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BOOK REVIEW

FROM THE PRINCIPAL'S DESK

The 2003 edition of *The Law Review* was distributed to over 60 leading law colleges in India and abroad. Copies were also given to all the Honourable judges of the Supreme Court and the High Court of Bombay. Published articles are used as reference by the legal fraternity, both professional and academic, and letters of encouragement and appreciation have been received by the college.

In its third formal year of publication, *The Law Review* for the first time carries a book review written by one of our ex-students, who is studying for his Masters at the University of Columbia. The titles of the articles published in the first two volumes are carried at the end of this issue and it is also proposed to make available the abstracts of the articles on the college website.

The Faculty Advisor and the members of the Law Review Committee play a key role in selection of the articles. Only articles of the highest standard are approved for publication. This year, seven articles and a book review covering a wide spectrum of legal topics have been approved out of a total of 28 submissions. The approved articles, where necessary, are restructured, their contents analysed and issues discussed by the committee and the authors. This guidance and support system offered by the committee to the student authors, some of whom are first timers, is a delightful learning experience for both.

Over the years, the Government Law College has been fortunate to have received unconditional and wholehearted support in all its endeavours from judges and lawyers, amongst others. I thank the Editorial Board, consisting of esteemed lawyers and headed by Mr. Justice Y. V. Chandrachud, Former Chief Justice of India, for devoting time and effort in ensuring that the articles are legally sound and carry contemporary views on the issues at hand. I am also thankful to our contributors who have generously and unhesitatingly assisted us financially for this publication.

I am sure that the incisive research of the young student authors coupled with their fresh outlook will go a long way in initiating and sustaining law reform in the years to come.

Mrs. P. R. Rao
Principal, Government Law College

FOREWORD

I am deeply impressed by the high quality of articles written by our students. The articles show that the writers have devoted considerable time and have taken great care to expound propositions which are out of the common rut. The articles are marked by originality and a perceptible sense of creativity. I admire and applaud the effort of our students. It is not fair that, when each article is so excellent, the articles should be graded according to merit. I propose to state briefly what each writer has said, taking up the articles in the alphabetical order according to the names of the writers. The premises extracted below from the various articles are but samples of the care, concern and creativity of the writers.

1. Hyperlinks: A Study Of The Legal Controversies
   Abu Jaliwala
   "Today, almost every aspect of our daily lives is touched by technology and yet perhaps—paradoxically for the information age—the average person is ignorant of the mechanics of its everyday operation. This is also true for the Internet. Everybody seems to know how to get onto it but few know how it all works."

2. Amendmenace: The Constitution Of India Unveiled
   Archana Balasubramanian and Namrata Yadav
   "[T]he Supreme Court has not pronounced the final word on the issue of the basic structure of the Constitution, a scenario that is unlikely to change in the near future. While the idea that there is such a thing as a basic structure of the Constitution is well-established, its contents cannot be completely determined with any measure of finality until the Supreme Court spells it out."

3. Credit Derivatives As A Means Of Credit Risk Management
   Ashika Visram
   "The early 1990s saw the introduction of financial sector reforms, which gave a fillip to development of banking industry. While this development will certainly yield dividends in the long run, they have also increased the number of risks faced by banks."

4. Safety Norms For Unsafe Wastes! Hazardous Wastes In India
   Gargi Shah and Ramya Mahesh
   "A plethora of industries has not only given man novel luxuries but has also saddled him with the tribulations of push button living ...

India generates about two thousand tons of hazardous waste per day."

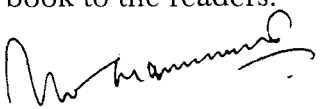
5. Pharma Patents: The New Regime And Pricing Implications
Mallika Iyer
"The original inventor spends several millions of dollars on the development of a new drug.... It is the security of a patent that mitigates part of the risk involved in investing huge sums of money in the research of a new drug.... It is inequitable for an imitator to develop his version of the drug and eat into the market of the original inventor by merely reverse engineering the process of manufacture."

6. Decriminalisation Of Homosexuality In India
Sonal Rangnekar and Kabir Duggal
"Sexuality in all its manifestation was celebrated and embraced in India prior to the entry of the Victorian dictators. Homosexuality has ever since been a tabooed subject—prevalent but never spoken or discussed. ... Legal discrimination against the 'sexual minorities' takes many forms, the most notorious being Section 377 of the IPC. It poses a serious threat to the homosexual community in India."

7. How Legal Is Illegal: Paradoxes In The Indian Drug Laws
Sushrut Desai and Vyom Shah
"India is one of the largest pharmaceutical markets in the world having a domestic turnover of more than Rupees 200 billion and exports of over Rupees 100 billion. It has been growing at over 10 per cent since the last decade and World Health Organization (WHO) ranks it the third largest in the world."

8. *Free Trade Today* by Professor Jagdish N. Bhagwati
Siddharth S. Mehta
"Free Trade Today is a spirited and compelling defence of international trade. It has, at its pith, three lectures delivered by Jagdish Bhagwati at the Stockholm School of Economics, to explain the benefits of international trade and the misconceived notions behind protectionist thinking and practices."

I have great pleasure in introducing this book to the readers.



Mr. Justice Y. V. Chandrachud
Former Chief Justice of India

HYPERLINKS: A STUDY OF THE LEGAL CONTROVERSIES†

*Abu Jaliwala**

"Civilisation advances by extending the number of important operations which we can perform without thinking of them."

Alfred North Whitehead[1]

I. INTRODUCTION

Mr. Whitehead's comment finds relevance in this great leap of our modern civilisation. Today, almost every aspect of our daily lives is touched by technology and yet perhaps—paradoxically for the information age—the average person is ignorant of the mechanics of its everyday operation. This is also true for the Internet. Everybody seems to know how to get onto it but few know how it all works. Ignorance about the Internet's operations increases the possibility for illegal action. The Internet has made as much impact on the code of law as on the discipline of science, making the work of statute makers perilous. The commercialisation of the Internet and the paradigm shift towards revenue generation instead of information exchange has increased conflict to a great extent. While in certain cases lawmakers have stepped in to fill the void by enacting appropriate legislation, in others, the courts have made even ancient legislation potent through interpretation. A critical component of the Internet is the hyperlink and this has been at the centre of a storm vis-à-vis its legality in light of possible intellectual property violations.

The article shall first explain some key nomenclature, technical concepts and processes as well as intellectual property laws and then shall move on to discuss views on the hyperlinking controversies and disputes unfolding

† This article reflects the position of law as on 31 March 2004.

* The author is a student of Government Law College, Mumbai and is presently studying in the Third Year of the Three Year Law Course. He can be contacted at ajaliwala@indiatimes.com.

1 Alfred North Whitehead (1861–1947), a British mathematician, logician and philosopher, best known for his work in mathematical logic and the philosophy of science. In collaboration with Bertrand Russell, he authored the landmark three-volume *Principia Mathematica* (1910, 1912 and 1913) and contributed significantly to 20th century logic and metaphysics.

globally and also possible solutions to the disputes. Along the way, it shall cite and explain international cases and opinions and their relevance in an attempt to decipher the aforementioned perplexity.

II. Hyperlinking: An Overview

A. The Internet: An Explanation

The world wide web is essentially a protocol for document exchange designed to aid the collaborative sharing of resources and is facilitated mainly through Hypertext Mark-up Language or HTML.[2] The hypertext system connects with other objects in the database through links.

The Internet is not just a network of computers; it is rather a 'network of networks', which grows almost like a living organism.[3] The main programming feature that has kept this 'network of networks' from becoming a twisted thicket of website is the hyperlink.

B. The Hyperlink

Almost all Internet pages contain 'hyperlinks' or 'links'. These links are typically highlighted words or images that can be clicked on by the user resulting in the immediate delivery and view of linked content which is present on the source site. Thus, the web surfer is able to jump from one website to another by clicking on a link on the first web page. Hyperlinking enables an Internet surfer to connect to other web pages and retrieve information within seconds, without having to perform new searches or other tasks such as typing in the web address. The extensive use of these interconnections between the pages is why the medium of the Internet is termed a 'web'.[4] As the linking system does not require action or permission by the owner or the publisher of the source site, he often does not know that a link to his site has been created.

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[2] Alex Morrison, "Hijack On The Road To Xanadu: The Infringement Of Copyright In HTML Documents Via Networked Computers And The Legitimacy Of Browsing Hypermedia Document", 1999 (1) *The Journal of Information Law and Technology*, *available at* http://elj.warwick.ac.uk/jilt/99-1/morrison.html.

[3] *Ibid.*

[4] Jeffrey R. Kuester and Peter A. Nieves, "Hyperlinks, Frames And Meta-Tags: An Intellectual Property Analysis", (1998) *IDEA: The Journal of Law and Technology*, 38 IDEA: J.L. & Tech., 243, 246.

C. *Types Of Links*

There are different types of links and the operation of the link depends upon its type.

1. Image Or Inline Link

An Image or Inline Link (IMG link) allows website operators to integrate content from remote web pages onto their own web page. Such images are displayed on the linking site, but the image is not stored on the linking site's server. For instance, if one is publishing a web article on Mr. M. F. Husain, one can include an image of a Husain painting from, say, any art collector's on-line image file to provide an illustration which will accompany the written text of the article. Unlike a hypertext reference link (HREF link) the user cannot really discern that the image is coming from another source since there is a seamless integration of text and image.

2. Hypertext Reference Link

When a HREF link is activated, information from the source page is displayed and information from the linking page is disconnected. Unlike IMG links, HREF links allow display of information only one page at a time i.e. either the linking page is displayed or the source page. HREF links are of two types—surface link and deep link.

a. *Surface Link*

Surface links are also HREF links. However, they typically connect the user to the home page of another website.

E.g. Asian School of Cyber Laws is a surface link to the homepage of the Asian School of Cyber Laws.

b. *Deep Link*

Deep links are a form of HREF links that connect the web user to the interior pages of another website.

E.g. Computer Crime and Abuse Report (India) 2001-02 is a deep link to the Cyber Crime Report published by the Asian School of Cyber Laws.

D. Where Is The Problem?

The hyperlink is an essential element in the web's functioning. Historically, linking has been encouraged by source sites. The commercial viability of a website on the Internet depended on the number of viewers or 'eyeballs' that the website attracted. Linking is a vital way to generate increasing number of 'eyeballs' to the site.

