LAW, JUSTICE AND HUMAN VALUES

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PREFACE

Jeremy Bentham, the English philosopher lawyer, famously wrote that "Ignorance of the law excuses no man except the lawyer." It is the teacher's responsibility to educate the people on fundamental concepts such as law, justice and human values. To that class of dedicated teachers who have a passion for learning and helping the seekers of knowledge, belongs Prof (Dr) R. Venkata Rao, Vice Chancellor of National Law School of India University, Bengaluru. Centre for Policy Studies, now in its 24th year, has been a beneficiary of his generous support. His scholarly articles published in the CPS bimonthly Bulletin during the last fourteen years are being brought out in a book form on the occasion of the 3rd D.V. Subba Rao Memorial Lecture by Shri Thottathil B. Radhakrishnan, Hon'ble the Chief Justice, High Court of Telengana and Andhra Pradesh. On behalf of Centre for Policy Studies and Visakhapatnam Public Library we offer grateful thanks to Prof. R. Venkata Rao.

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TOWARDS A MORE RESPONSIBLE AND RESPONSIVE CORPORATE GOVERNANCE

When I went through the concept note for the conference, I am reminded of Kautilya's reference to the businesses. Why do you have to do business? To generate wealth (artha) and to earn profits. What is the purpose of wealth and profits?To share among the shareholders. Why? Wealth and profits make the shareholders, employees, customers, suppliers, distributors and also the government happy. However Kautilya stated that happiness is obtained not by wealth and profit only, but by doing things properly and doing the right things – "sukhasyamoolam dharma". Dharma without wealth, according to Kautilya, is toothless - "dharmasyamoolamartha", and wealth without dharma is useless because a poor person cannot support the entire society. Indian culture has always emphasised that "sukhasyamoolam dharma" and "dharmasyamoolamartha" taken together – namely wealth- do not directly lead to happiness. Happiness for self and others results through ethical behaviour: wealth or resources make ethical behaviour possible.

In the modern corporate culture, this ethical behaviour of the business is called "Corporate Governance" which has four pillars supporting it, namely Transparency, Accountability, Fairness and Responsibility. 'Transparency' requires ensuring timely, adequate, and accurate disclosure of all material information. These disclosures must be over and above the statutory provisions given under rules and regulations.'Accountability' refers to the board of directors, who are accountable not only to shareholders but to stakeholders, and executives of the company are accountable to the board for the performance of the tasks assigned to them. 'Fairness' refers

to the fair and equitable treatment to all shareowners, including minorities, and to all participants in the corporate governance structure. 'Responsibility' lies on the shoulder of the board of directors and management for their behaviour and there must exist a means for penalizing mismanagement.

Post liberalization for over nearly 3 decades, we have seen a strong shift from the pre-existing socialistic disposition for businesses towards a more open market-oriented approach under the control of regulations. In the 1990s, Securities and Exchange Board of India (SEBI) rapidly began ushering in corporate governance reforms as well as a measure to attract foreign investment. The first corporate governance initiative was sponsored by industry. In 1998, a National Task force constituted by the Confederation of Indian Industry (CII) recommended a code for "Desirable Corporate Governance," which was voluntarily adopted by a few companies. Here, we witnessed the influence of the United Kingdom's developments as an influencing factor because the CII Code was largely based on the Cadbury Commit tee report issued in the U.K. Thereafter, a committee chaired by Mr. Kumar Mangalam Birla submitted a report to SEBI "to promote and raise the standard of Corporate Governance in respect of listed companies." Based on the recommendations of the Kumar Mangalam Birla committee, the new 'Clause 49' containing norms for corporate governance was inserted in 2000 into the Listing Agreement that was applicable to all listed companies of a certain size. Although the substance of the corporate governance norms contained in 'Clause 49'was similar to those recommended in the U.K. by the Cadbury Committee Report and these subsequently found their place in the Combined Code on Corporate Governance,

there was one material difference. While the Combined Code operated as a voluntary code on a "comply-or-explain" basis, 'Clause 49' was mandatory for large listed companies. Hence, there was explicit recognition that what works in the U.K. will not necessarily work in India due to the various institutional circumstances and other local factors.

Subsequently, following Enron and other global corporate governance scandals that occurred at the turn of the century, SEBI decided to strengthen Indian corporate governance norms. In the wake of the enactment of the Sarbanes-Oxley Act ("SOX") in the U.S. in 2002, SEBI appointed the Narayana Murthy Committee to examine 'Clause 49' and recommend changes to the existing regime. The key mandatory recommendations focus on strengthening the responsibilities of audit committees; improving the quality of financial disclosures, including those related to related party transactions and proceeds from initial public offerings; requiring corporate executive boards to assess and disclose business risks in the annual reports of companies; introducing responsibilities on boards to adopt formal codes of conduct; the position of nominee directors; and stock holder approval and improved disclosures relating to compensation paid to non-executive directors. Following the recommendations of the Narayana Murthy Committee, SEBI, on October 29, 2004, issued a revised version of 'Clause 49', which came into effect from January 1, 2006. Thus, we see that although there was some reference to the English position under the Cadbury Committee report during the initial stages of formulation of corporate governance norms in India, these norms have subsequently been strongly influenced by developments in the U.S. The corporate governance reforms during this era can at

best be said to operate as a mixed transplant from both the U.S. and the U.K.

Talking about 'Transparency' which is one of the pillars of Corporate Governance and its most commonly discussed benefifit is that it reduces asymmetric information by appropriate disclosures. Corporate governance at its core involves the monitoring of the corporation's performance and the monitor's capacity to respond to poor performance – the ability to observe and the ability to act. Most information concerning a corporation's performance is uniquely available from the corporation. Without effective disclosure of financial performance, existing investors cannot evaluate management's past performance, and prospective investors cannot forecast the corporation's future cash flow.

One might well respond that corporations have an incentive to voluntarily provide financial information in order to lower their cost of capital. But, delivering information to investors is easy; but delivering credible information is hard. There is established straightforward relationship:

Investment requires good corporate governance, and good corporate governance requires the capacity to make credible disclosure of financial results.

Effective corporate governance also requires a second form of transparency – ownership transparency. Shareholders can suffer from poor corporate performance; however, they also can suffer from a controlling shareholder's divergence of earnings or opportunities to itself. For this reason, it is also important that companies disclose the identity of shareholders who own significant amounts of corporate stock.

In this regard, the response of corporate law is to control conflicts of interest among corporate constituencies. These conflicts are referred to in economic literature as "agency problems". There are three generic agency problems. The first agency problem relates to the conflict between the company's managers and its owners (being the shareholders). The second relates to the conflict between the majority or controlling shareholders on the one hand and minority shareholders on the other. The third agency problem relates to the conflict between the owners and controllers of the firm (such as the shareholders and managers) and other stakeholders (such as creditors, employees, consumers and public), with many of whom the company may enter into a contractual arrangement governing their affairs inter se.

Corporate Law, including SEBI Regulations, attempts to reduce the frictions among the various constituencies by balancing the information demanded by the constituencies and at the same time protecting certain information as 'confidential' which essentially is a tool for successfully competing in the product market. Corporate disclosures, in this respect, have evolved and transformed over the period of time. What was formerly a managerial prerogative is now placed under the direction of the statutes and regulations of government bodies, a domain of private discretionary choice or freedom is minimized or eliminated and the system is based on disclosure based mandatory reporting, leaving slight discretion to managers.

"Sunlight is the best of disinfectants", as propounded by Justice Brandeis. However, his observation must be balanced by the recognition that excessive light without adequate protection may cause skin cancer. The Disclosure Based Reporting is

suitable for developed countries where investors themselves are either able to properly evaluate the information disclosed in a prospectus, or can afford to pay for high-quality professional advisory services. It appears to be an erroneous presumption that "common man has uncommon wisdom" to understand the complex information contained in prospectuses for the purpose of making informed investment decisions.

I would like to close with the phrase from Arthashatra, from where I started – Birds do not make their nest on trees which do not bear fruit.

(Keynote address delivered at National Conference on "Corporate Streamlining" on 31st January 2018 organised by JSS Law College, Mysore.)

(CPS Bulletin August 2, 2018)

CORPORATE SOCIAL RESPONSIBILITY AND SOCIAL SUSTAINABILITY: INDIAN CONTEXT

(Paper presented at 'India-Sweden Research Conference : Exploring Different Legal Perspectives and Approaches' at School of Business, Economics and Law, University of Gothenburg on March 8, 2017)

Introduction

No corporation exists in isolation. Every company is interdependent on the society. While society supports the company, the latter also supports the society in many ways. In the era of capitalism, the company was seen as a profit churning machine. From the very conception of a "company" by the British Crown in 1600 A.D., this innovative creature was used as a method of collective investment overseas and later at the domestic level. This also guided the development in the application of the concept of separate legal personality over a period of time on an international level.

India has a long tradition of corporate philanthropy and industrial welfare that has been put to practice since ancient times dating back to philosophers like Kautilya who had emphasized on moral practices and values while doing business in India. CSR has been informally practiced in ancient times in the form of charity to the poor and underprivileged sections of society. There are ample examples in Indian scriptures which highlight the importance of sharing one's earning with the underprivileged section of society. The tradition continues in the modern times with firms like Tatas, Birlas, Godrej, Bajajs, Singhanias and Modis practising CSR by setting up charitable foundations, educational and healthcare institutions consistent

with the strong community ethos. The corporate philanthropy involved funding projects for building schools, pilgrim rest houses, places of worship like temples, distributing relief items during disasters, helping the poor and empowering employees. In fact the Tata Group is credited for introducing 'social responsibility' among corporate houses in the country.

'Sustainability' and 'Corporate Social Responsibility' ('CSR') are terms that are sometimes interchanged. However, CSR is a subset of sustainability and is the means by which we attempt to measure sustainable practices. The impacts of sustainable practices are expressed in terms of the 'three legs of sustainability': environmental, economic, and social effects. CSR is the method by which those effects are quantified and reported.

The differences between sustainability and CSR might best be explained through an example. Say a land mine manufacturer stops using toxic chemicals in its manufacturing process and final product. The company writes and distributes the appropriate reports about that improvement. The company might 'score' well from a CSR perspective: both the new manufacturing process and use of the final product will have a smaller effect on the environment. However, the production of land mines, toxic-free or not, is not a sustainable process because it has significant negative social and economic effects. This is why we view CSR and sustainability as two sides of the same coin: related but not identical. A business can adopt sustainable practices but fail to quantify the effects of those practices through the appropriate CSR tools. A business can also fulfil all its CSR reporting obligations while still being involved in unsustainable practices. To date, our focus at Ecology has

been on sustainability first and CSR second. While both are important, we believe changing behaviour by encouraging sustainability is the most essential activity.

Brundtland Commission's Report in 1987 defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". This is considered to be a standard definition, judged by its widespread use and frequent citation. However, this definition seems to resolve the apparent conflict between economic development and environment protection only, without highlighting the social dimension of sustainable development. It was in the Johannesburg Declaration at the World Summit on Sustainable Development in 2002 that social development as the third pillar of sustainable development was clearly acknowledged.

The emergence of corporate social responsibility and sustainable development as important concerns of business activity is the result of realization that any business conducted with the sole motive of profit maximisation for the shareholders, in disregard of societal and environmental concerns is bound to fail in the long run. The traditional concept of Business has come a long way since the famous economist and Nobel laureate, Milton Friedman famously proclaimed in 1970,

"The business of business is to maximise profits, to earn a good return on capital invested and to be a good corporate citizen obeying the law – no more and no less".

In 1984, Edward Freeman introduced the stakeholder theory and argued that socially responsible activities helped business in building strong relationships with stakeholders,

and that management must pursue actions that are optimal for a broad class of stakeholders rather than those that serve only to maximize shareholder interests. In 1989 another prominent economist, Kenneth Andrews exhorted corporates "to focus corporate power on objectives that are possible but sometimes less economically attractive than socially desirable". In 1997, John Elkington first introduced the concept of "Triple Bottom line" to emphasise that a company's performance is best measured by the economic, social and environmental impact of its activities. These developments at the turn of the previous century are only indicative of several parallel movements, private initiatives and scholarly debates focussed on introduction of reforms in business, corporate governance and management practices. They arose out of a common concern for economic growth, environmental issues, social imperatives and enhanced ethical standards in business. Cumulatively, they brought about an integration of environmental, social and economic aspects of business and espoused societal expectations from business to behave responsibly and deliver better governance.

Based on the various literatures developed as on date, there are four aspects of sustainability which need to be recognised in any CSR activity, namely:

Societal influence, which we define as a measure of the impact that society makes upon the corporation in terms of the social contract and stakeholder influence.

Environmental impact, which we define as the effect of the actions of the corporation upon its geophysical environment.

Organisational culture, which we define as the relationship between the corporation and its internal stakeholders, particularly

employees, and all aspects of that relationship.

Finance, which we define in terms of an adequate return for the level of risk undertaken. These four must be considered as the key dimensions of sustainability, all of which are equally important.

The UN Global Compact was the first major initiative by the International organisation to lay down a charter of ten principles for all companies globally to respect and follow in their business operations. By asking companies to embrace, support and enact a set of core values in the areas of human rights, labour standards, environment and anti-corruption, it sets the agenda for corporate social responsibility for all corporate enterprises and provides a framework for initiation and practice of sustainability policies. The overwhelming endorsement which it received from the corporate world testifies that the UN Global Compact is the largest voluntary corporate responsibility initiative in the world that forges close linkage between business, society and environment in all development endeavours. Many other international bodies and associations like the OECD countries were quick in coming out with their set of guidelines for multinational corporations, largely in conformity with the principles of the UN Global Compact.

If in spite of such widespread awareness about corporate social responsibility and sustainable development, both these concepts have for long been in search of definitions which could separately capture their all-encompassing essence and philosophy, it is because these concepts are dynamic and evolving. Corporate Social Responsibility is the responsibility which the corporate enterprises accept for the social, economic

and environmental impact their activities have on the stakeholders. The stakeholders include employees, consumers, investors, shareholders, civil society groups, Government, non-government organisations, communities and the society at large. It is the responsibility of the companies to not only shield the diverse stakeholders from any possible adverse impact that their business operations and activities may have, but also entails affirmative action by the companies in the social, economic and environmental spheres as expected of them by the stakeholders, to the extent of their organisational resource capabilities. This is besides corporate legal obligation to comply with statutory rules and regulations regarding the conduct of business operations, and the duty to compensate the stakeholders in the event of any harm or collateral damage.

It is now universally accepted that corporate social responsibility is not a stand-alone, one time, ad hoc philanthropic activity. Rather, it is closely integrated and aligned with the business goals, strategies and operations of the companies. There is a close integration of social and business goals of companies.

MODELS OF CSR IMPLEMENTATION

Although there has been a little documentation of social responsibility initiatives in India, particularly during the initial years, there has been a growing degree of companies that pay genuine attention to the principles of socially responsible behaviour, which are favoured by the customers and also preferred for their goods and services. Broadly the development of Indian Model of CSR can be divided into following timeline. This section presents the five distinct phases of CSR

development in the Indian economy as –

- 1800 – 1914 - Ethical Model
- 1914 – 1960 - Trusteeship Model
- 1960 – 1980 - Statist Model
- 1980 – 1990 - Liberal Model
- 1990 – till date – Stakeholder Model

I. Ethical Model (1800–1914): CSR as Charity and Philanthropy:

Although there is no formal concept of CSR in this period, India not only witnessed a rich hub of merchandise trading in the world, but also the social engagement of wealthy merchants. The oldest form of CSR in India was predominately in the form of donations, charity and philanthropy. Hence, the first phase was mainly based on self-regulation of doing business characterized by culture, religion, family values and tradition but also influenced by caste groups and political objectives. The tradition of wealth sharing of the big businesspersons for social causes like setting up of temples, helping the society in getting over phases of famine, and epidemics by providing food and money to the poor and thus securing an integral position in the society was followed as a tradition. The approach towards CSR changed since 1850s when the large industrial families were inclined towards economic as well as social considerations.

II. Trusteeship Model (1914–1960)

During India's struggle for independence in 1914 Gandhi introduced the notion of "trusteeship", wherein the industrial houses establish trusts for the welfare of the common man. Trusts for schools, colleges and scientific institutions were established to undertake activities in line with Gandhi's attempt

to abolish untouchability, encourage empowerment of women and rural development. The concept of "trusteeship" views businesses as stewards of society's resources and assets that the right of a capitalist is to accumulate and maintain her wealth for the welfare of the society.

Theory of trusteeship resonates strongly with those founded in England and the United States in the late nineteenth and early twentieth centuries that later evolved into the concept of CSR. Further, some scholars present Gandhi's theory of trusteeship as an "ethical model" of CSR where companies commit voluntarily for public welfare. Similar to philanthropy in the early industrialization phase, this phase was also characterized by the support for physical and social institutional infrastructure. However in this period, such ideas were led by a nationalistic fervour and a vision of a free, progressive and modern India and not necessarily as social responsibility.

III. Statist Approach (1960–1980)

In 1960s there was a paradigm shift in the economy when India adopted the socialist and mixed economy framework with the emergence of Public Sector undertakings (PSUs), state-owned companies. This framework was propagated by then Prime Minister JawaharLal Nehru and is recognized as statist model. This period is also described as an "era of command and control" due to stringent legal rules and regulations to govern the activities of the private sector. High taxes and license system imposed restrictions on the private sector which indirectly triggered corporate malpractices at the same time. Labour and environmental standards became face of the political agenda and the subject of legislation. Despite the progressive nature of

economy where businesses were to play their part as respectable corporate citizens, and engage into regular stakeholder dialogues, social accountability and transparency, the Statist approach did not materialize at that time and corporate philanthropy was still practiced.

IV. Liberal Approach (1980–1990)

During 1980s traditional engagement of CSR as corporate philanthropy was being abandoned by Indian companies and CSR was integrated into as a sustainable business strategy. During 1990s, the Indian economy was liberalized and deregulated to overcome the shortcomings of the mixed economy and to integrate India into the global market. During liberalisation, reforms, controls and license systems were partly abolished, and rapid growth was pronounced in the economy. The trend towards liberalization and privatization led to deregulation making companies solely responsible to owners, and this characterizes third model of corporate social responsibility viz liberal model. Along with this rapid growth, there was a further increase in the philanthropic donations commensurate with the increased profitability and enhanced expectations from business from public in general and government. The liberal model is consistent with doctrine by Milton Friedman (1970), who challenged the very notion of corporate responsibility for anything other than part of profit maximisation decision.

V. Stakeholder Approach (After 1991)

Since 1990s, globally, the trend of CSR has emerged which is beyond charity and philanthropy. Under the doctrine of Stakeholder Theory, CSR has evolved as corporate strategy which is closely related to core business. The stakeholder

approach is further propagated by management scientists such as Peter Drucker and many other authors as a part of corporate strategy emphasizing that survival of the corporation depends on not only the responsibility towards shareholders but also towards employees, governments, customers and community in general. As a result of globalization and liberalization that integrated Indian economy into world economy there has been a fundamental transformation from charitable donations at individual levels to integrating community in organisation's reputation and success. The aforementioned transformation occurred as the outsourcing of production and manufacturing units flourished in India and Indian corporates started following labour and environmental standards imposed on them by their western counterparts. Market competition among Indian exporters influenced more and more compliance with the International standards related to CSR and corporate governance.

Intertwined CSR and Sustainability :

Sustainable development poses a multi-dimensional challenge – in terms of economic, social and environmental dimensions – with each having competing claims for primacy. Corporate enterprises are expected to adopt sustainability policies that balance the trade-offs between these competing claims for the promotion and growth of business. An enduring and balanced approach to economic activity, social progress and environment protection is what is called for. But, for some reason, the concern for environmental protection continues to be emphasised and the social dimension of sustainable developments is often overlooked.

Sustainable development policies touch upon social

issues such as welfare of employees, empowerment of the weaker sections, holistic development of backward regions, improvement of the working conditions of labour, etc. Activities undertaken by companies to address basic issues pertaining to health, nutrition, sanitation and education needs of the impoverished communities, for the promotion of skill development, capacity building and inclusive growth of society, are all sustainability activities.

CSR policies are closely linked with the practice of sustainable development. Sustainability practiced through CSR involves conduct of business operations in a way that minimizes harm to the environment and local communities located in the vicinity of a company's commercial / production units, while benefitting consumers and employees, and thus contributing to sustainable development. Through sustainability initiatives, which include development of a new range of goods and services, and innovative production methods that are environmental and consumer friendly and cost effective, companies can enhance consumer satisfaction, and simultaneously boost business growth and profitability. The R&D department in companies helps in sustainability efforts through innovation that often changes consumer preference for new products and services that are beneficial for environment and society. In fact, CSR activities are generally so full with content of, and focused on sustainable development that often CSR initiatives cannot be easily separated from sustainability policies. Hence, to judge the performance of a company separately for its CSR activities and sustainability initiatives, is at times difficult and impractical, and for that reason it makes business sense to deal with them together.

