Public Libraries) Act, 1954; The Working Journalists, other newspaper employees (Conditions of Service) and Other Miscellaneous Provisions Act, 1955; Working Journalist (Fixation of Rates of Wages) Act, 1958; The Newspaper (Price and Page) Act, 1956; The Parliamentary Proceedings (Protection of Publication) Act, 1977; The Press Council Act, 1978; The Prasar Bharati (Broadcasting Corporation of India) Act, 1990; The Cable Television Networks (Regulation) Act, 1995; The Press Council Act, 1978 etc.

25. The legislations like, the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954; The Copyright Act, 1957; Criminal Procedure Code 1973; Criminal Law Amendment Act, 1961; The Contempt of Courts Act, 1971; The Indecent Representation of Women (Prohibition) Act, 1986; The Right to Information Act, 2005; The Representation of the People Act, 1950 and 1951; The Information Technology Act, 2000 etc.

Doctors' Negligence under

The Consumer Protection Act

Prof. S. Radhakrishnan Nair**

Every person engaged in a profession is bound to take reasonable care in his activities not to injure others. It aften happens that many injuries are traced to negligent acts. Negligence is not susceptible to any precise definition. Various meanings may be attributed to negligence. In current forensic sense "Negligence" has three meanings. They are state of mind, careless conduct and the breach of duty to take care. Negligence means lack of proper care and attention, carelessness or act of carelessness.[1] The major focus of the article is on the professional liability of doctors and other health care professionals and on the organization providing facilities for health care.

Medical jurisprudence deals with legal responsibilities of a physician. The professional responsibility of a medical practitioner arises the moment the physician-patient relationship is established. The law presumes that a person who enters a medical profession undertakes to use a reasonable degree of skill, care, knowledge and prudence in the treatment of his patient to the best of his judgment. All doctors owe a duty to their patients to exercise reasonable care in carrying out their professional skills of diagnosis, advice and treatment and situations in which a stricter duty will be applied are quire rare.[2] A general medical practitioner is expected to use only average degree of skill and knowledge which other medical

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1. The concise Oxford Dictionary of Current English (1990) p. 794
2. Medical Negligence (Sweet and Maxwell)

practitioners of his qualification use but he is not expected to perform or bring the highest degree of skill and knowledge in the treatment of his patient. According to Stratified the liability of doctors is not unlimited. They are not guarantors of absolute safety. They are not liable in law merely because a thing goes wrong. The law requires them to exercise professionally that skill and knowledge that belongs to the ordinary practitioners.

Gone are the days the doctor-patient relationship was based on a total regard and respect. Now the medical profession has become a big profit centre with all the ingredients of a commercial venture needing huge investment and dealing with the patients like customers of goods. The classic relationship of a family doctor has changed over to a trader-customer relationship. Today we are living in an era of a welfare state which has to promote the prosperity and well being of the people. In Pacshim Banga Khet Mazdoor Samity Vs State of West Bengal [3] the Supreme Court observed that providing adequate facilities for the people is essential part of the obligation undertaken by the Government in a welfare state. Art 21[4] of the constitution imposes an obligation on the state to safeguard every person's right to life.

In this regard the necessity of a statute was being felt for a considerable time as the consumers were being exploited by those offering services of various types. The most controversial term 'service' which is much debated and disputed has been inserted in the Consumer Protection (Amendment) Act 1993. The Consumer Protection Act 1986 provides for two separate reliefs, one for deficiency and other for injury caused by negligence. While deficiency is defined in the Consumer Protection Act, negligence has not been defined.

In Ravinder Gupta Vs Gangadevi,[5] the Punjab and Haryana High Court observed that deficiency under consumer law includes what is negligence in the Law of torts, but it is somewhat wider. Distinction between deficiency in service and negligence has also been brought

3. AIR 1996 SC 2421
4. No person shall be deprived of his life or personal liberty except according to procedure established by law.
5. 1993 (3) CR 255

out in a decision of the State Commission of Pondicherry in Vasanda Coumary Vs R. Ramachandradu,[6] the line of demarcation between the two notions will get more precise when the consumer dispute redressal agencies decide more on the point. In all cases of negligence there will be a deficiency but in all cases of deficiency negligence may not be present.

Medical negligence is the main area in which the consumer is always at the mercy of the doctor and quite often victim of his negligence. In the modern welfare state people with increased awareness of their rights go to the court to seek compensation for the negligent act of doctors and in India the doctors have come under the purview of Consumer Protection Act. When a patient comes to the doctor for care and the doctor accepts the same, an implied contract comes in to effect and a duty of care arises. Medical negligence is the breach of duty owed by a doctor to his patients to exercise reasonable care, and skill in the treatment of a patient, whereby the health, or life of the patient is endangered.

The prime object of medical profession is to render service to humanity with full respect to the dignity of the man. A physician is free to choose, whom he will serve. Once having undertaken a case, the physician should not neglect the patient nor should he withdraw from the case without giving prior notice, so as to allow the patient to secure another medical attendant. He has full liberty to adopt any of the accepted theories of medicine or surgery in which he honestly believes. In order to prove the negligence of a doctor, the consumer must be able to establish to the satisfaction of the court the following points.

Legal duty to take care

It is not for every careless act that a man may be held responsible in law, nor even for every careless act that causes damage. He will only be liable in negligence if he is under a legal duty to take care. Reasonable degree of skill and care means that degree of care and competence which an ordinary competent member of profession, who professes to have those skills, would exercise in the circumstance

6. III (1998) CPJ 227

in question. The doctors owe a duty to exercise reasonable skills and care to their patients. Such a duty exists from the moment of establishing a patient doctor relationship, that is from the moment a patient approaches the doctor and the doctor examines the patient. The duty to observe reasonable standard of care is not affected even if he renders the service gratuitously. The standard of reasonable care cannot be defined with mathematical precision. The standard of reasonable skill and competence is variable, depending upon the qualification and experience of the doctor. The Supreme Court in Laxman B Joshi Vs T.B. Godbole[7] observed that "The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither very high nor very low degree of care and competence judged in the light of the particular circumstances of each case is what law requires". The National Commission in Vinitha Ashok Vs Lakshmi Hospital[8] observed that "the law does not require that a doctor should use the highest degree of skill, it is enough for the doctor to show that he acted in accordance with the general and approved practice. The practitioner can be held liable for wrongful diagnosis and not for mistaken diagnosis. Thus the most important duty of the physician is to exercise reasonable degree of skill, care and diligence throughout the treatment.

Breach of duty

In an action for negligence it must be definitely shown that there was breach of duty to take care on the part of the defendant. The question whether the defendant's conduct amounts to breach of duty may be decided with reference to the principle laid down by Alderson in Blyth Vs Birmingham Water Works Co.[9] Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do. In an action for medical negligence it must be proved that the doctor did not discharge his duty to take reasonable care.

7. AIR 1969 SC 128
8. II (1992) CJJ 372
9. (1856) LR II Ex at 784

Damages suffered by the patient

A patient cannot sue a doctor in the absence of any damage even though the doctor may have been negligent and the loss suffered by the patient should be measurable and compensate in terms of money. In Sidhraj Dhaddha Vs State of Rajastan [10] where a doctor was shown to be negligent but no loss or injury was proved, the action was dismissed.

What constitutes medical negligence

Under Consumer Protection Act in order to get compensation it is not adequate to prove negligence, but the complainant has to prove that such deficiency was the result of negligence of the opposite party. The following are the important cases that constitute medical negligence in the light of various judicial decisions.

1. Failure to exercise reasonable care and skill is negligence

The maxim "Imperita culpae adnumeratur" means a person holding himself to be competent to do some kind of job is required to exercise minimum reasonable skill and care. Failure to exercise reasonable care and skill is negligence. In Laxman Balkrishnan Joshi Vs Dr. Trimback Bapu Godbole [11] the patient died due to shock resulting from detection of fracture which was found out by the doctor without taking the preliminary caution of giving anesthesia to the patient. The Supreme Court held that the doctor was guilty of negligence and therefore liable for damages.[12]

2. Failure to conduct essential pre-operative diagnostic test

Before conducting a surgery it is the duty of a medical practitioner to conduct a pre-operative diagnostic test. Failure to conduct all

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10. AIR 1994 Raj 68
11. AIR 1969 SC 128
12. Dr. Louis Vs Kannoli Pathumma 1 (1993) CPJ 31, Kanaiyalal Ramanlal Trivedi Vs Dr. Satya Narayana Viswakarma 1996 (3) CPR 54, Ambalappa Vs Sriman D Verendra Hegde 1999 (3) CPR 72.

essential tests before surgery will constitute negligence on the part of the doctor.[13]

3. Operation on a patient without adequate preparedness

Before conducting an operation the doctor could take adequate preparation. If the doctor could not take it seriously, he will be guilty of negligence. In Dr. Rasmi Fadnavid Vs Mumbai Grahak Panchayat [14] the patient died because of excessive blood loss and the inability of the doctors to forsee this and to keep units of blood ready in the operation theatre for timely transfusion. The National Commission held that the doctor was guilty of negligence and directed to pay compensation.

4. Practising medicine without the required qualification constitutes negligence and no further proof of negligence is required in such cases.

A doctor when consulted by a patient owes him certain duties namely a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give, a duty of care in administration of that treatment. A breach of any of these duties gives cause of action of negligence to the patient. In Avtar Singh Bhatora Vs Dr. Swarn Prakash Garg[15] the complainant's case is that the doctor was neither qualified nor authorized to practise in allopathic system of medicine but he prescribed the allopathic drugs to the complainant-patient. His lack of expertise was responsible for the further deterioration of his condition aggravating chest pain. The perusal of record shows that the doctor was neither registered nor qualified. It amounts to actionable negligence and hence prima facie case of medical negligence. In Poonam Verma Vs Ashwin Patel and others.[16] Dr. Patel who is a Registered Homeopathy Practitioner prescribed allopathy medicine for viral fever and subsequently for typhoid without confirming by blood test or urine examination. When Verma's condition deteriorated, he was admitted to the hospital on the advice of Dr. patel and after two days moved to Hindiya Hospital

13. Prasanth S. Dhanaka Vs Nizam's Institute of Medical Sciences 1999 (CPJ) P. 163
14. 11 1994 CPJ 312
15. 1 (2001) CJ 197
16. " (1996) 4CTJ 465

in an unconscious state, where he died. Here the Supreme Court held that since Dr. Patel was registered as a Medical Practitioner of Homeopathy, he was under a statutory duty not to enter the field of any other system of medicine, as admittedly, he was not qualified in the other system of allopathy.

In Ms. Sau Madhuri Vs Dr. Rajendra,[17] the National Commission observed that there is no standard criteria for determining the amount of compensation in medical negligence cases. But one has to see financial status of the doctor as well as the patients in these cases apart from the factors of age, the earning status of the patient, and other relevant circumstances having a bearing on the case. In Spring Meadows Hospital Vs Harjol Ahluwalia,[18] the National Commission held that certain acts of the hospital authorities amount to negligence. They are: misreading of prescription by a nurse, delegation of responsibility to a junior with knowledge that the junior is incapable of performing the task properly, hospital entrusting the work of a nurse to an unqualified person, nurse giving an injection without the direct control and supervision of a doctor. Even a bad handwriting of a doctor resulting in the administration of wrong medicine may render the doctor liable to pay compensation for the injury if any caused by such medicine.

Failure to provide Medical Records

Medical records play a decisive role in establishing the medical negligence in a court of law.[19] The question which arises in this context is as to whether the patients are entitled to receive such records from the hospitals or the doctors, and whether they can refuse to hand over them to the patients or to their relatives if demanded.

Under Consumer Protection Act consumers have the right to be informed, the right to choose and the right to grievance redressal. And from these rights flow the right to all medical records because without that, a consumer or a patient has no access to information. Without information a patient can exercise neither his right to choose

17. 1997 CTJ 734
18. 1 (1998) CPJ 2
19. Rosy Kumar "Medical Records"

nor his right to redress his grievance. But unfortunately in Poonam Medical Foundation, Ruby Hall Clinic Vs Maruti Rao C. Tikare,[20] the National Commission held that failure to supply hospital records did not constitute negligence or deficiency in the service rendered by the hospital. Regarding this issue, there is no settled law. Since the decision on this issue varies from case to case, it is suggested that approriate legislative measures may be put in place conferring a statutory right on the patients and their relatives to have access to medical records on demand.