However, certain kinds of linking have been at a cross with copyright, trademark and other laws. Linking has also created a massive proliferation of information, which may be detrimental to society, such as spread of pornography,[5] information about terrorist organisations[6] and information relating to bomb making or mass destruction.[7] As a result, the Judiciary in some countries, for example, Japan have gone so far as to make those involved in hyperlinking liable for aiding and abetting criminal offences.[8]

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[5] Rediff.com was accused under Section 292 of *The Indian Penal Code, 1860* because its search engine gave access to its users to millions of pornographic sites. *See* Manoj Joshi, "India Wrestles With Net Porn", 2 October 2000, *at* http://www.wired.com/news/politics/0,1283,39132,00.html and Manu Joseph, "Porn A Thorn For Indian Portal", 4 December 2000, *at* http://www.wired.com/news/business/0,1367,40432,00.html.

[6] *See* Declan McCullagh, "University Backs Down On Link Ban", *CNET News.com*, 8 October 2002, *at* http://news.com.com/2102-1023-961297.html. The University of California at San Diego ordered a student organisation called the Che Cafe Collective to delete hyperlinks to the official site of the Revolutionary Armed Forces of Colombia, an alleged terrorist organisation, citing the then recently enacted *Patriot Act*. Around 8 October 2002, after receiving several letters criticising their action, the University agreed with the signers of the letters that links are a First Amendment right and withdrew the order.

[7] *See* Joris Evers, "AltaVista, Google Remove Controversial Links", *IDG News Service*, 18 April 2002, *at* http://www.pcworld.com/news/article/0,aid,94843,00.asp. On 15 April 2002, Deutsche Bahn threatened legal action against AltaVista, Yahoo and Google unless they removed hyperlinks to the online copies of two articles from the outlawed German extremist publication *Radikal*. The articles were titled "A Handbook For Destruction Of Railroad Transport Of All Kinds" and provided detailed instructions on how to cut power on parts of the railway system. The matter did not go to court as the three search engines removed the hyperlinks.

[8] *See* Daniel Scuka, "Japan Walks Where the US Fears to Tread", *Japan Inc.*, June 2000, *at* http://www.japaninc.net/mag/comp/2000/06/jun00_reports_porn.html and Kazumi Tanaka, "Web Links Can Be Considered Illegal, Osaka Court Judgement Says", *Asia Biz Tech* (Tokyo), 7 April 2000, *at* http://web.archive.org/web/20000606122921/http://www.nikkeibp.asiabiztech.com/wcs/leaf?CID=onair/asabt/news. According to an Osaka District Court ruling dated 30 March 2000 by Judge Masayuki Kawai, a webmaster linking to a website that is in violation of the law can be charged with aiding and abetting the

Since 1996, there have been cases where linking has been challenged in courts across the globe. However, most cases have been settled out of court and therefore it would be presumptuous to say that there is a definite judicial opinion on issues raised by linking. But an indication of possible judicial opinion can be derived from the preliminary injunctions granted by courts internationally.

III. Copyright Issues

A. Copyright Violations: Site Or Parasite

Certain kinds of hyperlinking could be found to violate the linked site owner's copyright. As per the traditional laws of copyright, an owner of a copyright has the exclusive right to reproduce, modify and publish his work in any material form.[9] When one hyperlinks to such copyrighted material, one can pass off the material as one's own. Also, there may be times when the owner of the material may want his material to reach only certain classes of viewers. By allowing others to do so, as in the case of pirated books, an offending website may actually reduce the value and worth of the copyrighted material. Economic factors play a vital role too. The home page of the website has the most banners. When a website bypasses the home page (as in the case of deep hyperlinking, IMG links and framing) one strikes at the income of the linked site as many web pages are supported by advertising.[10]

The argument against this is that as the hyperlink is simply an embedded address, the website only provides the address for the same. By clicking the hyperlink it is the user who goes to the website. Thus, the person setting the link merely provides an additional method of accessing the material on the source website. The linking site does not store any of the information on its web server. No modification of the content is involved.

Copyright owners counter that many web pages are really composite documents consisting of several items, such as graphics and text and are

crime. As per this decision, he could be held liable even if he is unaware of the contents of the linked page.

9 In India, these rights are encapsulated in Section 14 of *The Indian Copyright Act, 1957.*

10 The loss of income was the main bone of contention in *Ticketmaster* v. *Microsoft* as well as *Ticketmaster* v. *Tickets.com.* These cases are discussed in Part VII B of this article.

not meant to be viewed as individual parts. Whether they can be viewed as independent parts is an artefact of the HTML language and not the intention of the copyright holders. Also, the owners want people to view the contents only if they have seen the advertisements that are bound to it.

This embroilment is best understood by examining certain copyright-related hyperlink cases.

1. *Shetland Times* v. *Dr. Jonathan Wills and Zetnews Ltd.*[11]

This case is among the earliest cases regarding copyright. On 24 October 1996, Lord Hamilton gave a preliminary interdict (equivalent to a preliminary injunction) to prevent *The Shetland News* (Shetland News), an Internet based newspaper, from offering links from its web pages to those of its rival Internet newspaper, *The Shetland Times* (Shetland Times).[12] Shetland News had introduced deep links on its website to news articles placed on the online version of Shetland Times. The links were verbatim copies of the headlines of Shetland Times website. The plaintiffs planned to use advertising on their homepage as a source of revenue, but due to the defendants' deep hyperlinks such advertisements would never be seen by visitors arriving through the defendants' site, leading to a potential loss of revenue.

Lord Hamilton, while granting the interdict against Shetland News, observed that headlines could be a literary work. However, on 11 November 1997, the parties opted for an out of court settlement. The terms of the settlement agreement stated that Shetland News would still be able to link to stories that are on the website of Shetland Times by the use of headlines but would have to make sure that:

- Each hyperlink that goes to one of Shetland Times' stories uses the legend, 'A Shetland Times Story', appearing under the headline and in the same size;
- Next to each headline there would have to be a button showing Shetland Times' masterhead logo; and

[11] [1997] FSR 604 : (1996) IP&T Digest 42.

[12] *Shetland Times, Ltd.* v. *Dr. Jonathan Wills and Zetnews, Ltd.*, (Sess. Cas. 24 October 1996), *available at* http://www.shetland-news.co.uk/opinion.html.

- The legends and buttons would have to be hyperlinks to Shetland Times online headline page.[13]

In spite of the out of court settlement, it could be argued that Lord Hamilton's granting of the interim interdict suggests that deep linking would not be permitted. It is important to note that the basis for the decision was a peculiar interpretation of the copyright cable programming law in Scotland.[14] Additionally, although the links were verbatim copies of the headlines of the Shetland Times website, elsewhere, for instance the United States, the headlines would have been too short to have been allowed copyright protection.

2. *Scientology* v. *Karin Spaink/Xs4all*

The most recent verdict on this issue has been given by the Dutch Court in *Scientology* v. *Karin Spaink/Xs4all.* This case deals with the liability of Internet Service Providers (ISPs) that host sites that hyperlink and decides on their liability as contributors to infringement.

The dispute dates back to 1995 when Mrs. Spaink displayed copyright protected material owned by the Church of Scientology. Some ISPs (for e.g. Xs4all) were hosting the websites of Mrs. Spaink and were providing hyperlinks to these sites. The Church sued and claimed that by placing the material on their systems and providing hyperlinks to the same, the ISPs were infringing their copyright. The Church claimed that the sites had been informed of the presence and the protected nature of the content and thus the continuing presence of the material on their systems was unlawful. The Church of Scientology filed the copyright lawsuit demanding that the published materials be removed from the sites in question. It was also the contention of the Church that the ISPs should be held accountable for their subscribers' activities in relation to copyrights. The Church received a setback, however, when a single Judge at the District Court of The Hague, in an order dated 12 March 1996, rejected the Church's claims saying the posted documents were legal, based on individuals' rights to quote from copyrighted material.[15]

[13] Jonathan Wills, "Shetland Times Internet Case Settled Out Of Court", *The Shetland News*, 11 November 1997, *available at* http://www.shetland-news.co.uk/headline/97nov/settled/settled.html.

[14] Kuester and Nieves *supra* n. 4, 264–265.

[15] *Scientology* v. *Karin Spaink/Xs4all* (District Court of The Hague 12 March 1996) (ruling in summary proceedings), *available at* http://www.spaink.net/cos/verd1eng.html.

In a second lawsuit decided in 1999, the Amsterdam Courts again ruled in favour of the ISPs, citing the right to freedom of speech. However, in that ruling, the Judge said that ISPs should be held accountable for posted materials that might violate existing laws and copyrights. The ruling dated 9 June 1999 says *inter alia* that:

> "[T]he Service Provider, who does not reproduce or publish material himself, nevertheless can be bound to assist and take adequate measures, on the grounds of the care that is fitting in the conduct of society, if he is notified that one of the users of his computer system is infringing copyright or otherwise acting unlawfully through the use of his home page... ."[16]

Thus, the ruling said that if a service provider were made aware of illegal publishing of copyrighted materials or hyperlinks to copyrighted information, it should take action and remove the website or links.

However, the Court of Appeal in The Hague, Netherlands, has denied the Scientologist's latest appeal. The Court rejected all of the Church of Scientology's claims, its action against the Dutch ISP Xs4all, writer Karin Spaink and ten other ISPs.[17] This case establishes an important precedent for freedom of speech on the Internet and protects ISPs in particular.

3. *Verlagsruppe Holtzbrinck* v. *Paperboy.de*[18]

The German Federal Supreme Court too has found deep linking to be legal.[19] The Court held that web pages containing publicly accessible news articles may be deep linked while bypassing the home pages of content providers.

The plaintiff, a media group that publishes several newspapers and magazines, sued an online news search engine provider (sometimes colloquially referred to as a headline scraper) www.paperboy.de for forbearance. The defendant had offered deep links to articles on the plaintiff's website.

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[16] *Scientology* v. *Karin Spaink/Xs4all* (District Court of The Hague 9 June 1999) para 16, *available at* http://www.spaink.net/cos/verd2eng.html.

[17] Matt Hines, "Hyperlinks Remain Legal After Scientology Defeat", *CNET News.com*, 9 September 2003, *at* http://news.zdnet.co.uk/business/legal/0,39020651,39116197,00.htm? rtag=zdnetukhompage.