Since corporate social responsibility and sustainability are so closely entwined, it can be said that Corporate Social Responsibility and Sustainability is a company's commitment to its stakeholders to conduct business in an economically, socially and environmentally sustainable manner that is transparent and ethical. Stakeholders include employees, investors, shareholders, customers, business partners, clients, civil society groups, Government and non-government organisations, local communities, environment and society at large. Recent trends indicate that a company's corporate social responsibility and sustainability is not limited to its own operations and activities, but extends to its supply chain network, which includes service providers, vendors, contractors and other outsourced agencies. Therefore, companies, especially multinational companies, are nowadays careful in their selection of partners, agents, vendors and contractors abroad and prefer to do a thorough check of their credentials in corporate social responsibility and sustainability.

Growing awareness about corporate social responsibility and sustainability issues have led to attempts at devising some common matrices for measuring the performance of companies in these areas. Such attempts, though nowhere near perfection, at least underline the need for consistency, transparency and impartial measurement. A number of international private initiatives in this regard have led to the development of standards and benchmarks for voluntary disclosure, reporting and audit of corporate social responsibility and sustainability programmes. Most notable of these initiatives are the Global Reporting Initiative's (GRI) Sustainability Reporting Guidelines; Account Ability's AA1000 standard based on John Elkington's triple bottom line (3BL) reporting; Social

Accountability International's SA8000 standard; and, the ISO 14001 environmental management standard.

Due to increased customer interest, growing investor pressure, competitive labour markets, greater oversight over suppliers in the supply chain network, and increasing globalisation of business, there is demand for greater disclosure and audit of corporate social responsibility and sustainability reporting to establish good business citizenship credentials. Sustainability reporting is on the increase and a large number of organisations and companies worldwide have voluntarily adopted internationally accepted standards and frameworks like GRI for disclosure and reporting, and have offered their performance for measurement and audit against international benchmarks.

Corporate Social Responsibility and sustainability, if discharged sincerely, is perceived to bring with it several benefits for the companies. The spin offs can be by way of improving the brand image, preparing it for risk management through public goodwill in the event of a crisis, retaining and attracting talent for the organisation, winning the confidence of the investors and shareholders, improving its relations with important stakeholders, and positioning the company for competitive business advantage and financial gains in the long run.

The benefits that a company expects to reap from its CSR and Sustainability policies, or the motivation behind these policies is of great significance in determining the kind of CSR and Sustainability activities that it undertakes, or the implementation strategy that it chooses to adopt in pursuit of

these policies. CSR activities prompted by 'genuine concern' for social and environmental issues produce implementation models different from those motivated by 'enlightened self-interest' of a company. CSR and Sustainability activities taken up as part of 'public relations' campaign for enhancing the 'brand image', or for earning 'public goodwill' are different from CSR and Sustainability activities undertaken by a company to obtain 'license to operate' in certain areas.

From amongst the various perspectives of CSR and the different prevalent practices of CSR, the one that finds favour with the private multi-national companies of the developed economies is the 'strategic CSR', or CSR based on 'enlightened self-interest' of companies. This approach is supported and endorsed by the doctrine of "shared value" propounded by eminent Harvard economists Michael Porter and Mark Kramer. This approach seeks financial gains for companies from the activities they undertake in discharging their corporate social responsibility. According to Porter and Kramer "The essential test that should guide CSR is not whether a cause is worthy but whether it presents an opportunity to create shared value – that is, a meaningful benefit for society that is also valuable to the business". Creating "Shared Value" involves creating new business opportunities and developing new products that are profitable for companies while simultaneously contributing to social development. Through 'strategic CSR' companies seek to exploit "opportunities to achieve social and economic benefits simultaneously". Putting it succinctly, companies look for business opportunities in socio-economic problems besetting societies.

Creating "shared value" approach offers a good model

for corporate enterprises to conduct their normal business operations, but it may not be the best suited for activities undertaken under CSR and Sustainability by the public sector enterprises in India because there appears to be an unstated but underlying direction for spending the mandatory budgetary allocation for CSR for public good, social value creation, and social causes.

Engaging the stakeholders in a dialogue to know their expectations is an important aspect of corporate social responsibility and sustainability. It is observed that corporate enterprises operating in different socio-economic conditions differ in their understanding of the range of stakeholders to be covered through their CSR activities, their assessment of the expectations of the stakeholders, and the mechanism of engagement of the stakeholders.

In the developed economies where the basic needs of the society are adequately taken care of, either through economic advancement, or by strong state welfare system like social security schemes for citizens, the corporate enterprises in such developed countries in their selection of CSR and Sustainability activities, are mainly concerned about the stakeholders, directly impacted by their business operations, like employees, consumers, shareholders, vendors, contractors, service providers and environment. And from the CSR and Sustainability activities they pursue, they seek and expect financial gains for business also.

However, in developing economies like India, where socio-economic disparities are glaring and state social security network is also not available to all, the responsibility of public

sector enterprises gets enlarged to cover a wider spectrum of stakeholders, at times even those that are not directly impacted, like interest groups, government and non-government organisations, communities and the society at large. In such situations, stakeholders expect public corporations to assume social responsibility for inclusive socio-economic growth and lend support to efforts aimed at development of backward regions, empowerment of the weaker sections, and upliftment of the deprived and marginalised communities. Social and environmental concerns tend to assume primacy over immediate business gains.

Thus, there can be variations in the perception of corporate social responsibility and sustainability, and its implementation strategies, because different stakeholders in different socio-economic situations have different expectations from business and the way it should be conducted.

Business organizations are considered to be social institutions in India. They are expected to contribute to nation-building as much as an individual is expected to, but the onus is larger given that artificial entities have larger access to combined resources in comparison to the living entities. In the larger context, CSR encapsulates the idea of giving back to the society since all business organizations (esp. companies)derive resources from the society, whether it is labour, raw materials or profits. In other words, business should deal with the social issues that are impacted by the normal operating activities of the company. This is also backed by the stakeholder theory which has been the focus of the world since last two decades.

World Business Council has defined ‘corporate social

responsibility' as "the continuing commitment by business to contribute to economic development while improving the quality of life of the workforce and their families as well as of the community and society at large." Several studies have observed a proportional relationship between the healthy CSR practices and financial performance of the companies. Some writers advocated CSR by arguing that, as entities existing at the behest of society, corporations and their managers were morally and civically obligated to engage in activities that benefited society but may produce fewer returns to shareholders, others argued that companies are built for chasing profits only and should not be expected to do charity. Some scholars view CSR as blood money to atone for past sins, or as an image projection which masks bare self-interest of the companies. For the more optimist, CSR provides an opportunity for companies to reconnect with their advocated values and gives them a chance to reflect a concern for social issues.

In Indian context, the sharp contrast between the growth of GDP of the company and the simultaneous increase in poverty is the reason pointed out by the government to make CSR mandatory. In specificity, India's contribution to the global GDP increased from 1.5% in the year 2000 to 2.6 % in 2014 while it still remained at a rank of 135 out of 186 countries in UNDP's Human Development Index as calculated in 2014 and ranked lower than other developing countries in terms of social indicators. It is a clear reflection of the inequality present in India which must be minimized to bring about a sustainable growth in the country.

Regime under the Companies Act, 2013 and Companies Act, 1956.

In Indian context, Chairman of the CSR Committee mentioned the Guiding Principle as follows: "CSR is the process by which an organization thinks about and evolves its relationships with stakeholders for the common good, and demonstrates its commitment in this regard by adoption of appropriate business processes and strategies. Thus CSR is not charity or mere donations. CSR is a way of conducting business, by which corporate entities visibly contribute to the social good. Socially responsible companies do not limit themselves to using resources to engage in activities that increase only their profits. They use CSR to integrate economic, environmental and social objectives with the company's operations and growth."

The Companies Act, 1956 did not have any provision related to corporate social responsibility. It was absolutely voluntary and a number of companies performed activities even then. Tata would be a good example here which already had a comprehensive policy and programme in place. Its consumers associate Tata with a country conscious brand and it has been basking in consumer loyalty for years altogether.

With the advent of Companies Act, 2013, the CSR is mandatory for certain companies. These companies are those which have a high turnover amounting to 1,000 crores or net worth of rupees five hundred crores or more, or a net profit of rupees five crores or more during any financial year. These companies are required to establish a CSR Committee in order to formulate CSR policy and to supervise the CSR activities. However, the CSR policy is approved by the board and must be published in the Board's Report which is placed before the members of the company at the general meeting. The statute also points out to the activities which can be undertaken for

CSR. Schedule VII to the Act enumerates such areas but is only illustrative in nature as was clarified by a circular which provided that CSR policy must be relatable to Schedule VII and the entries in the Schedule must be interpreted liberally so as to capture the essence of the subjects laid therein. A notable check placed by the government in this regard is that the companies must run these CSR exercises in a program/ project mode themselves or through implementing agencies which will be monitored & evaluated continuously by the company's committee. CSR expenditure is also under surveillance and must meet the format provided by the Ministry.

Transparency and accountability for the entire process is maintained by making mandatory various disclosures on an annual basis including inability to spend the mandatory 2% of the net profits. Interference in this regard by the government has been discouraged by the business community which has been readily conceded to by the Ministry. However, the inability to spend or allocate the amount has been allowed only when the company explains the same to the shareholdersand puts all related information on its website, i.e. in public domain. Unspent amount out of this 2% is carried forward to the subsequent year wherein it must be spent over and above the calculated amount for that year.

Public sector undertakings have been placed with higher responsibilities in this regard and the government has been handed a whip to monitor the CSR activities in this regard. Additional check is also put because of the presence of Auditor and Comptroller General who audits these companies.

Challenges to CSR Initiatives in India

CSR initiatives face many challenges in India and are often seen as deterrent to even the best-intentioned plans. The most important ones are described here.

Lack of Community Participation in CSR Activities:

Often, the communities who are the intended beneficiaries of a CSR program show less interest which will affect their participation and contribution. Also, very little efforts are being made to spread CSR within the local communities and instil confidence in the people. The situation is further aggravated by inadequate communication between the organization and the community at the grassroots level.

Need to Build Local Capacities:

There is a need to build the capacities of the local non-governmental organizations. Many NGOs are not adequately trained and equipped to operate efficiently and effectively as there is serious dearth of trained and efficient organizations that can effectively contribute to the ongoing CSR activities initiated by companies. This seriously compromises efforts to scale CSR initiatives and consequently limits the scope and outcome of a company's CSR initiatives.

Issues of Transparency:

Lack of transparency is one of the key issues. There is a perception that partner NGOs or local implementation agencies do not share adequate information and make efforts to disclose information on their programs, address concerns, assess impacts and utilize funds. This perceived lack of transparency has a negative impact on the process of trust building between companies and local communities, which is key to the success of any CSR initiative.

Lack of Consensus:

There is a lack of consensus amongst local agencies regarding CSR project needs and priorities. This lack of consensus often results in duplication of activities by corporate houses in their areas of their intervention. The consequent result in unhealthy competitiveness spirit among local implementing agencies goes against the necessity to have rather than building collaborative approaches on important issues. This factor limits organization's abilities to undertake impact assessment of their initiatives from time to time.

Conclusion

According to the emergent literature, there is a growing awareness that business needs to manage its relationship with the wider society. Corporate leaders are responsible for their corporations' impact on society and the natural environment beyond legal compliance and the liability of individuals. Wayne Visser has mentioned about the transformation of CSR 1.0 to CSR 2.0. According to him "Corporate Social Responsibility" is the classic notion, which he calls CSR 1.0 and CSR 2.0, which can be more accurately labelled "Corporate Sustainability and Responsibility". While the CSR 1.0 presents a vehicle for companies to establish relationships with communities, channel philanthropic contributions and manage their image; CSR 2.0 includes a diverse stakeholder panels, real-time transparent reporting and new-wave social entrepreneurship defined by "global commons", "innovative partnerships" and stakeholders involvement.

(CPS Bulletin April 2, 2017 & June 2, 2017)

QUO VADIS – WHITHER ACTIVISM?

Power tends to corrupt and absolute power corrupts absolutely (Lord Acton). With the horrendous experience of the despotic regime of King Louis XIV behind him, Montesquieu has advocated the doctrine of separation of powers among the three organs of the State. The legislature makes laws, the Executive enforces laws and the Judiciary applies laws where they are clear and makes laws clear where they are not clear. A natural corollary of this has been the system of checks and balances. This has been incorporated in the democratic constitutions all over the world. In contemporary times, the working of liberal and democratic constitutions has proved that sometimes fissures arise in the working of the principle and the delicate apple cart has been upset causing severe strains to the working of the systems.

Ever since Marshall has propounded the principle of judicial review starting that we are governed by the constitution but the constitution is what the judges say what it is, a debate has been raging over respective roles of the three organs of the state. The New Deal is too familiar an illustration. Can a bunch of Judges, who are nominated, arrogate to themselves the power not fully envisaged in the Constitutional scheme of things and undo the Acts of the people who are elected periodically by the people? Can this be done in the name of the Constitutional values? The moot question is – Who are the better judges of people's aspirations and expectations? Can the judges say populist measures are transient and smack of political expediency and therefore be relegated to the background for protecting the long term goals and the cherished values of the Constitution? Are not the judges entrusted with the Holy mission of protecting

the Constitution? If, yes, is it only singular to judges? Is not the executive also clothed with the same responsibility? These are some of the issues dividing the jurists into two different camps.

Seventy years after commencing her tryst with the destiny, India has emerged as one of the true champions of the RULE OF LAW. The principles of liberal democracy have been like the clarion call and the signature tune of the Constitution of India has been the protection of the dignity of the individual. One thing needs to be mentioned. A number of countries became independent along with India and a number of Constitutions have been drafted. But in most of the countries, democratic forms of government have disappeared and Constitutions have been thrown overboard. The unique feature of working of the Indian Polity has been that the Constitutional principles have been growing from strength to strength. This is no small measure due to the role of Supreme Court of India which has been rightly called Sentinel on the qui vive. Today the evolving principles and the expanding horizons of different facets of constitutional moorings, being enunciated by the Supreme Court of India are looked at with awe and admiration by jurists and judicial institutions all over the world. In fact, Prof. Upendra Baxi in his inimitable style observes that India might have had become Republic in 1950 but the Supreme Court of India became Republic only in 1970's. This is because, the Supreme Court has started evolving the new principles of administrative Law only in 1970's by liberating itself from the narrow confines of the earlier years. Whereas in the first twenty odd years, the Supreme Court of India has been always quoting the courts of the United States, United Kingdom and France among other countries, later it started enunciating new principles of administrative law

to such an extent that today the judgments of the Supreme Court of India are quoted with respect by the U.S Supreme Court and the Highest Courts in other countries.

This judicial activism has been possible due to the advent of judges with vision and far sighted wisdom like Justice P N Bhagwati, Justice V R Krishna Iyer and Justice O Chinnappa Reddy among others. The poor people who have hitherto been priced out of the Indian legal system, found the savior in the Supreme Court. The butcher, the pavement dweller, the bonded labour, the destitute women, the neglected child, the hapless prisoner - the list is only illustrative – found the beacon light in the new vistas of jurisprudence with focus on human rights. Epistolary jurisdiction, public interest litigation and forsaking of forms have been cited as examples of the Court's concern of Human rights culture.

The whips issued to the Executive have sought to drive out the indifference of the executive in fulfilling the mandate of the Constitution. But the saga bordering on hyperactivism has sent ripples when the judiciary started entering the domain hitherto considered as the exclusive preserve of the Executive. One should remember that executive and legislative action is the province of the organs specified in this regard. There may be gray areas on the boundaries, especially with the steady growth of case law on intervention in the public interest.

Former Chief Justice of India, Justice K M Ahmadi observed that it is a misnomer to call it judicial activism and it is only common man's activism. Judicial activism should be only a temporary phenomenon when the other organs fail to discharge their constitutional obligations. The three organs of

the state should remember that the days of mutual fault finding are over and that they are collectively responsible to fulfill the Constitutional mandate. What is required is JUDICIOUS ACTIVISM on the part of all the three organs.

(CPS Bulletin - December 2, 2017)

NATIONAL SPACE LEGISLATION FOR INDIA – AN IDEA WHOSE TIME HAS COME

Fifties was an era full of science, fictional idea of space expeditions but what came as a surprise was that it was the Soviet Union that realised this fictional idea. 4th October 1957 SPUTNIK 1 the first man-made object reached the low Earth orbit sending radio signals all over the globe raising a number of legal questions before the world community – Did the radio signal infringe the sovereign rights of nations? Do nations have jurisdiction over the outer space? Do nations have any threat from space expeditions? Who bears the liability for damage caused by these space objects? Is a nation free to undertake any space activity?

Had the success of Sputnik 1 been a luck by chance, these questions would have been Utopian but it was rather a trigger for space race. Thanks to the international community who anticipated the outcomes of uncontrolled space race and formulated the rules for space exploration, the 1967, Outer Space Treaty (OST) represents the basic legal framework of international space law prescribing certain obligations upon the State parties for healthy exploration of space. Followed by the OST, four more treaties were realised the Rescue Agreement, 1968; the Liability Convention, 1972; the Registration Convention, 1975 and the Moon Treaty, 1979. Except for the Moon Treaty, India has ratified all the other four space treaties. Nevertheless with the coming of these treaties in force, the above raised questions, in no way became redundant.

In the initial years of space exploration states were the sole participants but with increasing commercialization and

private participants questions, raised by the success of Sputnik1 once again become relevant and thereby a necessity for national space legislation. Most of the space faring nations have adopted their national space legislations with the objective to promote commercialization and privatisation of space. But is that the justification for India to have its national space legislation, keeping in mind, India occupies a prominent place in the group of elite space club – certainly not! Unlike the US and Russia, Indian space programme was driven with the motive to solve societal problem through space based technology. The necessity for National space legislation for India has to be understood in terms of its current space activities and future prospects, international commitments and Constitutional obligations.

Indian space programme made a humble beginning way back in the year 1960s with mere experimental sounding rockets but today with the operationalization of indigenously built Polar Satellite Launch Vehicle (PSLV) and Geo-Stationary Launch Vehicle (GSLV), India has developed self-reliant technology to launch satellites/ space objects playing a significant role in the commercial launch market. At the dawn of New Year 2015, when the world was waiting to receive gifts from their beloved Santa, ISRO came with a jubilant gift – the much awaited GSLV Mark III. As rightly stated the success of GSLV Mark III will enhance the capability of India to be a competitive player in the commercial launch market. Seems the vision envisaged by the Prime Minister of India is not far from reality - "India has a potential to become the launch service provider of the world. We must work towards this." As a space lawyer I see, the rising space technological achievements of India and the new vision statement, put forth by our Prime Minister, demands for

national space legislation of India in the light of our international obligations.

Article VII OST – "Each State Party to the treaty that launches or procures the launching of an object into Outer Space . . . and each State Party from whose territory or facility an object is launched is internationally liable for damage to another State Party . . ."

Since space activities are inherently dangerous, Article VII OST imposes unlimited liability upon the launching state meaning once a 'launching state for ever a launching state.' Noted authors have said that 'procuring of launch' connotes not actual control over the launch but possibility to control the launch. Thus India shall be liable for all the commercial and non-commercial launches. The words "whose territory or facility an object is launched' used in Article VII leave no room to escape from this liability as a launching state. The larger concern here is though India offers merely commercial launch without any intent to have any control over the object/ satellite once it has been launched but it shall bear forever the international liability for damage caused by such objects. Of course the Liability Convention, 1971 clarifies that in case of joint launch, the liability shall be joint and several, but this does not exonerate the liability of India. However the Liability Convention does suggest a way out in cases of joint launch.

Article V (2) Liability Convention – "A launching State which has paid compensation for damage shall have the right to present a claim for indemnification to other participants in the joint launching." The participants in a joint launching may conclude agreements regarding the apportioning among

themselves of the financial obligations in respect of which they are jointly and severally liable. Such agreements shall be without prejudice to the right of a State sustaining damage to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable."

Where India procures a launch for its foreign customers all it requires is an indemnification bond from the State on whose behalf it procures the launch. A mutual contract formulated under the general contract and business laws of India may be sufficient and no specific law may be needed but if India aspires to be "the launch service provider of the world" it will be in the interest of India and the commercial participants to undertake activities within the umbrella of law, as Aristotle long back said 'rule of law' is always better than rule of men. Rule of law becomes complementary when the new Government has been emphasizing on 'good governance.' Commercial exploration of space without rule of law shall be forlorn.