Failure to get consent constitutes negligence

Consent to medical treatment is widely regarded as the corner stone of the doctor-patient relationship.[21] The term 'informed consent', an American concept,[22] requires that before any person is subjected to medical or surgical procedure, he must be informed about the risk and that patient or his guardian must then consent to undergo that procedure and he must be competent to give that consent. Consent for surgery, if not obtained gives rise to a cause of action for seeking remedy irrespective of the fact that medical negligence or deficiency in service is not established.

Conclusion and Suggestions

The Indian Medical Council Act came in to force in 1956, and it empowered the council to take disciplinary action against doctors committing professional misconduct.[23] There is no provision in the Indian Medical Council Act 1956 for the protection of interest of the person who has suffered on account of negligence or dificiency in the service rendered by medical professionals. The field left open by the said act is covered by the Law of Torts in general and by Consumer Protection Act in particular. Recently in a public interest litigation filed by Malay Ganguly, the Division Bench of the Supreme Court directed the Medical Council of India to incorporate a provision in the Indian Medical Council Act that any complaint against a delinquent

20. (1995) 3CTJ 411
21. "Medical Negligence" Sweet and Maxwell 1996 p. 6.001
22. Malcolm Khan and Robson Michelle "Medical Negligence" 1997 p.42
23. Section 24 of the Indian Medical Council Act

doctor should be disposed of by the State Medical Council within six months.

The definition of the term "service" under Consumer Protection Act expressly excludes rendering of any service free of charge. But it is clear from many cases that services provided by the Central and the State Government Hospitals to the patients, free of charge were deficient, thereby resulting in damage or injury to consumer of such services. So it is suggested that the concept of service should be widened and free medical service institutions be brought within the ambit of the regulatory provisions of the Consumer Protection Act.

Hence it is suggested and concluded that a paper on medical ethics, liability and accountability for medical negligence should be introduced in the curriculum for Bachelors of Laws and a legislation should be enacted for conferring the statutory right to the patient or their relatives to be supplied medical records if so demanded and the Medical Council of India should incorporate a provision in the Medical Council of India Act that any complaint against a delinquent doctor should be disposed of by the State Medical Council within six months and the concept of service should be widened and free medical service provided by the Government Hospitals or elsewhere be brought within the purview of the Consumer Protection Act.

Matrimonial Property

- An emerging concept in Personal Law

M.S. Soundara Pandian **

The Supreme Court of India, in a recent judgement, directed the Government to enact laws for granting divorce on the ground of irretrievable break down of marriage under the Hindu Marriage Act 1955.[1] Expressing concern over the Supreme Court directive to the Government, the All India Democratic Women's Association (AIDWA) has made an appeal that the Government should not take such a step in the absence of legislation on women's right to marital property, child support and adequate maintenance. Indian women did not have the right to any of the assets in the matrimonial home even after years of marriage. Contributions of women to household have not been recognized by the law.[2]

There are three concepts relating to the property that directly concern women, when a marital relationship faces problems or where divorce is imminent. These are maintenance, dowry and matrimonial properties. Sufficient laws are already enacted to handle cases relating to maintenance and dowry. But the third one (i.e.) Matrimonial Property, which is not duly recognised in our personal laws, merits mature consideration.

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1. The Hindu, dated 23.03.2006
2. The Hindu, dated 23.03.2006

Matrimonial property[3] is the property acquired by the spouses during marriage, and would include immovable property or rights in immovable property, household goods, jewellery, property gifted to both spouses, investments, insurance policies, business interests, retirement benefits etc. This would likewise include debts incurred for the benefit of both spouses in the course of managing household affairs, for the acquisition of the property or the purpose of educating a child or debts incurred for a family business. Properties excluded from the purview of matrimonial property are properties acquired before marriage, individual gifts, inheritance, etc.

The concept of matrimonial property better understands the nature of a marriage in the context of property rights. So far as marriage is a going affair, there arises no need for disposal of matrimonial property. This concept gains momentum in the eventually of break down of marriage culminating in divorce. In view of the complex nature of conjugal relationship which is based on mutual trust and shared interest, while purchasing the property, the spouses little bother in whose name the property is purchased irrespective of the fact from whom the consideration flows. This is because they plan their future as a life long affair and the very idea of divorce is repugnant to the conjugal harmony. Husband and wife normally enjoy and use much of their property together and their money and goods are mingled so inextricably. They do not contemplate that a time might come when decision would have to be made as to who owned what. There is no idea of having an agreement or understanding as to where the ownership would rest in the eventuality of break down of marriage culminating in divorce. The husband normally takes decision regarding the family's resources or investments. Property is then nominally registered in the husband's name despite the fact that the wife may have directly or indirectly contributed to its acquisition. Women see no cause for concern in this, since the benefit is to be shared by both. It is when the relationship is strained that this disadvantage for the women is brought into focus. On divorce, the question of distribution of these assets assumes importance. This

3. Hine Vs. Hine (1962) I) WLR1124 (C.A.). Instead of matrimonial property, the word "family asset" is used. Per Lord Denning, family assets means "something acquired by the spouses for their joint use, with no thought of what is to happen when the marriage breaks down".

problem may be conversed from two angles. Firstly, women on account of societal norms, expectations and the division of labour within the relationship of marriage would generally undertake the responsibility of home makers and devote themselves to the work of culinary and rearing of children and other dependents in the family and thereby indirectly help their husbands in the acquisition of family assets and other property by their thrift and skills. As a consequence, all the income will be attributed to the husbands who earn it, thus ignoring or rendering invisible the contributions women make to the family and acquisition of income and resource. Wife's contribution towards family by her physical work is no less important than the husband's financial contribution. The mere fact of women's contribution not being tangible or estimable, cannot deny her right of ownership to the assets acquired by the family. Secondly, there is increase in the number of married women in the labour force, thus, the wife contributes significantly to the common pool from the gains of employment or otherwise, which results in the augmentation of the family income which may be utilized in the purchase of family assets including immovable property. This means that increasingly, married women are acquiring property through their own work as distinguished from the property which comes to them; say by dowry, succession, inheritance etc. It is in this background that the problems of distribution of family assets arise.

At common law of England, husband and wife become one: "the very being or legal existence of the women is suspended during the marriage".[4] It flows from this principle that wife's personal property and the income vested in her husband on marriage; in effect the law regarded husband and wife as one.[5] A first legislative step was taken through the Married Women's Property Act, 1870 and then followed by the Law Reform (Married Woman and Tort Feasors Act, 1935) which provided that a married woman shall be capable of acquiring, holding and disposing of any property as if she were a *femme sole* and also recognized three basic principles of equality of status and capacity, of separation of property and of separation of

4. Cretny M. Stephe, Principles of Family Laws. Fourth Edition. p. 629
5. Lord Denning, M.R. Williams and Gyns Bank Limited Vs. Boland (1979) Ch. 312, 332, C.A.

liabilities.[6] This principle of separation of property worked till the Second World War. Thereafter, most women were wage earners contributing towards purchase of family assets directly or indirectly. To protect the interest of such married women, the courts recognized only the financial contribution directly or indirectly made by a married women towards the acquisition of family assets. However, injustice continued to the wife who looked after the home and the family and she could claim maintenance only from the husband and nothing more.[7] Wife's contribution in looking after the home or caring for the family became a relevant factor in the Matrimonial Proceedings and Property Act, 1970 [8] for the first time. The provisions of the Act of 1970 are now replaced and now re-enacted in the Matrimonial Clauses Act, 1973.[9] By applying the concept of matrimonial property, the property is equitably distributed between the spouses when there is severance of the matrimonial relationship. Thus, property is not taken by the spouses in the traditional manner i.e., property in a particular spouse's name would remain with him or her. Instead there is a common pool of resources identified which is equally divided.

In India, contrary to common law, the married women enjoyed property rights from antiquity. "Nowhere were proprietary rights of women recognized so early as India".[10] Among the matrimonial statutes governing various communities in India, the Indian Divorce Act, 1869, The Parsi Marriage and Divorce Act, 1936, The Dissolution of Muslim Marriage Act, 1939, Muslim Women (Protection of Rights of Divorce) Act, 1986, The Hindu Marriage Act, 1955, The Special Marriage Act, 1954 and The Family Court Act, 1984 offer various matrimonial remedies.

The Indian Divorce Act, 1869 provides for the settlement of the wife's property on husband and children or both where a decree for divorce or judicial separation is passed on ground of adultery of the wife[11] and also empowers the court to divert any property of the

6. B.K. Sharma - Divorce Law in India, p. 362
7. Pettitt Vs. Pettitt (1969) 2 All ER 385 (HL) p. 403-404.
8. Section 4 and Section 5
9. Section 24(1) and Section 25(1)
10. Guroodas Banerjee. Sir, Hindu Law of Marriage and Streedhana. Fifth Edition (1915) p.370.
11. Section 29, The Indian Divorce Act, 1869.

guilty spouse for the benefit of children of the marriage and innocent party.[12] A similar provision[13] is found in The Parsi Marriage and Divorce Act, 1936. But the Dissolution of Muslim Marriage Act, 1939 does not make any such provision. However, The Muslim Women (Protection of Rights on Divorce) Act, 1986 provides for the return of property of a divorced women that was given to her before, at or after the marriage.[14]

Section 27 of the Hindu Marriage Act, 1955 merely provides for the adjustment of properties made "at or about the time of marriage" and "which may belong jointly to both the husband and wife". Perusal of the said provision makes clear that its scope is narrower since it covers only that property which is gifted at or about the time of marriage and which may belong jointly to both husband and wife and not that property acquired by the spouses both individually or jointly during the subsistence of marriage. The legislative intention in enacting Section 27 is to protect the interest of the wife when marriage breaks down by saving the wife from running to different courts for settling property dispute arising from matrimonial conflict. It seems that the legislature did not foresee the problem in terms of disposal of property acquired during the subsistence of marriage.

The Special Marriage At, 1954, a common legislation applicable to all the communities in India, does not contain any provision in this respect. The only statute which deals with the subject matter is the Family Court Act, 1984. The Act confers jurisdiction on a family court to decide a dispute with respect to the property of the parties or either of them.[15]

Unlike the Hindu Marriage Act, 1955[16] The Family Court Act, 1984[17] empowers the family court to exercise jurisdiction to decide disputes relating to properties of both or either of the spouses not-withstanding that the property is gifted at or about the time of marriage or acquired

12. Section 40, The Indian Divorce Act, 1869
13. Section 50, The Parsi Marriage and Divorce Act, 1936
14. Sectino 3(d)
15. Section 7(1) Explanation (C).
16. Section 27.
17. Section 7(1) Explanation (C) "A suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them".

both jointly or individually by the spouses during the subsistence of marriage. Though the provision appears simple, there exist two conflicting views expressed by the High Courts on the question whether a family court, while deciding a divorce petition under the Hindu Marriage Act, 1955, can decide an application under Section 27 of the same act read with Section 7 of the Family Court Act, 1984 with respect to the property which does not fall within the ambit of Section 27. A Division Bench of the Rajasthan High Court[18] answered in the negative and held that Section 7 of the Act of 1984 does not confer a right for getting all disputes decided in proceedings under Section 13 of the Act of 1955. For getting a relief for property other than those covered under Section 27 of the Act of 1955, a regular suit has to be filed under the Act of 1984. Contrary to this view, a Division Bench of the Karnataka High Court[19] held that the jurisdiction of the family court is extended in respect of suits relating to properties which do not fall within the ambit of Section 27 of the Act of 1955. However it is to be noted that Section 7(1) Explanation (C) of the Family Court Act, 1984 does not expressly include matrimonial property or spousal property or any property acquired by the spouses either individually or jointly during the subsistence of marriage. Though it seems that the view taken by the Karnataka High Court is fair and conforms to the spirit of the Act of 1984, the Judicial response from other High Courts on this controversy is yet to come. Further it is unfortunate that the Family Court Act, 1984 is yet to be enforced throughout the country and the family courts are established only in some metropolitan areas.[20] In places where family courts are yet to be established, the courts already vested with matrimonial jurisdiction under a statute has no power to entertain a suit or proceeding between the parties to a marriage with respect to the properties acquired during the subsistence of their marriage.