[18] *At* http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py? Gericht=bgh & Sort=3 & Datum=2003 & Art=pm & Blank=1 & nr=26553 & id=1058560384.14 (in German).

[19] Case No. I ZR 259/00 (ruling dated 17 July 2003).

After initial success at the trial level, the plaintiff's case was dismissed on appeal. The Federal Supreme Court also held for the defendant.

The Court stated that deep links do not violate copyright laws because the copyright owner has already made the articles publicly accessible. As the authors have exercised their discretion in posting the works on the Internet despite the likely risk of unlawful use, they provided free public access. Every Internet user enjoys access to the work simply by learning the Uniform Resource Locator (URL). The hyperlink technique obviates the need to enter the URL manually and merely provides an easier and more convenient way to use the Internet.[20]

The Court also stressed the importance of deep links for the Internet and held that it was up to the plaintiff to prevent deep links with technical measures, if they did not like them.[21]

The exploitation of the plaintiff's work does not violate unfair competition laws. Whoever uses the Internet has to put up with the limitations resulting from the legitimate interests of the public in efficient usability of this medium. The functionality of search engines must be accepted as a limitation by the authors.[22]

This case does not rest the law relating to deep linking in Germany, as Germany's copyright law, along with that of the other member countries of the European Council, was likely to change soon after this case.[23]

IV. Moral Rights And Ethics

A. Moral Rights

Moral rights have been defined as rights the author retains over the integrity of a work and the right to be named as its author even after sale or transfer of the copyright.[24]

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[20] *See* "Deep-Linking Legal After German Supreme Court Ruling", *German American Law Journal :: American Edition*, 18 July 2003, *available at* http://www.recht.us/amlaw/IP/z718paperboy.html?seemore=y.

[21] Drew Cullen, "Deep links are legal in Germany. Official", *available at* http://www.theregister.co.uk/content/6/31838.html.

[22] *Supra* n. 20.

[23] Cullen *supra* n. 21.

[24] "A Guide To Copyright: Glossary", *at* http://strategis.ic.gc.ca/sc_mrksv/cipo/cp/copy_gd_gloss-e.html.

Moral rights belong to the authors and are independent of the economic rights of copyright. They may not be assigned. One of the more important rights is the right of integrity, which protects an image or text from being modified or placed in such a context as to undermine the original intentions of its creator.[25]

Whether moral rights themselves are enforceable or not is not really in question, as this would vary with the country and the prominence it gives to such rights. The scope of a creator's moral rights is therefore unclear and differs with cultural conceptions of authorship and ownership, but may include the creator's right to receive or decline credit for his work, to prevent his work from being altered without his permission, to control who owns the work, to dictate whether and in what way the work is displayed, and/or to receive resale royalties. Under American law, moral rights[26] receive protection through judicial interpretation of several copyright, trademark, privacy and defamation statues and through the *Visual Artists Rights Act of 1990*,[27] which applies exclusively to visual art. In Europe and elsewhere, moral rights are more broadly protected by ordinary copyright law.

B. Is Hyperlinking Ethical?

1. Not Always

The moot question is whether hyperlinking to copyrighted material without permission is ethical.

Some academicians opine that while the web is an open medium, individual websites are not common property; they belong to their creators and the creators have the ethical right to exert some control over who links to their sites and how they do so. Deep linking may deny the creator fair compensation by steering users around advertisements and it may defeat the site's aesthetic presentation—much like a cinema hall showing a film out of order so that the last scene appears first.[28]

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[25] B. Royan, "Rights Management And Digital Resources: Challenges And Problems", *at* http://ignca.nic.in/clcnf150.htm.

[26] Betsy Rosenblatt, "Moral Rights Basics", March 1998, Harvard Law School, *at* http://cyber.law.harvard.edu/property/library/moralprimer.html.

[27] 17 U.S.C. §106A, *available at* http://cyber.law.harvard.edu/property/library/copyrightact.html#anchor545352.

[28] Richard Spinello, "Web Site Linking: Right Or Privilege", 4–5 June 1999, *at* http://www.bc.edu/bc_org/avp/law/st_org/iptf/commentary/content/spinello.html.

It is also contended that website authors "should have the right to restrict links from certain sources when such a connection might be a source of embarrassment."[29] For example, a news site that is being linked to by a pornographic or racist website could give the impression that the targeted site endorses or is affiliated with the source of the link, thus harming its reputation and credibility.

Such a view is thus in conformance with the concept of moral rights of an author in traditional copyright law.

2. Of Course

Many believe that the Internet was deliberately designed to allow users to shift instantly from idea to idea and page to page in a non-linear, non-hierarchical manner.[30] Tim Berners-Lee, the computer scientist credited with inventing the web, believes that a link is nothing more than a digital referral or footnote.[31] He also indicates that it was his intention to develop a medium that made random connections or links, from one subject to another "in an unconstrained, web-like way" that mirrored, as closely as possible, the intuitiveness of the human brain.[32] Hypertext itself, as Berners-Lee notes, was conceived as a language in which the reader "could follow links and delve into the original document from a short quotation."[33]

From this position, attempting to guide users through a series of advertisements or story items they would rather skip, defeats the original design of the web.

3. Depends On Who Is Asking ...

Another way of looking at this is that attempts to rein in linking through the legal system simply reflect corporate, commercial values, which treat virtual space no differently than physical or real space where private lots and businesses are protected by walls, fences and gates.

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[29] *Ibid.*

[30] Robert I. Berkman and Christopher A. Shumway, *Digital Dilemmas: Ethical Issues for Online Media Professionals* (Iowa State Press 2003) (edited excerpt), *available at* http://www.ojr.org/ojr/ethics/1065049186.php.

[31] Tim Berners-Lee and Mark Fischetti, *Weaving the Web* (Harper Collins San Francisco 1999), *available at* http://www.w3.org/People/Berners-Lee/Weaving/Overview.html.

[32] *Ibid.*

[33] *Ibid.*

While such beliefs may not go down well with the liberty-espousing computer maverick, it does have philosophical support. One source where such support can be derived from is Locke's "labour-desert" theory. The essence of this theory is that people have a natural right or entitlement to the fruits of their labour. Thus, if someone takes common, unusable land and through the sweat of his brow transforms it into valuable farmland, that person deserves to own this land. Locke's basic argument is that labour is an unpleasant and onerous activity and hence people do it only to reap its benefits; as a result, it would be unjust not to let people have these benefits, which they take such pains to procure. In short, property rights are required as a return for the labourer's painful and strenuous work. Therefore, from a Lockean perspective, there ought to be property rights in websites because their value is based entirely on someone else's labour in constructing and setting-up the site. The production of a website is often a labour-intensive activity and this effort should confer a property right for those who made the investment of time and effort to build that site.[34]

An opposing set of values posits that cyberspace is quite different from physical space in the sense that traditional, commercial borders do not—or should not—exist. The conflict between these two value systems appears to be driving the deep linking debate. "The deep linking issue attempts to answer the question that's been asked since the Internet first became part of the general public's consciousness: Is this medium a free source of information for the benefit of the people, or a controlled presentation of branded content that benefits commercial interests?"[35]

V. Trespass

Advocates of free linking on the Internet believe that no one is obliged to create a site, a link or to 'surf' on the web and once a person decides to put a resource on-line on the Internet, that person must accept the implicit functioning, spirit and rules thereof.

Therefore, if your website is not password protected, it is expected that it will be both visited and linked.

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[34] Royan *supra* n. 25.

[35] Michelle Finley, "Attention Editors: Deep Link Away", 30 March 2000 (quoting the opinion of Darren Deutschman), *at* http://www.wired.com/ news/politics/ 0,1283,35306,00.html.

This has been further elucidated by drawing an analogy with the common law principle of easement or servitude.[36] Hyperlinks permit a progression i.e. the passage from one site to another, therefore, from one property to another, whether remaining at the front of the site or whether entering the site to cross through or visit it. If the hyperlink is looked upon as a right-of-way (or rather a right-of-view) from one site to another, the permission of the owner of the 'servient tenement' (source website) would not be required.[37] However, as dealt with earlier in this article,[38] such a comparison of virtual property with real property will still not make for any ethical justification of many acts. In fact, comparisons with real property only weaken the case for free-linking.

VI. Trademark Issues

A. Trademark Law In The United States

As the incidence of this controversy has been greater in the United States (US), an examination of the US trademark law is in order. The *Lanham Act* is the federal trademark law. Among the most important principles with relation to trademarks in this Act is the commerce clause. Commercial use of trademarks is defined as use in commerce to reference goods or services for sale.[39] Thus, enforcement of the *Lanham Act* is limited by the bounds of the commerce clause. The Courts in turn have defined the term "commerce" broadly and an action will be found to be non-commercial where it is altogether non-economic and where it will have no substantial impact on interstate commerce if the action is repeated elsewhere.[40] Keeping this in mind, any trademark issues in hyperlinking can be raised only if the infringer is partaking in an act of commerce.

Trademark claims relating to links could be Trademark Infringement, Trademark Dilution and Trademark Tarnishment.

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[36] Encapsulated in India in the *Indian Easements Act, 1882*.

[37] For a further analysis of this argument, *see* "Hyperlinks: Legal Status", 3 March 2003 (recommendation report of the Internet Rights Forum), *at* http://www.foruminternet.org/telechargement/documents/reco-hyli-en-20030303.htm#_ftn1.

[38] Refer to Part IV B of this article.

[39] *Lanham Act* §§ 41, 43, 15 U.S.C. §§ 1125, 1127 (1998).

[40] *United States* v. *Lopez* 514 U.S. 549 (1995).

1. Trademark Infringement

Trademark infringement occurs when another entity uses the owner's mark or one that is similar in a way that is likely to cause consumer confusion as to the actual source of goods or services.

2. Trademark Dilution

Dilution of a trademark is the unauthorised use of the mark in any way that diminishes the mark's capacity to denote a single source, whether or not the user is a competitor.[41] Consumer confusion about the source of goods or services is not an aspect of this violation. Comparative advertising could be held to be guilty of trademark dilution. Spoofs on Air India's *Maharaja* or Amul's 'butter girl' could be trademark dilutions in the US, if made for use in commerce.