Our stars have been favourable that no liability has arisen till date but that does not guarantee for future. It is Murphy's rule that "anything that can go wrong will go wrong." Since space endeavours involve heavy financial investment, any liability arising will involve a colossal sum. Probably the payment for damage might be paid from the Consolidated Fund of India. Since no amount of money can be appropriated out from the Consolidated Fund of India except in accordance with law (Article 266), India shall be constitutionally handicapped if any such liability arises. In the absence of national space legislation, India does not have the capacity to discharge its international obligation for damage caused due to space objects launched by

India or whose launch was procured by India or whose launch was carried from the territory or facility of India. As mandated by Article 51 of the Constitution of India, to foster respect for international law and treaty obligations, it is in the very interest of India to have its national space legislation.

Of late, Government of India has thought in this direction and realised the necessity for regulating the space activities. The increasing role of private participants in the space sector is another reason to have national space legislation. Gone are the days when states were the sole participants in space exploration. Today the private sector possesses tremendous technological and financial capacity and has been outstandingly performing in space sector. It is the success of Ansari-X prize which has given likely hope for space tourism. Private companies like Bigelow Aerospace, Space X, Virgin Galactic etc. are playing pioneering role in commercial exploration of space. Cargo transportation, commercial launches, rover manufacturing etc. have become competitively cost effective with more and more companies entering in this field.

India has achieved milestones in space technology but at the same time it has been subject to criticism as well for rocketing tax payer's money to space when India has not been able to overcome its social problems. Giving preference to societal problems over space or vice-versa does not seem to be wise step. We must not forget the space vision given by Dr. Vikaram Sarabhai – father of Indian space programme - "There are some who question the relevance of space activities in a developing nation. To us, there is no ambiguity of purpose. We do not have the fantasy of competing with the economically advanced nations in the exploration of the Moon or the planets

or manned space-flight. But we are convinced that if we are to play a meaningful role nationally, and in the community of nations, we must be second to none in the application of advanced technologies to the real problems of man and society".

India being a developing country, money plays a prominent role in all our activities. Therefore we need to look for an alternative where both space activities and societal programme can go harmoniously in a balanced manner. Private Sector can be probable alternative for space endeavours. To a limited extent we have opened this sector to private participants but a lot remains to be done. Private participants can play a meaningful role in space based application areas like remote sensing, navigation, satellite communication etc. The primary concern in opening outer space for private participants is national security, safety and compliance with international obligations.

Article VI OST – "State parties to the treaty shall bear international responsibility for national activities in outer space … whether such activities are carried by Governmental or Non-governmental organization . . . and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space . . . shall require authorization and continuing supervision by the appropriate State Party to the Treaty".

The first part of Article VI dissolves the distinction between the non-governmental and governmental space activity by considering all space activity as 'national space activity'. It imposes an obligation upon state parties to ensure that all space activities, be they carried by private participants or

Government, have to be strictly in compliance with the Outer Space Treaty. Article VI read with Article VII makes the State liable for the damages resulting from private space activities. In other words 'space activities may be private but liability is always public'. International space law makes the State liable for wrongs committed by private individual unlike the liability regime defined in other branches of International law. It must be recalled that the liability under international space law is unlimited in time and money. A launching state is absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight. In the event of damage being caused elsewhere than on the surface of the Earth, the damage is determined on the basis of fault.

The second part of Article VI gives discretion to the State to prescribe conditions for participation of private players by way of authorization and supervision. Authorization and supervision, being a procedural aspect, creates a basis for national space legislation fostering equality of opportunity to private participants and ensuring compliance with international obligation. The authorization may be by way of license. Therefore national space legislation should prescribe the conditions of license, procedure to ensure conditions of license are complied with, once it has been granted, penalty for breach of license conditions. Since the State has to bear the liability for private participants a guarantee for indemnification shall be needed should State pay for damages arising because of the authorised activities. The damages being contingent on time factor it will be in the interest of State as well as private participant to take compulsory insurance for space activities. To eliminate the possibility of damage, an obligation is imposed upon states to

continuously supervise space activities. A legislation to that effect will ensure greater safety and security, minimize the risk of damage occurring and liabilities any arising thereto.

Space debris is a prime concern in safe exploration of space. The catastrophic effect of ASAT test has been panoramically visualised in the movie 'Gravity'. The conservation and protection of environment both terrestrially and in outer space is yet another concern in private participation creating a necessity to legislate. National space legislation shall be a tool in debris avoidance and mitigation.

As more and more commercial enterprises and foreign nations acquire the ability to explore outer space, the launched space object whether stationed in the orbit or on the surface of celestial bodies are exposed to likely risk of being damaged. INSAT series and CARTOSAT series satellites are backbone of space based infrastructure. With increasing private participation this infrastructure is likely to increase. If any damage is caused to the space object(s)/ satellite(s) of India by another state party, India shall have to establish its ownership and jurisdiction over such space object to bring a successful claim for damage. Ownership and jurisdiction of space become easily ascertainable by way of registration."A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body." The Registration Convention imposes an obligation upon State parties to register their space objects in the prescribed manner both in national registry and the UN Registry. The registration requirement creates yet another basis for national space legislation. Registration of space object in the national

registry will also ensure that any unauthorised sale/ transfer of space object/ satellite (which is quite probable in light of private participation) is void ab initio.

Thus Article VI, VII and VIII of Outer Space Treaty form the primary basis for national space legislation and give ample room for private sector participation. As of today around 22 space faring nations have adopted their national space legislations. United States has adopted an extensive space law. Derived from the current state practice, the International Law Association (ILA) has drafted the Model Law for National Space Legislation. It suggests that minimum building block for any national space legislation should be authorisation of space activities, supervision of space activities, registration of space objects, indemnification & liability related issues and other additional requirements. The ILA draft may serve as a point of reference as a starting point for the national drafting efforts. A similar set of recommendations has been made by the UN General Assembly relevant for the peaceful exploration and use of outer space.

If India aspires to be 'the launch service provider of the world' we should be second to none in having national space legislation. It is high time to reap the commercial benefits of space through rule of law. National Space Legislation is necessary in the light of international obligations and Constitutional dimensions for effective commercialization and privatization of space. India has demonstrated great technological potential but with great technological potential, comes the risk of greater liability! Time to shield against these liabilities, by way of adopting National Space Legislation!

(CPS Bulletin February 2, 2016)

STATE OVER COMMERCE OR COMMERCE OVER STATE?

(Keynote address : International Seminar on Corporate Jurisprudence January 29, 2014, Amity University, Lucknow)

Good afternoon, ladies and gentlemen! And, that of course, includes our young friends from Amity University, Lucknow campus. I am quite delighted to attend this international seminar on corporate jurisprudence. I am grateful to Mr Naresh Chandra for the invitation. In this keynote address, I'll argue that while commerce is critical to lift millions of people out of poverty, without the regulation by the state, commerce will neither flourish nor achieve its purpose.

Since the seminar is interestingly titled "corporate jurisprudence", let me begin with exploring the term "jurisprudence". In 1970, Justice P.B. Mukharji in his seminal Tagore Law Lectures on what he characterized as the 'New Jurisprudence' had said the following:

"The teaching of jurisprudence is a horror and nightmare for students, who are anxious to bury it no sooner they have taken their last examination on it". (P.B. Mukharji, Mukharji on the New Jurisprudence: The Grammar of Modern Law, Eastern Law House, Calcutta, 1970).

Sadly, little has changed even though we are in 2014 today. The so-called "new" jurisprudence as well as the "old" Jurisprudence both generally remain esoteric. However, the significance of a good comprehension of legal theory can hardly be overemphasized. A command over Jurisprudence is supposed

to separate a mere "lawyer" from the "jurist" - whatever the two terms might mean.

Indeed, the Constitution of India provides for elevation of a "jurist" to the bench. Article 124 (3) (c) of the Constitution of India, in relevant part, states:

"A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and -- ... is, in the opinion of the President, a distinguished jurist." Interestingly, this provision has not been utilized till date. Does it mean that there are no "jurists" in India or that the Supreme Court hasn't been successful in finding one?

In a different, but perhaps relatively more apt context for the purposes of our discussion, Nani Palkhivala, arguably India's one of the greatest lawyers, writing about India, had felicitously mentioned that: "India is like a donkey carrying a sack of gold -- the donkey doesn't know what it is carrying but is content to go along with the load on its back".

Knowledge of law sans jurisprudence would be akin to proving Palkhivala's point in the realm of law. This would more accurately be so in the context of corporate law. After all, what would be corporate law without jurisprudence? Students of corporate law would recall Salomon v. Salomon which firmly upheld the doctrine of separate legal personality and limited liability so that creditors of an insolvent company could not sue the company's shareholders to pay up outstanding debts even if there were no practical differences between the company and the dominant shareholder.

But for the jurisprudence developed in Salomon, where would corporate law be today? But for the concepts of

limited liability and separate legal personality, the vehicles of corporate form wouldn't perhaps be ubiquitous. And, but for the jurisprudence developed in Salomon, it wouldn't be possible to generate wealth at such a massive scale with a potential to lift millions out of poverty. In spite of the recent financial crisis, the western countries generally enjoy a much better standard of living compared with India. Is it a mere quirk of fate that the western societies have little poverty?

One of the most significant reasons behind the absence of poverty in western societies is industrialization which in turn was accentuated through the surplus capital generated through corporations. But, is the corporate form really a western concept? Professor Vikram Khanna of Michigan Law School (currently teaching as a visiting professor at Harvard) wrote the following in 2005:

"...business people on the Indian subcontinent utilized the corporate form from a very early period. The corporate form (e.g., the sreni) was being used in India from at least 800 B.C., and perhaps even earlier, and was in more or less continuous use since then until the advent of the Islamic invasions around 1000 A.D. This provides evidence for the use of the corporate form centuries before the earliest Roman protocorporations. In fact, the use of the sreni in Ancient India was widespread including virtually every kind of business, political and municipal activity. Moreover, when we examine how these entities were structured, governed and regulated we find that they bear many similarities to corporations and, indeed, to modern US corporations. The familiar concerns of agency costs and incentive effects are both present and addressed in quite similar ways as are many other aspects of the law regulating

business entities. Further, examining the historical development of the sreni indicates that the factors leading to the growth of this corporate form are consistent with those put forward for the growth of organizational entities in Europe. These factors include increasing trade, methods to contain agency costs, and methods to patrol the boundaries between the assets of the sreni and those of its members (i.e., to facilitate asset partitioning and reduce creditor information costs). Finally, examination of the development of the sreni in Ancient India sheds light on the importance of state structure for the growth of trade and the corporate form as well as on prospects for some kind of convergence in corporate governance".

It is obvious from Professor Khanna's observations above that the corporate form as a business vehicle hasn't been alien to Ancient India. Further, it appears from Professor Khanna's account that the state had a critical role to play in the emergence of growth of trade i.e. commerce and the corporate form. Why should the modern day India be so sceptical of them?

To my mind, in the Indian context, there are two major reasons behind the present day scepticism - first, the popular notions of business people of as being "greedy" and second, the spate of recent scandals such as 2G spectrum scandal and coal allocation bordering on "crony capitalism".

We have just celebrated the 65th Republic Day. On 25th November, 1949, this is what Dr B R Ambedkar said in the Constituent Assembly:

"I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn

out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. Who can say how the people of India and their purposes or will they prefer revolutionary methods of achieving them? If they adopt the revolutionary methods, however good the Constitution may be, it requires no prophet to say that it will fail. It is, therefore, futile to pass any judgement upon the Constitution without reference to the part which the people and their parties are likely to play."

What is true of the Constitution, is equally, if not more true of corporate law. If corporate participants are "greedy", what is that corporate law will be able to achieve? Of course, this is not an argument for the absence of regulation. As corporate shenanigans interpret, misinterpret, and reinterpret corporate law, parliament's job is to keep pace with them and try and outmaneuvre.

Perhaps this is the reason why India has a brand new corporate law in the form of the Companies Act, 2013. Would it really be any better than the Companies Act, 1956? Well, only time will tell.

Until then, what could be asserted with reasonable certitude is that while commerce is critical to lift millions of people out of poverty, without the regulation by the state, commerce will neither flourish nor achieve its purpose. Indeed,

commerce itself could be the by-product of the regulation by the state.

I am sure several paper presenters would touch upon many of the above issues. I've also had an opportunity to notice that amongst the list of suggested topics there are quite fascinating ones such as Robert Nozick's entitlement theory. I'll be interested in listening to the application of such theories in the context of corporate jurisprudence. I look forward to listening. Thank you!

(CPS Bulletin June 2, 2014)

THE ROLE OF THE COURT IN PROTECTING RIGHTS

There are few issues in contemporary constitutional law that are as controversial as the role, the Supreme Court of India has assumed over the past three decades. There is consensus on the fact that its role has changed, and deep division on whether the role is appropriate for the court. Justice VR Krishna Iyer calls the Court the "sanctuary of humanity", while critics have gone so far as to predict that the activist jurisprudence of the court represents the "first footprints of an impending constitutional lawlessness". The Supreme Court's activism has been primarily in the area of protecting rights. In this essay, I propose to discuss three facets of the Court's rights jurisprudence: expansion in "substantive" terms, expansion in "procedural" terms, and finally, an analysis of where this has taken the court, and the path ahead.

I SUBSTANTIVE RIGHTS - ART. 21 OF THE CONSTITUTION

A. Introduction

Substantive rights have been traced to Art. 21 of the Constitution, and particularly to the expression "life and personal liberty". In AK Gopalan, the question was whether a preventive detention law contravened the petitioner's rights under Arts. 19 (fundamental freedoms including the right to freedom of movement), 21 (the right to life and personal liberty) and 22 (the right against preventive detention). The majority held that though Art. 22 is not a complete code, Art. 19 does not apply to a prisoner whose liberty has been curtailed through valid legal procedure under Art.21. Thus, after Gopalan, Arts.

19 and 21 operated in distinct spheres. This began to change in Kharak Singh, where the right to privacy was held part of Art. 21. In Maneka Gandhi, however, Bhagwati J. held that since fundamental rights are "indelibly written in the subconscious memory of the race which fought for well-nigh thirty years for securing freedom from British rule", they should be construed widely. Maneka Gandhi further held that Courts must "expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction."

There is no doubt that the courts have done so. In the cases after Maneka Gandhi, the Supreme Court has read innumerable rights into Art. 21. On the other hand, these include rights which have far-reaching impact on the Indian society, such as the right to shelter, the right to privacy and the right to medical care; however, Art. 21 has also been used to enforce public health standards against Municipalities, tackle the mosquito menace, determine the conditions of service of subordinate judicial members, appropriate regulations for blood banks," adequacy of precautions at the Army Firing Range, shortage of chemicals, management and control of road-traffic and pedestrian movement, construction of a new bridge etc. These developments make it necessary to undertake two exercises- first, to examine the scope of the court's rights jurisprudence, and secondly, to assess the court's institutional competence in discharching these functions.

B. Economic and Social Rights

As to the first question, it is useful to notice the major decisions on the point. In Bandhua Mukti Morcha v. Union of

lndia, the Supreme Court held that the right to life under Art. 21 includes the right against "bonded labour", particularly in view of certain Directive Principles of State Policy, such as Art. 39(e), 39(f) etc. "In Consumer Education and Research Centre v. Union of lndia" a PIL was filed calling into question the conditions of work and the consequent occupational hazards for workers in the asbestos industry. According to the Court, "the expression 'life' assured in Article 21 of the Constitution does not connote mere animal existence or continued drudgery through life. It has a much 'wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure... The right to life with human dignity encompasses within its fold, some of the finer facets of human civilisation which makes life worth living. The expanded connotation of life would mean the tradition and cultural heritage of the persons concerned." The Court went on to specifically protect workmen employed in hazardous industries and held that their right to health cannot be sacrificed on the altar of economic necessity. It was observed that a denial of this right violates Art. 21, the Charter of Human Rights and Art. 38 and 39 of the Constitution.

In Upendra Baxi v. State of Uttar Pradesh, the Supreme Court similarly intervened to protect the rights of people in protective homes set up under the Suppression of Immoral Traffic in Women Act, 1956. The Court used the tool of continuing mandamus to ensure that appropriate conditions are provided to these residents, observing that Art. 21 includes the right to live with dignity.

A decision that has polarised opinion in Narmada Bachao Andolan v. Union of India." Although the Court eventually declined to intervene, it recognised that inhabitants of affected

areas are protected by Art. 21 against displacement except in accordance with law. The Court in that decision declined to intervene mainly because of the doctrine of laches and since the proposal had been extensively deliberated by the Government. In that case, the Supreme Court held that it is not a court of first appeal over all policy decisions that the Government takes, and is competent to interfere only when there is non-application of mind, lack of consideration of relevant materials, consideration of irrelevant materials etc. Indeed, in ND Jayal v. Union of India, the Court not only affirmed Narmada Bachao Andolan on the point of the scope of Art. 21, but reiterated that the right to a clean environment is a part of Art. 21.

Economic rights were most famously recognised by the Court in Olga Tellis v. Bombay Municipal Corporation, where the Court held that the right to life includes the right to a livelihood. In its most recent judgment on the point, PUCL v. Union of lndia, PUCL filed a writ petition seeking orders to compel the implementation of the Integrated Child Development Scheme. Recognising that the right to food is part of Art. 21, the Court issued various directions to enforce compliance with its earlier orders, and ensure effective implementation of the ICDS scheme. It directed the Government not to revise the age schemes adversely.

Similarly, the Court recognised the right to health in the landmark decision of Parmanand Katara v. Union of lndia. The case arose out of an incident where a bleeding man who had been injured in a road accident was refused treatment at a hospital on the ground that the hospital in question was not empowered to treat "medico-legal" cases. The Supreme Court held that the State, through a doctor in a Government hospital, is

bound under Art. 21, to extend medical assistance for preserving life. The same issue arose in a more recent decision - Paschim Banga Khet Mazdoor Samity v. State of West Bengal. In that case, a similar incident exposed the callousness of several State run hospitals to persons in need of emergency treatment. The Supreme Court observed, "(failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21. In the present case there was breach of the said right of Hakim Seikh guaranteed under Article 21 when he was denied treatment at the various government hospitals which were approached even though his condition was very serious at that time and he was in need of immediate medical attention." In addition, the Court ordered compensation in such cases, and framed guidelines for the admission of patients in State run hospitals. It was also held that the lack of financial resources does not exempt the State from having to fulfil its constitutional obligation.

The right to education was recognised famously in Unnikrishnan v. State of Andhra Pradesh. The decision arose out of an earlier case in Mohini Jain, and one of the questions in Unnikrishnan was whether Mohini Jain had been correctly decided. The Court proposed a general test for determining whether a right is sufficiently "fundamental" for it to be regarded as covered by Art. 21. It held that it is the "importance" of the right that matters, and that the right to education is necessary to achieve the objectives set out in the Preamble. The Court even envisaged the possibility of a Directive Principle "crystallising" into a Fundamental Right with the passage of time. The 86th Constitutional Amendment and the Right to Education Bill,

2005 are consequences of this decision of the Court.

C. Rights of Dentenue

It is now well-settled that the right to life includes the right to live with human dignity. This propelled the Court in DK Basu to declare that the right against custodial violence is part of Art. 21. Specifically, the Court observed that ‘’using any form of torture for extracting any kind of information would neither be ‘right nor just nor fair’ and, therefore, would be impermissible, being offensive to Articie 21”. In addition to this declaratory measure, the Court formulated 11 guidelines to ensure that persons accused of an offence are not subjected to interrogation except as prescribed by law. Some of these guidelines require the arresting officer to have an arrest memo attested, inform a relative of the accused as soon after the arrest as is practicable, draw up an inspection memo at the time of arrest, medical examination every 48 hours etc. The Court held that failure to observe these guidelines shall render the concerned officer subject both to departmental proceedings as well as contempt of court charges which could be instituted in the concerned High Court.

In Madhav Hoskot v. State of Maharashtra, an SLP was filed challenging an order of conviction and sentence imposed by the High Court. The SLP had been filed more than four years after the High Court order, and the accused argued that this delay was mitigated by his lack of legal aid in prison. The issue that tangentially arose was the applicability of Art. 21 in terms of legal representation. The Supreme Court held that atleast a single appeal on facts is a necessary component of “fair procedure” envisaged in Art. 21. In addition, the Court

held that legal representation is implied in Art. 21. Referring to American jurisprudence on the point, the Court observed that this is particularly necessary in India, since a large number of prisoners are from the poor and illiterate sections of society, with no legal awareness. Consequently, the Court issued six guidelines, which in essence require the State prosecuting the individual to ensure that he has the right to appeal, that a copy of the judgment is delivered to him by the Jail authorities, that he is appointed counsel if he is unable to engage one etc.