Thus the Family Court Act, 1984 is inadequate to deal with the property adjustment of spouses on divorce. The court may face

18. Padmaja Sharma Vs. Ratan Lal, (1994) 1 HLR 576 at 581
19. A.S. Gouri Vs. B.R. Satish, II (1991) DCM 350. See also Shyni Vs. George, AIR 1997 Kerala 231.
20. Nirmala Gupta Vs. Ravendra Kumar, AIR 1996 MP 227 (DB). The High Court invoked the power u/s 151 of the code of civil procedure to pass an appropriate order in regard to property that may belong solely to the husband or the wife.

numerous situations on dissolution of marriage resulting in a claim by the wife for a share in matrimonial property acquired with or without the aid of her financial contribution. The contribution which wives make towards the acquisition of the family assets by performing their domestic chores, thereby releasing her husband for gainful employment is at present wholly ignored in determining their rights. It is also difficult to find a compromise in respect of a claim made by a non-working wife especially in a non-contractual situation. The judicial response is also unpredictable. In doing justice to the wife, the courts may rarely make an order for equitable distribution of properties between the spouses. This situation would become a tool in the hands of unscrupulous husbands to get rid of wives and children before providing for settlements. Therefore non-recognition of the rights of women to matrimonial properties amounts to prescribing the inability of the wife to maintain herself as a condition precedent to make any claim on the matrimonial properties in her husband's name.

Thus the social responsibility makes the legislature take notice of this gender injustice and enact appropriate provision in the Family Court Act, 1984 on the lines of The Matrimonial Clauses Act, 1973 [21] in England. Till law is enacted, the family courts can make use of the provisions already existing[22] in the Family Court Act, 1984. The courts deciding matrimonial disputes in areas where family court is not established, may invoke the power under Section 151 of the Code of Civil Procedure. Above all, the establishment of family court should not be optional and should no more depend on population of a given area. Such courts should be established in all districts compulsorily. This legislative action will definitely ameliorate the sufferings of the wife on dissolution of marriage.

21. Section 24(1) and Section 25(1).
22. Section 7.

Status Based Protective Discrimination and Women:

A Critical Analysis

J. Vincent Comraj **

"The fight is not for women's status but for human worth. The claim is not to end inequality of women but to restore universal justice. The bid is not for loaves and fishes for the forsaken gender but for cosmic harmony which never comes till women come. The soul of man is woman and when she goes there is no goodness of strength left". - V.R. Krishna Iyer [1]

Women are considered to be the eyes of the society. It is not known whether the society sees through them or the social outlook of women is the most appropriate one taking in to account the peculiar position of their status. Women enjoy a special status in the society and in a country like India where mother is worshipped as a goddess the position of women is bound to create passionate attitudinal emotions.

But the reality with regard to the social functions of women is like the Platonic attitude to poets. Plato in his 'Republic' says that the poets are to be honoured, anointed, garlanded, taken in a procession and left outside the republic with a warning that they should never attempt to enter the republic again. The Indian attitude to women is

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1. Humans without Rights by V.R. Krishna Iyer.

also like this. They respect women but they try to banish them to the secluded interiors of their houses. This has resulted in the praise of female innocence and ignorance from time immemorial. This status based seclusions had a debilitative effect and the present position of women is the outcome of the relics of the arbitary ethos of a bygone age. Hence women are granted the constitutional protection.

Protective Discrimination in Favour of Women

Art. 15(3) enables the State to make provisions for women. This provision intends to meet the special needs on account of their peculiar characteristics as women, such as the need for maternity leave before or after child birth etc. This raised an important issue whether the words "special provisions for women and children" as used in Art.15(3) are confined to conceiving or other biological peculiarities of women or these words are to be taken as equivalent to special provisions for the advancement of the interest of women as used in Art. 15(4). It is submitted that women under Art. 15(3) also should be treated as a socially and educationally backward class as contemplated in Art. 15(4). In the words of V.S. Deshpande J. in Charan Singh Vs. Union of India.[2]

> "Women satisfy the educational, social and economic criteria of backwardness as compared to men. This fact is clouded and has not been brought to the forefront because the search for the criteria of backwardness has been restricted to comparisons being made, between different castes, communities or social classes, each of them including men as well as women. But when the condition of women is to be considered, one can approach by treating women as a class and compare the condition of women as against the condition of men".

In Anjali Roy Vs. State of W.B.,[3] where a girl student was refused admission in the college solely on the ground of sex in contravention

2. 1979 S.L.J. 26 at 32
3. AIR 1952 cal 825

of Art. 15(1) of the constitution, it was held that Art. 15(1) is of wider application than Art. 29(2) and, therefore the former should be construed 'as controlling' the latter. Bose J. did not consider the provision in Art. 15(1) of any help in upholding the rights of the Indian women to equal facilities of college education. The learned Judge pointed out :

> "Art. 15(3) of the Indian Constitution, however provides for only special provision being made for the benefit of women and does not require that absolutely identical facilities as those enjoyed by males in similar matter must be afforded to women also".[4]

It is a wrong view because if Art. 15(3) enables the state to make special provision favouring women, then how can the State take away the right guaranteed to them under Art. 15(1)? It is submitted that guarantee under Art. 14 can be made available to women and nothing in Art. 15(1) or in Art. 29(2) should be understood to qualify the provisions of Art. 14. Articles 15, 16, 17 and 29 should be understood to supplement and add to the equality clause of Art. 14 and not to detract from the guarantee.

In University of Madras Vs. Shantha Bai,[5] a woman applicant was refused admission to the college on the ground of sex only. Raja Mannar, Chief Justice held that Madras University was not included in the definition of State, and therefore, the petitioner could not complain of discrimination under Art. 15(1). The learned judge justified the denial of admission on the ground that in the college open to men only, there were no facilities for women like a separate common room, etc. In this context, the court compared the situation to that where a college is not permitted to admit students to the science classes without adequate laboratories. The court ignored the fundamental right of the women. It is submitted that if women have the right to be admitted, there is a corresponding duty on the State to provide necessary facilities for admission. The State thus discriminates against women precisely by failing to create equal facilities for women. The court also relied on Art. 29(2) which has

4. Supra
5. AIR 1954 Mad 67

omitted 'sex' as prohibitory ground for discrimination. It is submitted that Articles 15(1) and 29(2) should be interpreted harmoniously.

Professor Tripathi says:[6]

> "The omission of 'sex' from the test of Art. 29(2) absolves the State from the duty of admitting a woman applicant in a particular college, but it does not absolve the State from the duty, imposed by Art. 15(1), of making available to the same student another and equally good college where she could be admitted. Art. 29(2), which is a guarantee against segregation cannot take away or destroy Art. 15(1) which is a guarantee against discrimination or unequal treatment. It may be true that segregation on the basis of 'sex' does not offend Art. 29(2), but the fact remains that if such segregation also has the additional effect of discriminating, it must be stuck down under Art. 15(1)".

In Yusuf Abdul Aziz Vs. The State of Bombay,[7] the validity of Section 497 of the Indian Penal Code was challenged. This section makes an abettor of adultery punishable, but provides that, "in such case the wife shall not be punishable as an abettor". It was argued that clause (3) of Art. 15 should be confined to provisions which are beneficial to women and could not be used to give them a licence to commit and abet crimes. The court found no such restriction under clause (3) nor agreed that the provision which prohibits punishments amounts to a licence to commit offence for which punishment has been prohibited. Bose J. observed:

> "Sex is a sound classification and although there can be no discrimination in general on the ground the constitution itself provides for special provisions in the case of women and children".[8]

To differentiate between men and women on this count smacks of an archaic concept which is certainly not consonant with dignity of

6. Some insights in the Fundamental Rights by Prof. Tripathi
7. AIR 1954 SC 321
8. Supra

the woman. Steps may be taken for the removal of this difference between men and women in the offence of adultery.

In Ms. Chocki Vs. State,[9] Section 437 of the Code of Criminal Procedure enables women and children to be released on bail for non-bailable offences in the circumstances under which a male cannot be released on bail has been held to be consistent with Art. 15(3). This provision takes care of women's physical condition and saves her from falling into awkward and hazardous situation which could have put her into inconvenience.

In Shadab Vs. Mohd. Abdullah,[10] the Allahabad High Court disallowed the decision of the excise authorities taken at the time of disposal of the application for the licence for opening liquor shops to prefer women applicants to men applicants. The grant of the licence to the applicant only on the ground that she was a woman, said the court was not only made on irrelevant ground, but was discriminative and violative of Art. 15(1).

The provisions under Order 5, Rule 15 of Civil Procedure Code for making service of summons on any male member of the family, if the defendant could not be found was held not discriminatory of Art. 15(3) which covers any provision either for betterment or for some other purpose specially made for women. It was held that there was no discrimination between a women and man simply on the ground of his or her sex in receiving a notice on behalf of some other member of the family. It is submitted that such a provision cannot be sustained in modern times as it discriminates against women. Indeed, it is heartening to note that keeping pace with the growing literacy, awareness and the change in the role of female, the discriminatory provision was amended to provide that the service of summons can be affected on adult females also.

In Raghubans Saudagor Singh's[11] case, an order of the Governor of Punjab rendered women ineligible to posts in men's jail other than those of clerks and matrons. The order was assailed as violative of

9. AIR 1957 Raj.10
10. AIR 1967 J&K 120 (127)
11. AIR 1972 P&H 117

Art. 16(2). The court turned down this plea and held that what is forbidden under the constitution is discrimination on the ground of sex alone, but when the peculiarities of sex added to a variety of other factors and consideration form a reasonable nexus with the object of classification then the constitutional bar under Articles 15 and 16(2) cannot be attracted. Upholding the bar and explaining the difficulties of a female officer in men's jail the court observed:

> "Necessarily the inmates of these jails have a large majority of hardened and ribald criminals guilty of heinous crimes of violence and sex. The difficulties which even male wardens and other jail officials experience in handling this motley and even dangerous assemblage are too clear to need elaboration. A woman performing these duties in a men's jail would be even in a more hazardous predicament".[12]

The other view taken is that protective discrimination in favour of women in matters of employment is permissible within the constitutional scheme. The Supreme Court has interpreted in Thomas[13] case that Articles 14, 15 an 16 have to be read together to form the totality of provisions dealing with equality. It was argued that the reason for enacting Articles 15(3) and 16(4) was that the right to equality declared in Articles 15(1), 16(1) and 16(2) had to be balanced by benign or reverse discrimination made in favour of the disadvantaged classes. What is prohibited by Art. 15(1) as also by Art. 16(2) was adverse discrimination. What is allowed by Art. 15(3) as also by Art. 16(4), benign or protective discrimination by which women and backward classes are helped towards equality. Remedial and welfare provisions such as Art. 15(3) have to be widely construed. It follows as a necessary corollary that the scope and the content of the exception in clause 3 will extend to the entire field of the State discrimination including that of public employment. Thus construed clause 3 of Art. 15 is to be deemed as a special provision in the nature of a proviso qualifying the general guarantees contained in Articles 14, 15(1), 15(2), 16(1) and 16(2).

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12. Supra 11
13. State of Kerala Vs N.M. Thomas AIR 1976 SC 490 (1976) 2 Sec. 310.

The Report of the committee on the status of women in India:

The Committee on the Status of Women in India has pointed out that though the women do not constitute a minority they have started acquiring the recognized dimensions of a minority. These are :

(i) inequality of status

(ii) inequality of class and

(iii) inequality of political power

The committee emphasized that the continued backwardness of women is due to a deeply ingrained notion that a woman's role in life does not call for much formal education. This notion is reaffirmed by an occupational structure that makes it difficult for women to be productively employed after completion of their education. The committee recommended :

1. The development of suitable employment opportunity for women.
2. The development of information and guidance service to ensure that the women avail of the new employment opportunities.
3. Launching of a systematic campaign to alter both societal notions as well as women's self-concepts regarding their roles in life.

Reservation for women in elections

The 73rd and 74th amendements[14] provided reservation of seats for women in elections to panchayats and municipalities. Art. 243(d) of the Constitution of India provided for reservation of one third of seats for women in municipalities. The 81st Amendment Bill was introduced seeking to provide for reservation of one third of seats in the Parliament and State Legislatures. Here in this context, the

14. Amendment acts

thorough analysis of the working out of so many steps taken to uplift women is to be made. No one can deny the fact that the reservations for local bodies have created situation of proxy power wielding by the husbands of the elected women. The real reason for such clumsy situations is the "societal notions as well as the women's self-concepts" as the committee report points out. It is felt that the largesse of reservations has not been based on a sound platform of mature womenfolk and enlightened societal notions. Much of the personal laws and societal customs still are considered ***opinio juris*** [15] by the society. The society is not able to appreciate the archaic notions of female virtue. The principles of a bygone age is still considered binding and cherished by conservative misogynist religious bigots.