3. Trademark Tarnishment

Trademark tarnishment is one kind of dilution where the defendant's use of the plaintiff's mark attaches a negative association to the mark.[42]

B. Trademark Cases

1. *Playboy* v. *Netscape*

A few years ago, Playboy Enterprises which owns the trademarks "playboy" and "playmate" litigated against Netscape Communications, owners of the search engine, Netscape, alleging violations of its trademark by the latter selling banner advertisements triggered by the terms "playboy" and "playmate". Playboy argued that the links tarnished and diluted its brand name by associating its trademarks with inferior products. The US District Court dismissed the suit without a trial in 2000. However, recently, the US Court of Appeals for the Ninth Circuit reinstated the trademark infringement lawsuit by Playboy Enterprises against Netscape

[41] *Lanham Act* § 45, 15 U.S.C. § 1127 (1998) defines "dilution" as "the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake or deception."

[42] Christopher E. Gatewood, "Click Here: Web Links, Trademarks And The First Amendment", (Spring 1999) *Richmond Journal of Law and Technology*, 5 RICH. J.L. & TECH. 12, *available at* http://www.richmond.edu/jolt/v5i3/gatewood.html.

Communications, ruling that the web company could be held liable for the unauthorised use of trademarks in search engine advertisements.[43]

A week after the Appeals Court's ruling, the companies reached a settlement in the case, thus ending the five year old lawsuit.[44]

2. *Ford Motor Company* v. *2600 Enterprises, et al*

In 2001, Ford requested an injunction against 2600 Enterprises to prevent it from hyperlinking to Ford's website from the website "f***generalmotors.com".[45] In December 2001, the lawsuit was dismissed in its entirety for failure to state a claim upon which relief may be granted. "Trade Mark law does not permit (Ford) to enjoin persons from linking to its homepage simply because it does not like the domain name or other content of the linking Web page."[46] The decision in this lawsuit suggests that one would have a right to link.

Ford initially appealed to the US Court of Appeals for the Sixth Circuit, but finally withdrew its appeal in June 2002.

VII. Unfair Competition

A. Unfair Competition

In the US, the *Lanham Act* provides a cause of action for a federal unfair competition claim.

The most important categories of federal unfair competition under the *Lanham Act* include passing off[47] and false advertising.[48]

The requirements for a passing off claim for federal unfair competition are:

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[43] "Playboy Wins Net Search Trade Mark Dispute", *ZDNet*, 16 January 2004, *at* http://zdnet.com.com/2110-1104_2-5142137.html.

[44] Stefanie Olsen, "Netscape, Playboy Settle Search Trade Mark Case", *ZDNet*, 23 January 2004, *at* http://zdnet.com.com/2100-1104_2-5146502.html.

[45] John Leyden, "Ford Loses 2600 Lawsuit", *The Register*, 29 June 2002, *available at* http://www.theregister.co.uk/content/6/25954.html.

[46] 177 F. Supp. 2d 661 : 2001 U.S. Dist. Lexis 21302 (E.D. Michigan 20 December 2001), *available at* http://www.2600.com/news/122201-files/ford-dec.html.

[47] 15 U.S.C. § 1125(a)(1)(A) (1998).

[48] 15 U.S.C. § 1125(a)(1)(B) (1998).

- An association of origin by the consumer between the mark and the first user; and
- A likelihood of consumer confusion when the mark is applied to the second user's goods.[49]

Unlike a common law cause of action for passing off which requires either fraud or a distinctive mark or trade name, a federal claim for passing off encompasses a broader area of unfair competition which may be generally described as a misappropriation of the skill, expenditures and labour of another.[50]

The *Lanham Act*'s prohibition against false advertising can also be interpreted against hyperlinking. This specifically prohibits a person from using a false or misleading description of fact or false or misleading representation of fact in commercial advertising or promotion which misrepresents the nature, characteristics, qualities or geographic origin of his or her or another person's goods, services or commercial activities. To establish a cause of action for false advertising under the *Lanham Act*, the plaintiff must show that the challenged statement is literally false or even though the statement is not literally false, that it is likely to deceive or confuse customers.[51]

The two common types of unfair competition in the US law, namely passing off and false advertising, are separate causes of action.[52]

Unfair competition law helps where trademark law would not, viz. in cases where a generic term is used as a source identifier. Since a generic term is not eligible for trademark protection and therefore cannot be registered, a plaintiff using a generic term will not be protected by trademark law.[53]

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[49] *Forschner Group, Inc.* v. *Arrow Trading Co.* 904 F. Supp. 1409, 1417 (S.D.N.Y. 1995), *aff'd*, 124 F.3d 402, 43 U.S.P.Q.2d (BNA) 1942 (2d Cir. 1997).

[50] *American Footwear Corp.* v. *General Footwear Co.* 609 F.2d 655, 662 : 204 U.S.P.Q. (BNA) 609, 614 (2d Cir. 1979).

[51] *National Basketball Association* v. *Motorola Inc.* 105 F.3d 841, 855 : 41 U.S.P.Q.2d (BNA) 1585, 1597 (2d Cir. 1997).

[52] For a deeper analysis of the *Lanham Act* and its applicability on Internet based intellectual property issues, *see* Kuester and Nieves *supra* n. 4.

[53] *Blinded Veterans Association* v. *Blinded American Veterans Foundation* 872 F.2d 1035, 1039 : 10 U.S.P.Q.2d (BNA) 1432, 1435 (D.C. Cir. 1989).

B. Electronic Unfair Competition

Thus, it can be seen that unfair competition and antitrust laws are other weapons that can be used against a hyperlinker. Of course, misleading advertising and unfair marketing are the most common types of 'traditional' unfair competition within the framework of electronic commerce but the Internet also offers other possibilities that do not exist in the 'real world'; for example, spamming, domain name grabbing, the manipulating of search engines and the misleading use of hyperlinks. Such electronic actions may qualify as unfair competition and may therefore be referred to as electronic unfair competition.[54]

1. *Ticketmaster Corp.* v. *Microsoft Corp.*

In April 1997, Microsoft launched Seattle Sidewalk, a web guide to the Seattle area, which also listed various events. When visitors wanted to purchase tickets from them, they were referred to Ticketmaster's website. Ticketmaster is an agency that provides tickets for various shows and events. It has a popular online site where a web user can access information on events as well as purchase tickets online. On 28 April 1997, Ticketmaster reacted with a suit to Microsoft's deep linking in the US District Court for the Central District of California. Both parties had participated previously in abortive negotiations over a linking agreement. This itself reflected that Microsoft recognised the value of Ticketmaster's site. Ticketmaster alleged that Microsoft's activities constituted trademark dilution as well as unfair competition. There was an out of court settlement in this lawsuit in February 1999. Although the terms of the settlement were not disclosed, Microsoft did agree to link to Ticketmaster's home page instead of its sub-pages. The settlement was thus a disappointment for those searching for a firm legal precedent about controversial linking activities.[55]

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[54] Marike Vermeer, "Electronic Unfair Competition And Applicable Law: An Open Spot In The European Jungle", Vol. 7.5 *Electronic Journal Of Comparative Law* (December 2003), *available at* http://www.ejcl.org/ejcl/75/art75-9.html.

[55] Bob Tedeschi, "Ticketmaster And Microsoft Settle Linking Dispute", *The New York Times on the Web*, 15 February 1999, *available at* http://www.nytimes.com/library/tech/99/02/cyber/articles/15tick.html.

VIII. Precautions And Solutions

A. Permission Of The Linked Site

A website owner may consider a linking agreement with the source site. However, permission itself is a double-edged sword. While seeking permission is a telling way of preventing trespass and intellectual property claims, it is not fool proof. For one, permission itself may not be granted—particularly when there is no benefit to the source site or if the source site is a competitor.

Even when available, acquiring the permission could be a long drawn process. Again, in cases of surface hyperlinking or where the linking site is not likely to run foul of copyright laws, by citing fair use for instance, it might even be unnecessary. Further, if permission is granted it could be subject to conditions. Violation of such conditions could mean contractual violations. It must be noted that the definition of consideration in *The Indian Contract Act, 1872* allows third party consideration. So, even if the linking site owner has not paid any monetary consideration to the linked site owner he could still be held contractually liable.[56] Thus, such agreements may be difficult to obtain.

But, more importantly, seeking permission can only be at best a precaution for the linker to avoid liability. Practically, so long as a definite judicial opinion against linking remains distant, any website's insistence that every prospective linker seek permission before carrying on with the link is likely to be simply ignored. Any prospective legislative insistence that such an authorisation process take place would disable the Internet.

B. Technical Protection

Website owners have increasingly protected their sites using technical means. One method is that the user can only access a website through its home page. So when a user clicks on a hyperlink, he is automatically taken to the home page rather than the page of the embedded address.[57]

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[56] The condition and consideration could, for instance, be a certain number of 'eyeballs' to the site.

[57] This was used by Ticketmaster to direct traffic from Tickets.com and other linkers to the home page of Ticketmaster. As a result of this technical modification, Judge Hupp no longer needed to judge on the copyright infringement aspect of Ticketsmaster's case against Tickets.com.

Another method is by using software that blocks hyperlinks. Here the error message: "Error 404 File not found" is seen.[58]

C. Other Precautions

Simple pragmatic steps could prevent disputes and protect linking websites from any legal challenge. Linking websites should:

- Take steps to minimise any appearance of an endorsement or association with the source site. This will help protect the website from claims for passing off and trademark usurping.
- Avoid framing as far as possible.
- Use hyperlinks that contain only text.
- Ensure that the source site's logo, catch phrase or registered trademark is not used within the hyperlink.
- Give due credit to the source site and declare that the copyright, if any, vests with that site or the site owner. Post a disclaimer clause if necessary.[59] Disclaimers that prevent confusion as to the source of the material at the end of the link will go a long way towards preventing claims of infringement or misappropriation.
- To avoid getting linked, prospective source sites could clearly state on their home page that linking to their website is prohibited. Attempts could also be made to collect fees from offending websites.[60]

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[58] One may block frames in a similar manner. *See* FAQ on frames and how to block getting framed *at* http://www.htmlhelp.com/faq/html/frames.html.

[59] *See* Gatewood *supra* n. 42. A good example of this is Cable News Network's (CNN) web news publication. The publication notes in a separate box below its news stories that its links are to "Related sites" and that "External sites are not endorsed by CNN Interactive."