A similar issue arose in Francis Coralie Mullin v. Administrator. The Conditions of Detention Order under the Conservation of Foreign Exchange and Prevention of Smuggling Act provided that a detenue could have only a monthly interview with family members, and prescribed onerous conditions for even meeting legal advisers. Holding the provisions of the Order unconstitutional, the Supreme Court, through Bhagwati J., affirmed that the scope of Art. 21 was wide. According to the Court, "... in Maneka Gandhi case this Court for the first time opened up a new dimension of Article 21 and laid down that Article 21 is not only a guarantee against executive action unsupported by law, but is also a restriction on law making. It is not enough to secure compliance with the prescription of Article 21 that there should be a law prescribing some semblance of a procedure for depriving a person of his life or personal liberty but the procedure prescribed by the law must be reasonable, fair and just and if it is not so, the law would be void as violating the guarantee of Article 21. This Court expanded the scope and ambit of the right to life and personal liberty enshrined in Article 21 and sowed the seed for future development of the law enlarging this most fundamental of fundamental rights".

The Court also affirmed in Francis Coralie that the right to life under Art. 21 is more than "mere animal existence". As to its scope, the Court held that "the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."

The Court has also addressed itself to the question of protecting people endangered by the nature of the judicial process, For example, the problem of undertrial prisoners is a grave one, and it is often the case that undertrials serve prison terms awaiting trial that are longer than the maximum sentence they can receive if convicted. In Sheela Barse v. Union of India, the Court passed several orders in this respect. For one, it held that children under the age of 16 cannot be incarcerated like adults, for it has a "dehumanising effect" on their prospects, and that the inability of the State to find juvenile homes is no reason to so incarcerate them. In addition, the Court directed lower courts to periodically inspect jails, rebuked the State for not discharging its obligations under welfare provisions like Art. 39(f) etc. Another decision on the regulation of prisons is Sunil Batra v. Delhi Administration. The Supreme Court issued various guidelines, holding that it has jurisdiction to intervene in the administration of prisons when conditions are so appalling that they constitute a breach of Art. 21. In particular, the Court proscribed the practice of solitary confinement for undertrials or those pending appeals.

II. PROCEDURAL INNOVATIONS - ART. 32 OF THE CONSTITUTION

Art. 32 of the Constitution provides that the Court may issue 'appropriate' orders to remedy the violation of a fundamental right. In 1950, the locus standi principle was constructed narrowly, where the Court held that Art. 32 applies only if there is 'iniury to the complainant'. A shareholder could therefore not use Art. 32 to remedy injury caused to the company, unless it independently affected him as well. However, Mukherjea J. in that decision observed that an 'exception' to this rule allows any person who is not an 'absolute stranger' to obtain habeas corpus for 'liberating another from illegal imprisonment'. This was to later become a common phenomenon, of which Sunil Batra and the Bhagalpur Blinding Case are examples.

Locus standi is often misunderstood as a procedural technicality. It serves an important public purpose - that of discouraging what Professor de Smith calls the "professional litigant". The following observations are classic: "All developed legal systems have had to face the problems of adjusting conflicts between two aspects of the public interest-the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging the professional litigant and the meddlesome interloper to invoke the jurisdiction of the courts in matters that do not concern him."

According to Professor S.P. Sathe, the liberalization of locus standi occurred in the following manner: "The Supreme Court of India is the protector and guarantor of the fundamental rights of the people of lndia, the majority of whom are ignorant

and poor. The liberalization of the rule of locus standi arose from the following considerations: (1) to enable the Court to reach the poor and disadvantaged sections of society who are denied their rights and entitlements; (2) to enable individuals or groups of people to raise matters of common concern arising from dishonest or inefficient governance; and (3) to increase public participation in the process of constitutional adjudication. This litigation came to be known as public interest litigation (PIL). PIL is, actually, a misnomer because all public law litigation is inspired by public interest. In fact, even private adjudication subserves public interest because it is out of public interest that people should honor contracts, should be liable for civil wrongs, and should honor rights in property or status. Whereas public interest is served indirectly by private litigation because the main focus is on the private interest of the litigants, public interest is served more directly by public law ajudication because the focus is on the unconstitutionality arising from either lack of power or inconsistency with a constitutionally guaranteed right. Public interest litigation is a narrower form of public law litigation."

This liberalization began with Fertilizer Corporation's case. Chandrachud J. held that if public property is affected, the Court would be inclined to hear a section of the public which is directly interested and affected. Krishna lyer J. went further, and held that judicial 'law-making' is required in this field, since it is in a socieiy where 'freedoms suffer from atrophy'. At this point, PIL still only allowed a third party to file on behalf of the injured party if he himself was unable to do so. Thus, there was a distinction between a 'writ filed in the public interest' and a 'public interest writ'- PIL referred not to whether the subject

matter of the writ was in the public interest, but whether the complainant was able to approach the Court. Specific legal injury was still required.

In *S.P. Gupta,* the Court eliminated this distinction. Bhagwati J. held that there may also be a situation "where the State or a public authority may act in violation of a constitutional or statutory obligation or fail to carry out such obligation resulting in injury to public interest or what may conveniently be termed as public injury as distinguished from private injury." In this situation, the Court said, any member of the public having 'sufficient interest' can maintain an action, for otherwise it would be disastrous to the rule of law. The Court disapproved of a decision of the House of Lords to the contrary in Gouriet v. Union of Post Office Workers, terming it 'clearly incorrect' and likely to 'stultify public law in England'. By 'sufficient interest', the Court appears to only want to weed out litigants using PIL for private gain. The Court in Gupta relied on several decisions of Lord Denning MR to elucidate 'sufficient interest' such as Ex Parte Blackburn, where he had held that Blackburn could challenge the order of the London Council allowing the exhibition of pornographic films, contrary to law, because 'he was a citizen of London, his wife a rate payer and his children might be harmed by the pornographic films'. Thus, almost any member of the public will be considered by the Court to have 'sufficient interest' to maintain an action in the public interest. Hence, the law in India today is that any member of the public can maintain an Art. 32 petition if (a) it is on behalf of a complainant who is unable to approach the Court, or (b) if the State has acted. in violation of a constitutional or statutory obligation. Venkataramaiah J. in that case was more

conservative, and does not seem to have accepted Principle (b). However, it is now settled that SP Gupta is in fact authority for both propositions. It has been successfully applied in several cases- Swami Agnivesh had locus in Bandhua Mukti Morcha (Bonded Labourers Case), as did the petitioners in petitions to order CBI investigations into the flesh trade (Paramjit Kaur), compulsory emergency treatment in hospitals (Khet Mazdoor Samity), education of children of prostitutes etc. 'Epistolary jurisdiction' evolved, where the Court would treat letters written to individual judges as writ petitions, waiving procedural formalities. In the Bhagalpur Blinding Case, the Court accepted the letters of lawyers and journalists to inquire into the matter. The Court has also, in this manner, dealt with free legal aid, observance of labour laws in relation to the Asian Games (PUDR v. Union), and pension funds for workers, among others.

The growth of public interest litigation has coincided with the Court dispensing with more and more hitherto well established principles of procedure. For example, it was held in Tilokchand Motichand v. Munshi that delay or laches can defeat an otherwise maintainable writ under Art. 32. It is important to remember that Tilokchand was a tax writ, and no question of personal liberty was involved. Therefore, some of the academic criticism that came its way may not have been correct. In any event, the Court held that laches is of less importance when the writ raises an issue in the public interest. That is not to say that laches is irrelevant in a public interest writ. Indeed, that is one of the principal grounds on which the Supreme Court rejected the writ petition filed by Narmada Bachao Andolan.

It is submitted that public interest litigation addresses one very important aspect of access to justice for the poorer sections

of society - the procedural aspect. It is axiomatic that if victims of rights violations are in a position where they are unable to even approach the Court, then all the substantive developments and innovative methods of Constitutional interpretation by the Court will be rendered useless." Public interest litigation solves this problem by eliminating the traditional common law requirement of locus standii, namely only he whose rights have been violated can approach the Court.

A caveat must be added, however. Of late, there have been numerous complaints that public interest litigation is being seriously misused by both lawyers and litigants, and is adding in a big way to the burden upon the Courts. In order to ensure that in a huge plethora of cases, the plight of those who actually need the assistance of the Court is not drowned out, it is clear that there must be strict adherence to the two requirements elucidated above. Only then will public interest litigation be able to serve its real purpose, that is, to ensure that the rights of the poorer and exploited sections of the society are actually protected.

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SOCIO ECONOMIC RIGHTS :

A BRIEF OVERVIEW OF THE EXISTING REGIME

Introduction :

Since the inception of the human rights discourse at the global arena, second generation rights have been relegated to the background. The debate surrounding the lack of enforceability and justisiability of economic, social and cultural rights have posited a herculean challenge in implementing these rights in domestic settings. On the contrary, first generation of civil and political rights have seldom encountered such resistance and have been universally promoted in national scenario. Though numerous scholars have expressed the indivisibility and interdependence paradigm between first and second generation rights, in reality the latter are seldom regarded as legal rights. The effective realisation of these has especially been problematic in developing countries.

The International Covenant of Economic, Social & Cultural Rights (hereinafter ESCR) remains the normative framework for second generations rights. A sprinkling of ESCR can also be sourced in other global human rights treaties like CEDAW, CEC, CERD, CRPD etc. The individual complaint mechanisms for the ICESCR is still in the pipeline. Regional human rights instruments impinging ESCR also exist-the European Social Charter, San Salvador Protocol etc.

Specific Obligations under ESCR Regime

The nature of obligation under ESCR varies. There are three integral elements of it. The Duty to Respect is tantamount to the negative obligation imposed on the State to refrain from

acting in a manner that would either prevent access to rights or affect the enjoyment and exercise of the same. The Duty to Protect imposes upon the States the duty to prevent interference from third parties. And this requires a positive obligation on the part of the State establish regulatory frameworks that combat violations from third parties. The Duty to fulfil obliges the State to take affirmative action to ensure access and enjoyment of ESCR by all. This talks about an immediate achievement or a minimum standard to be progressively achieved.

Mapping Diverse Enforceability Approaches

Several countries world over including in the Asian region have endorsed innovative ways in promoting and protection of economic, social and cultural rights. Despite the issues of progressive realisation as well as lack of resources for ESCR some countries in the last few decades have made substantial inroads in the arena of justiciability of ESCR.

The Directive Principles Approach in India is one such illustration for essaying plethora of jurisprudence on second generation rights. The Constitution of India embodies ESCR predominantly in Part IV and has with unique procedural initiatives like the Public Interest Litigation adjudicated effectively on the enforceability of ESCR. It is in the recent past that the Parliament has also legislated extensively on numerous types of ESCR –National Rural Employment Guarantee Act, Unorganised Workers Social Security Act, Right to Education Act etc. The adjudication of ESCR by Indian court has also meant series of orders directing implementation of various schemes like the Mid-Day Meal Scheme to actualise ESCR.

The Bill of Rights Approach is unique to South Africa

which though does not relegate ESCR but talks about availability of fund for them to materialise. The Grootboom case was instrumental in two arenasidentifying the minimum normative core content of ESCR as well as the criterion of progressive obligation. The Court endorses these two parameters as being fundamental in assessing the State's compliance and willingness to implement ESCR. The Courts have also repeatedly emphasised on sustaining public pressure on the Government for rights to be more encompassing as well as to actually materialise especially in the realm of ESCR.

The European context adopts the Indivisibility Approach. Relying on the European Convention on Human Rights, the Courts have endorsed second generation rights by interpreting it in civil and political rights provisions of ECHR. Both procedural and substantive guarantees against States as well as third parties have been enumerated by the European Court on Human Rights evolutive interpretation of civil and political rights.

Profiling Asia : Complexities Galore for Socio Economic Rights

The Asian continent as a region is diverse and heterogeneous. Political instability dots many countries especially in the South Asian context. Military rules, dictatorial States, totalitarian governments are commonplace. The region has also over the decades experienced a legacy of bloodbath and severe human rights transgressions with armed conflicts and civil wars being pervasive in many nations. Political instability is pervasive. Economic development has set in but in an inegalitarian and lop-sided fashion. Poverty continues to be the predominant cause of human rights abuses in many countries.

The Asian continent is also conspicuous for being the sole region bereft of a regional human rights mechanism unlike its European, Inter America, African and even Arab counterparts. Independence of institutions is also problematic-especially the judiciary and this has impacted severely the facilitation of human rights. The glaring absence of human rights ombudsman to assist in effective and sustainable implementation of human rights has been yet another illustration of negligible or minimal commitment to human rights by the Governments. Lack of a vibrant civil society set up that engages critically with the Government on human rights concerns has further added to the exiting woes.

And lastly State controlled media with sweeping censorship laws in many nations has culminated in human rights being a 'non-issue' in several nations. The resistance to numerous human rights norms on grounds of cultural relativism especially in the domain of second generation rights is yet another impediment. Archaic cultural and traditional practices has been yet another reason to curtail rights of certain subaltern groupswomen , children, minorities etc. Some pockets in the region like South Asia have also witnessed series of refugee producing nations like Sri Lanka, Afghanistan, Myanmar, Tibet, Nepal etc. and this has also challenged regional peace and security.

Globalization, economic liberalisation and development has also implied a sizeable population being internally displaced due to development projects. The out flow and inflow of migrant population is another commonality in the region. Furthermore issues of caste, religion, gender, disability etc. have resulted in marginalisation and social exclusion that have

grave repercussions on access to rights. Empowerment has been a rhetoric and despite rapid urbanisations and development and hardships, sufferings and quest for survival continues to haunt many Asian States. Issues of corruption, lack of accountability, skewed public distribution system etc. are a few more factors responsible for ineffective realisation of ESCR.

MDGs : Role of Asia

The Millennium Declaration was a product of the United Nations Millennium Summit in 2000 wherein world leaders concurred on the greater need to promote human rights and justice globally. The Declaration chalked out 8 time bound Millennium Development Goals to be achievable by 2015 by all countries in the world. All the 8 goals have a direct bearing on diverse economic and social rights- health, education, food, maternal and child health, environment. The MDGs were also unique for the North South collaboration and partnership it envisaged to accomplish these goals.

The Asian region is centrifugal to the world's vision of access to these enumerated 8 basic and core rights. For the entrenchment a human rights culture domestically as well as globally the role played by the Asian region in addressing the proposed 8 MDGs is extremely vital. The successes and failures of the Asian States vis-à-vis the MDGs would largely determine the success of this endeavour at the global front.

However in most South Asian States these have remained mere 'aspirational precepts'. Mainstreaming of economic, social and cultural rights is vital for the holistic development and progress of a given nation. There is a dire need to re-invigorate the commitments from States for the actual, effective and

sustainable realisation of these rights in contemporary settings.

Goal 1 : Eradicate Extreme Poverty & Hunger, Goal 2 : Achieve Universal Primary Education, Goal 3:Promote Gender Equality & Empowerment of Women, Goal 4: Reduce Child Mortality, Goal 5: Improve Maternal Health, Goal 6: Combat HIV/AIDS, malaria and other diseases, Goal 7:Ensure Environmental Sustainability, Goal 8 :Develop a Global Partnership for Development.

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BASIC STRUCTURE AND BASIC HUMAN RIGHTS

A RELOOK AT KESAVANANDA

There are times in the life of a nation when events overtake it. Kesavananda Bharati v. State of Kerala is undoubtedly such a moment for India. Indeed, much has been said about this decision, and many adjectives have been coined in an inadequate attempt to fully grasp the magnitude of its contribution to Indian democracy. Much has been written about the role its progenitor, Nani Palkhivala, played in the episode. I do not propose to revisit these, important as they are, for there is one feature of Kesavananda that has gone curiously unnoticed - its contribution to human rights.

The average observer of Indian law and politics would not associate Kesavananda with human rights in the manner he would Maneka Gandhi. The reason perhaps is that human rights flow from the basic structure doctrine, but did not create it. In other words, it is not solely the concern of protecting human rights that moved the court to evolve the basic structure doctrine. However, this cannot detract from the importance of the connection between the doctrine and what has unquestionably emerged as the most important branch of public law in the 21st century - human rights.

Judicial History - Sankari Prasad to Golaknath

The Constitution (First Amendment) Act, 1951, which inserted inter alia Articles 31A and 31B in the Constitution was the subject matter of decision in Sankari Prasad's case, the first of the trilogy of cases that preceded the seminal decision in Kesavananda Bharati. The main arguments in favour of unconstitutionality revolved around whether the amendment

procedure whether the Amendment Act, in so far as it purports to take away or abridge the rights conferred by Part III of the Constitution, fell within the prohibition of Article 13(2). The Court rejected all contentions based on the amendment procedure. In response to the contention on the scope of Art. 13(2), the Court opined:

Although 'law' must ordinarily include Constitutional law there is a clear demarcation between ordinary law which is made in the exercise of legislative power and Constitutional law, which is made in the exercise of constituent power. In the context of Article 13, 'law' must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power with the result that Article 13(2) does not affect amendments made under Article 368.

The next time the issue came before the Court was 13 years later in Sajjan Singh's case. It is interesting to note that the propriety of Sankari Prasad Singh Deo was not challenged in Sajjan Singh, but Justice Gajendragadkar, C.J. still thought it fit to give reasons in support of the reasoning of Justice Patanjali Sastri in Sankarai Prasad Singh Deo. The learned Chief Justice thought that the power to amend in the context was a very wide power and it could not be controlled by the literal dictionary meaning of the word 'amend'. He further held that when Article 368 confers on Parliament the right to amend the Constitution, it can be exercised over all the provisions of the Constitution. He thought that "if the Constitution-makers had intended that any future amendment of the provisions in regard to fundamental rights should be subject to Article 13(2), they would have taken the precaution of making a clear

provision in that behalf'. He was of the view that even though the relevant provisions of Part III can be justly described as the very foundation and the cornerstone of the democratic way of life ushered in this country by the Constitution, it cannot be said that the fundamental rights guaranteed to the citizens are eternal and inviolate in the sense that they can never be abridged or amended. According to him, it was legitimate to assume that the Constitution-makers visualized that Parliament would be competent to make amendments in these rights so as to meet the challenge of the problems which may arise in the course of socioeconomic progress and development of the country.

These two cases show the approach of the Court to questions of the status of fundamental rights and, in turn, human rights. The Court rejected the contention that fundamental rights could not be amended, and allowed such amendment by normal amendment procedure, leaving these socalled inviolable shorn of much-needed protection. However, while these decisions were detrimental to fundamental human rights, that is not, in itself, an indictment of their reasoning and rationale. For one, much could be said for the textual interpretation of the relevant provisions by Justice Sastri and Justice Gajendrgadkar. Secondly, the Court pointed out the very valid concern that the unamendability of fundamental rights would mean that Part III of the Constitution could not stay in step with socio-economic changes and developments. Such a static Constitution was clearly not in the best interests of the nascent Indian democracy, and could not have been intended by the drafters. Finally, a survey of decisions in this period reveals a general reluctance on the part of the Court to impose competence-based restrictions on the Parliament. Given that India became a Republic in the year

when Sankari Prasad was decided, and was all of 14 years old at the time of Sajjan Singh, this sentiment cannot be criticized either. However, while a majority of the Court interpreted the Constitution with a strong emphasis on the presumption of constitutionality of Parliamentary legislation, a dissenting note was struck by Justice Hidayatullah, which went on to lay the foundations of Golak Nath's case. In his words,

It is true that there is no complete definition of the word 'law' in the article but it is significant that the definition does not seek to exclude Constitutional amendments which it would have been easy to indicate in the definition by adding 'but shall not include an amendment of the Constitution' ... The meaning of Article 13 thus depends on the sense in which the word 'law' in Article 13(2) is to be understood ... The Constitution gives so many assurances in Part III that it would be difficult to think that they were the play-things of a special majority. To hold this would mean prima facie that the most solemn parts of our Constitution stand on the same footing as any other provision and even on a less firm ground than one on which the articles mentioned in the proviso stand.

This dissenting view of Justice Hidayatullah, formed the foundations on which the decision in Golak Nath's case was based. As observed by no less a jurist than Granville Austin, the period around the time Ms. Indira Gandhi came to power was when the confrontationist stance between the Court and Parliament began to emerge, and the evolution of the basic structure also possibly owes its origins to this politico-judicial situation. In Golaknath, the petitioner urged before the Court that Sankari Prasad's case and Sajjan Singh's case had been wrongly decided by this Court. Subba Rao, C.J. speaking for himself and

4 other judges summarized the conclusions as follows:

(1) The power of the Parliament to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Article 368 thereof which only deals with procedure. Amendment is a legislative process.