Before venturing in to reservation for women in vital areas of political power it is mandatory to make a ***catharsis*** [16] of the mental outlook of the society. The notions of female slavery should be uprooted from all the areas of fundamentalism. Be it religious or caste based social set up, the ignominy heaped on women by the archaic principles should first be removed. Then only women can come out of their clutches and ornamental bonds and perform their political functions properly. In this context the following suggestions are offered :

i) In as much as Art. 13(3) includes customs and usages having the force of law as 'law' all religious based practices denigrating women shall be held to be violative of Art. 15(1) and are to be removed from the societal moral perspective.

ii) The parts of religious scriptures which denigrate women shall be prohibited from being published in any part of India.

iii) The prayers, sermons, texts, and rituals where women are portrayed as weaker sex and as beings lower in stature and status shall be held illegal and unconstitutional and banned.

15. In the opinion of the people it is binding in spirits of necessity, an element of custom.
16. Concept of purification by Aristotle

iv) The societal inhibitions that promote inequality and adverse discrimination against women shall be held as illegal and if a specific legislation for this purpose is required such legislation shall be made for providing exemplary punishment in tune with the Protection of Civil Rights Act.[17]

v) The protective posture of male chauvinistic husbands accompanying their wives to the places of their public functioning shall be prohibited.

vi) Sufficient enlightenment in the matter of equality of sexes in the changing world be made through necessary changes in the curriculum in school and college text books.

From the foregoing, it is to be appreciated that in spite of the judicial pronouncements interpreting Art. 15(3) the status of women has not substantially changed. The protective discrimination is making a slow process of eliminating gender inequality. It cannot for a long time hold on in as much as employment in the globalised and privatized scenario has come to naught. The special provisions made under the concept of protective discrimination have only made marginal progress. Much is to be done by means of surgical operations in the form of vital radical and reform oriented legislation to eliminate the societal inhibitions and religious bigotry promoting gender inequality. Until such vital steps are taken the protective discriminatory political empowerment of women will result in a situation where women will be blinded by the lightening created by sudden availability of political powers not to be affected by such lightening, let us first enlighten the women by gradually transforming their self-concepts through radical legislative means.

[17] Protection of Civil Rights Act

International Criminal Law - New Developments: Transnational Offences, Extradition and Mutual Legal Assistance

Mrs. D. Bhuvaneswari **

International criminal law constitutes the fusion of two legal disciplines viz., international criminal law and domestic criminal law. Until the collapse of the USSR and the subsequent cataclysmic effects, organized crime was essentially a domestic affair, even though transnational patterns were evident. Some States chose to see the phenomenon holistically,[1] while others preferred to view each underlying offence in isolation from the organized nature of the group. Similarly, requests for international cooperation and mutual legal assistance were made on the basis of the underlying offence. The escalation of both national and transnational crime and the acknowledgment that effective law enforcement is increasingly dependent upon international cooperation mechanisms has led to several important international initiatives, which aim to standardize and simplify extradition procedures. The rise in terrorist related offences has been an added incentive for States to negotiate efficient surrender mechanisms. Although some States have traditionally preferred bilateral treaties, there is a move amongst States in close

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1. For example the 1951 Racketeering Act, 18 USC 1951 et seq
2. Kindler Vs. Canda (1991) 84 DLR (4th) 438 p. 488

geographical proximity to each other to make use of multilateral treaties. Undoubtedly multilateral extradition treaties, between States that share a common legal and cultural heritage generally present fewer procedural difficulties that are culturally, politically and geographically miles apart.

Extradition is the formal process whereby a fugitive offender is surrendered to the State in which an offence was allegedly committed in order to stand trial or serve a sentence of imprisonment. There is no general rule of international law that requires a State to surrender fugitive offenders and extradition arrangements proceed on the basis of a formal treaty or a reciprocal agreement between States. While the United States of America continues to prefer bilateral treaties as the legal basis for extradition, European States increasingly rely upon multilateral regional treaties. The process of extradition, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions.[2] In this purview, Law of Extradition, which is a branch of International Criminal Law, is based on the assumption that the requested State is acting in good faith and that the fugitive will receive a fair trial in the courts of the requesting State.

The post 1990 era, with the advent of globalised trade and physical movement of persons, witnessed an increase in organized crime, originating especially from the former Eastern block necessitating a different approach to the problem.[3]

In this respect the international exchange of evidence in criminal matters through formal mutual legal assistance arrangements is a fairly recent phenomenon. There is a realization that participation in formal arrangements would provide prosecuting authorities with increased access to evidence located abroad. States have become increasingly willing to negotiate Mutual Legal Assistance Treaties (MLAT). Since early 1990's the United Nations (UN) General Assembly had been detecting the increase and expansion of organised criminal activity world wide, and making a reference to the emergent links between organized crimes. The effect of these organized crimes will

3. N. Passas, 'Globalisation and Traditional Crime, Effects of Criminogenic Asymmetries', 4, Transnational Organized Crime (1998), 2.

be curbed to a maximum possible extent through this Mutual Legal Assistance.

In England the Extradition Act, 2003 has brought into effect the most radical change in the subject, since the extradition Act, 1870. The law of Mutual Legal Assistance has also undergone tremendous revision in the Crime (International Co-operation) Act, 2003. Twenty years ago, extradition and Mutual Assistance Law were regarded as technical subjects of little interest, but now they have become subjects of political as well as legal controversy. However the substantial revision does not diminish the importance of the history and general principles of the subject.

The European Union changes are unquestionably political as well as legal in character. The Home Office[4] contained the following aspirations.

"Total harmonization of domestic time table and European Union agenda could be very difficult to achieve and waiting for reciprocal action by our European Union partners could be an unacceptable delay. We have an opportunity to be in the European Vanguard for setting the pace for changes in Extradition within the European Union".

There have been two separate but relatively provoking changes in the law. One is the increasing influence of the European Union on Criminal, Extradition and Mutual Assistance Law, following the Treaty of Amsterdam of 1997 and the Tampere Meeting in 1999. This resulted in the European arrest warrant and it provided the basis for Britain's extradition arrangements with other European Union States. This actually paved the way for the sudden development of the transnational European criminal justice institutions.

In the present context States increasingly recognize the international nature of serious criminal activity. Co-operation has begun at State and law enforcement level. It has taken the form of provisions intended to improve the detection, investigation and effective trial of crime as well as close cooperation in extradition. Most of these provisions fall under the general framework of Mutual Legal Assistance.

4. The Law on Extradition, A Review of March 2001.

It has been remarked by David Blunkett, Home Secretary, House of Commons, while introducing the bill, "We live in an increasingly, global and mobile world, where serious and organized criminals operate across national borders. We need to keep one step ahead of the game in tackling the criminals whose business is terror, or trafficking people, drugs and arms across the world.[5]

Most criminal justice systems recognize that the most pressing transnational concerns are organized crime and terrorism. If we take United Kingdom, the law enforcement authorities began to consider these threats seriously about twenty years ago and they now seek to promote assistance principally through UK membership of the European Union and the Commonwealth as well by means of close relationship between the United Kingdom and the United States of America. The United Kingdom has become party to numerous treaties, conventions, protocols and framework decisions designed to give effect to a political will to improve cooperation in such matters.

Initiatives made by the United Nations and European Union in Mutual Cooperation

United Nations Model Treaty on Mutual Legal Assistance

Using the features common to existing agreements, the 1990 UN Model Treaty on Mutual Legal Assistance (Model Treaty) creates a framework which can be used as a guide for States negotiating bilateral or multilateral agreements.[6]

Each party is required to establish a competent authority through which assistance should be directed and the parties undertake to provide 'the widest possible measure of mutual assistance' with regard to taking evidence from witnesses, carrying out searches and seizures, serving documents, and supplying documents and records. However one of the important aspects which this model treaty has left out to include is with respect to areas of judicial cooperation such as the transfer of prisoners, proceedings and the execution of judgments and thus it is outside the ambit of the 1990 Model Treaty. So States

5. Home office press release, October 30, 2003
6. 1990 UN Model Treaty on Mutual Legal Assistance in criminal matters, 30ILM (1991), 1449

may refuse to comply with a request for assistance on grounds similar to those found in extradition treaties. Although there is no double criminality requirement found in the treaty, it does contain a special provision. Thus evidence may only be used in connection with matters for which the request was made, and documents and original records must be returned to the requested State as soon as possible. The requested State can be asked to provide assistance to enable a witness to travel to the requesting State to assist in a criminal investigation or to testify in criminal proceedings. The 1990 Model Treaty complies with standard MLAT practice in that evidence must be obtained in accordance with the law of the requested State.

European Union Initiatives

The European Convention on Mutual Assistance in Criminal Matters 1959

The 1959 European Convention is the foundation upon which most of the further European Union Mutual Legal Assistance measures have been built. Its origin lay in a desire by leading States of the council of Europe to promote greater cooperation in Extradition arrangements, which had culminated in the European Convention on Extradition, 1957. In the course of drafting this instrument of extradition law, it was realized that Mutual Legal Assistance is also an important aspect of effective judicial cooperation and provisions were included. The UK has also incorporated the major provisions of 1959 European Convention in domestic legislation in the 1990 Act, and ratified it in 1991. Parties undertake to provide each other with the widest measure of mutual assistance in proceedings for offences which fall within the jurisdiction of the judicial authorities of the requesting State.

The Commonwealth Scheme relating to Mutual Assistance in Criminal Matters - Harare Scheme

In 1983 the Commonwealth law ministers initiated the creation of Mutual Legal Assistance Convention that would enable Commonwealth countries to cooperate more effectively. The Harare

scheme, which has been subsequently amended,[7] contained many provisions similar to those in the 1999 European Convention.

The following are some of the treaties concluded with respect to Mutual Legal Assistance,

1. **The Mastricht Treaty:** It introduced a new level of European State integration. It provided for judicial cooperation in both civil and criminal matters.

2. **The Treaty of Amsterdam:** The treaty was signed on October 2, 1997 by an intergovernmental conference. Investigative and prosecuting authorities were expected to collaborate through institutions such as Europol in areas including training, the prevention of crime and the exchange of information.

3. **European Convention on Mutual Legal Assistance in Criminal Matters (MLAT) 2000:** On 29th May, 2000 the council of ministers adopted the Convention on Mutual Assistance designed to make mutual assistance more efficient and effective.

The effect of Terrorist Attacks of September 11, 2001

The above developments demonstrate that, in the investigation and prosecution of crimes, drug trafficking, serious fraud and money laundering offences were usually the stimuli for closer international legal cooperation. This stimulus changed to terrorism after the attacks on New York and Washington DC in September 2001. On 19th September 2001, the European Commission published its proposed framework decision on terrorism. On 12th September, 2001 the European Union announced an action plan, consolidating its position in relation to US Assistance, security and terrorism. The September 2001 attacks undoubtedly brought worldwide attention to transnational crime, creating an atmosphere in which greater cooperation was attempted as a matter of urgency. The effect of such cooperation is evident not only from the subsequent adoption of new extradition arrangements, but from the European Union and

7. May 1999 Amendments to Paras 27 and 28 of the scheme.

United States mutual assistance and extradition agreement signed on 28th June, 2003.

This 2003 Convention is the first comprehensive treaty between the European Union as a whole and any Non-European Union State on criminal law. Under the treaty of Amsterdam the European Union has the power under Article 38 to negotiate and agree such treaties. The convention builds on existing bilateral treaties in force between most European countries and the United States in relation to Extradition and Mutual Assistance procedure.

Even though modelled on MLAC-2000 and the subsequent protocol to that convention, the European Union / US Convention is in some respects more developed, where the main provisions are as follows:

a) The Convention gives US authorities access to information from banking and non-banking financial institution in investigations into criminal offences.

b) The Convention establishes 'Joint Investigative Teams' for the purpose of facilitating investigations or prosecutions involving the US and one or more member States.

However States retain the right to refuse a request from the United States of America under any grounds that existed under any bilateral treaty or if no such treaty to refuse on grounds of security, sovereignty or other essential interest. There is no express provision allowing the European Union requested State to refuse request on the ground that it relates to an investigation or prosecution where the death penalty might be applied. It would appear that each case will be considered by the relevant authority on its merits [8] even though all European States have signed protocol 13 to the European Convention on Human Rights, which prohibits the death penalty absolutely.

Future Developments

The objective set for the Union to become an area of freedom, security and justice leads to abolishing Extradition between member States and replacing it by a system of surrender between judicial

8. Para-8, 30 House Lods select committee on the European Union 38th report

authorities. Further the introduction of a new simplified system of surrender of sentenced or suspected persons for the purpose of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedure. Traditional cooperation relations which have prevailed up till now between member states should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice. The European arrest warrant provided for in this framework decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition, which the European Council referred to as the cornerstone of judicial cooperation.

The framework decision adopted on 13th June, 2002 on the European arrest warrant and the surrender procedure between member states provides in Article 1, the definition of European arrest warrant.