[60] *See* "Meteo-data/Hot Maps", *at* http://www.linksandlaw.com/linkingcases-framing.htm#METEO-data. Some website have tried to recover some form of compensation from sites that link to them. The owners of Meteo-data, a meteorological website demanded that people pay for links to their Web site. In one case, they sued for framing their weather-charts. They lost and filed a petition for bankruptcy. A company called Hot Maps has also sent letters to people, who linked to their site, demanding they pay a fee. Hot Maps obtained interim injunctions from a Hamburg regional court against some website operators. However it remains unclear as to the extent it will be successful in obtaining the fee and in at least one case Hot Maps has abandoned its claim.

- Post a prominently displayed warning on the website stating that linking is not permitted.

IX. Legislation Preventing Hyperlinking

A. United States

In 2002, the US Senate passed *The Dot Kids Implementation and Enforcement Act of 2002* (Dot Kids Act).[61] The Dot Kids Act established an Internet domain (kids.us) as a kids-friendly area on the web. It prohibits any site within the kids.us domain to create hyperlinks that take a user outside the domain.

However, some websites have found a way around this law. They post a URL of the site outside the domain instead of providing a hyperlink. The user simply uses the copy-paste option to get to the site. Also, software programs like Microsoft Word already recognise and convert URLs to hyperlinks. A similar software feature in web browsers could nullify any law preventing hyperlinks unless URLs too are considered as hyperlinks.

Several websites and domains also prohibit their users from posting hyperlinks. For example, ebay.de prohibits links to websites outside the ebay-domain.

B. European Council

Some European countries too are in the process of enacting legislation that restricts hyperlinks. A protocol to the *European Convention on Cybercrime*,[62] could criminalise Internet hate speech, including hyperlinks to such hate speech website.[63] Such a convention would make it obligatory for representatives of the 44 European countries belonging to the European Council to make laws banning hate speech sites and hyperlinks to them.

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[61] HR 3833, *available at* http://www.kids.us/content_policy/kids_efficiency_act.pdf.

[62] *See* The Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

[63] Julia Scheeres, "Europeans Outlaw Net Hate Speech", 9 November 2002, *at* http://www.wired.com/news/business/0,1367,56294,00.html.

C. *South Africa*

South Africa too has introduced the *Electronic Communications and Transactions Act, 2002.* Section 76 of the Act (Information location tools) states, *inter alia*, that:

> "A service provider is not liable for damages incurred by a person if the service provider refers or links users to a web page containing an infringing data message or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hyperlink, where the service provider—
>
> (a) Does not have actual knowledge that the data message or an activity relating to the data message is infringing the rights of that person;
>
> (b) Is not aware of facts or circumstances from which the infringing activity or the infringing nature of the data message is apparent;
>
> (c) Does not receive a financial benefit directly attributable to the infringing activity; and
>
> (d) Removes or disables access to, the reference or link to the data message or activity within a reasonable time after being informed that the data message or the activity relating to such data message, infringes the rights of a person."

D. *Germany*

Germany, in 1997, became one of the first countries to enact special laws for multimedia liability. The federal State enacted the *Teleservices Act/ Teledienstege-setzl (TDG)* based on its legislative competence to regulate telecommunications and economics.[64] Germany is also a signatory to the *European Convention on Cybercrime.*

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[64] Oliver Köster and Uwe Jürgens, "Liability For Links In Germany. Liability Of Information Location Tools Under German Law After The Implementation Of The European Directive On E-Commerce", Hamburg:Verlag Hans-Bredow-Institut, July 2003, *available at* http://www.rrz.uni-hamburg.de/hans-bredow-institut/publikationen/apapiere/14liability.PDF.

X. Websites Asking To Be Linked

Another aspect to the hyperlinking controversy is whether a website can demand to be linked as a right in the absence of any such right acquired by contract. This is plausible in cases of municipality sites. Municipal websites refer to websites supported by the local administration or municipality and are designed to inform, educate and enlighten its citizens about local government functions and services. Foreigners and prospective visitors to a destination can find maps and photographs of the area along with a lot of useful information such as listings of local restaurants, hotels, night-spots and other attractions on the site. Such information is usually hyperlinked whereby the visitor can directly visit the site required from the municipal website.

Do operators of such websites have a duty to link to another site when specifically asked? Failure to do so could invite litigation on grounds of bias. Such litigation has already taken place in the US. The US Court of Appeals for the Sixth Circuit has held that:

> "The requirement that websites eligible to be linked to the city's site promote the city's tourism, industry, and economic welfare gives broad discretion to city officials, raising the possibility of discriminatory application of the policy based on viewpoint."[65]

The bone of contention would have to be the link list. Municipal websites would be expected to observe strict neutrality in coming up with the list. It might also be a good idea for the sites to form a linking policy which delineates substantial criteria for a website to be in the link list.[66] In India, such a policy would have to comply with the principle of reasonableness and be in conformity with Article 14 of the Constitution of India.

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[65] *The Putnam Pit, Inc.* v. *City of Cookeville* 221 F. 3d 834 (6th Cir. Tenn. 2000) : 2000 FED App. 0235P : 28 Media L. Rep. 2257.

[66] For a discussion of this issue, *see* Bernd Ramming and Stephan Ott, "Operators Of Municipal Web Sites Beware—No Links To Harry Potter!" (summary of article), *available at* http://www.linksandlaw.com/ownpublications-linkliste-engl.htm.

XI. Linking And The Information Technology Act, 2000

The Information Technology Act, 2000 (IT Act), considered by many to be a hastily drafted legislation, adds to the possible liabilities of the linking party. The wide language of Section 43(b) of the IT Act could make even an innocent surfer liable.[67] This is so, because of a process peculiar to the information age called caching. When applied to the Internet, caching means the copying of a web page or a website and storage of that copy for the purpose of speeding subsequent access. Caching, which entails duplicating a popular site on an as-it-is basis on the servers of the ISP, is used by ISPs on a regular basis. Although caching could also create a liability under *The Indian Copyright Act, 1957*, the threat is minimal because it is likely to constitute fair use under Section 52(1) of the Act. Now, many countries also have specific legislation protecting users from copyright liability, under their respective copyright laws, created by caching.

However, as there appears to be no fair use clause for Section 43 of the IT Act, it is at least possible that parties resorting to hyperlinking without permission can be held in violation of that provision.[68]

XII. Hyperlinking And Patents

By hyperlinking or by using the technology or process itself, does the hyperlinking entity or the linking site infringe any patent? This would be the case if the hyperlinking technology is, or has been, patented. Any linking website would then be forced to pay a fee for using the technology, if challenged and found to be in violation.

The links-patent issue is closely related to another issue concerning the law of the Internet—the grant of software patents.

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[67] The relevant portion of Section 43 states: "If any person without permission of the owner or any other person who is incharge of a computer, computer system or computer network— (a) accesses or secures access to such computer, computer system or computer network; (b) downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium; ... he shall be liable to pay damages to by way of compensation not exceeding one crore rupees to the person so affected ... ."

[68] *See* Mohd. Salman Warris, "I. T. Act, 2000 And Copyright Issues", *at* http://www.asianlaws.org/projects/copyright_issues.htm.

Software patents are a relatively new phenomenon. Until the early 1980s, the US Courts generally considered software to be nothing more elaborate than applied mathematics and thus not patentable.

This anti-software bias changed slowly, as attorneys became savvier about describing the unique challenges of programming and judges understood the complexities of coding. In 1996, the United States Patent and Trademark Office (USPTO) issued its first guidelines intended to facilitate the patenting of computer software. Two years later, the federal case *State Street Bank and Trust Co.* v. *Signature Financial Group*[69] affirmed a relatively low bar for the patenting of software, listing a wide range of criteria under which programs could be considered to provide a useful, tangible and concrete result—a patent prerequisite. Essentially, State Street Bank said that any software with a practical use had a good shot at passing muster. In view of this, computer-related patent applications nearly doubled.[70]

However, the USPTO was unprepared to handle the increase in patent applications and ended up granting far too many patents than they should have. One reason for this happening is that when researching a patent application the USPTO is supposed to seek examples of "prior art" or similar inventions from the past that might disprove the novelty of the subject in question. The usual manner of going about this is by looking through peer-reviewed journals and other traditional scientific sources. But computing knowledge has been disseminated in much more haphazard ways—through mailing lists, at open-source conferences and in university dormitories, which could easily be ignored by USPTO authorities.[71]

Additionally, the patent granted is typically described in wide terms. Thus, this can allow a patent holder to claim he has a patent on a popular web software tool or process, thus potentially gaining millions of dollars.

A. British Telecom

The British Telecom's (BT) claim over patent to a hyperlink has been the main controversy relating to this branch of intellectual property. BT took

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[69] 149 F.3d 1368 (Fed. Cir. 23 July 1998), *available at* http://www.law.cornell.edu/patent/comments/96_1327.htm.

[70] Brendan I. Koerner, "Can You Patent Common Features Of The Internet?", 30 January 2003, *at* http://slate.msn.com/id/2077925/.

[71] *Ibid.*

pioneering American ISP, Prodigy, to court for royalties it claimed it was owed as the inventor of the hyperlink.[72]

BT stumbled upon the patent during a routine update of its 15,000 global patents in the summer of 2000. It sought to prove that the patent lodged with the USPTO back in 1980, long before the web existed, was valid. The company had claimed that every US hyperlink is its intellectual property and therefore subject to a licensing fee. If it ended up successful, every ISP in the US would have been liable to pay BT for the use of the technology. The United Kingdom (UK) patent has already expired so ISPs in the UK would escape without having to pay anything.[73] But in the US, the patent number 4,873,662, was issued to BT in 1989 and expires in 2006.

In June 2000, BT had contacted Prodigy and 16 other ISPs, including America Online, asking them to buy a hyperlink licence and when they refused, the company pursued Prodigy as a test case.[74] The hyperlink patent, known as the Sargent patent, was part of a technology called Prestel—an early system of linked computers that was being developed by the Post Office. BT was a part of the Post Office in those days. BT had argued that the Internet infringes the Sargent patent and that Prodigy facilitates infringement by its subscribers by providing them with access to the Internet.

Prodigy's counter was that the language used in the patent is too vague to apply to hyperlink technology as we know it today. Prodigy also had evidence in the form of a fuzzy black and white video, which showed a 1968 demonstration by Douglas Engelbart, creator of the ARPANET (widely considered to be the forerunner to the Internet), apparently demonstrating hypertext linking.[75] This buttressed an argument that the patent was invalid because the invention was not original.