(2) Amendment is 'law' within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void.

(5) We declare that the Parliament will have no power from the date of this decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein.

However, the Chief Justice refused to express an opinion on the contention that, in exercise of the power of amendment, Parliament cannot destroy the fundamental structure of the Constitution but can only modify the provision thereof within the framework of the original instrument for its better effectuation. Justice Hidayatullah reaffirmed this decision, observing that:

(i) the Fundamental Rights are outside the amendatory process if the amendment seeks to abridge or take away any of the rights;

(ii) Sankari Prasad's case (and Sajjan Singh's case which followed it) conceded the power of amendment over Part III of the Constitution on an erroneous view of Articles 13(2) and 368.

(iv)that this Court having now laid down that Fundamental Rights cannot be abridged or taken away by the exercise of amendatory process in Article 368, any further inroad into these

rights as they exist today will be illegal and unconstitutional unless it complies with Part III in general and Article 13(2) in particular;

(v) that for abridging or taking away FundamentalRights, a Constituent body will have to be convoked

This mapping of the judicial path traversed by the Supreme Court from 1950 to 1967 shows how judicial deference gave way to an activist protection of fundamental human rights over the better part of two decades. It is against this backdrop that the decision of 13 judges of the Court in Kesavananda Bharati assumes great relevance.

Kesavananda Bharati - Redefining the Indian Constitution

I mentioned earlier how the dissenting opinion of Justice Hidayatullah in Sajjan Singh led to the decision in Golaknath. Similarly, it was Justice Mudholkar's dissent in Sajjan Singh that led to Kesavananda Bharati, and the evolution of the 'basic structure' doctrine.

Interpreting the intent behind the different provisions in the Constitution, the learned judge observed that it was meant to be a document that gave effect to some sacrosanct values, and had to be interpreted as such. All the efforts of the Constituent Assembly were directed towards the founding of a nation based on these immutable values. "Above all, it formulated a solemn and dignified Preamble which appears to be an epitome of the basic features of the Constitution. Can it not be said that these are indications of the intention of the Constituent Assembly to give a permanency to the basic features of the Constitution?" Further, "It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded

merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Article 368?" This line of argument was taken further by the likes of M.K. Nambiar when arguing Golaknath, but finally saw the light of day in Kesavananda.

The period between 1967 and 1973 was one of great Constitutional conflict, with the status of the right to property, and issues of the guardianship of the Constitution dominating political and judicial debates. Finally, the constitutional validity of amendments by which two State enactments were added to the Ninth Schedule, and granted Constitutional immunity, was challenged before a full Bench of 13 judges of the Supreme Court in Kesavananda Bharati. These enactments had already been struck down as unconstitutional by the Kerala High Court in VN Narayanan Nair before the said amendment. The Supreme Court decision comprises eleven separate judgments, resulting in a veritable quagmire of judicial dicta and jurisprudential controversies. In an attempt to resolve some of these issues, nine judges signed a summary statement which records the most important conclusions reached by them in this case. However, as Granville Austin correctly points out, there are several discrepancies between the points contained in the summary signed by the judges and the opinions expressed by them in their separate judgments. However, these discrepancies aside, the decision gave birth to the seminal concept of the 'basic structure'. Seven of the thirteen judges in the Kesavananda Bharti case, including Chief Justice Sikri who signed the summary statement, declared that Parliament's constituent power was subject to inherent limitations. While there was a great degree of uncertainty as to what these limitations were, a

majority of the Court agreed that there were some limitations. These limitations were the basic structure of the Constitution.

However, one question that has troubled jurists and constitutional experts alike is: where does the basic structure originate from? Is it a set of values that the drafters of the Indian Constitution sought to protect, and which, in turn, should influence its interpretation? Or is it a set of provisions of the Constitution, which were meant to be its foundations, which should be preserved at any cost? The decision in Kesavananda Bharati seems to be deeply ambiguous on this issue. The emphasis placed by some of the judges like Justice Sikri on the Preamble suggests that the basic structure has an extra-Constitutional origin. However, Justice Chandrachud's enunciation of the basic structure doctrine in the subsequent decision in Indira Gandhi v. Raj Narain suggests otherwise. While he dissented from the majority in Kesavananda Bharati, he laid down a test that is now widely quoted as the accepted standard for a basic structure analysis- "to examine in each individual case the place of the particular feature in the scheme of the Constitution, its object and purpose and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of the country's governance". This statement can be taken as very strong authority for the proposition that the search for the basic structure of the Constitution begins and ends in the Constitution. This issue is quite apart from the other raging debate of what the basic structure consists of, which essentially, is an issue of substance. This issue is one of procedure- where does one look for the basic structure of a Constitution. As I will now elaborate, especially in the context of human rights, this debate is of immense importance.

Kesavananda Bharati and Human Rights

Having discussed the evolution of the basic structure doctrine and its actual enunciation in Kesavananda Bharati and the cases which follow, I now move on to the final issue I shall be discussing here. One of the most interesting aspects of the relationship between Kesavananda Bharati and Golak Nath is the differing stances adopted on the sanctity of fundamental rights.

From an entirely human rights perspective, the decision in Golak Nath seems prima facie ideal. Laying down that the fundamental rights are immutable and unchangeable, the decision seemed to establish beyond doubt the primary importance of the rights in the Indian Constitutional scheme. On the other hand, Kesavananda Bharati seemed to be more equivocal on this aspect. Six judges on the Bench were of the opinion that the basic structure doctrine found no place in Indian jurisprudence. Six were of the view that the basic structure doctrine was a tool available to the Indian judiciary, and that fundamental rights formed an essential part of this basic structure. Justice Khanna, whose opinion is probably the narrow thread on which Indian Constitutional integrity rests, opined that while there was a basic structure to the Indian Constitution, fundamental rights per se did not form a part of it. In this scenario, did Kesavananda Bharati's departure from Golak Nath signify a departure from the primacy of fundamental human rights?

I think the answer to that question must be in the negative. The effect of Golak Nath was that Part III of the Constitution was rendered untouchable. Not only was a dilution of the rights impermissible, any modification of the rights would also not be

possible. This means that in cases where the socio-economic milieu of the country necessitated the adaptation of existing rights, or the addition of new rights to Part III, the Parliament would be powerless to do so. This static Part III clearly could not have been the intent of the Constituent Assembly, which intended a Constitution for the future of India. Thus, the rigidity of the Golak Nath's decision is a double edged sword which crystallizes the fundamental human rights as they existed at the time of drafting, which safe as it may be, is not in the best interests of Indian Constitutional dynamism, and neither in the best interests of actual effectual human rights delivery. Kesavananda Bharati, on the other hand, laid down the broader proposition that there is some basic structure to the Constitution which is immutable and unchangeable. As long as this is preserved, the Constitution can be amended and adapted to cater to changing socio-economic and politico-legal realities. This means that Fundamental Rights in India can be amended, as long as they do not depart from what was intended as being a part of the basic structure. The decision is left to each subsequent Bench of the Supreme Court, to decide on facts before it, what comprises the basic structure. This stance, in my opinion, is more ideally suited to constitutionalism than the view adopted in Golak Nath. The only down-side to the dynamism that Kesavananda Bharati allows is the possible reluctance of future judges of the Supreme Court to be champions of civil, political economic and social liberties. However, a survey of the Indian Supreme Court's jurisprudence over the last three decades proves this concern to be unfounded. The Supreme Court has repeatedly shown itself to be the bulwark of these rights, adopting an activist and firm stance to accommodate social concerns in the Indian

Constitutional jurisprudence. With such dynamic judges on the Court, concerns about the basic structure doctrine proving to be an illusory doctrine can be laid to rest in peace.

The final issue that remains to be addressed harks back to the question of origins of the doctrine. I mentioned earlier that it is unclear whether the basic structure doctrine originates from the Constitution or is extra-Constitutional. The significance of this decision cannot be better explained than by looking at the decision of the Supreme Court in ADM Jabalpur v. Shivkant Shukla. Widely regarded as one of the lowest ebbs of Indian Constitutional history, there is much which could be said for the legal reasoning adopted by the majority. Their point was simple- the rights granted by the Indian Constitution are exhaustive, and have no place outside the Constitution. Hence, any suspension of these rights permitted by the Constitution, extinguishes the rights altogether. Justice Khanna, in a sole scathing minority opinion, begged to differ. In his view, Part III of the Constitution merely codifies the rights which exist outside the Constitution. Hence, even if part III may be suspended by a Constitutionally permissible procedure, the rights continue to exist. This clearly shows the significance of resolving whether the basic structure finds place outside or inside the Constitutional document. The other importance of this debate is the possibility of borrowing from international jurisprudence, if the basic structure were considered as having a wider scope. Over the few decades, there has been an active human rights movement all over the world, which India is still lagging behind in. Taking a more expansive view of the basic structure doctrine will allow the Court to guide the evolution of the Indian Constitution to be in step with

international human rights developments, thus truly making it a document for eternity.

In short, it is time to reassess the basic structure doctrine as a matter of some urgency. To add greater cohesion to this doctrine, it is indubitable that courts must define it more precisely than has been possible to date. While it is no doubt the case that these are terms that resist a precise definition, I have tried to demonstrate that perhaps this exercise may usefully take the direction of human rights, and fundamental rights. History will, as ever, be the ultimate witness to the success or failure of these efforts - but it is certain that April 24, 1973 will always be remembered as a day that defined India's constitutional history.

(CPS Bulletin February 2, 2010)

CYBER CRIMES - SOME STRAWS IN THE WIND

The word 'Cyber space' was coined by William Gibson in his science fiction novel, NECROMANCER, published in 1984. It has subsequently become widely used as a means of denoting the apparent or virtual location within which electronic activities are undertaken. The imaginary location where the words of the parties meet in conversation is what is refereed to as cyberspace.

CRIME may be defined as "taking or attempting to take or doing or attempting to do any act by means of process which is not accepted by the norms of the society or by unfair means"

CYBER CRIME can be defined as "Any crime, with the help of computer and telecommunication technology, with the purpose of influencing the functioning of computer or computer systems".

Current estimates indicate that there will be over 1000 million users connected to the Internet by 2005. Out of these users, 0.5% i.e., 5 million represents the true threat as people who can steal things of value from organizations. It is difficult to identify that culprit, as the Net can be accessed from any part of the globe. The field is wide open for hackers. Hence, cyber crimes are considered to be "White collar crimes".

In India today, computers have become an integral part of the fast developing society. Already computers are being used in banking, manufacturing, health care, defence, law enforcement, there is no end to the list. This new phenomenon called computer revolution however has a darker side also. Computer network is the interconnection of communication lines or any other communication facility with a computer

through remote terminals or a system consisting of two or more inter related computers. All such data networks and hundreds of applications such as the World Wide Web and E-mail that run on networks are in the hands of cyber criminals. In other words, cyber crime means an act committed by a person who knowingly or recklessly or without authorization alters, deletes, tampers with, damages, destroys or takes data intended for use by a computer system whether residing within or external to a computer system.

Some of the cyber crimes, that usually relate to Internet are discussed hereunder.

a) Harassment and stalking on the net: this has been defined as " the practice of harassing individuals via electronic mail or other computer based communication to the point where they feel as threatened as if they were being watched, followed or spoken to in person". Cyber stalking is a relatively new form of electronic crime. Its victims are mostly invisible and its violence is primarily verbal.

b) Viruses: A virus is a cracker programme that searches out other programs and infects them by embedding a copy of itself in them so that they become corrupted. When these programmes are executed, the embedded viruses are executed too, thus propagating the infection. Many nasty viruses, written by particularly perversely minded crackers, do irreversible damage like nuking the entire user's files.

c) Mischief: The computer viruses and worms may just be the modern plague that afflicts the upcoming millennium. People are sending viruses across as mail attachments or downloads from sites that destroy the computers.

d) Data diddling: False data entry, changing data before or during their input into system.

e) Hacking: Exploiting known vulnerabilities in security systems.

f) Password sniffing: Automated guessing of phone numbers, user Ids and passwords.

g) Trojan horse: A method of inserting instructions into a computer programme so that the program performs an unauthorized function while performing a useful one.

h) E-Mail Bombings: Sending numerous or large e-mail messages to one person without his consent is considered as E-mail bombings.

i) Logic Bomb: A program that caused the system to crash at a specific time.

j) Pornography: It is nothing but obscenity on the net. Performing a variety of sexual acts and establishing criminal internet.

k) Forgery: The electronic messages are susceptible to alteration or tampering and forgery.

l) Identity theft: Another kind of crime on the internet is Identity theft. Obtaining credit cards and loans in some one else's name etc.

m) Software piracy: Software piracy occurs when software gets copied without permission from the copyright holder.

n) Data theft or Industrial Espionage: All Organizations have their own secrets. This confidential information and trade secrets are stolen by competitors of the company for their advantage.

Various surveys reveal that most of the cyber crimes are committed by people ranging in age from 19 to 30 who have no previous criminal record. Teenagers are getting addicted to internet browsing. If the same trend continues, the day is not far off for establishing clinics for their cure. It is not exaggeration to say that computer and internet are spoiling the human relations to a certain extent. The cyber criminals are considered to be bright, highly motivated, outwardly self confident and willing to accept challenges. To prevent this type of activities, United States of America has enacted the Communication and Decency Act.

The World Wide Web (WWW) is peeping into every home and community across the globe challenging the sovereignty of civilized communities. The crimes stated above are only few. Their list is endless. The computer has not only made information easier to collect, store, generate and process but has also made it easier to steal.

The most common motivations for committing computer crimes are :

- Personal or financial gain
- Entertainment or fun
- Revenge
- Challenge
- Accidental happenings
- Misunderstanding
- Human greed etc.

PREVENTION OF CYBER CRIMES:

Some of the new technologies for preventing Cyber Crimes are:

FIRE WALL: Firewall implemented with secure standards will not allow any intruder into the system.

SET: Secure Electronic Transform is the new technology or credit card on Internet. This involves cryptographic algorithms to encrypt the credit card numbers so, it cannot be seen on the internet.

CRYPTOGRAPHY: Cryptology is the study of tools, techniques and methodologies protecting data from unauthorized access. Two major aspects of Cryptology are Cryptography and Cryptoanalysis. Cryptography deals with strategies and schemes for protecting the data by placing it in such a manner that it can be used only by using a secret key and become totally meaningless to any one without access to the key. This is known as Encryption or Encipherment. An authorized user with knowledge of key can recover the original data by reverse process known as Decryption or Decipherment.

DIGITAL SINATURES: The Information and Technology Act has recognized the importance of Digital Signatures. Ordinary electronic signature does not assure authenticity and integrity of the electronic information. A Digital signature assures integrity of the electronic information. A Digital signature assures integrity of the contents of a message. It is not like a manual signature where the user signs on any Electronic format. The signature is signed with magnetic ink or special purpose pens. Many states in US and other parts of the world are following digital signatures based on Public Key Infrastructure (PKI).

HASH FUNCTION OR HASH ALGORITHMS : Hash algorithms can be combined with public-key cryptosystems to produce digital signatures that guarantee the authenticity of a set

of input data. A public key is that which is freely disseminated to everyone and a private key that is known to only its holder. A public key cryptosystem is a method of encrypting and decrypting information that relies on two inputs keys i.e., public key and private key.

* * *

Sec.5(b) of the Banking Regulation Act defines Banking and its kinds. The kinds of Banking are:

- Mass Banking
- Class Banking
- Wholesale Banking
- Retail Banking
- Fund Based banking
- Non-fund based banking
- Paper based banking
- Non paper based banking
- On-line banking and
- Off-line banking

On-line banking deals with on-line debit cards, credit cards and on-line fund transfer. Whereas off-line banking deals with Automated Teller Machines (ATMs), Electronic purse and debit cards. . The banking crimes are categorized into two types.

1) ATM CARD CRIMES

2) CREDIT CARD CRIMES

1) ATM CARD CRIMES: Many of the credit card crimes will also relate to ATM card crimes. The 'sticky card, Fake ATM machines, Usage of portable ATM machines lead to number of crimes which cannot be noticed by an ordinary man.

2) CREDIT CARD CRIMES: The credit card crimes like Replica card, borrowed card, Double Card, overcharging and faulty card trick etc., though seem to be harmless are causing loss to the users as well as banks.

3) BANKING FRAUDS: One of the major sources of banking fraud is through hacking into the databases for illegal transfer from one account to another.

INFORMATION AND TECHNOLOGY ACT, 2000 :

In India, today, as in the rest of the world, computers have become an integral part of the fast developing society.' For the last five years, the use of computers has become inevitable in all walks of life. The increasing employment opportunities in this field is also attracting the public attention. As computers have started peeping across the country, the crucial point that centers around the, world is cyber crimes and punishment. The Investigating agencies and judicial officers are not fully aware of this computer system and the crimes related to it. The Law enforcement agencies should understand the new methods of investigating the cyber crimes It is high time to give proper training to the Investigating Agencies to prevent the illegal activities of the hackers. Without basic knowledge of the functioning of the computers, Internet etc., it is not possible for the Investigating Agencies to detect and prevent the cyber crimes.

To meet the challenges posed by the cyber criminals, the Indian parliament has enacted Information and Technology Act, 2000 which came in to force on 9.6.2000. It is not exaggeration to say that the IT Act is a new millennium gift given to the people of India by the Parliament. In Asia, Japan, Singapore,

Malaysia and India have enacted various laws to curb the cyber crimes. Malaysia also enacted the following Acts for the same purpose:

1. Digital Signature Act, 1997
2. Computer Agreement Act, 1997
3. Communication and Multi-Media Act, 1998
4. Tele Medicines Act.

Malaysia has recognized the importance of Information and Technology earlier than India.

With the implementation of Information Technology Act, 2000 India has become one of the 12 countries in the world to put in place legal framework for facilitating all types transactions in the digital era. The Act provides a legal sanctity to computer information.

New inventions, discoveries and technologies not only brought the nations together, but also posed new challenges for the legal world. Computers, Internet and Cyberspace together known as Information Technology have also posed new problems in jurisprudence. The law providing answers to these problems or dealing with the Information Technology is often referred as the COMPUTER LAWS or INFORMATION TECHNOLOGY LAWS or CYBER LAWS.

The IT Act is enacted to sort out many problems of the cyberspace. The Indian Parliament has brought drastic changes firstly, by enacting IT Act, secondly by making suitable amendments to the Indian Penal Code, the Indian Evidence Act, the Banker's Books Evidence Act, the Reserve Bank of India Act etc. The Indian Parliament has visualised the various

crimes likely to be committed by the 'white collar criminals. Computers know no boundaries. Keeping this in view, the Indian Parliament suitably inserted certain provisions in IT Act.

It is not out of place to refer sec.1 (2) and sec.75 of the IT Act. Combined reading of these sections indicate the scope of the Act. Any person who commits an offence outside India, in connection with computers, is also liable for punishment under the Act. Taking into consideration, the gravity of the offences committed by the cyber criminals, Chapter-IX is inserted to deal with punishments and adjudication. The courts can impose maximum fine amount to the tune of Rupees one crore. Chapter-IX also deals with penalty for damage to computer, computer system etc. Chapter-X deals with the establishment of THE CYBER REGULATIONS APPELLATE TRIBUNAL to exclusively deal with cyber crimes. To safeguard the interest of the parties, the orders passed by the adjudicating Officers are appealable in this Tribunal.

Criminal liability is dealt in Chapter-XI of the Act. The other important aspect of this Act is that as per the provisions of sec.61, a Civil Court has no jurisdiction to entertain any suit in respect of subject matter dealt by the adjudicating officer or the Appellate Tribunal.. As per sec.78 of the Act, the police officer, not below the rank of Divisional Superintendent of Police alone, has to investigate the cyber offences.

Amendments to various Acts:

The cyber criminals have compelled the Indian parliament to amend Indian Penal Code, Indian evidence Act, Banker's Books Evidence Act and Reserve Bank of India Act. Suitable amendments are made to sections 29A, 167, 172, 173, 175, 192,

204, 463, 464, 466, 468, 469, 470, 471,474,476, 477A IPC. Where ever the word 'document' is referred in I.P.C., it includes electronic records.

In Section 3 of Indian Evidence Act, the definition of "Evidence" has been broadened to include electronic records. As per sec.90A the court can draw presumption in respect of electronic records of five years old.

The definition of "Banker's Books" in Banker's Books Evidence Act has been defined to include not only ledgers, day books etc., but also printouts of information stored on computers and other devices.