Definition: European Arrest Warrant

European arrest warrant is a judicial decision issued by a member state with a view to the arrest and surrender by another member state of a requested person, for the purposes of conducting criminal prosecution or executing a custodial sentence or detention order. Member states shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this framework decision.

European Evidence Warrant

Some new developments have been proposed and within the European Union, the principle of mutual recognition of judicial decision is intended to become the basis for judicial cooperation in both civil and criminal matters. So this leads to the result that when a decision has been made by a judicial/prosecutorial figure at the appropriate level within a State, that decision should automatically be accepted in other States. Actually this principle lies behind the European arrest warrant. The European Commission has proposed the introduction

of a similar type of warrant (The European Evidence Warrant) for obtaining of objects, data or documents that could have been obtained under procedural law measures such as production orders and search and seizure orders. The commission considers this proposal to be the first step towards the single mutual recognition instrument that would in due course replace all of the existing mutual assistance regimes. The result of the consultation process makes it clear that United Kingdom Government is supportive of this aspect.

This will be evident from the wordings of Parliamentary Under Secretary of State at Home Office, "The concept of EEW is reasonable development of the mutual recognition programme of 2001 because the EEW would provide greater legal certainty that evidence within the scope of the decision can be obtained from other member states".[9]

Now we can come to Indian scenario. To what extent these new developments of International Law had its impact upon India? India has had some disappointments in its attempt to get fugitives extradited from other countries. It often happens even though those countries are in good relations with India. 'The cases of Anees Ibrahim and Ottavio Quattrocchi need to be looked at from the perspective'. Extradition is an area where political considerations play a prominent role, but States can take decision by the exercise of executive discretion to extradite, even though there is no extradition bilateral treaty. The process of extradition involves interposition of the judiciary in both countries. Taking the lesson from the past events, India, as the greatest victim of terrorism should implement the recent judicial cooperation development measures for the purpose of getting the criminals getting extradited.

UN Model Treaty on Extradition :

The UN model treaty on extradition was adopted by the General Assembly of the United Nations in 1990 and is supplemented by the complementary provisions for the Model Treaty on Extradition. These instruments are prepared as part of a general UN initiative to promote the development of effective international cooperation in criminal matters and to encourage the implementation of national and

9. 4th report of the select committee on European scrutiny.

international measures to tackle organized crime. The aim of the treaty is to encourage States to update existing extradition treaties in the light of recent developments in international law. The provisions are similar to those found in the 1957 European Convention on Extradition. The model treaty includes both mandatory and optional exceptions to extradition.

The treaty includes provisions simplifying extradition procedure. In an attempt to introduce some flexibility for States negotiating extradition treaties, several provisions have optional clauses, which allow for some modification to be incorporated in to the text of a specific treaty.

Of course India is also entering into cooperation with several countries, of which, some of the following may be highlighted. India has signed agreements of this type with about 14 countries and extradition deals with 30 countries.

India-United States: India and United States of America signed bilateral treaty on mutual legal assistance in criminal matters on October 7, 2001.

India-Russia Cooperation: In October 2000, a declaration on strategic partnership between India and Russia was signed which included increased cooperation in fighting against organized crime and cooperation in rendering mutual legal assistance in civil and criminal matters and in matters relating to extradition.

India-South Korea: Signed extradition treaty and a treaty of mutual legal assistance in criminal matters.[10]

India-Nepal: India held official level talks to replace 5 decade old Indo-Nepal extradition treaty and work out a new agreement on mutual legal assistance in criminal matters (AMLACM). In this aspect India is following UN special model while working on the proposed extradition treaty. The renewal of treaty aimed at accommodating the changing trends of crimes and criminal activities including economic, cyber and terrorism.

10. The Tribune - 5th October, 2004

Extradition of Abu Salem - India and Portugal

Even though more willingness is there on the part of the countries with respect to this Mutual Legal Assistance in Extradition matters, getting the criminals in the hands of requested State seems to be a lengthy and cumbersome process. Recently, nearly after a decade, India has successfully extradited Abu Saleem, who was accused in Mumbai serial blasts 1993. The Mumbai court is trying Abu Saleem for offences under the Terrorist and Disruptive Activities (Prevention) Act, 1987. Even though India and Portugal do not have a bilateral extradition treaty, Portugal, one of the European Union Member States has extradited Abu Saleem under the International Convention for the suppression of the financing of terrorism, 2000, to which both countries are signatories and have ratified. This is one of the instances where we can infer States' serious commitment to their internationally assumed obligations under International Treaties. As a pre-requisite to the extradition, the Government of India assured the Portugal Government that it would not sentence Saleem, if convicted, to death or imprisonment exceeding 25 years. It undertook to guarantee him a fair treatment and trial in conformity with International Human Rights Law.

Traditionally courts in the UK, Canada, and the Unites States have taken the view that it is not the duty of the committal court to enquire into the adequacy or otherwise of procedural safeguards afforded to a defendant in the requesting State. In Re Arton[11] the English court considered it inappropriate to "enter into the question whether the action of the executive of a foreign country at peace with us is honest or dishonest; we must assume that the French courts will administer justice in accordance with their own law; and so long as they do that, or whether they do it or not, we cannot interfere beforehand to prevent them from exercising in this particular case the procedure which they exercise with regard to any criminals who may be brought within their jurisdictions".

However, this viewpoint is now somewhat outmoded and in appropriate circumstances national courts will consider the issue of

11. IQB 108, pp 115-16, 1896

fair trial in the requesting State. R v Secretary of State for the Home Department ex p Rachid Ramda[12] and Re saifi[13] may be taken into consideration.

Questions arose whether these assurances and undertakings are valid under Indian law, and binding upon Indian courts. Answer is found in the very law under which the accused has been extradited, namely the International Convention for suppression of the financing of terrorism, where Article 11 provides unequivocally, that extradition shall be subject to the other conditions provided by the law of the requested State. Moreover the UN Model Treaty on Extradition also provides for such measure in Article 4. A diplomatic assurance given by the executive of Indian Government is binding upon Indian judiciary also. Article 51 of the Indian Constitution, which says about promotion of international peace and security, directs "the State to foster respect for International Law and treaty obligations in the dealings of organized peoples with one another".

Even though there is worldwide concern about this mutual cooperation in criminal matters for the purpose of tackling effectively the crimes, on the other side we have International Human Rights Law also. While most modern extradition treaties appear to seek a balance between protecting the Fundamental Rights of the requested person and the need to ensure that the extradition process operates efficiently and effectively, it is doubtful whether there is a rule of International Law requiring extradition procedure to take account of general principle of Human Rights. Nevertheless, in practice many extradition treaties do impose procedural protections restricting extradition if surrender would lead to gross violations of Human Rights. A conjoint understanding of these solemn principles of law and judicial pronouncements lead to the conclusion that the provisions of the International Convention for the suppression of financing terrorism, has become part of Indian domestic law and adoption of municipal law in accordance with International Law has become a more necessity of time.

12. (2002) EWHC 1278
13. 12 (2001_ 4 All ER 168

Environmentalism

- A need for Sensitising Community Consciousness and Activising Public Participation

S. Srinivasan **

"We owe it to our ancestors to preserve entire those rights which they have delivered to our care; we owe it to our posterity not to suffer their dearest inheritance to be destroyed" - Junius

If only these words of wisdom be realized and taken to heart by the humans, who in fact is the most endangered species, preserving the environment would not be a difficult task. While there has been, at different point of time and at different levels, a stiff assertion of one's right, everyone seems to be oblivious of his paramount duty pertaining to nature and environment. In the Indian saga of homicidal environmental misfeasance and ecological lawlessness, we have the nature conscious constitutional provisions envisaged under Art. 48-A and 51-A(g).[1] These provisions in effect reflect the national commitment to protect and improve the environment.[2]

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1. Article 48-A: The state shall endeavour to protect and improve the environment and to safe guard the forests and wild life of the country. Article 51-A(g): It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes and wild life and to have compassion for living creatures. These provisions were inserted by the Constitution (Forty Second Amendement) Act of 1976. It is significant to emphasise that these provisions were incorporated in response to the Stockholm Declaration adopted by the International Conference on Human Environment in 1972.

2. Gurdip Sing - "Environmental Law - International and National Perspective" Laxmian (Indian) Pvt. Ltd., New Delhi 1995, 49.

Blissfully unmindful of such duty, we have been ecologically insensitive and contribute much to the ecological crisis and environmental pollution and have outdistanced the nature in which we live. Precisely the ecological crisis, against which we are now trying to race, is of our own making. People have no control over the resources on which the very quality of life depends. On the contrary, as **Justice V.R. Krishna Iyer** points out, we have unconscionable ecocides who propagandize pollution as a necessary evil for the salvation of the nation.

Raising to acceptable levels the plans to control pollution so formulated has not been done either by State or Central Governments. Whatever little that is being done in this regard is primarily by the renderings of the Supreme Court and High Courts in Public Interest Litigations. The judiciary has played a major role in the evolution of environmental jurisprudence through the instrument of PIL. Seeking recourse to PIL in majority of environmental matters is clear indication of failure of the official machinery. The seminal decisions of Supreme Court and various High Courts laying down principles and broad parameters for enforcement of norms provide simple answer to critiques of judicial activism and Public Interest Litigations. The Interest shown by the Apex Court in evolving the principles of law on environmental protection is equally encouraging.

The decision of the Supreme Court in ***Oleum Gas Leakage case*** [3] is of considerable significance for two reasons. In the first instance, the remedial powers of the Supreme Court under Article 32 stood expanded[4] and secondly the rule in Rylands Vs. Fletcher was modified to suit the exigency.[5] In another case, Supreme Court ruled that the financial capacity of the tanneries should be considered as irrelevant while requiring them to establish primary treatment plant.[6]

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3. M.C. Metha Vs. Union of India (1987) 1 SCC 395.
4. The Supreme Court declared that gas victims were entitled to be awarded compensation under Art.32 and the powers of the court to grant relief would include the powers to award compensation in appropriate cases.
5. The Court excluded the application of exception to the rule of strict liability as laid down in Rylands Vs. Fletcher.
6. M.C. Metha Vs. Union of India and others. AIR 1998 SC 1037.

Statement of explicit policy objectives is very much lacking in the set of legislation or the various legislative policy. All the legislative policies or, for that matter, executive actions, seem to have been kept out of the knowledge, access and reach of the common public the victims of pollution, in whose interest they are made. The principle of public participation is not seriously considered in Indian environmental policy. Various machineries, so envisaged under the environmental laws, for effective implementation of the provision are clothed with powers to impose conditions and terms that are necessitated to prevent pollution. The particulars of such conditions, on which monitoring of activities affecting environment is done, are kept away from public scrutiny as a confidential record, for no plausible reason, if at all.

The existing legislation does not provide for involvement or contribution of public for helping the implementing machinery. As a result, the civil society develops the attitude that these laws are alien to their interest or that it does not concern them. Further the complexities of laws, absence of a public system for the review of efficacy of such laws, mutual inconsistency and lack of comprehension leave the activist public perplexed with an ultimate confusion even if they have access to or knowledge of such policy measures.

In our native system there are some inherent drawbacks that have been continually tilting the ecobalance to the extreme of high degree pollution. The rites and rituals result in air pollution and unwarranted wastage of natural eco resources. Open air toilets, invariably in the rural sectors, the remote lanes and street corners of urban areas, cause terrible health hazards. Firing crackers and fireworks, playing music and songs at high decibel have traditionally been integral and inevitable part of customary ceremonies functions and festivals leading of voluntary and contributory noise and air pollution. It would be treated blasphemy and attack on religion if one raises voice against the sentimental cremations and sending half burnt bodies to float across the rivers. Any legislative or executive environmental policy of superlative degree would be of no avail unless the realization comes from the people raising public consciousness. More so, the policy makers seem to have forgotten these and have

The rules of international law like 'Precautionary Principle' and 'Polluter Pay Principle' were made part of our domestic law by virtue of the ruling in **Vellore Citizens Forum Vs. Union of India.**[7] Besides affirming the aforesaid principles, the Supreme Court in **A.P. Pollution Control Board Vs. M.V. Nayudu**[8] pointed out the deficiencies in the judicial and technical inputs in the appellate authorities functioning under certain environmental laws and recommended for immediate amendment of the statutes and rules in question. The principles so evolved, given their far-reaching implications in the management of the environment, exposed the inadequacy of the legal system, in that the people will be kept running to the Supreme Court or High Courts through Public Interest Litigations for every instance of environment violation in order to ensure and protect natural ecosystems, is difficult to answer.