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[72] Jane Wakefield, "Why BT Claims It Owns The Right To 'Click Here'", *BBC News Online*, 11 February 2002, *at* http://news.bbc.co.uk/1/hi/in_depth/sci_tech/2000/dot_life/1814080.stm.

[73] *Ibid.*

[74] Matt Loney, "BT Hit With Ruling In Patent Case", *CNET News.com*, 14 March 2002, *at* http://news.com.com/2100-1033-860407.html.

[75] *Ibid.*

BT lost its bid when US District Judge Colleen McMahon awarded Prodigy its motion for summary judgement to have the case dismissed, saying that no jury could find that Prodigy infringes BT's patent.[76]

The patent describes a system in which multiple users, located at remote terminals, can access data stored at a central computer. The Internet has no 'central computer' as described in the Sargent patent. Therefore, Judge McMahon said, since the Internet itself does not infringe the Sargent patent, "Prodigy cannot be liable for contributory infringement or active inducement for providing its users with access to the Internet."[77]

The ruling further states:

> "In contrast to what BT would have us believe, there are no disputed issues of material fact in this case. Instead, the two sides reach vastly different conclusions based on the same set of facts. I find that, as a matter of law, no jury could find that Prodigy infringes the Sargent patent ... either as part of the Internet or on its web server viewed separate from the Internet. Prodigy's motion for summary judgement is therefore granted."[78]

B. SBC Communications, Inc.

Telecom giant, SBC Communications, Inc. (SBC), which incidentally owned Prodigy, claims that it owns the right to links that stay visible on the page during navigation. SBC sent cease-and-desist letters to hundreds of website operators, accusing them of infringing an SBC patent covering "frames".[79]

Internet advocates have criticised the USPTO for granting patents covering popular website features and enabling patent owners to set up a toll booth on the Internet to collect royalties for use of such patented features.[80]

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[76] Matt Loney, "BT Loses Hyperlink Patent Case", *ZDNet UK*, 23 August 2002, *at* http://news.zdnet.co.uk/business/0,39020645,2121257,00.htm.

[77] *British Telecommunications Inc.* v. *Prodigy Communications Corp.* 22 U.S. Dist. LEXIS 15521 (22 August 2002 S.D.N.Y.).

[78] *Ibid.*

[79] Koerner *supra* n. 70.

[80] W. Scott Petty, "SBC Communications 'Frames' On-line Sellers By Seeking Royalties For Patent Covering Internet Frames", *King & Spalding*, *at* http://www.kslaw.com/library/articles.asp?1063.

These critics also denounce holders of Internet patents who seek to monetise their patent assets by setting up patent enforcement programmes to pursue licensing revenues and litigation objectives. A commonly asserted criticism is that many Internet and software patents are invalid in view of prior mainframe computing and data communications technologies. A favourite target of critics is Amazon.com, which has successfully sought patent protection for its on-line business models and has used patent litigation to battle with its competition.[81]

XIII. Conclusion

Rapid advances in technology such as hypertags[82] only make more urgent the need for regulation in this field. Many believe that to control linking is to alter the basic nature of the web. They also hold that regulation should keep itself out of the Internet as much as possible and protecting content on the web can be accomplished through technical means. However, this could end up being self defeating as only rich, powerful companies and large corporations would be able to protect their work technically and content owners of smaller, financially less powerful sites would not be able to protect their turf. This article has examined opinions on hyperlinking issues—both judicial and otherwise. Opinion generally has little or no effect of law and judicial opinion would have a binding effect only on its country of origin. Hyperlinking, in many cases, transcends international boundaries and judicial opinion of any one country cannot have more than a persuasive effect on the Judiciary of another country, thus diluting its relevance in an international situation. A specific comprehensive system of law simultaneously adopted by several countries would seem to be a solution; however enforcement may suffer since the

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[81] *Ibid.* Amazon's patents first came into the public eye in 1999 when the company obtained a patent for a technology that allowed on-line consumers to order, pay for and arrange for delivery of items sold via a website—all with a single-click of a mouse. Amazon's assertion of the "one-click" patent in an infringement lawsuit against competitor BarnesandNoble.com forced the latter to redesign its "Express Lane" on-line ordering system in 1999.

[82] Recently successfully tested, hypertags are considered the real-world equivalent of hyperlinks. Infrared mobile phones interact with a small electronic tag which is attached to an advertising poster or sign. To operate the tag one has to point the infrared port on the mobile phone to the poster or sign and the piece of content gets downloaded to the phone.

issue of jurisdiction on the Internet continues to be a vexed question. It is true that today most countries frame their intellectual property laws in concurrence with international conventions. However, different interpretations on crucial issues by different courts may still leave a lacuna in a uniformly accepted code of conduct for hyperlinking.

Hyperlinking issues are important and every country ought to have its say on what the law ought to be in this regard. In conclusion, a multi-country convention may best fit the requirement; for, if nothing else, it would give ample opportunity for mutual debate—a rarity in the history of the development of the Internet. Either way, the virtual world, as we know it, will never be the same.

AMENDMENACE: THE CONSTITUTION OF INDIA UNVEILED†

*Archana Balasubramanian** and *Namrata Yadav*Φ

I. INTRODUCTION

This article is not one of the usual debates on the controversies, which have plagued the Indian Constitution over the last five decades. On the contrary, it adopts a very different and an analytical approach towards unconstitutional action on the part of the different governments, which have come into power. This is an attempt to highlight the incautious behaviour of the Legislature and the Judiciary, which although being separate entities, have at times committed aberrations, sometimes against their very own consciousness. Though the Judiciary and the Legislature have reflected a very hermetic attitude, it cannot be said that they have completely safeguarded themselves from this external pressure. The consequence, therefore, is the annihilation of the very existence of Indian democracy and what is appalling is that everything remains obscured, overlooked and undetected, reflecting a very naïve state of mind of the Indian citizenry. We wish to create a transparency by analysing these perplexities in the constitutional history, which are yet to be explored.

In this process of charting Indian constitutional history, we also wish to expound the scope of amending powers under Article 368 and to analyse, in light of various judgments, what the real powers of the Parliament and the Judiciary are.

The Supreme Court, in the second half[1] of its existence, has used the ultimate power, which is the power to annul the amendments to the Constitution,

† This article reflects the position of law as on 31 March 2004.

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1 The authors believe that Indian constitutional history can be divided into two parts: from independence upto the emergency period i.e. 1977, which was dominated by the Legislature, and the second half i.e. after 1977 when the Judiciary, through judicial activism, emerged as the stronger institution.

extensively. The argument we propose is that a weakened political class, anxious to show adherence to the rule of law, has quietly acquiesced in judicial primacy. Now, this judicial primacy could stand in the way of political and economical changes, which may be felt necessary, as is shown ahead.

II. Article 368—Raison D'être

The Constitution of any country is the fundamental law of the land, often described as a superior or supreme law[2] with higher sanctity and more permanence than ordinary legislation. Nevertheless, an adequate provision for its amendment is considered implicit in the very nature of the Constitution. Pundit Jawaharlal Nehru, while explaining the necessity of flexibility in the Constitution, observed in the Constituent Assembly:

> "While we want this Constitution to be as solid and as permanent in structure as we can make it, nevertheless there is no permanence in Constitutions. There should be a certain flexibility ... in any event, we should not make a Constitution, such as some great countries have, which are so rigid that they ... cannot be adopted easily to changing conditions, ... what we may do today may not be wholly applicable tomorrow."[3]

And thereafter Article 368[4] came into being.

The Constitution vests in the Judiciary the power to adjudicate upon the constitutional validity of all laws. If a law made by Parliament or the State Legislatures violates any provision of the Constitution, the Supreme Court has the power to declare such a law invalid or *ultra vires.* This check notwithstanding, the founding fathers wanted the Constitution to be an adaptable document rather than a rigid framework for governance. Hence, Parliament was invested with the power to amend the Constitution. When the framers of the Constitution provided the 'procedure' for its amendment in Article 368, no one could have anticipated that the extent of the amending power would become a source of continuing conflict between

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2 K. C. Wheare, *Modern Constitutions* (1st edn Oxford University Press London 1951) 91.

3 C. A. Deb., vol. VII, 8 November 1948, 322–323.

4 "Article 368 (Power of Parliament to amend the Constitution and procedure therefore):
(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

Parliament and the Supreme Court. In fact, within a year of promulgation, the Constitution witnessed changes in its text to overturn judicial decisions on agrarian reforms, free speech, positive discrimination and compensatory discriminations; something which the founding fathers of the Constitution could hardly have foreseen.

Nehru's evocative indictment that lawyers had purloined the Constitution did not stop the tussle.[5] It went on. It is to be noted that over the past 53 years, the Constitution has been amended nearly 94 times. Some of the amendments simply tidied up matters to meet the exigent situations. The controversial amendments, with which we will primarily be dealing, sought to overturn judicial decisions, which successive governments claimed were obstructing social justice and the nation's progress.

Article 368 of the Constitution gives the impression that Parliament's amending powers are absolute and encompass all parts of the document. But the Supreme Court has acted as a brake to the legislative enthusiasm of Parliament ever since independence. With the intention of preserving

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(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:
Provided that if such amendment. seeks to make any change in—
(a) article 54, article 55, article 73, article 162 or article 241, or
(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
(c) any of the Lists in the Seventh Schedule, or
(d) the representation of States in Parliament, or
(e) the provisions of this article,
the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

(3) Nothing in article 13 shall apply to any amendment made under this article.

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article."

[5] XII–XIII Parliamentary Debates (P. D.) (Pt. II) Col. 8832 (17 May 1951).

the original ideals envisioned by the constitution-makers, the Supreme Court pronounced that Parliament could not distort, damage or alter the basic features of the Constitution under the pretext of amending it. The phrase 'basic structure' itself cannot be found in the Constitution. The Supreme Court recognised this concept for the first time in the historic *Kesavananda Bharati case*[6] in 1973. Ever since, the Supreme Court has been the interpreter of the Constitution and the arbiter of all amendments made by Parliament.