The IT Act amended Reserve Bank of India Act and added Clause (pp) to section 58. The newly added sub-section deals with fund transfer through electronic means between the banks and other financial institutions.

The Copyright Act is also amended by adding new subsections to sec.2 and sec.2(0) by changing the definition of the word 'literary work' which includes computer program as well as computer database.

Recently the Department of Information Technology, Government of India constituted an expert committee to examine the Information Technology Act 2000 and other related laws with a view to finding out the existing shortcomings. This was thought necessary since "developments at the global level needed harmonization with Indian Information Technology Act 2000 for a secure and trusted e-society". The Committee has since submitted its report on various aspects including authentication by asymmetric cryptosystem, cyber crimes including cyber stalking, theft and sending of obscene and

pornographic material, definition of 'traffic I data', use of the device of encryption for securing e-data, rights of network service providers, cyber squatting and cyber ethics. This is but indicative of the new frontiers being explored in the context of the changing dimensions of information technology.

IPRs have, it says, been regarded as 'good' for rich countries and 'poison' for poor countries. The impact of IP policies on poor people will also vary according to socioeconomic circumstances. What works in India, will not necessarily work in Brazil or Botswana. The Report says that the 'fair use' or 'fair dealing' provisions have not met the needs of developing countries, particularly in the field of education. Stronger protection and enforcement, the Report says, will reduce access to knowledge-related products in developing countries, with potentially damaging consequences for poor people. For instance, the cost of software is a major problem in developing countries, and is "the reason for the high level or illicit copying". Copyright can also be a barrier to the further development of software which is specifically adapted to local needs and requirements". It says:

"Access to internet in developing countries is limited, although growing rapidly in most countries. But the Internet provides an unrivalled means of low cost access to knowledge and information required by developing countries, when their access to books and journals is severely restricted by lack of resources. But the application of copyright rules to the Internet is problematic. A historic 'fair use' rights may be restricted by forms of technological protection, such as encryption, which restricts access even more stringently than copyright. In the USA, recent legislation (the Digital Millennium Copyright Act)

forbids the circumvention of such technological protection, even when the purpose of circumvention does not contravene copyright laws. The EU has introduced a special form of protection of databases (the' Database Directive') which rewards investment in the creation of databases, and which may restrict access to data by scientists and others, including in developing countries. The 1996 WIPO Copyright Treaty contains elements which may restrict the access of developing countries to information".

Globalization is a phenomenon which is not limited to trading activities - it also drives legal innovation, and computer law is more strongly affected than most areas of law.

(CPS Bulletin December 2, 2004 & February 2, 2005)

ELECTORAL REFORMS - RECOMMENDATIONS OF THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION

After the commencement of our tryst with destiny, democracy has taken deep roots in our way of lives and allayed the apprehension of the cynics. The democratic institutions in our country have grown from strength to strength. The very fact that in this part of the world only in our country democracy has not only continued to survive but become a way of our lives speaks volumes about the inherent strength of our institutions.

The National Commission to Review the Working of the Constitution realizing that the electoral process is a very important process in nourishing the strength of the democratic institutions has made important recommendations to make the electoral process as clear and as transparent as possible.

Realizing the need for preventing the system from being hijacked by the lumpen elements, the Commission came out with timely recommendations.

The National Commission to Review the Working of the Constitution consisting of eleven eminent persons drawn from different fields worked for a period of two years and one month and submitted the Report of 1976 pages containing 248 recommendations.

The National Commission observed that for reforming the electoral process, no major consitutional amendment is necessary and reforms can be made by ordinary legislation, modifying the existing laws. Rightly recognizing that the functioning of the democracy at the grass roots needs to be made foolproof, the Commission stressed the need for preparing the

electoral role properly at the Panchayat Level Constituency of the voter. Likewise of foolproof I.D. Card which can also serve as multipurpose Citizenship Card should be prepared. Both these can be done in a single exercise.

Electronic Voting Machines should be introduced all over the country at the earliest possible opportunity. (This was successfully done during the recent elections).

Regarding the measures for preventing the criminals from contesting for any political office, the Commission suggested the following :

1) Amendment of the Representation of People's Act in such a way that any person charged with any offence punishable with imprisonment for a maximum term of 5 years or more, should be disqualified for being chosen as/or for being a Member of Parliament or Legislature of State on the expiry of the period of one year from the date the charges were framed against him by the court in that offence and unless cleared during the one year period, he shall continue to remain so disqualified till the conclusion of the trial for that offence.

It means where a person is charged with any offence punishable with imprisonment for the maximum term of 5 years or more, he cannot claim that he should be presumed to be innocent till he is convicted and his disqualification starts on the expiry of a period of one year after the charge.

2) In case a person is convicted of any offence by a court of law and sentenced to imprisonment for six months or more, the ban should apply during the period under which the convicted person is undergoing the sentence and for a further period of six years after the completion of the period of the sentence.

It means if a person is convicted of any offence and sentenced to imprisonment for 6 months or more, the candidate will be disqualified not only during the period of operation of the sentence but for a further period of six years after the completion of the sentence.

3) If any party puts up such candidate with a knowledge of his antecedents, it should be deregistered.

4) If a person is convicted for any heinous crime like murder, rape, smuggling, dacoity etc. he should be permanently debarred from contesting for any political office.

5) For an effective and speedy disposal of criminal cases against politicians pending before the courts, Special Courts at the level of High Courts should be constituted and such Special Courts should decide the cases within a period of six months. The Special Courts can take evidence through Commissioners.

All contesting candidates should be required to declare their assets and liabilities by an affidavit and such details should be made public. This has already become the law of the land.

Besides, the legislators should be required to submit their returns about their assets and liabilities every year and a final statement in this regard at the end of the office. All this should be audited by a special authority created specially under the law for the purpose.

To prevent wasteful expenditure the Commission recommended that the candidates should not be allowed to contest the elections simultaneously for the same office from more than one constituency.

An important change regarding the X Schedule of

the Constitution (Anti Defection Law) has been suggested. Anti Defection Law should be made applicable both to the individuals and groups. The power to decide questions as to disqualification on the ground of defection should vest in the Election Commission instead of in the Chairman or Speaker of the House concerned.

To combat the menace of frivolous candidates from contesting the election as independent candidates, the Commission came out with some innovative suggestions. The Commission recommended that the security deposit for the independent candidates should be doubled progressively for every election for those independent candidates who fail to win and keep contesting. Likewise an independent candidate who fails to secure at the least 5% of total number of votes polled should be disqualified from contesting for the same office at least for a period of six years. More stringent is the recommendation that an independent candidate who loses election three times consecutively should be permanently debarred.

The Commission observed that, if the dirt is to be cleansed, the Election Commission should be empowered to deregister and derecognise the political parties if they do not comply with the norms.

Regarding the state funding of elections, the Commission, while deferring the issue, has observed that the question of granting exemption from payment of taxes to the amounts contributed to the political parties upto a specified limit should be seriously examined. Such tax loss to the state can always be shown as contribution of the state to the funding of elections.

The NCRWC observed that political parties should

swear allegiance to the provisions of the Consitution and to the sovereignty and integrity of the nation, they should hold regular elections at an interval of 3 years at various levels of the party and they should provide reservation/representation of at least 30% of its organizational positions and same percentage of the party tickets for Parliamentary / State Legislative seats for women. If any party fails to do so, it would invite a penalty of the party losing recognition.

Regarding the adoption of the system of run off contest, electing the representative winning on the basis of 50% plus one vote polled as against the first-past - the post system, the Commission recommended a careful and full examination of the issue by the Government and the Election Commission of India which in turn should consult various political parties and other interests that might consider themselves affected by this change. Where it has become a fashion for the higher strata of the society not to cast their votes, the Commission's recommendation that the duty to vote at elections and actively participate in the democratic process of the Governance be included in Fundamental Duties is timely.

Similarly on the contentious issue of the eligibility of non Indian born citizens to hold high office in the realm such as President, Vice-President, Prime Minister and Chief Justice of India, the Commission felt that a National dialogue should precede an in-depth examination through a political process.

The above is the summary of some of the recommendations made by the National Commission to Review the Working of the Constitution on Electoral Reforms.It is now time for the legislature to pick up the gauntlet.

(CPS Bulletin August 2, 2004)

LAW AND SCIENCE

THE ROLE OF JUDGES IN DELIVERING EQUITABLE AND SPEEDY JUSTICE

Most Esteemed Vice Chancellor of Kakatiya University, Professor N. Lingamurthy, The Registrar, The Principals of the Constituent Colleges, Members of the Faculty, Student Friends, Research Scholars, Distinguished Invitees, Ladies & Gentlemen

I am extremely beholden to the Vice Chancellor of Kakatiya University for having conferred on me the honour of delivering the 7th Pingle Venkatram Reddy Endowment Lecture. I am grateful because this endowment had been instituted by Shri Justice P. Jagan Mohan Reddy, Retired Judge of Supreme Court of India, whom I have always held in great reverence. In fact, my mind goes back to 1975, when I was a Research Scholar in Andhra University, I had the privilege of listening to Shri Justice Jagan Mohan Reddy's erudition, when he delivered Shri Alladi Krishna Swamy Aiyyar Endowment Lecture in Andhra University, Visakhapatnam on "Social Justice and Indian Constitution". These lectures were later published under the title "The Indian Constitution – What it is and what it signifies". Justice Jagan Mohan Reddy, a Judge Extraordinary and a Vice Chancellor par excellence and above all a human being of infinite virtues has been the role model to most of us.

But, let me confess humbly that when I saw the names of the eminent persons who delivered the first six endowment lectures, I thought I am rushing in where Angels fear to tread. The list includes, among others, Mr. Nani A. Palkhivala, Dr. Abid Hussain and Padma Bhushan Dr. K.I. Varaprasad Reddy. As I suffer from no eminence, I am wondering whether I am the

odd person in or out. Be that as it may, I would like to share my thoughts this morning on "Law and Science".

After reading Manu Bhowmik's "Code Name God", a book which speaks about the relationship between Science and Spirituality and also Robin Sharma's "The Monk Who Sold his Ferrari" a book which says that life is more important than law, I wonder whether it would be apt for me to share my thoughts on "Law and Science". Can law regulate greed and avarice? Can Science provide solutions to all the mysteries of life? These are two issues which have been engaging the attention of all thinking persons. Where Science & Technology are taking giant strides, can law cope with the pace of the technological innovations?

* * *

No human being is an island. All human beings, excepting sinners and saints, are gregarious and they cannot afford to live in isolation. If that is the traditional saying, the modern version of it is ' no subject is an island'. One cannot afford to study any subject in isolation in a fast developing and ever expanding environs of the frontiers of knowledge. The strict watertight compartment regimentation of subjects is a thing of the past and for a comprehensive and holistic perception of any subject, an inter-disciplinary approach is absolutely essential.

'From darkness to light, ignorance to knowledge and life to eternity' is the goal of acquisition of knowledge. After all the purpose of knowledge is to make the community around us a better place to live in, and therefore, the end process of all the subjects tends to be the same - - to make this planet a better place. The inter-relationship between law and science is all the

more important because (with apologies to Einstein) science without law will be blind and law without science will be lame. 'The function to Law', to Quote Prof. Dworkin, ' is to secure the desirable and to prevent the undesirable'.

Looked at that way even the function of Laws of science, for that matter, any subject, will be to secure the desirable and prevent the undesirable.

Ever since the liberation of man from the shackles of religious bigotry and the subsequent development of critical spirit of enquiry (perhaps, the other name for scientific temperament) in the middle of the 19th Century thanks to the publication of the 'Theory of Origin of Species' by Charles Darwin, 'The Manifesto of Communist Party' by Marx and Engels and the impact of industrial revolution, the scientific and technological advancement has been remarkable, bringing in its wake many unforeseen changes. Sometimes the changing facets of science have prompted the law makers to make the corresponding changes in law thereby making law adapt to the changing environs. But it should be mentioned that some times law has not been able to cope with the fast changing technological advancement.

* * *

"Ethics" means showing concern for others. Life is one of the precious gifts of nature. The question, that has been agitating the minds of right thinking persons, is the value to be given to the quality of life.

Does "life" mean any type of life? Or does "life' mean "qualitative life'? Does life without dignity connote any meaning?

When life is reduced to vegetative existence, has "life" any purpose? Is it not a drain on the resources of society, which are definitely not unlimited?

It is in this context that the debate on euthanasia needs to be examined. The debate on the right to assisted suicide also assumes significance on the same score.

An old man in his bout of morning walk, when asked, "How do you like your old age?", replied, "it is fine, considering the alternative." This shows as to how precious and dear life is to living organisms and how scared are they of death.

Undoubtedly survival is a value. But in certain situations life becomes increasingly painful and one without dignity purely in a vegetative state. Dignity means the right to life in conditions in which genuine self-respect is possible or appropriate, whatever these are. The right to dignity is fundamental, urgent and imperative. Where life becomes worse by virtue of dementia, life ceases to have any meaning. The period of unconsciousness or dementia before death might make life worse as a whole than if that had become sooner. Normally life is judged not just by reckoning overall sums of pleasure or enjoyment or achievement, but more structurally, as we judge a literary work, for example, whose bad ending mars what went before. The ability to retain similar level of control over dying as one has exercised during life is seen by many as the way to achieve death with dignity. This is where the Euthanasia engages the attention of the jurists.

Euthanasia is defined as 'gentle and easy death: bringing about of this especially in the case of incurable and painful diseases. The word Euthanasia comes from the Greek

"Euthanotos' derived from the work 'eu' meaning good, and 'thanatos', meaning death. It has also been defined as 'mercy killing of the hopelessly ill, injured or incapacitated and 'the ending as painlessly as possible of the life of the person who is fatally ill and suffering pain.

A distinction may be made between Euthanasia and abortion. Abortion is a waste at the start of human life. Death intervenes before life in earnest has even begun. In euthanasia people make decisions about death at the other end of life, after life in earnest has ended.

The dilemma of criminal justice is that, when the trend is towards decriminalisation, criminal law tends to criminalise the acts coming within the meaning of Euthanasia. Should not criminal law make concessions for benevolent motives. Is the criminal law justified in demanding the indignified criminalisation of the practitioner? Is the purpose of criminal law not something more than only to prevent or reduce any conduct which may prove harmful to others? Should the right to die with dignity by Euthanasia be compromised by the law of homicide? In fact when Darwin (Australia's Northern Territory) had become the first state to legalise Euthanasia, a furore was created.

A reference to the case law across the countries clearly shows the inconsistency of criminal law in its response to the practitioners who take life-limiting decisions.

In R v. Cox, where the doctor literally followed the instructions of his distressed dying patient and deliberately injected her with strong potassium chloride resulting in the death of the patient, the doctor was convicted by the jury for

the homicide. This inspite of the fact that the family considered that the doctor has provided a merciful release to the old patient. Many members of the jury openly wept when the verdict was written.

The House of Lords in Airedale N.H.S. Trust v. Bland was called upon to decide the legality of withdrawal of feeding. B was severely injured in the Hillsborough stadium disaster. As a result of the interruption of supply of oxygen, he had remained for three years in persistent vegetative state. He has lost all the higher brain functions. There was clear medical opinion that there was no hope of ever regaining brain functions. He has fed and his other bodily functions met by artificial means and he received antibiotic treatment to combat recurring infection. Before the accident, he had not expressed any opinion as to how he should be treated in these circumstances. The hospital authorities supported by the parents of B, sought a declaration to the effect that they might lawfully discontinue all the life saving treatment and medical support measures including the termination of ventilation, nutrition and hydration by artificial means. They also desired to discontinue medical treatment except for enabling the patient to end his life with dignity. The House of Lords held that sanctity of life was not infringed by ceasing to give invasive treatment which conferred no benefit on the patient and there was no duty on the part of the doctors to continue such treatment when the patient had no further interest in being kept alive. The authorities were entitled to the declaration sought by them. The House further directed that until a body of experience and practice was built-up application should be made to the Family Division of the High Court in any case where it was considered that continued treatment and care

no longer conferred any benefit.

In the American case of Doctor Jack Kevorkean who was nicknamed Doctor Death, the Juries have repeatedly declined to convict the doctor of homicide. Doctor Kevorkean has constructed a variety of suicide machines and promoted the commercial use of machines to people seeking assisted death. He installed one of these machines to his Volkswagon Van; it allows patients to kill themselves by pressing a button that injects poison through needle that doctor has inserted into vein. It is reported that at least 28 people have made use of the suicide machines of the doctor. Though the techniques of the doctor were contrary to the letter of the criminal law, they seem to have satisfied the morality of a significant proportion of American Society resulting in the reluctance of the jury to convict the doctor.

The Indian Supreme Court, though not called upon to examine the issue of Euthanasia directly, has made pertinent observations in the case of Smt.Gian Kaur v. State of Punjab.

'Protagonism of euthanasia on the view that existence in persistent vegetative state (PVS) is not a benefit to the patient of a terminal illness being unrelated to the principle of 'sanctity of life' or the 'right to live with dignity' is of no assistance to determine the scope of Article 21 for deciding whether the guarantee of 'right to life' therein includes the 'right to die'. The 'right to life' including the right to live with human dignity would mean the existence of such a right upto the end of natural life. This also includes the right to a dignified life upto the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with

dignity when his life is ebbing out. But the 'right to die' with dignity at the end of life is not to be confused or equated with the 'right to die' an unnatural death curtailing the natural span of life.

A question may arise, in the context of a dying man, who is terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life in these circumstances. This category of cases may fall within the ambit of the 'right to die' with dignity as a part of 'right to live' with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced. The debate even in such cases to permit physician assisted termination of life is inconclusive. It is sufficient to reiterate that the argument to support the view of permitting termination of life in such cases to reduce the period of suffering during the process of certain natural death is not available to interpret Article 21 to include therein the right to curtail the natural span of life.

It is an irony that though most countries still prohibit doctors or others from directly killing people at their own request, they still produce the apparently irrational result that people can choose to die lingering deaths by refusing to eat, by refusing treatment that keeps them alive. They cannot choose a quick, painless death that the doctors could easily provide. The latter example is generally observed in the Indian scenario where the aged people generally persuade their near and dear to withhold treatment.

The antagonists of Euthanasia have certain misgivings like

(a) There could be discovery of new treatments.

(b) Medical profession is a profession, meant to save life and not one that helps the people to die.

(c) There can be mis-diagnosis.

(d) People's regard for doctors will go down.

(e) Legally sanctioned killing will always make any society more callous about the death.

It is dignity that distinguishes the life of human beings from the life of other living organisms. It includes not only the right to live dignity but also the right to die with dignity, for example, if to terminate a pregnancy is permissible when the foetus is seriously abnormal when a baby would be born with Tay-Sach disease or without a brain – then it becomes permissible to end the life of suffering patient who wants to die or a patient who is in the persistent vegetative situation.

Measure like recognising the efficacy of advance directions or the living will of patients, making euthanasia the subject of special defence of homicide, providing built in safeguards to punish those perpetrating involuntary euthanasia are some of the measures that can be given a serious thought.

Right to Assisted Suicide – The U.S. Experience:

In the United States of America, the State of Oregon has enacted "Death with Dignity Act in 1994'. This Act allows Oregon physicians to prescribe life ending drugs to terminally ill patients who have fewer than six months to live. Two doctors

must agree on the patient's prognosis. The patient must be able to take the medication on his or her own with no help from another person. The patient must be mentally competent and not clinically depressed. There is a waiting period between applying for a death-hastening prescriptions and when he or she actually gets it.

Here it should be kept in mind that this is different from 'Euthanasia'. Euthanasia involves a physician actually administering or injecting a drug to a person. Under Oregon Law, the dying person must administer his or her own lethal dose.

The Death with Dignity Act includes requirements that the patient:

- Must be an adult, 18 years or older.
- Must be a resident of Oregon who possesses an Oregon drivers licence, is a registered Oregon voter, owns or leases property in Oregon and has filed an Oregon tax return for the most recent tax year.
- Must make two verbal requests – separated by 15 days – to the physician.
- Must make written request to the physician, and the request must be witnessed by two individuals who are not primary caregivers of family members.
- Must be able to rescind the verbal and written requests at any time.
- Must be able to self-administer the prescription.

The Law further requires that:

- The attending physician must be Oregon-licensed.
- The physician's diagnosis of the patient must include terminal illness, with six months or less to live.
- The diagnosis must be certified by a consulting physician, who must also certify that the patient is mentally competent to make and communicate health-care decisions.
- If either physician determines that the patient's judgment is impaired, the patient must be referred for a psychological examination.
- The prescribing physician must inform the patient of alternatives, including palliative care, hospice and pain-management options.
- The prescribing physician must request that the patient notify [his or her] next-of-kin of the prescription request.