The real problem is that the problem is not understood properly. The civil society in India remains weak in its understanding of technical issues so required to fight pollution. The Indian environmentalism, based on the concept of "utilitarian conservationism", built upon the work of thousands of civil society groups and individuals across the country seems to have grown mainly in responsiveness to the weakness of democratic governing process in the country. However, although the relationship of the environmental movement with the political and bureaucratic systems has remained weak and often antagonistic. The environmentalists, groups or individuals, remain handicapped in pushing through policy and legislative changes.

Further there is a disempowerment of the civil society. Negotiations on environmental issues are being conducted in far citadels and if it is global negotiations, at the far off global capitals and often beyond the coverage of media instrumentalities. This leaves the civil society without any knowledge of the politics of such negotiations, and hence no chance of intervention, if at all. The matter of pollution control is yet to become political issue. Since electoral democracy is provenly weak in confronting the scourge of pollutions, legislations are not worth the paper on which they are promulgated.

7. (1996) 5 SCC P.647
8. (1999) 2 SCC 718

all legal and executive measures will prove waste.

In the light of the above and the existing dismal situation certain effective measures are to be given a serious thought.

Suggestions:

1. At the outset, what emerges as to foremost conviction is that success in the fight against pollution and attempts for preservation of environment can be achieved only if it becomes a people's movement. A cultural campaign is necessary to rouse the consciousness and conscience of the community to the calamitous after effects of the degradation of environment and its permanent pauperization of the people. Without the social consciousness and mass mobilizations, the spirit of all legislative, executive and judicial action will slump.

2. The impetus should come from the elements of Indian democracy which ensures the public rights such as the right to speech, form association, protest and move court. It should be based upon a strong awareness and realization of the importance of bringing about a balance between environment and development. Public participation can be signified in playing a key role in questioning and opposing, specific projects that are inimical to social and environmental concerns. Popular movements and environmental activism should vociferously advance the cause of environmental protection against the vested interests. In the process the trend should not be to remain merely good at opposing but good at generating a positive vision for the future. In this context, the recent legislation on Right to Information[9] can go a long way in accelerating the process of sensitizing public against environmental degradation.

3. The civil society should sincerely indulge and involve in organizing model projects providing the way for participatory community based natural resource management systems. In this regard it is to be pointed out that in the environmental policy, stress should

9. Right to Information Act 2006.

not realized that involvement and participation of the public to be promoted at the rural and grass root level. Obviously policies are discussed and analyzed at urban level. Local antipollution measures and the people have remained to be distant neighbours.

Contrary to the participatory movements, there has been a high degree of indifference on the part of the public towards the environmental hazards. Everyone thinks and feels, on all the opportunities he gets acquainted with instance environmental violations, that it is the other person's problem. This indifference prevails right from the initial level to the extent it assumes serious proportions. It becomes too late when it reaches such a huge dimension and when the affected party or the public senses the serious consequences and raises hue and cry. It enables and encourages the violators to indulge in their activities with immunity. Not only under various provisions of the plethora of environmental legislations, viz The National Forest Policy, 1988, National Conservation Strategy and Policy Statement on Environment and Development 1992, The Water (Prevention and Control of Pollution) Rule, 1975, The Water (Prevention and Control of Pollution) Cess Act, 1977, The Air (Prevention and Control of Pollution) Act, 1981, The Air (Prevention and Control of Pollution) Rules, 1982, The Wildlife (Stockholm Declaration) Central Rules, 1973, but also under major criminal laws of our country, viz Indian Penal Code (Under Section 268, 269, 277, 288 and 290) environmental violations and pollutions are made punishable.

Sensing the inadequacy or inherent drawbacks of the laws, there have been periodical reviews and amendments to suit the present day needs of stern measures to control pollution. New legislations in these regards such as The Environmental (Protection) Act, 1986, Hazardous Wastes (Management and Handling) Rules, 1989, The National Environmental Tribunal Act, 1995, Wildlife Protection Laws, The Public Liability Insurance Act, 1991 etc. are also made. Inspite of all these legislative measures and innumerable policies, environmental pollution goes on unabated. Obliviously the reason could be attributable to the public indifference. The fact, that is an eye opener, is that sans public participation and conscious movements,

and sincerely be taken up. Meaningful and worthwhile education on the technicalities of the matters of environment would enable the public to train themselves for environmental preservation. Further it would promote their awareness of the dynamics of law in this area. That in turn would accelerate a strong public movement, which would ensure full implementation and effective enforcement of law. Introduction of environmental issue into educational curriculum will be a sordid measure in this regard. It will be relevant that Supreme Court has recently charged the Secretaries of all States for not incorporating environmental studies in curriculum.

7. Making the problem of environmental pollution a political issue would accelerate the growth of public awareness thereby serving as a strong deterrent to the flouting of laws on pollution seriously.

8. People should invoke in themselves a strong sense of vicarious responsibility to cognize the issues of environmental hazards violations and pollution. Being part of the legal system, they should bear the duty as envisaged under constitution and other laws to protect environment. The power vested on the District Magistrate under two broadly worded sections of Criminal Procedure Code 1973 viz. S. 133 and 144 is pervasive and can instantly prevent any noxious activity or nuisance. But the law is limping and rarely helps anybody since there is lack of fearless vigilance on the part of authorities and total absence of public activist awareness to initiate public interest action against environmental pollution or invasion. Motivation should come from the civil society to be sensitized and alertly report instances of environmental invasions to render effective assistance to authorities and activate pangs of legislations and wheels of justice.

9. All the legislative policies and the socially generous interpretations played upon such policies by the judiciary alone cannot guarantee environmental justice. It demands the existence of, in the rhetoric of Justice V.R. Krishna Iyer, a well informed citizenry and militantly moblized public opinion. This in turn calls for a legal entitlement to information to all the public minded citizens. The means of

invariably be made on environmental preservation rather than merely on control of pollution.

4. The evil which law seeks to remedy being grave and of much public concern, there should be a clear vision of conflicting values before embarking upon a legislative or policy measure. While enacting legislation in this regard, a drive for a strong public opinion should be created. An all round awareness about the role and purpose of a particular measure or policy should be evoked. If this be done, a high degree of public participation and involvement in the whole operation would flow in the process of implementation and enforcement of law, thereby making it effective. Lest it should remain a dead letter.

5. Public participation is significant in the level of effectiveness of monitoring the enforcement of law and the machinery involved. In the event of non performance on the ground of conflicting interest or priorities or break down, it necessitates the activities and the environmental sensitive people to resort to PIL in the court of law. Speaking on the role of judiciary to prompt public consciousness in this regard, it is more appropriate to quote **Justice O. Chinnappa Reddy.**

   "Whenever a problem of ecology is brought before the court, the court is bound to bear in mind Art. 48A of the Constitution.... and Art. 51A(g). When the court is called upon to give effect to the Directive Principle and the Fundamental Duty, the court is not to shrug its shoulder and say that priorities are a matter of policy and so it is a matter for the policy-making authority. The least that the court may do is to examine whether appropriate considerations are borne in mind and irrelevancies excluded".[10]

6. The hard fact is that the civil society remains weak in its understanding of the technical issue that is so demanded in the fight against pollution. It requires scientific expertise. In this regard efforts to educate, through mass media, parliamentary role and activities, voluntary agencies, public should be effectively

10. Sachidanand Pandey Vs. State of West Bengal AIR 1987 SC 1109.

acquiring information is through freedom of access to materials relating to environmental issues, and the proceedings, both of legislative and executive, of the Government. There is an imperative need to accelerate flow of information in the area of environmental schemes and policies so as to promote the civil society participation (Public Participation) to keep our Government on track and to literally browbeat our elected representatives. It may be suggested that various enforcing authorities or machineries so envisaged by different environmental laws, be it boards or others, should provide opportunity to scrutinize the register containing conditions laid down for maintaining environmental order. The public may bring to the attention of such boards or authorities any deficiency or violations of such conditions.

10. Lastly, another inevitable requisite to activate environmental mandate is that there should be a democratization of local bodies with people involvement in the municipal functions. People oriented local bodies should go along with a mass line whereby each ward or sub village shall be under the batch of public spirited persons. More voluntary agencies should work against local/ rural pollution. And as a unified force the rural and urban movement should work together with activist groups in order to realise the legislative ideals.

To sum up, in one simple frame, we can conclude that all these shall help us, the Earth folk, to disprove what W.S. Gilber said, "Man is nature's sole mistake".

Judicial Delays : A Crisis*

Dr. K. Chandrasegaran **

Of late, many a hue and cry is made that there is huge backlog of cases pending in courts of law at all levels. In the backdrop of ridicule to which the justice delivery system is subjected to and consequential erosion of public confidence, the State is talking loudly about the need for managing the crisis and suggests that if no credible alternative is evolved, the courts of law are sure to collapse under its own weight. As our experience shows, the State tries to pass the buck by raising its accusing finger pointing to frequent dislocation of work due to strike by the lawyers, cumbersome procedure envisaged in civil and criminal laws, frequent adjournments at the instance of the litigants and the like. More surprisingly, there is no reference to its own failures contributing the most to the accumulation of arrears in the courts of law. It is really shocking that there are some reasons, which are to a large extent responsible for this sorry state of affair, and the State must own responsibility exclusively at least for the same. An in-depth analysis of the problem will expose to public gaze the stark reality that the problem the State is talking about and facing

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is nothing but the problem of its own making. Obviously, the State emerges as the key defaulter and eventually, it must atone for all its omissions and adopt such measures as may be necessary without any further loss of time to help the system to retrieve the glory it has been enjoying all along.

The crisis ridden justice delivery system depends upon several players for its efficient performance. Of all, the State is the most depended player for its multifaceted role as *"the power-cum-purse holder, the lawmaker and a major litigant"*. Beyond doubt, it is the fundamental responsibility of the State to ensure necessary inputs for the system to sustain its worth. It is in this context, the attitude of the State all through needs to be investigated thoroughly.

Mounting arrears of litigation, no doubt, is a cause for concern and the question that begs answer is how serious is the State in resolving the crisis. The forums right now available for the resolution of disputes find it extremely difficult to cope up with the increasing load of litigations.[1] Hence, the State is anxiously looking for an alternative mode of settlement and the endorsement of out-of-court settlement by the State in the recent past as the most favoured mode of resolution of disputes is ample proof of such urge. This is the reason behind the re-induction of Section 89 of the Civil Procedure Code[2] with a difference and the move towards this direction undoubtedly reflects the anxiety of the policy makers in ensuring resolution of conflicts quickly. The emphasis underlying the new policy is to keep the confidence of the litigant-public in the justice delivery system intact.

Salt is salt only when it is with sour and it is not without. This equally applies to the State as well. It cannot stop with preaching

1. The forums we come across for resolution of disputes are the ordinary courts of law with general jurisdiction (first generation forums), special tribunals with exclusive jurisdiction over the disputes earmarked for them (second generation forums). The Legal Services Authorities Act of 1987 provides for establishment of Lok Adalats for consent based settlement of disputes (third generation forums). Fast track courts for speedy disposal of old cases pending with the ordinary courts of law also have come to stay with the blessings of the apex court in Brij Mohanlal Vs. Union of India and others AIR 2002 SC.The se fast track courts serve as supplementary institutions to ordinary courts of general jurisdiction.

2. Section 89 of the Civil Procedure Code deals with settlement of disputes through arbitration, conciliation, judicial settlement including through Lok Adalat and mediation.

but should move ahead and reach the logical end to make the exercise complete. Then only it is a State committed to 'we, the People of India'. So the presumption goes that the State speaks not only for others but also for itself.

This presumption needs to be put to test and hence the need for gathering the intention of the State in order to understand its commitment to stand by what it says. The most controversial issue that arises for consideration is whether the State is prepared for the eventuality especially when it emerges as the major litigant. Earnest hope on our part is that the State being the policy-maker, it cannot shun its responsibility in this regard. By all means, it should opt for out-of-court settlement and emerge as a model litigant for emulation by others. Unfortunately, what really emerges is difficult to digest since what we are made to realise is that what the State says does not apply to it. The view expressed is not perverse, as reasons for the same are plenty.

First and foremost is the failure on the part of the State to ensure adequate number of courts of law in direct proportion to the docket explosion. Five-fold increase of ordinary courts recommended by the Apex Court is noteworthy.[3] The message conveyed is that what is existing is not adequate to cater to the demands of the litigant-public.[4] The ironical part of the story is that the least we have cannot function fully for want of man-power. The power-cum-purse holder has not only failed to respond positively to increase the number of courts but has also prevented the existing from functioning effectively. Man-power failure does not stop with the ordinary courts of law. It extends to other forums and High Courts as well.