A. What Are Constitutional Amendments?

Constitutional amendments are not precisely defined. However from the body of Article 368, one can observe three categories of amendments.[7]

- Firstly, those that can be effected by Parliament by a simple majority such as that required for the passing of any law—the amendments contemplated in Article 4, Article 169, Para 7 of the Fifth Schedule and Para 21 of Sixth Schedule fall within this category and are specifically excluded from the purview of Article 368, which is the specific provision in the Constitution dealing with 'the power and procedure for the amendment of the Constitution';
- Secondly, those that can be effected by the Parliament by a prescribed 'special majority'; and
- Thirdly, those that require, in addition to such 'special majority', ratification by at least one half of the State Legislatures.[8]

B. Constitutional Amendments Start As Early As 1951[9]

Parliament's authority to amend the Constitution, particularly the chapter on the Fundamental Rights of citizens, was challenged as early as in 1951. After independence, several laws were enacted in the States with the aim of reforming land ownership and tenancy structures. This was in keeping with the ruling Congress party's electoral promise of implementing the

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6 *Kesavananda Bharati* v. *Union of India* AIR 1973 SC 1461 (*Kesavananda Bharati case*).

7 *Sankari Prasad* v. *Union of India* AIR 1951 SC 455 (*Sankari Prasad case*).

8 Dr. R. C. Bharadwaj (ed), *Constitution Amendments in India*, (Published for the Lok Sabha Secretariat) 2.

9 N. A. Palkhivala, *Supreme Court on Amendment of Fundamental Rights in Indian Constitution* (Law Publishing House Lucknow 1973) iii.

socialistic goals of the Constitution, as laid down in Article 39(b) and (c), which required equitable distribution of resources of production among all citizens and prevention of concentration of wealth in the hands of a few (Part IV—Directive Principles of State Policy). The property owners who were adversely affected by these laws petitioned the courts.[10] The courts struck down the land reform laws saying that they transgressed the fundamental right to property guaranteed by the Constitution. Piqued by the unfavourable judgments, Parliament placed these laws in the Ninth Schedule[11] of the Constitution thereby effectively removing them from the scope of judicial review.

The authors are of the opinion that the Ninth Schedule was created with the primary objective of preventing the Judiciary, which upheld the citizens' right to property on several occasions, from derailing the Congress Government's agenda for a social revolution. With this agenda in mind, laws relating to the nationalisation of certain sick industrial undertakings, the regulation of monopolies and restrictive trade practices,[12] transactions in foreign exchange, abolition of bonded labour, ceiling on urban land holdings, the supply and distribution of essential commodities and reservation benefits provided for Scheduled Castes and Tribes in Tamil Nadu were added to the Ninth Schedule through various constitutional amendments.[13] This protective umbrella covers 284 laws passed by State Legislatures.[14]

In the *Sankari Prasad case*[15] and the *Sajjan Singh case*, the Court rejected both arguments namely:

- That the Parliament and the State Legislatures are clearly prohibited from making any laws that take away or abridge the fundamental rights guaranteed to a citizen; and
- Amendments to the Constitution had the status of a law as provided under Article 13(2).[16]

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[10] *Sajjan Singh* v. *State of Rajasthan* AIR 1955 SC 845 (*Sajjan Singh case*).

[11] Inserted by the *Constitution (First Amendment) Act, 1951.*

[12] The *Monopolies and Restrictive Trade Practices Act, 1969* (Central Act 54 of 1969).

[13] Entry 93 onwards of the Ninth Schedule.

[14] Position of law as on 21 January 2004.

[15] AIR 1951 SC 455, 458.

[16] Article 13(2) states that any law made after the Constitution came into force cannot be repugnant to the provisions of Part III i.e. the part containing the fundamental rights.

Significantly though, two dissenting Judges in the *Sajjan Singh case* raised doubts over whether the fundamental rights of citizens could become a plaything of the majority party in Parliament. It is pertinent to note that the Supreme Court, thirty years later, in the *Waman Rao case*[17] brought to the surface the necessity to prevent a fraud on the Constitution because laws, which had nothing to do with agrarian reform or directive principles, were included in the Ninth Schedule merely to protect them from constitutional challenge.

III. The Immutable Struggle

In 1967, a Bench of the Supreme Court consisting of 11 judges reversed its earlier position. Delivering its 6:5 majority judgment in *Golak Nath* v. *State of Punjab*,[18] Subba Rao, C. J. put forth the curious position that Article 368, which contains provisions relating to the amendment of the Constitution, merely laid down the amending procedure and did not confer upon Parliament the power to amend the Constitution. He laid down that the amending powers conferred by Article 368 were, in reality, residuary powers derived from Article 248 read with Entry 97 of List I of the Seventh Schedule and Articles 245 and 246.[19]

On the contrary, Hidayatullah, J. opined that the power of amendment was not located in the residuary power of legislation. Article 368 provides the procedure, which when complied with results in an amendment of the Constitution. If it could be called a power at all, it is a legislative power. But it was *sui generis*.[20]

In this case, the Supreme Court has held that any constitutional amendment is deemed to be law as described under Article 13(2). This arose from the reasoning that the amending power and legislative powers of the Parliament were essentially the same. Therefore, since Article 13(2) barred any law, which abridged or took away fundamental rights, one can come to the conclusion that Parliament, through a constitutional amendment, cannot abridge or take away fundamental rights.

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17 *Waman Rao* v. *Union of India* (1981) 2 SCC 362 (*Waman Rao case*).

18 (1967) 2 SCR 762 (*Golak Nath case*).

19 (1967) 2 SCR 762, 807–808.

20 H. M. Seervai, *Constitutional Law of India* (3rd edn N. M. Tripathi Pvt. Ltd. Mumbai 1983) vol. III, 2637.

The majority judgment invoked the concept of 'implied limitations' on Parliament's power to amend the Constitution. This view held that the Constitution gives a place of permanence to the fundamental freedoms of the citizen. In giving the Constitution to themselves, the people had reserved the fundamental rights for themselves. Article 13, according to the majority view, expressed this limitation on the powers of Parliament. Parliament could not modify, restrict or impair fundamental freedoms due to this very scheme of the Constitution and the nature of freedoms granted under it. The judges stated that the fundamental rights were so sacrosanct and transcendental in importance that they could not be restricted, even if such a move were to receive unanimous approval of both Houses of Parliament. They observed that a Constituent Assembly might be summoned by Parliament for the purpose of amending the fundamental rights if necessary.[21]

Within a few weeks of the verdict in the *Golak Nath case*, the Congress party suffered heavy losses in the parliamentary elections and lost power in several States. Though a private member's bill tabled by Barrister Nath Pai,[22] which sought to restore the supremacy of Parliament's power to amend the Constitution was introduced and debated both on the floor of the House and in the Select Committee, it could not be passed due to political compulsions of the time. But the opportunity to test parliamentary supremacy presented itself once again when Parliament introduced laws to provide greater access to bank credit for the agricultural sector and ensure equitable distribution of wealth and resources of production by:

- Nationalising banks[23] and
- Derecognising erstwhile princes in a bid to take away their Privy purses,[24] which were promised in perpetuity as a sop to accede to the Union at the time of India's independence.

Parliament reasoned that it was implementing the directive principles of state policy but the Supreme Court struck down both moves. By now, it was clear that the Supreme Court and Parliament were at loggerheads

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[21] (1967) 2 SCR 762, 805.

[22] Seervai *supra* n. 20, 2638.

[23] *R. C. Cooper* v. *Union of India* AIR 1970 SC 564.

[24] *Madhav Rao Scindia* v. *Union of India* (1971) 1 SCC 437.

over the relative position of the fundamental rights vis-à-vis the directive principles of state policy.

A. Right To Property: It's Journey From Article 19(1)(f) To Article 300A

Originally, the Constitution guaranteed a citizen the fundamental right to acquire, hold and dispose of property under Article 19(1)(f). Under Article 31, he could not be deprived of his property unless it was acquired by the State, under a law that determined the amount of compensation he ought to receive against such an acquisition. Property owned by an individual or a firm could be acquired by the State only for public purposes and upon payment of compensation determined by the law. Article 31 has been modified six times; beginning with the First Amendment in 1951, this fundamental right was progressively curtailed until finally in 1978, Article 19(1)(f) and Article 31 were deleted by the Forty-fourth Amendment.[25] Instead Article 300A was introduced in Part XII, thereby making the right to property only a constitutional right. This provision implies that the Executive arm of the Government (civil servants and the police) could not interfere with the citizen's right to property. However, Parliament and State Legislatures had the power to make laws affecting the citizens' right to property.[26] We believe that, at one level, the battle was about the supremacy of Parliament vis-à-vis the power of the courts to interpret and uphold the Constitution. At another level, an affluent class, much smaller than that of the large impoverished masses for whose benefit the Congress Government claimed to implement its socialist development programme over the sanctity of property as a fundamental right, jealously guarded the contention.

Through a spate of amendments made between July 1971 and June 1972,[27] Parliament sought to regain lost ground. It restored for itself the 'absolute power' to amend any part of the Constitution including Part III, dealing with fundamental rights.[28]

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[25] Articles 19(1)(f) and 31 (Compulsory acquisition of property) were repealed by the *Constitution (Forty-fourth Amendment) Act, 1978.*

[26] Refer to Part II B of this article.

[27] During this period of two years the Parliament enacted the Twenty-fourth, Twenty-fifth, Twenty-sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth and Thirtieth Amendment Acts.

[28] The *Constitution (Twenty-fourth Amendment) Act, 1971.*

Even the President ceased to have the power to withhold his assent to any Amendment Bill, which was passed by both Houses of Parliament. Several curbs on the right to property were passed into law. The right to equality before the law and equal protection of the laws (Article 14) and the fundamental freedoms guaranteed under Article 19 were made subordinate to the directive principles of state policy contained in Article 39(b) and (c).[29] Privy purses of erstwhile princes were abolished and an entire category of legislation dealing with land reforms was placed in the Ninth Schedule beyond the scope of judicial review.[30]

B. The Kesavananda Milestone

The *Kesavananda Bharati case* dealt with a challenge to these three amendments (Twenty-fourth, Twenty-fifth and Twenty-ninth).[31] Inevitably, the constitutional validity of these amendments was challenged before a 'Full Bench' (13 Judges) of the Supreme Court. It is outside the scope of this article to undertake a detailed analysis of the 11 individual judgments delivered by the Full Bench of the Hon'ble Supreme Court or to reconcile the views of Khanna, J., who tilted the balance, with those of the Sikri, C. J. and Shelat, Hegde, Grover, Jaganmohan Reddy and Mukherjea, JJ. in order to deduce the majority view.