Those who oppose the Oregon law say the law places doctors in an improper position, at odds with a doctor's role as a healer, comforter and consoler.

They say physician assisted suicide is not medicine and it is contrary to and is not compatible with the doctor's proper role in caring for patients.

Those who support the Oregon Law opined that allowing individuals to die with dignity will be in tune with the contemporary value judgment in the society.

This Act was challenged in the U.S. Supreme Court in the case of Gonzales vs. Oregon. The U.S. Supreme Court upheld the Act by a 6-3 verdict.

* * *

Another important area is the development that has taken place in the field of psychiatric science. In traditional Criminal Law a person can be declared guilty of committing crime only if the person has the intention to commit the act. Intention is as important as the act. This is called Mens Rea in Criminal Law. Unless a human being is a villain with a brain he cannot be punished in Criminal Law. As such those persons who do not have intention are exempt from criminal liability. Insane people, lunatics, infants below the age of seven years come under this category. The definition of insanity in the ancient criminal law was kept within very narrow limits. But with the advances made in psychiatric science, the horizons of the defence of insanity have also expanded and in the middle of the 19th century in England in the famous McNaughten's case, Daniel McNaughten was acquitted on the ground of insanity when he killed a person. McNaughten was acquitted on the ground that his obsession with the idea of becoming the Prime Minister of United Kingdom made him insane thereby entitling him to the benefit of the defence of insanity. Though this judgment has shocked many public figures, it became the polestar for the defence of insanity for quite a long time.

In the recent past in three important cases the advances made in the realm of psychiatric science were responsible for the acquittals of the three accused in three different important cases. In U.S Hinickley's Case, Hinickley, a young dropout

from university, made an unsuccessful attempt on the life of the former President of United States Ronald Reagan and when he was tried by the jury he was acquitted on the ground of insanity. The jury found that Hinickley was madly in love with Hollywood film celebrity and because she did not respond to his overtures and love letters Hinickley thought the Hollywood actress was doubting his masculinity and that in order to assert his masculinity he made an attempt on the life of the defacto number one citizen of the world. Hence, the jury said Hinickley deserves to be sent to psychiatric home and not to a prison.

Again in the United States in the famous case Bobbitt, which took place in 1994, Ms. Bobbit was acquitted on the grounds of irresistible impulse. In this case Ms. Bobbit unable to withstand the systematic tortuous treatment inflicted by her husband regularly, cut his penis and threw it out in a mood of desperation. Ms. Bobbit was indicted accordingly but was acquitted on the ground of irresistible impulse because the court observed that the beastly treatment meted out to her by her husband made her go crazy.

In the United Kingdom a woman by name Ahulwallia who was victim of wife battering was released. Such judgments should have been unthinkable if law were not to take cognizance of the advances made in the psychiatric science.

* * *

Another interesting area is the concept of surrogate motherhood. Thanks to artificial insemination, the era of test-tube babies has not only begun but has come to stay. In law of contracts if a person promises to perform on act and later fails to do the same, the affected party can claim damages for

the breach of contract. In case of surrogate motherhood very interesting ethical issues arise. Suppose a woman enters into a contract with another woman asking her to be her surrogate and agrees to pay a specified sum of money. The other woman enters into contract and takes advance and agrees to be the surrogate mother. But finally after delivering the baby, because of the maternal instinct she refuses to handover the child. Has she committed any breach? Can any action be taken against her? Does the instinct of maternity bow-down before the inane lifeless letters of law?

* * *

The advances made in genetic engineering have also raised certain interesting questions. The creation of sperm banks where sperms of Nobel Laureates and persons distinguished in their respective fields, are collected for future use to make babies to order, has thrown tremendous propensities. Creation of Frankensteins can become possible if genetic engineering is allowed to proceed unbridled. This is an area where law needs to respond positively.

In countries like India, the deplorable plight of the womenfolk has been responsible for certain unscrupulous elements taking advantage of the amniocentesis or sex determination tests. Thanks to the advances made in scanning technology, the sex determination of the child in the womb has become possible and unfortunately this has been used for causing female infanticide. Maharashtra was the first state to bring a legislation to curb the unholy practice and later the Government of India has also made a law in this regard.

Similarly in the realm of cyber space also the changes are

taking place at such a fast pace that law is finding it difficult to cope with the same. It is observed that the key board of the computer can cause more damage than the nuclear bomb and bring havoc of immense magnitude. Can law provide the regulatory mechanism?

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I once again thank the Vice Chancellor of Kakatiya University for having given me the opportunity to add my name at least as a footnote to the illustrious list of the galaxy of the eminent speakers of this Endowment Lecture instituted by the great Son of India in memory of one of the greatest industrialists that the State has produced.

I thank you all for lending your ears for such a long time – perhaps an aeon in terms of Science.

(Lecture delivered at the 10th Anniversary Celebrations of Bodhraj Sawhny Memorial Trust on 10th December, 2010 in Delhi)

(CPS Publication *Dialogue and Democracy*
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ON BEING A TEACHER

25th February, 2013 – a great human being has completed his voyage on this Planet. A Spiritual person has completed his human experience. Prof. B.S. Murthy, a person in whom all the elements were perfectly mixed, a teacher extraordinaire and a human being par excellence, has left for that abode from where no traveller has ever returned. Having had the soul filling experience of being under his tutelage from 1975 to 1977, when I was doing my Masters in Andhra University I thought, the best way of paying my homage to him is to pen down my thoughts "On Being a Teacher" for publication in the Centenary issue of Bulletin of the Centre for Policy Studies.

The caveat: I have learnt all these from BSM (sobriquet of Prof. B.S. Murthy) and let me not be accused of originality.

Thirty five years of my tryst with teaching both as a teacher and as an administrator first in (if I am permitted to use, International Law School) Andhra University and then in National Law School of India University, Bangalore, an institution that brought about a total paradigm shift in legal education and the preferred destination of quality legal education, have taught me the lesson: `Passion for what you do and Compassion for whom you do' should be the Mantra.

Sometimes I wonder: are we churning out "LETTERED" than "LEARNED" young persons forgetting that Education is not Information but Formation. T.S. Eliot's aphorism on information, knowledge and wisdom always keeps taunting me.

Once during my interaction with Mother Teresa when she visited Andhra University to address the University Community,

she asked me a question –

Son, what are you?

I humbly said: I am a teacher.

Mother asked: What do you teach?

I said I teach Law.

Mother said: God Bless you, son, also teach Ethics.

I said I will.

Then Mother asked me,

Do you know the meaning of Ethics?

I humbly said: Mother, kindly enlighten me.

She said by Ethics I mean: "Show concern for others".

This is what exactly Prof. B.S. Murthy told me "Show concern for others". What magical words, if everyone does it, how beautiful will be this Planet. Let me recall with immense satisfaction that interaction with His Holiness Dalai Lama and Mother Teresa have been one of my best learning experiences in Andhra University, the abode of learning.

Normally teachers have a universal complaint that they are always hard-pressed for time to cover syllabus oblivious of the fact that the job of a teacher is not to cover the syllabus, but to uncover the syllabus, to remove the cover of darkness, to remove the cover of ignorance. The journey is from darkness to light, ignorance to knowledge and here to eternity.

I cannot but recall the words of Aristotle who said: "If my teacher and God were to simultaneously appear before me, I will bow down before my teacher because it is my teacher who has shown me who God is".

The first lesson in nobility of teaching I learnt from Prof. B.S. Murthy. He always used to say any one has a right to

complain, but not a teacher, because a teacher should always be a part of the solution and never be a part of the problem. Students will continue to respect a teacher as long as they realize that a teacher is also a student committed to incessant learning. Certain things in life have only a beginning and learning is one such thing.

A student is never a problem but has a problem. If teachers walk that extra mile to make students go from the classroom wise and not otherwise, Alvin Toffler's prediction that power will shift in Twenty-first century to knowledge societies which will be found in abundance in India, will certainly come true. That will be the day on which we the teachers can say we have redeemed our pledge.

(CPS 100th Bulletin April 2, 2013)

Inspiring Teacher

Another inspiring teacher for me is Prof. Korimilli Gupteswar, now living in California, U.S.A., for whom "Rule of Law is a way of Life", best exemplified the Japanese Proverb: "Better than a thousand days of diligent study is one day with a great teacher".

Prof. (Dr.) R. Venkata Rao

HUMAN RIGHTS

Rights will have locomotion only when they have eloquent spokespersons for them. It is only because there were many crusaders of Human Rights in the Western World in the nineteenth century and also in twentieth century that the Human Rights today bear the stamp of the Western influence. Though the origin of human rights is normally traced to the Western moorings, they were very much prevalent in ancient India.

India, being the motherland of one of the oldest civilizations of the world and the birthplace of diverse cultures and religions, has very rich heritage of human rights values. It is also one of the greatest and oldest companions of the international community's struggle for preservation, protection and promotion of human rights. Many centuries ago when the Western civilization did not even see the light of the day, it was from this holy land that the highest ideal of human life was echoed: "SERVE JANAH SUKHINO BHAVANTU" that is, let all people be happy. In fact, protection and promotion of human rights are possible only in a society where all people, irrespective of their castes, creed, sex and religions, live happily.

The RIGVEDA, which is considered to be the oldest document of human civilization declares that all human beings are equal and they are all brothers. The ATHARVAVEDA, likewise, proclaims that all human beings have equal right over food and water. To quote Justice Jois, "The Vedas including UPANISHADS (Shruti) were the primordial source of "DHARMA" a compendious term for all human rights and duties, the observance of which was regarded as essential for securing peace and happiness to individuals as well as society. The Smrities and the Puranas were

collections of the rules of DHARMA including civil rights and criminal liabilities (Vyavahara Dharma) as also Raja Dharma (Constitutional Law) which were developed on the basis of fundamental ideals incorporated in the VEDAS. There were also several other authoritative works on RAJA DHARMA. All of them were intended for securing happiness to all".

Unlike Western civilization and culture which are based on the rights of the individuals, Indian civilization and culture have been based since time immemorial, on duty not merely the duty of every individual towards other individuals but also the duty of the state (earlier, the King) towards citizens. The great thinkers of our ancient civilization and culture believed that enjoyment of rights by every individual would be secured only when every individual including the King perform his duties. For, they considered that "sense ot right always emanates from selfishness whereas the sense of duty always generates selflessness. One of the great messages of the Bhagwad-Gita was: "KARMANYE VADHI KARASTE ..... " Your right is to perform your duty". Gandhi amplified his idealism in the following words: INDIA IS ESSENTIALLY KARMABHUMI (Land of duty) IN CONTRADISTINCTION OF BHOGABHUMI (Land of enjoyment).

The Indian Supreme Court's contribution to the development of Human Rights and spread of Human rights Culture is also noteworthy, especially in the post 1978 era. Expanding the doctrine of locus standi, through public interest litigation, the Supreme Court has made innovative contribution in evolving new principles of Administrative Law. In case of the marginalized sections, the prisoners, the handicapped, pavement dwellers and neglected children among others, new principles of ameliorative

jurisprudence have been shaped.

At a time when the Universality of the Universal declaration of Human Rights is being debated all over and the Right to Development has been recognized and the 1993 Vienna Declaration has unambiguously affirmed that, "ALL HUMAN RIGHTS ARE UNIVERSAL, INDIVISIBLE, INTERDEPENDENT AND INTERRELATED". The Human Rights will have any meaning only when human suffering is taken seriously by one and all.

(Summary of lecture delivered at the Centre for Policy Studies on May 12, 2000).

(CPS Decennial Volume)

THE INTERFACES OF HUMAN RIGHTS & HUMANITARIAN LAW

"There is something essentially disturbing in the undoubted truth that man is the only animal which engages in the systematic destruction of its own species. The most benign account of world history could scarcely avoid referring to the countless wars which have plagued mankind since the very beginning of recorded time. Is there any lesson to be drawn from this blood-smeared past? Or is war an inevitable part of human existence ... ?

The subject of war and war crimes takes us straight to the heart of the mystery that baffles every jurist - why is man, alone of all creatures, the only one who systematically murders his own kind? For nearly 2000 years Western man has accepted the answer given by the Christian Churchman that man is a fallen creature, and one result of the fall was the murder of Abel by his brother Cain. But some zoologists and students of animal behaviour have suggested an altogether more revolutionary theory, that man. achieved his present position as the world's most dominant species because he is the descendant of a killer ape. Killing, according to this theory, is so much a part of man's basic personality that he will never be able to throw off the habit. The gloomy conclusion seems to be that civilization will never "tame" man. In fact the more highly evolved it becomes, the more man's basic aggression will struggle to burst out."

International humanitarian Law also called the law of armed conflict and previously known as a law of war - is a special branch of law governing situations of armed conflict in a word, war. International humanitarian law seeks to mitigate the effects of war, first in that it limits the choice of means and methods of

conducting military operations, and secondly in that it obliges the belligerents to spare persons who do not or no longer participate in hostile action.

To mitigate the sufferings or effects of war, a new branch of law called International Humanitarian Law emerged.

Fundamental Rules of Humanitarian Law applicable in Armed Conflicts:

1. Persons hors de combat and those who do not take a direct part in hostilities are entitled to respect their lives and physical and moral integrity. There shall in all circumstances be protected and treated humanely without any adverse distinction.

2. It is forbidden to kill or injure an enemy who surrenders or who is hors de combat.

3. The wounded and sick shall be collected and cared for by the party to conflict which has them in its power. Protection also covers medical personnel, establishments, transports and material. The emblem of the Red-Cross (red cresent, red lion and sun) is the sign of such protection and must be respected.

4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have right to correspond with their families and to receive relief.

5. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he had not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.

6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.

7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare the civilian population and property. Neither the civilian population nor civilian person shall be the object of attack. Attacks shall be directed solely against military objectives.

To make life the best possible and suffering the least possible is the objective of both Human Rights law as well as Humanitarian Law. Though purists state that human rights stricto sensu will be applicable in times of peace, and humanitarian law in times of armed conflict, both these laws tend to converge at number of points.

Like human rights law, humanitarian law is based on the premise that the protection accorded to victims of war must be without any discrimination. This is such a fundamental rule of human rights that it is specified not only in the United Nations Charter but also in all human rights treaties. One of many examples in humanitarian law is Article 27 of the Fourth Geneva Convention of 1949:

" ... all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion."

Given the obvious risk to life in armed conflict, a great deal of humanitarian law is devoted to its protection, thus having a direct beneficial effect on the right to life. First and foremost,

victims of war, i.e., those persons directly in the power of the enemy, are not to be murdered as this amounts to an unnecessary act of cruelty. These persons are mainly protected by the 1949 Geneva Conventions, with some extension of this protection in 1977 Additional Protocol I. As far as the protection of life during hostilities is concerned, it is obvious that the lives of combatants cannot be protected whilst they are still fighting. However; humanitarian law is not totally silent even here, for the rule that prohibits the use of weapons of a nature to cause superfluous injury or unnecessary suffering is partly aimed at outlawing those weapons that cause an excessively high death rate among soldiers. With regard to civilians, the customary law of the nineteenth century required that they be spared as much as possible. Military tactics at the time made this possible, and civilians were less affected by the direct attacks than by starvation during sieges, or shortages due to the use of their resources by occupying troops. However, military developments in the twentieth century, in particular the introduction of bombardment or missiles, seriously jeopardized this customary rule.

The most important contribution of Protocol I of 1977 is the careful delimitation of what can be done during hostilities in order to spare civilians as much as possible. The balance between military necessities and humanitarian needs that was explained in the Lieber Code continues to be at the basis of this law, and the States that negotiated this treaty had this firmly in mind so as to codify a law that was acceptable to their military staff. The result is a reaffirmation of the limitation of attacks to military objectives and a definition of what this means, but accepting the occurrence of "incidental loss of civilian life" subject to the principle of proportionality. This is the provision that probably grates most with human rights lawyers, not only

because it in effect allows the killing of civilians but also because the assessment of whether an attack may be expected to cause excessive incidental losses, and therefore should not take place, has to be made by the military commander concerned.

On the other hand, the Protocol protects life in a way that goes beyond the traditional civil right to life. First, it prohibits the starvation of civilians as a method of warfare and consequently the destruction of their means of survival (which is an mprovement on earlier customary law). Secondly, it offers means for improving their chance of survival by, for example, providing for the declaration of special zones that contain no military objectives and consequently may not be attacked. Thirdly, there are various stipulations in the Geneva Conventions and their Additional Protocols that the wounded must be collected and given the dical care that they need. In human rights treaties this would fall into the category of "economic and social rights". Fourthly, the Geneva Conventions and their Protocols specify in considerable detail the physical conditions that are needed in order to sustain life in as reasonable condition as possible in an armed conflict. Thus, for example, the living conditions required for prisoners of war are described in the Third Geneva Convention and similar requirements are also laid down for civilian persons interned in an occupied territory. With regard to the general population, an occupying power is required to ensure that the people as a whole have the necessary means of survival and to accept outside relief shipments if necessary to achieve this purpose. There are also provisions for relief for the parties' own populations, but they are not as absolute as those that apply in occupied territory. Once again these kinds of provisions would be categorized by a human rights lawyer as "economic and social". Finally in this selection of provisions

relevant to the right to life, humanitarian law lays down restrictions on the imposition of the death penalty, in particular, by requiring a delay of at least six months between the sentence and its execution, by providing for supervisory mechanisms, and by prohibiting the death sentence for being pronounced on persons under eighteen or being carried out on pregnant women or mothers of young children. Also of interest is the fact that an occupying power cannot use the death penalty in a country which abolished it.

The next "hard-core" right is that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Humanitarian law also contains an absolute prohibition of such behaviour, and not only states this prohibition explicitly in all the appropriate places but goes still further, since, a large part of the Geneva Conventions can be said in practice to be a detailed descriptions" of how to carry out one's duty to treat victims humanely.

As far as the prohibition of slavery is concerned, this is explicitly laid down in 1977 Protocol II, the possibility of slavery is furthermore precluded by the various forms of protection given elsewhere in the Geneva Conventions. It is interesting to note in particular that this prohibition was well established in customary law, and is reflected. In the Lieber Code's articles on the treatment of prisoners of war, who are not to be seen as the property of those who captured them, and on the treatment of the population in occupied territory ..

Human Rights bodies are now recognizing the importance of judicial guarantees to protect hard-core rights although, with the exception of the Inter-American Convention, these are unfortunately not expressly listed as non-derogable. If human

rights specialists had at an earlier stage taken a close interest in humanitarian law, they would have noted the extensive inclusion of judicial guarantees in the Geneva Conventions. This is because those drawing up humanitarian law treaties had seen from experience the crucial importance of judicial control in order to avoid arbitrary executions and other inhuman treatment.

The protection of children and family life is also given a great deal of importance in humanitarian law. It is taken into account in a number of different ways, such as the provision made for children's education and physical care, the separation of children from adults if interned (unless they are members of the same family), and special provisions for children who are orphaned or separated from their families. The family is protected as far as possible by rules that help prevent its separation by keeping members of dispersed families informed of their respective situation and whereabouts and by transmitting letters between them.

Respect for religious faith is also taken into account in humanitarian law, not only by stipulating that prisoners of war and detained civilians may practise their own religion, but also by providing for ministers of religion who are given special protection. In addition the Geneva Conventions stipulate that if possible the dead are to be given burial according to the rites of their own religion. Of course, it should be remembered that humanitarian law is not formulated as a series of rights but rather as a series of duties.

These are some illustrative points of convergence.

(CPS Decennial Volume)

UNITED NATIONS PEACE KEEPING FORCES AND INTERNATIONAL HUMANTARIAN LAW

In International Law, the sovereign states are the fullest International persons possessing all rights and capacities exercisable within the frame work of International Law. The converse is the case in respect of International Institutions. They have no power, except those expressly or impliedly conferred upon them by their constituent documents. To quote the International Court of Justice 'whereas a State possess the totality of rights and duties recognized by International law, the rights and duties of an entity such as the United Nations must depend upon its purposes and functions as specified or implied in its constituent document and developed by subsequent practice'.

An important question that has been engaging the minds of the jurists in recent times is whether the United Nations Peace Keeping Forces are bound by the principles of International Humanitarian Law. One argument is that the International Humanitarian Law which is primarily contained in the 1949 Geneva Conventions and the two Additional Protocols of 1977 is not binding on the United Nations Peace Keeping Forces as the United Nations cannot become a party to the Geneva Conventions. In fact the final clauses of the Geneva Conventions preclude the participation of the International Organizations. It is also opined that International Humanitarian Law at best be applicable to peace enforcement operations and not peace keeping operations. This issue assumed greater significance in the light of the recent United Nations operations in Somalia, Rwanda, Bosnia (part of erstwhile Yugoslavia) and Iraq. Recent

years have witnessed not only an unprecedented growth in terms of number and scale of United Nations peacekeeping operations but also an unforced expansion of their mandates often going beyond peace keeping. The dividing line between the peacekeeping operations and peace enforcing operations is becoming very thin. The traditional role of the peacekeeping forces which spoke about minimum use of force and self-defence are no longer entirely valid.