Next comes the role of law maker. In the sphere of law making, the deficiency is so glaring that it is since a decade the Apex Court has been laying down directions governing grey areas. The Apex Court is adopting this strategy to force the State to fall in line with

3. All India Judges' Association and others Vs. Union of India and others AIR 2002 SC 1752 at p.1766.

4. Short on judges, Long on cases, Courts under strain, The Hindu, 25th June 2005 p.5; Civil Courts Facing Crisis, The Hindu, 13th Hune 2005 p.4.

the constitutional mandate. Directions so given are 'pro tempore' in nature and they are intended to operate till a law is passed by the legislature. It is unfortunate that the deficiency syndrome is very much visible even in the case of the existing laws. It is no exaggeration to say that 'for want of certain vital inputs, some laws remain in a vegetable State'. Industrial Disputes Act of 1947 is one of such fateful laws. It is needless to point out that the grand law meant for investigation and settlement of industrial disputes proudly carries within its scheme machineries of conciliation and arbitration besides others. In spite of their presence nearly for six decades, they could make no impact in the arena of industrial relations. This is attributable to the failure of the State to make them really worth through necessary changes in the law. The fact that the recommendations of the First National Commission on Labour made for improving the efficiency of the said machineries way back in 1969 still remain in the cold storage is good enough to sustain the claim against the State. Repealing of the Arbitration Act of 1940 is another instance of this kind. It is the claim of the State that the said law has become outdated and consequently, incapable of meeting the changing needs of time. While the concern of the State is really understandable, it is really surprising that the State has taken unduly a long time to grasp the reality especially when the demand for a comprehensive law has been in air for long.

In the last leg, two things deserve consideration. The first limb of the last leg pertains to the mind set of the State-litigant towards its own policy of promoting out-of-court settlement. In pursuit of its activities, the State is sure to come into conflict with its subjects and public interest directs the State to seek remedies in the court of law. Equally, yet another facet of public interest demands that where the claim of any subject is genuine, the State should yield. At least three reasons can be offered in support of the latter. Firstly, it is the duty of the State to ensure that no avoidable litigation finds its way into the court of law. Secondly, respecting the genuine claim of the subject is the surest way of honouring the Rule of Law. And, thirdly and finally, it is the demand of public interest that public money should not be wasted in the prosecution of avoidable litigations. It is in this context, that the Code of Civil Procedure Code of 1908 vide Section 80 insists

on pre-suit notice. The theme underlying the pre-suit notice underscores the need for giving sufficient opportunity to the State to facilitate reconsideration of the issue in the light of legal position and to settle the claim out of court, if so advised. But in its real application, the same has emerged to be an empty formality. Hence, the Law Commission humbly recommended for scrapping of the same. The said recommendation bears testimony to the fact that the State has failed to put the provision (Section 80) into legitimate use. Such diluting strategy of the State is nothing but reflection of rigidity in its approach to the claims of the litigants. The inference one can draw from such recalcitrant attitude is that, as the State is not prepared to face challenges from its own subjects, it lacks magnanimity to concede genuine claims.

The second limb of the last leg encompassing the next phase of responsibility i.e. responsibility of the litigants to associate actively with the adjudicatory process for quick delivery of justice starts when the contest becomes inevitable. Here again, response of the State to such general demand of law is shot into focus. Keeping Article 14 of the Constitution at the back of the mind, the state-creator should earnestly realise that it does not have any special status to enjoy before its own creatures i.e., courts of law. In the same vein, the courts of law should treat the litigants both State and the individuals with equality. This is what was conveyed by Dicey long back. Paradoxically, this concept of Dicey still eludes the State practice before the Administrative Tribunals. The State often blessed with spate of adjournments (this is more so, when there is no interim relief granted to the applicant) adopts casual approach in responding just by way of reply to the claims of the civil servants as applicants. While the rule prescribed in this behalf grants only a period of 30 days for the State-respondent to file its reply, the same is honoured more in breach than in observance. The said rule has simply become a casualty only by reason of casual attitude of the State. With the result, the Tribunals vested with exclusive jurisdiction over service matters established with a tall promise of expeditious disposal have been slowly gravitating towards extinction following steady rise of arrears. Now the State is searching for an excuse to wind them up gracefully. The humble move has begun with the empowerment of

State Governments to abolish the Tribunals established by them.[5] The auspicious day for bidding farewell is not far away.

A simple Poser to the State :

Very often, the State, more particularly the Revenue Ministry, introduces amnesty schemes to induce withdrawal of cases initiated against it. It is everybody's knowledge that disposal of cases in the normal course takes a long time and hence the State resorts to such schemes. The intention behind such schemes is to bring to an end litigations initiated by the tax defaulters as huge amount of money due by way of tax remain locked pending disposal of such cases. Banking institutions also follow suit to facilitate recovery of loans with ease. The question, which is thrown open to the State, is whether it is inclined in the same way for an out of court settlement of service matters. If the answer is in positive, the following suggestions are made to facilitate fair settlement of disputes.

- ★ Persons with sound knowledge of law, integrity and character should be chosen for the job. It is enough if it is a single member body with the status of Lock Adalat. Retired judges of the Supreme Court and High Courts may be considered for the said purpose. A Committee under the Chairmanship of the Chief Justice of India may be constituted to prepare a panel.
- ★ 'Ethically' sound lawyers with good practice or academicians of the same kind should be appointed as amicus curie to assist the single member body. Outstanding law students may also be associated.
- ★ Representation by the advocate and the standing counsel for the State should not be permitted. The officers of the State are good enough to defend their actions against the civil servant-applicant.
- ★ The State should be required to commit itself in writing both on facts and law. In other words, the State should be required to make its submissions in writing. Only those assertions of the

5. Bill on abolition of Administrative Tribunal okayed, The Hindu 21st April, 2005 p.12

State supported by circulars/rules/orders/notings/or any other document should be considered in support of its defence.

- ★ Request for withholding of any document should be declined.
- ★ Failure to furnish any document or any information, failure to furnish any document without undue delay, making of false statement should be dealt with severely without any exception by initiating contempt action against the officer of the State concerned.
- ★ Where any relief as claimed by the applicant is granted, direction for compliance within a stipulated period should be made. The officer should be personally required to file the compliance report.
- ★ Appeal by the State should be for fairly good reasons and only in the larger interest of the administration.

Conclusion :

In the present scenario, Alternate Dispute Redressal needs to be pushed ahead with all sincerity to ensure quick resolution of conflicts in the best interest of the society. However, all depends on the strategy of the State in particular towards promotion of out-of-court settlement. The State will do well if it puts its house in order and sets the ball rolling in the proper directions.

Enforcing Unenforceable Directive Principles of State Policy
- Recent Trends

G. Rajasekar **

Introduction

The Constitution of India was adopted during the mid 20th century, when the laissez-fair concept was already replaced by the welfare state concept. The framers of our Constitution took note of this change and provided a Constitution that envisaged a welfare state and the Preamble of our constitution underlines the political philosophy of the State, which promotes the welfare of the people.

The socio, economic and political welfare of the people is the basic objective of the welfare concept. These ideals have been largely engraved in part IV of the Constitution as Directive Principles of the State Policy (hereinafter referred to as Directive Principles). The Directive Principles, in fact, act as a tool for Social Engineering. Accordingly the judiciary has to perform a difficult task of striking a balance between Fundamental Rights and Directive Principles. The Directive Principles obligate the State to take positive action in certain directions to achieve justice-social, economic and political. The Directive Principles give direction to Indian Legislature and executive as regards the manner[1] in which they should exercise their powers.

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1. VII CAD 476, 493-4, CF. M.P. Jain, Indian constitutional Law p. 1596 (Fifth edition) 2003, Published by Wadhwa Sales Corporation, Nagpur.

The law should be dynamic and also satisfy the needs of the changing society. The constitution too is not an exception to this general rule. Whenever the gap between the law and society widens, it is the duty of the judiciary to bridge the gap. That's why the Constitution framers have established an independent judiciary, that shall act as guardian of the Constitutional mandates. The powers, which are vested in the judiciary by the Constitution, are inherent. The judiciary is expected to perform its function under the Constitution in such a way that its credibility as sentinel or savior of the rights of the people is maintained. But there are some who feel that the wide jurisdiction exercised by the courts in matters of public interest transgresses the traditional doctrine of separation of powers. According to them the role of judge is only to interpret and to declare the law and not to make law. But, it is a balancing act that all the three organs of the State have to play in order to see that they do not 'unduly' transgress each others domain, because the Constitution of India provides for a system of checks and balances, not strict separation of powers, so that each organ can to an extent enter the domain of the others. What is true and applicable to the organs is also true and applicable in case of various parts of the Constitution especially the enforceable part-III - Fundamental Rights and Unenforceable Part-IV - Directive Principles. This paper is an attempt to understand the role of judiciary in explaining the respective values of part III and part IV in a welfare state. An attempt is also made to demonstrate how the judiciary has, while doing so, started enforcing the otherwise unenforceable Directive Principles.

Objects of the Directive Principles

The main difference between Directive Principles and Fundamental Rights is that Directive Principles are not enforceable in a court of law.

According to Art. 37,[2] the principles are fundamental in the governance of the country and it shall be the duty of the State to

2. Art. 37 Application of the principles contained in this part. "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are neverthless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws".

apply these principles in making law, but they are expressly made non-justiciable.

The Directive Principles were related to moral, values rather than to sound legal principles.The main idea underlying these principles was that they would serve as an educational purpose and might serve as restraint on the Government. Those who govern have to give some respect to these principles while exercising their power to rule. On the contrary they are accountable to the electorate not to the court of law for neglecting them. This can be understood from the following words of Dr. Ambedkar in the Constituent Assembly :

"That a party which failed to implement these principles would stand to lose in the next elections. Thus, the accountability to enforce these principles was left to the political process. With the passage however greater emphasis has come to be laid on the fulfillment of the goals set out in these principles".[3]

Further, the Constitution makers rightly perceived that mere political democracy would be meaningless in a country where millions of poor live below poverty line. The ideals stated in the Preamble are reinforced through the Directive Principles which give a greater detail and the goal of economic justice, the socio-economic content of political freedom, the concept of welfare state etc. The Directive Principles supplement the Preamble to the Constitution with the intention to fulfill these principles. So these Directive Principles are exempted from the preview of the court. Through the 42nd Amendment Act the word "Socialist" was added to our Constitution. The purpose of adding this word was to establish an egalitarian social order through rule of law as its basic structure.[4]

But, as days passed, the meaning of socialism was widened by various judicial decisions. The judiciary began to consider the meaning of "Socialism" as to crystallize a socialistic State for securing socio-economic justice to its people by the operation of Part III and Part IV as two things on each other.[5]

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3. Supora note. 1 at p. 1596
4. Air India Statutory Corporation Vs. United Labour Union, AIR 1997 SC. 645
5. Minerva Mills Ltd. Vs. Union of India, AIR 1980 SC 1789

In another case, the Supreme Court has stated democratic socialism achieves socio-economic revolution to end poverty,[6] ignorance, disease and equality of opportunity. In Sanjaveev [7] case, the Supreme Court observed that

"the law ought to be designed in a broad manner so as to provide the economic justice for all because the aim of socialism is the distribution of the material resources of the community to fulfill common good".[8]

Judicial Approach to Directive Principles :

For easy understanding, the judicial trend can be studied under different phases viz. (i) Non enforceability phase (ii) Harmonious construction phase (iii) Predominance of Directive Principles phase.