The United Nations Peace keeping Forces would be having a role to play only in situations of armed conflict. Every situation of armed conflict results in human suffering. The unique growth of International Humanitarian Law is to alleviate the suffering caused among all sides. International Humanitarian Law applies equally to all parties independently of any other consideration including those relating to the legality of the use of forces. Therefore it is only logical that this law comes into play when the United Nations intervenes in conflictual situations.

Moreover the United Nations Charter itself states as a purpose the promotion and encouragement of respect for Human Rights (article. 1, para. 3), which implies respect for International Humanitarian Law. Further, more respect for Human Rights and International Humanitarian Law is ‘an essential condition for the achievement of its peace and security. If the United Nations itself does not promote respect for the instruments of Humanitarian Law, who else should do it. It would. be strange in the least were National contingents to be bound by the less stringent rules when operating under United Nations command than under National Command?

To be applicable Humanitarian Law requires the presence of an 'armed conflict'.

(Summary of the lecture delivered by Prof. Venkata Rao to the participants in Sixth Central Asian Competition in International Humanitarian Law in ALMATI, KAZAKHSTAN on 3rd May 2005 at the invitation of the International Committee of the Red Cross, Geneva)

(CPS Decennial Volume)

"OBSESSION WITH RESERVATIONS"

Democracy in India has grown from strength to strength in the last fifty six years dumbfounding the critics and allaying the fears of cynics. People who doubted whether Indians deserved democracy were made to bite the dust. Today India is not only the largest democracy in the world but is also a representative and participatory democracy. In fact, with a sense of pride we can say that in the subcontinent it is only in India that democracy has survived, endured and grown with the passage of time. Yet, we should not be complacent. A tremendous responsibility lies on the shoulders of all of us to preserve and protect the democratic nature of the polity. This will be possible only when every Indian feels that he belongs to the system and that the system belongs to him. We cannot afford to alienate anyone.

As stated in the preamble of the constitution, Justice-Social, Economic and Political should be ensured. A combination of diversity and heterogeneity makes our task formidable. Distinction on the basis of race, caste and sex are prohibited and the Constitution of India enables the state to take special measures for protecting the disadvantaged groups like scheduled castes, scheduled tribes, socially and educationally backward classes, women and children. It is in this context the issue of reservation to women in legislative bodies assumes significance. Though reservations for women in local bodies have been in vogue for quite sometime, the issue of reservation for women in legislatures and parliament has been meeting with resistance.

Democracy is always strengthened by men and women working together and not by Men vs. Women, Realizing that gender inequality is a failure that leads to other failures,

emancipation and not empowerment should be the focussed object. Unfortunately it is the grammar of empowerment much at the cost of emancipation that has been ruling the roost so far. The irony with the women's reservation bill is that one does not find a single political party opposing it but it never gets passed. There have been only action replays and affirmative inactions.

The women's reservation bill seeks reservation for women in legislatures but not services. Whereas in case of Scheduled Castes and Scheduled Tribes we have reservations both in legislatures and services, for socially & educationally backward classes we have reservations in services but no reservations in legislative bodies. It is only when, the entitlements to women are recognized and emancipation is ensured, gender justice would automatically be guaranteed. Till then any proposal like double representation, rotation of constituencies and 30% nomination may not yield the desired results. Arguments like quotas within quotas in favour of women belonging to Backward Classes and Minority Communities are beset with complications. ;

While each side has arguments against the other that appear to be unanswerable, the question that needs, to be answered is: can a secular fabric withstand the idea of obsession with reservations?

(CPS Decennial Volume)

IRAQ WAR – The U.S. and the U.N.

The Spectacle of War might have been an event of "Awe" for people watching the same on the T.V. comfortably ensconced in the drawing rooms but it has certainly "shocked" the conscience of mankind.

The United States' action in Iraq in the 3rd week of March, 2003 has once again proved right the dictum that Military Power is the final arbiter of International Resolution 661 (1990) only reaffirmed "the inherent right of individual or collective self defense in response to the armed attack by Iraq against Kuwait, in accordance with the Article 51 of the Charter" and asked all states "to take appropriate measures to protect the assets of the legitimate government of Kuwait".

Resolution 678 (1990) authorised "the member states cooperating with the Government of Kuwait to use all necessary means to uphold and implement Security Council Resolutions and to restore International peace and security in the area."

Resolution 661 and Resolution 678 were situation specific and after the withdrawal of the forces of Iraq from Kuwait, any use of force in this regard is not permissible under these resolutions.

Resolution 687 (1991) was adopted after the withdrawal of Iraqi forces. While imposing severe disarmament obligations on Baghdad, Resolution 687 empowers the Security Council alone "to remain seized of the matter and to take such further steps as may be required for the implementation of this resolution and to secure peace and security in the area".

Resolution 1441 (2002) obliges Baghdad to cooperate "immediately, unconditionally and actively with the UN

Monitoring, Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA) for ensuring full and final disarmament. This resolution which was passed under Chapter VII of the UN Charter, allows for enforcement by the Security Council only. In case of non-compliance, the individual member states cannot arrogate to themselves, the power to protect world peace and security. The Security Council alone has to ensure that the task of disarmament required by the resolution is complete.

"Weapons of Mass Destruction" were not found and Iraq has surprisingly extended cooperation to the Inspection Team. In fact the greatest weapon of mass destruction has been the "sanctions" imposed on Iraq. This "sanction regime" has resulted in the death of more than one million people in Iraq.

The reported resignation of Hans Blix, the top United Nations Inspector (his term of office is scheduled to come to an end in June, 2003) also leaves many questions unanswered about the intentions of the US. The US has been distancing itself from, if not destroying, the essential organization it was instrumental in creating after World War-II. The US has been so over bearing and demanding at the UN that the goodwill and commitment to International cooperation that was in evidence during the Gulf War (1991) was undermined. A number of US actions including rejection of International Criminal Court, environmental agreements and a convention against land mines also contributed to the distancing of the US.

The US action, which smacks of arrogance, has already claimed three permanent victims - EUROPE, NATO and US GERMANY RELATIONSHIP.

The US may ultimately win the "war" but has lost "peace". A victory, if any, for the US, in the end, could only turn out to be a Pyrrhic Victory.

"GLOBALISATION LACKS A MORAL DIMENSION"

"Even as communications, transportation and technology are driving global economic expansion headway on, poverty is not keeping pace. It is as if globalisation is in fast forward, and the world's ability to react to it is in slow motion," says Ted Turner who thinks that something is going seriously wrong. Commenting on this Larry Elliot writes in the Guardian that the millennium is ending not with a settled and prosperous world order but with instability bordering on anarchy. For economic globalisation has not been matched by political globalisation or a system of governance that can control its powerful forces. There is a vacuum at the heart of globalisation. It lacks a moral dimension, a sense that there is something wrong about a system that apportions risk to those able to bear it least and that tolerated grotesque disparities in wealth. Policy makers lack an adequate framework for coping with the new disorder. Financial crises are becoming more frequent and virulent, trade policy is governed by multinationals, market forces are on a collision course with the global environment and there is no structure to ensure that the development of genetically modified food is based on security and health, rather than short-term profit.

Two examples illustrate that the benefits of the hi-tech revolution trickling down from rich to poor are so much hot air. To buy a computer in the United States costs a month's wages; in Bangladesh eight year's income. A US medical library subscribes to 5,000 journals just to keep abreast of the

latest health research; Nairobi University Medical School, long regarded as a centre excellence for East Africa receives 20. The idea that the internet and technology transfer will make globalization all-inclusive is fatuous when a country such as Tanzania has three phones for every 1,000 people. Prof. Marris writes that "The .global destiny of the human race lies in our hands. The situation at the end of the 20th Century is not only intolerable but unnecessary."

(Larry Elliot in the Guardin Weekly July 15-21, 1999)

(CPS Decennial Volume)

Dr. B.R. AMBEDKAR

The multi-faceted genius

Dr. B.R. Ambedkar was an Educationist, Economist, Author, Professor, Lawyer, Leader, Fighter, Law giver and Law maker, Leveller and Liberator. Several hundred volumes have been written on Dr. B.R. Ambedkar. His own writings and speeches run into thousands of printed pages. Almost every other page of the Constituent Assembly debates carries illuminating remarks from the distinguished Jurist projecting the man and his vision. The unqualified appreciation and worship by millions of persons across the country of his dedicated services to the poor and disadvantaged stand testimony to the character of the man and his leadership at a crucial phase in Indian democratic evolution.

So long as the Indian Constitution lives and guides the destiny of nearly a fifth of the human race in this sub-continent, the name and fame of Dr. Ambedkar will continue to reverberate and inspire law makers towards structuring a social order committed to equality, dignity and social justice.

The following observations of T.T. Krishnamachari made in the Constituent Assembly clearly illustrate the role of Dr.B.R.Ambedkar in the making of the Indian Constitution:

"The House is perhaps aware that of the seven members nominated (by you), one has resigned and was replaced, one has died and was not replaced, one was away in America and his place was not filled up, and another person was engaged in State Affairs, and there was a void to that extent. One or two people were far away from Delhi and perhaps reasons of health did not permit them to attend. So it happened ultimately that burden of drafting this Constitution fell upon Dr.B.R.Ambedkar and I

have no doubt that we are grateful to him for having achieved this task in a manner which is undoubtedly commendable."

The Indian Constitution is built on a solid edifice that has stood the stress and strains of our myriad and massive problems.

Education is a subject which was very dear to Ambedkar. With outstanding zeal Ambedkar argued for the advancement of education all through his public life in such a way that one is left to imagine that had he been the Education Minister instead of the Law Minister, Independent India would have had a proud record of accomplishments in the field of education for all its teeming millions.

In the year 1927 itself Dr. Ambedkar made the following observations which are of significance even today, nearly seventy eight years later: Education is the key for empowerment. It is through education alone, a society can move towards true equality. This link between education and equality is best understood by Dr.Ambedkar, who took care to introduce an activist policy on education for all in the Constitution itself. It is our misfortune that despite the Constitutional mandate "for providing within a period of ten years free and compulsory education for all children until they complete the age of fourteen years", successive governments have failed to comply with its solemn obligation to any substantial degree.

Dr.Ambedkar was against the commercialization of education. Increasing demand for education has led to the starting of a large number of Colleges, Schools and training institutions many of them by private individuals. Some of these groups and individuals have found this educational market a rich source for generating money and have adopted variety of methods to

squeeze the public and raise enormous funds oftentimes ousting the common man from higher education. Dr.Ambedkar's observations in this regard are pertinent:

"Education is something which need to be brought within the reach of every one. The Education Department is not a department which can be treated on the basis of quid pro quo. Education ought to be cheapened in all possible ways and to the greatest possible extent. I urge this plea because I feel that we are arriving at a stage when the lower orders of the society are just getting into the high schools and colleges, and the policy of the department therefore ought to be to make higher education as cheap to the lower classes as it can possibly be made. We may forgo material benefits of civilization, but we cannot forgo our right and opportunity to reap the benefits of highest education to the fullest extent".

It is this conviction, which persuaded the eminent scholar statesman to give the call to all downtrodden people "Educate, Organize and Agitate", the Constitutional path for social justice and an egalitarian social order. "Educate, Organize and Agitate" - mark the order. Ambedkar raised himself from the lowest rung of the society to an enviable position in Indian political life by his in credible industry and noble self denial. His heroic struggle for the liberation of a suppressed people in bondage is without any parallel.

As Ambedkar has played the part of destiny in the liberation of suppressed humanity in India, we must learn to understand his life, character and mission and know him as he is. Ambedkar's life is highly instructive to everyone who yearns for human dignity and equality in human relations in society. Besides, it

provides a most inspiring example of what man can achieve by his indomitable perseverance and great self denial, even under the most depressing and destitute circumstances. It provides also a lesson that one should rely upon one's efforts in life rather than depend upon the help and patronage of others. Ambedkar's eternal search for knowledge, his incredible industry and his unflinching aim with which he raised himself from dust to doyen, from the life of a social leper to the position of a Constitution maker and his heroic struggles for raising the downtrodden to human dignity will constitute a golden chapter in the history of the nation and in the history of human freedom as well.

Ambedkar, who was referred to as "JEWEL" in his cabinet by Prime Minister Nehru, relinquished his post as Law Minister in September, 1951 following differences with Pandit Nehru over the adoption of the HINDU CODE BILL.

The whole nation owes a debt to Ambedkar for the reform measures initiated by him for the liberation of Hindu Women from the shackles imposed on them by orthodox elements. Till today, he remains the only person to have resigned from Minister's post for the cause of Women.

Ambedkar, in one word, IS the architect of Modern India.

(CPS Decennial Volume)

UNIVERSAL DICLARATION OF HUMAN RIGHTS

Prof. (Dr.) R. Venkata Rao

50th Anniversary

10th DECEMBER, 1998

THEME OF THE 50th ANNIVERSARY OF UNIVERSAL DECLARATION OF HUMAN RIGHTS

"ALL HUMAN RIGHTS FOR ALL"

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60th Anniversary

10th DECEMBER, 2008

THEME OF THE 60th ANNIVERSARY OF UNIVERSAL DECLARATION OF HUMAN RIGHTS

"AND DIGNITY AND JUSTICE FOR ALL"

****

70th Anniversary

10th DECEMBER, 2018

THEME OF THE 70th ANNIVERSARY OF UNIVERSAL DECLARATION OF HUMAN RIGHTS

"LET US MAKE HUMAN RIGHTS A FACT AND NOT AN IDEALISTIC DREAM"

We have traversed a lot, yet lot remains to be done to make Universal Declaration "Universal".

LET US SPREAD HUMAN RIGHTS CULTURE

70th Anniversary of Universal Declaration of Human Rights

It was on December 10,1948 that the Universal Declaration of Human Rights was passed by the United Nations General Assembly. Hailed as 'the international Magna Carta of humankind' the Declaration is a testament to human dignity and self respect and a beacon of hope to millions of poor and oppressed people of the world. It was, indeed, a historic occasion that three years after the horrendous Second World War, during a period of intense cold war rivalry, the Declaration of Human Rights was adopted by the United Nations General Assembly.

The drafting committee constituted by the United Nations consisting of eighteen members, chaired by one of the most respected ladies of that time, Mrs. Eleanor Roosevelt, a doughty champion of the rights of women and the underprivileged people, completed the task in less than two years. Significant contribution was made by the Canadian jurist John Peters Humphrey, the Director of the Division of Human Rights in the United Nations Secretariat who prepared the first draft that formed the basis of the Declaration and French jurist Rene Cassin who produced the second draft drawing inspiration from the famous Code Napoleon of 1804. Franklin Roosevelt's Four Freedoms proclaimed in 1941 and the Beveridge Report released in 1942 also impacted the Declaration.

The Universal Declaration of Human Rights had 'moral but no legal obligation.' The International Covenant of Civil and Political Rights made in 1976 provided 'legal sanction to most of the Declaration.' The debates in the U.N. General Assembly on the articles of the Declaration revealed the ideological differences and rivalries of the bipolar world. Rene Cassin who was awarded the Nobel Peace Prize in 1968 for his work in drafting the Universal Declaration of Human Rights summed up the articles under five categories. Articles 1 to 11 relate to individual rights, 12 to 17 to civil and political society,18 to 21 deal with spiritual, public and political freedoms, 22 to 27 social, economic and cultural rights and the last three 28 to 30 constitute 'the pediment that binds the structure together.'

Eleanor Roosevelt, the brain behind the historic document, worked with indefatigable energy to enable its completion in time. Presenting the Universal Declaration of Human Rights to the U.N. General Assembly in the winter of 1948 she said that 'it was not a statement of law and legal obligation but may well be the international 'Magna Carta' of 'all people everywhere'. Eleanor struck a poignant note when she asserted that Human Rights were based on 'a spiritual fact' and that man must have freedom to develop his full stature and 'through common effort to raise the level human dignity'. She continued her work with missionary fervour as US Representative to the United Nations

Commission on Human Rights till 1953, even after ceasing to be the Chair of the Commission.

Eleanor, the practical idealist had, however, no illusions about the capacity or keenness of governments to protect and promote human rights. In a memorable message she asked: "Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world.… Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world."

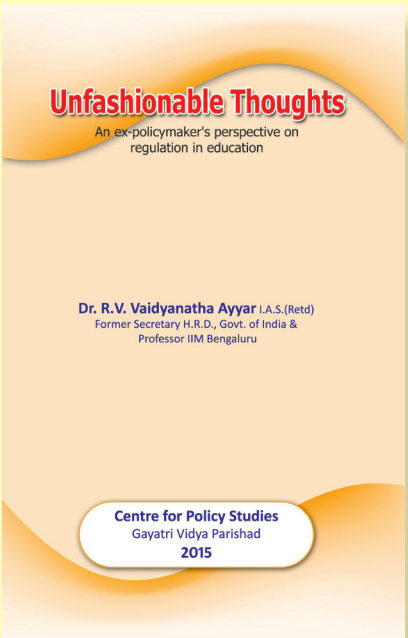
Seventy years after the Universal Declaration was adopted and decades after it has been beefed up by international covenants and treaties, protection and promotion of Human Rights are seen more in breach than in practice. Still, the Declaration serves as a charter of universal values, a source of hope and inspiration to humanity at large.

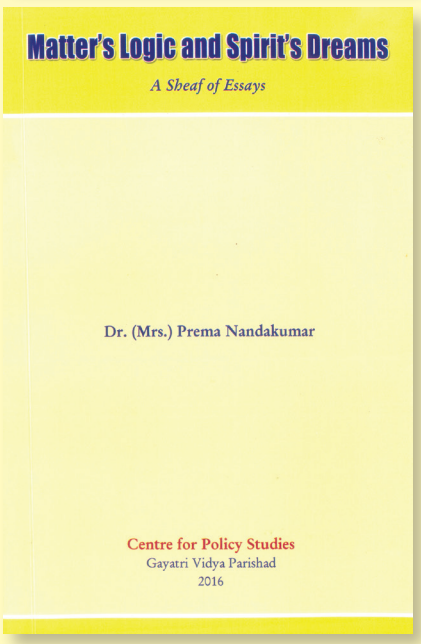
A. Prasanna Kumar

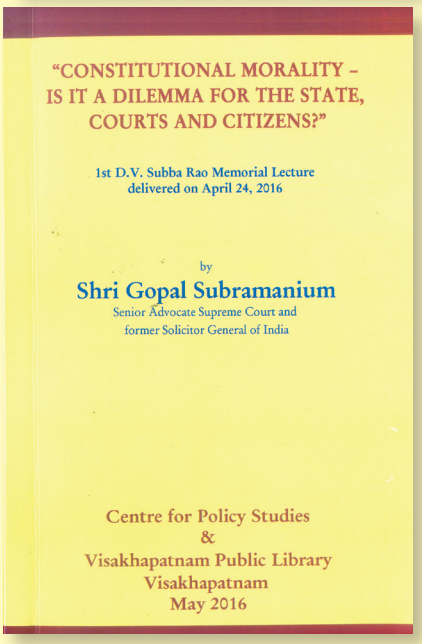
Editor

(CPS Bulletin - December 2, 2018)

Some CPS Publications







Prof. (Dr.) R.Venkata Rao

Vice Chancellor National Law School of India University, Bengaluru

"I cannot but recall the words of Aristotle who said: "If my teacher and God were to simultaneously appear before me, I will bow down before my teacher because it is my teacher who has shown me who God is". The first lesson in nobility of teaching I learnt from Prof. B.S. Murthy. He always used to say any one has a right to complain, but not a teacher, because a teacher should always be a part of the solution and never be a part of the problem. Students will continue to respect a teacher as long as they realize that a teacher is also a student committed to incessant learning. Certain things in life have only a beginning and learning is one such thing. A student is never a problem but has a problem. If teachers walk that extra mile to make students go from the classroom wise and not otherwise. Another inspiring teacher for me is Prof. Korimilli Gupteswar, now living in California, U.S.A., for whom "Rule of Law is a way of Life", best exemplified the Japanese Proverb: "Better than a thousand days of diligent study is one day with a great teacher". Prof. R. Venkata Rao with his 42 years of experience as a teacher and researcher has many achievements and awards to his credit, the most recent being Prof. N.R. Madhava Menon Best Law Teacher Award for the year 2017.