(i) Non Enforceability Phase : In the early period the judiciary did not enforce Directive Principles because they do not create any justiciable rights in favour of an individual.[9] At no point of time the court issued any Writ of Mandamus to the Government to follow Directive Principles.[10] In many subsequent cases also the court held that, as these principles do not create any justiciable rights in favour of an individual it cannot be enforced by the judiciary. But the courts however, felt it necessary "to evolve, affirm and adopt principles of interpretation which will not hinder the goals set out in the Directive Principles."[11]

The Directive Principles are positive obligations on the State while the Fundamental Rights create negative obligation. So, it is easy for the judiciary to refrain the State from violating the Fundamental Rights. Moreover, Art. 13 of our Constitution declares that any law which is inconsistent with Fundamental Right is protanto void. But

6. D.S. Nakara Vs. Unino of India, AIR 1983 SC 130 and see also, G.B. Pant University of Agriculture Technology Vs. State of Uttar Pradesh, AIR 2000 SC 2695.
7. Sanjee Coke Manufacturing Co. Vs. Bharat Coking Coal Limited AIR 1983 SC 130.
8. State of Karnataka Vs. Ranganatha Reddy AIR 1978 SC 215.
9. In re M. Thomas, AIR 1953 Mad 21, also in Gadahar Vs. State of West Bengal, AIR 1953 Cal. 565
10. Ranjan Drivedi Vs. Union of India, AIR 1983 SC 624 Again in Lily Thomas Vs. Union of India, AIR 2000 SC 1650 (The Supreme Corut held this court has no power to give direction for the enforcement of Directive Principles)
11. U.B.S.E. Board Vs. Harisankar, AIR 1979 SC 65

there is no such recital in our Constitution regarding Directive Principles. This can be understood from the following observation made by Supreme Court in State of Madras Vs. Champakam Durai Rajan.[12]

"The Directive Principles of State policy, which by Art. 37 are expressly made unenforceable by a court cannot override the provisions found in Part III (Fundamental Rights) which, not withstanding other provisions, are expressly made enforceable by appropriate writs, orders or directions under Art.32. The chapter on Fundamental Right is sacrosanct and not liable to be abridged by any legislative or executive act or order except to the extent provided in the appropriate Articles in Part III. The Directive Principles of State Policy have to conform to and run subsidiary to the chapter on the Fundamental Rights".

(ii) Harmonious Construction Phase: The Supreme Court's view in the operation of Directive Principles and Fundamental Rights on each other went to a sea changes. The Supreme Court began to give comparatively a higher value and attempted to harmonize the Directive Principles with Fundamental Rights.

In the 'Cow Slaughter' case the Supreme Court for the first time tried to make a balance between these two. This can be understood from the following words:

"A harmonious interpretation must be placed upon the constitution, and so interpreted it means that the State should certainly implement the Directive Principles but it must do so in such a way as not to take away or abridge Fundamental Rights, for otherwise the protecting provisions of Chapter III will be more rope of Sand".[13]

Again in ABSK Sangh' case it has been held that Art 32 is not confined to protect only individual's Fundamental Right but is capable of doing justice wherever it is found and society has an interest in it.[14]

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12. AIR 1951 SC 226.
13. Mohd. Hanif Quareshi Vs. State of Bihar, AIR 1958 SC 731
14. ABSK Sangh (Rly) Vs. Union of India AIR 1981 SC 298

From the above observations it is clear that the court accepted the harmonious interpretation.

In 're Kerala Education' case [15] the Supreme Court observed that though the Directive Principles cannot override the Fundamental Rights the country may not ignore the Directive Principles but should adopt "the principles of harmonious construction should attempt to give effect to Directive Principles and Fundamental Rights as much as possible".

However, in determining the scope and ambit of the Fundamental Right relied on by or on behalf of any person or body, the court may not entirely ignore these Directive Principles, but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible.

Like wise, the Supreme Court after nearly 11 years held that :

"While rights conferred under Part III are fundamental in the governance of the country, we see no conflict on the whole between the provisions contained in Part III and Part IV. They are complementary and supplementary to each other.... The mandate of the Constitution is to build a welfare society". [16]

The Supreme Court held in the 'Pavement Dwellers'[17] case, "that the Directive Principles are fundamental in governance of the country they must be regarded as equal to the understanding and interpretation of the meaning and content of Fundamental Right.

While explaining the importance of Directive Principles Chief Justice Chandrachud as then was observed as follows :

"Fundamental Rights - are not an end in themselves but are the means to an end. - The end is specified in the Directive Principles".

It is further observed in the same case as :

"that the Fundamental Right and Directive Principles together constitute the core commitment to social revolution and they together,

15. AIR 1958 SC 956
16. Chandra Bhawan Boarding Vs. State of Mysore, 1970 SC 2042
17. Olga Tellis Vs. Bombay Municipal Corporation, AIR 1984 SC 194

are the conscience of the Constitution.[18] *The Indian Constitution is founded on the bed rock of the balance between the two. "To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution".*[19]

That the "Fundamental Rights must be construed in the light of the Directive Principles" observed by Justice Jeevan Reddy.[20]

The core commitment to the social revolution lies in Part-III and Part-IV of the Constitution better known as the conscience of the Constitution, i.e., the Fundamental Rights and Directive Principles of State Policy[21] and also held as trinity of the Constitution.[22] From the above said decision the judiciary started to read Fundamental Rights along with Directive Principles with a view to defining the scope and ambit of Fundamental Rights.

(iii) Predominance of Directive Principles : Later the courts went to the extent of saying that social and economic justice is at the high level of a Fundamental Rights.[23]

The unifying approach to Fundamental Right and Directive Principles or that both should be interpreted and read together, has now come to hold the field. It has now become a judicial strategy to read Fundamental Rights along with Directive Principles with a view to defining the scope and ambit of the former. The judiciary began to adopt these techniques to broaden the scope of Fundamental Rights and to add some right termed as new rights in the list of expressed Fundamental Rights.

The technique of using the Directive Principles to interpret the Fundamental Rights expanded the scope of Art 21. This approach o

18. Supra. note 5 at p. 1789
19. Supra. note 5 at p. 1807
20. Unnikrishnan Vs. State of Andhrapradesh AIR 1993 SC 2178. (Fundamental Right and Directive Principles are supplementary and complementary to eachother, and not exclusionary to each other, and the Fundamental Rights are but the means to achieve the goals indicated in the Directive Principles and that Fundamental Rights must be construed in the light of the Directive Principles)
21. Dalmia Cement (Bharat) Ltd. Vs. Union of India, (1996) 10 SCC 645
22. Ahmed Mum Corpn. Vs. Nawabkhan Gulabkhan, AIR 1997 SC 152
23. Sup. N 4 at 667.

the judiciary resulted in amending the Constitution. In the year 1976 the Constitution was amended for the 42nd time. Through this Amendment Act, two Articles viz. 48A and 51A(g) were added to the Constitution as provisions to protect the environment. These two articles were placed under Part IV and Part IV-A (Fundamental Duties) respectively.

Although both 48A[24] and 51A(g)[25] cannot be enforced as such the judiciary attempted to enforce them through Fundamental Rights specifically under Art 21. By holding that the right to live with human dignity enshrined in Art 21 derives its life breath from the Directive Principles.[26]

In this fashion the Courts have issued Writs for enforcing the Directive Principles under Arts. 226 and 32.

Right to health and social justice has been held to be a Fundamental Right of the workers and impose an obligation on employer to protect the health and vigor of his employee. The court has derived this right by reading Art. 21 with Arts. 39(e), 41, 48A.[27]

Right to shelter is also made as a Fundamental Right under Art.21.[28] The Directive Principles are regarded as a dependable index of public purpose. If a law is enacted to implement the socio economic policy envisaged in the Directive Principles then it must be regarded as one for public purposes. So, in State of Bihar Vs. Kameshwar [29] the court relied on Art. 39 to decide that the law to abolish Zamindari had been enacted for a "Public Purpose" within the meaning of Art.31.

In brief, various Directive Principles when read into Art.21, made Art. 21 practically a multi-dimensional Fundamental Right.[30] Similarly a joint reading of Art. 14 and Art. 39(d) together, has led to the emergence of the principle of equal pay for equal work.[31]

24. Art. 48A. The State shall endeaour to protect and improve the environment and to safe guard the forest and wild life.
25. Art. 51A(g). To protect and improve the natural environment including the forest, lakes, rivers and wild life and to have compassion for living creatures.
26. Bandhua Muktimorcha Vs. Union of India AIR 1984 SC 802.
27. Consumer Education and Research Centre Vs. Union of India, AIR 1995 SC 922
28. Chameli Singh Vs. State of Uttar Predesh, AIR 1996 SC 1051.
29. AIR 1952 SC 252
30. Supran Note 27. see also Charan Singh Vs. State of Punjab AIR 1997 SC 1052.
31. People Union of Democratic Rights Vs. Union of India, AIR 1982 SC 1473.

Art. 31C, was introduced by the Constitution (25th) Amendment Act, 1972 sought to give primacy to Arts. 39(b) and (c) over the Fundamental Rights enshrined in Arts. 14, 19 and 31. The Supreme Court held the amendment valid in the 'Kesavananda Bharati' case in following words:

"In building up a just social order that the Fundamental Rights should be subordinate to Directive Principles... Economic goals have uncontestable claim for priority over ideological ones on the ground that excellence comes only after existence. It is only if men exist there can be Fundamental Rights".[32]

The Supreme Court in this case preserved its power of judicial review on the question whether a law made by a legislature has nexus with the principle enshrined in Art. 39(b) (c). Consequently neither declaration by the legislature that the law is made to enforce Art. 39(b) or (c) is conclusive nor absence of such declaration takes a law out of the protective umbrella of Art. 31C. Because of this declaration by the legislature that the law is made to enforce Art. 39(b) or (c) will not exclude the judicial scrutiny. By the amendment introduced by Sec. 4 of 42nd Amendment provision is made in Art. 31C saying that no law giving effect to the policy of the State towards securing all or any of the principles laid down in part IV shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Art. 14, 19 or 31. In 'Minerva Mills Ltd. Vs. Union of India', the majority through Chandrachud, Chief Justice (as he then was) held Sec. 4 of 42nd Amendment Act unconstitutional. However in 'Sanjeev Coke Manufacturing Company Vs. Bharat Coking Coal Ltd.' the Supreme Court expressed a doubt over the Minerva Mills decision in so far as it validated Sec. 4 of the 42nd Amendment Act. While 31C continues to remain in the text of the Constitution as amended by the 42nd Amendment as it was before the Amendment.[33]

32. Keshavananda Bharti Vs. State of Kerala, AIR 1973 1461 (Justice Mathew, held that if the Parliament, in its capacity as an amending body decides to amend the Constitution in such a way as to amend the Constitution to take away or abridge a Fundamental Right to give priority value to the principles embodied in Part-IV of the Constitution (Directive Principles) the Supreme Court cannot adjudge the Constitutional Amendments as bad for the reason that what was intended to see subsidiary by the Constitution makers has been made dominant)

33. Dr. A. David Ambrose, "Economic Dimensions of Law: Some Constitutional Reflections", The Bangalore Law Journal Pp. 82-83 Vol.I, (2005) p.82 at 83.

In another instance in which the judiciary gave the predominance of Directive Principles over the Fundamental Right is in 'John Valla Matton'. The Supreme Court held that:

"Article 44 is based on the premise that there is no necessary connection between religion and personal laws in a civilized society".[34]

From the above observation it is understood that Art. 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. But Art. 44 separates religion from social relations and personal law. There is no doubt marriage, succession and like matters cannot be brought within the rights guaranteed under Arts. 25 and 26 of the Constitution. The freedom of religion under the Constitution does not allow religion to infringe adversely on the secular right of the citizens and the power of the State to regulate the socio-economic relations.

The main theme of the Court's pronouncement was that the Constitution is based on the "bed rock of balance between" Directive Principles and Fundamental Rights and gives absolute primacy to one over the other would disturb this balance. Both can co-exist harmoniously. The goals set out in the Directive Principles are to be achieved without abrogating Fundamental Rights. Both can flourish happily together.

Conclusion :

The judicial response in the past few years towards the justiciability and enforceability of Directive Principles has been substantial and effective according to the requirement of the time. Judiciary has been vigilant and active in achieving welfare states. The foregoing discussion clearly establishes the changed judicial attitude towards the justiciability and enforceability of the Directive Principles. The change did not take place over night. The change took place in three distinct phases.

In stage one judiciary did not give any legal importance to Directive Principles and even for interpreting Fundamental Rights the help of Directive Principles was not sought.

34. John Valla Matton Vs. Union of India. AIR 2003 SC 2902

In the second stage the judiciary to some extent realised the importance of Directive Principles in interpreting various Fundamental Rights.

In the third important stage going one step further the judiciary started enforcing the Directive Principles and thereby recognizing directly the legal value and significance of the Directive Principles. This happened because the judiciary according to the demands had to place society's interest found in Part-IV ahead of individual rights found in Part-III of the Constitution. The purpose of recognising the legal value and enforceability of the directives on par with the fundamental rights is to translate in to reality the concept of socio-economic justice which is one of the underlying ideals of the preamble of our constitution. The sentiments of the people need to be respected and complied by the administration. The legislature also made effective steps to maintain the prominence of Directive Principles by incorporating Art. 31C through 25th Amendment Act, 1972. This position was responded positively and with a sense of responsibility the Hon'ble Supreme Court innovatively laid down that right to social and economic justice itself's a Fundamental Right. If this trend continues in this manner then the intention of the founding fathers of our Constitution in attaining the welfare state will be fulfilled.

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