Only nine Judges signed a summary statement,[32] which records the most important conclusions reached by them in this case, despite the order being passed unanimously. Granville Austin notes that there are several discrepancies amongst the points contained in the summary signed by the judges and the opinions expressed by them in their separate

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[29] The *Constitution (Twenty-fifth amendment) Act, 1971*.

[30] The *Constitution (Twenty-sixth Amendment) Act, 1971* and the *Constitution (Twenty-ninth Amendment) Act, 1972* respectively.

[31] The *Constitution (Twenty-ninth Amendment) Act, 1972* inserted the *Kerala Land Reforms (Amendment) Act, 1969* and the *Kerala Land Reforms (Amendment) Act, 1971* in the Ninth Schedule.

[32] The following summary, though signed by only nine of the 13 Judges, has ever since been accepted as the Court's view: *Golak Nath case* overruled; Article 368 does not enable the Parliament to alter the basic structure of the framework of the Constitution; The *Constitution (Twenty-fourth Amendment) Act, 1971* is valid; Section 2(a) and (b) of the *Constitution (Twenty-fifth Amendment) Act, 1971* are valid; The first part of Section 3 of the *Constitution (Twenty-fifth Amendment) Act, 1971* is valid. The second part, namely, "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy," is invalid; and The *Constitution (Twenty-ninth Amendment) Act, 1971* is valid.

judgments.[33] Nevertheless, the seminal concept of 'basic structure' of the Constitution gained recognition in the majority verdict.

The *Kesavananda Bharati* case, with its concomitant basic structure doctrine, is one of the most remarkable cases of the century. It represents the high point of judicial innovation and alters the very basis on which the constitutional power is divided between the plenary amendatory bodies and the Judiciary.[34] However the judges were clear that an amendment to the Constitution was not the same as a law as understood by Article 13(2).

Therefore, the *Golak Nath case*[35] has been overruled by this case. It was held by Hegde, J. that the then Supreme Court, despite being aware of the gravity of the issue before them, turned a blind eye to the practical implications and the realistic consequences of their judgment. As has been aptly laid down in the *Kesavananda Bharati case* by Hegde, J., the Court did not and could not overrule all those laws passed between 1951 and 1967 by relying on the doctrine of prospective overruling and acquiescence.[36]

In the same case Matthew, J. strongly expressed the view that the Constitution derives sovereignty from the people who had given it to themselves.[37] The Constitution has further created lesser and minor sovereigns in whom there is vested an amending power. This sovereign, in the context of Indian democracy, is Parliament. Parliament's power of amending is therefore as unlimited as that of the people (in whom there is vested the real power to amend the Constitution). Hence, the concept of 'implied limitation is overruled'.

Most importantly, seven of the 13 judges in the *Kesavananda Bharati case*, including Sikri, C. J. who signed the summary statement, declared that Parliament's constituent power was subject to inherent limitations. Parliament could not use its amending powers under Article 368 to damage, emasculate, destroy, abrogate, change or alter the basic structure or framework of the Constitution.

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[33] Austin, *Working a Democratic Constitution: The Indian Experience* (Oxford University Press New Delhi 1999) 265.

[34] Raju Ramachandran, "Supreme Court And The Basic Structure Doctrine", in B. N. Kripal, Ashok Desai *et al* (ed), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press New Delhi 2000) 108.

[35] (1967) 2 SCR 762.

[36] AIR 1973 SC 1461, 1618.

[37] AIR 1973 SC 1461, 1926.

The following observations by Shelat and Grover, JJ. (that received Khanna, J.'s concurrence), are pertinent:

> "Every Constitution is expected to endure for a long time. Therefore, it must necessarily be elastic. It is not possible to place society in a strait-jacket. The society grows, its requirements change. The Constitution and the laws may have to be changed to suit those needs. No single generation can bind the course of generations to come."[38]

1. Basic Features Of The Constitution According To The *Kesavananda Verdict*

Each judge laid out separately what he thought were the basic or essential features of the Constitution. Seven of the 13 judges upheld the validity of the *Constitution (Twenty-fourth Amendment) Act, 1971* conditionally. Six of these seven judges held that there was an inherent or implied limitation on the amending power, which precluded the Parliament from amending the basic structure or framework of the Constitution. All seven Judges gave illustrations of what they considered to be the basic structure but Khanna, J. expressly held that right to property was not a part of the basic structure.

a. *The Majority View*

There was no unanimity of opinion within the majority view either. Some of the judges believed that certain basic features were more important than others. The important features highlighted were the democratic republic form of government, separation of powers between the three organs, the federal character as well as the supremacy of the Constitution, unity and integrity of the nation, individual freedom and the secular character of the Constitution. This, however, only led to ambiguity.

b. *The Minority View*

The minority view delivered by A. N. Ray (who was appointed to the position of Chief Justice of India soon after the pronunciation of the verdict in the *Kesavananda case*), M. H. Beg, K. K. Mathew and S. N. Dwivedi, JJ. also agreed that the *Golak Nath case* had been decided wrongly. They

[38] AIR 1973 SC 1461, para 634.

upheld the validity of all three amendments challenged before the Court. Ray, J. stated that all parts of the Constitution were essential and no distinction could be made between its essential and non-essential parts. All the dissenting Judges agreed that Parliament could make fundamental changes in the Constitution by exercising its power under Article 368.

H. M. Seervai, one of the great critics of the Constitution, opined that the summary signed by nine judges has no legal effect at all and is not law declared under Article 141. Firstly, the order passed by the Full Bench was a unanimous order, so no occasion arose for determining what the majority of the Judges had decided although four of them refrained from signing the summary. This brings out the discrepancies in the opinion of the Bench regarding the content of the majority judgment.

Secondly, since this judgement had affected the rights of parties appearing before the Hon'ble Court, it was imperative that they be heard according to the principles of natural justice. This element was found lacking in this judgment and has been largely criticised.[39]

Thus, while overruling the *Golak Nath case*, the Court went several steps ahead in asserting its power of judicial review. The *Golak Nath case* had confined itself to deciding the issue relating to amendments that purport to abridge or take away Fundamental Rights. But the *Kesavananda case* gave the Court the power to scrutinise any amendment to see if it violated the basic structure, which it did not define, except illustratively.

C. Basic Structure Reaffirmed—The Indira Gandhi Election Case[40]

In 1975, the Supreme Court once again had the opportunity to pronounce on the basic structure of the Constitution. The Allahabad High Court, on grounds of electoral malpractice, upheld a challenge to Prime Minister Indira Gandhi's election victory in 1975.[41] Pending appeal, Krishna Iyer, J. granted a stay that allowed Mrs. Indira Gandhi to function as Prime Minister on the condition that she should not draw a salary and speak or vote in Parliament until the case was decided. Meanwhile, Parliament passed the *Constitution (Thirty-ninth Amendment) Act, 1975.* The *malafide*

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[39] Seervai *supra* n. 20, 2461.

[40] *Indira Gandhi* v. *Raj Narain* AIR 1975 SC 2299 (*Indira Gandhi case*).

[41] AIR 1975 SC 2299, 2313. Mrs. Gandhi was disqualified from contesting elections for six years.

intention of the Government was proved by the haste in which the amendment was passed.[42]

This amendment removed the authority of the Supreme Court to adjudicate petitions regarding elections of the President, Vice President, Prime Minister and Speaker of the Lok Sabha. Instead, a body constituted by Parliament would be vested with the power to resolve such election disputes. Section 4 of the Amendment Bill effectively thwarted any attempt to challenge the election of an incumbent, occupying any of the above offices, in a court of law.

Four of the five judges on the Bench (constituted in order to adjudicate the issue relating to the validity of Mrs. Indira Gandhi's election) upheld the *Thirty-ninth Amendment*, but only after striking down that part which sought to curb the power of the Judiciary to adjudicate in the current election dispute.[43] One judge, Beg, J., upheld the amendment in its entirety. Mrs. Gandhi's election was declared valid on the basis of the amended election laws. The judges grudgingly accepted Parliament's power to pass laws that have a retrospective effect.

Ray, C. J., in the *Indira Gandhi case*, maintained:

> "Clause 4 in Article 329 A has done four things. First, it has wiped out not merely the judgment but also the election petition and the law relating thereto. Secondly, it has deprived the defeated candidate, of the right to raise a dispute about the validity of the election by not having provided another forum. Thirdly, there is no judgment to deal with and no right or dispute to adjudicate upon. Fourthly, the constituent power of its own legislative judgment has validated the election."[44]

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[42] The Bill was introduced on 7 August 1975 and passed by the Lok Sabha the same day. The Rajya Sabha passed it the next day and the President gave his assent two days later. The amendment was ratified by the State Legislatures in special Saturday sessions. It was gazetted on 10 August 1975. When the Supreme Court opened the case for hearing the next day, the Attorney General asked the Court to throw out the case in the light of the amendment. This was clearly a pre-emptive action designed to benefit Mrs. Indira Gandhi, whose election was the subject of the ongoing dispute.

[43] The Supreme Court struck down Section 4 of the *Constitution (Thirty-ninth Amendment) Act, 1975*, i.e. Article 329A of the Constitution, as it existed in 1975.

[44] AIR 1975 SC 2299, 2320.

1. Basic Features Of The Constitution According To The *Indira Gandhi Case*

Again, each judge expressed views about what amounts to the basic structure of the Constitution.

According to H. R. Khanna, J., democracy is a basic feature of the Constitution and includes free and fair elections. K. K. Thomas, J. stated that the power of judicial review is an essential feature.[45] Mathew, J. agreed with Ray, C. J. that ordinary laws did not fall within the purview of basic structure. But he held that democracy was an essential feature and that election disputes must be decided on the basis of law and facts by the Judiciary.[46] Y. V. Chandrachud, J. listed four basic features, which he considered un-amendable.[47]

A. N. Ray, C. J. laid down that the constituent power of Parliament was above the Constitution itself and therefore not bound by the principle of separation of powers. Parliament could, therefore, exclude laws relating to election disputes from judicial review. He opined, strangely, that democracy was a basic feature but not free and fair elections.[48] He held that ordinary legislation was not within the scope of basic features.

2. Observations

For the first time, an amendment to the Constitution was challenged not in respect of rights of property or social welfare but with reference to an electoral law designed to ensure free and fair elections, which lies at the basis of a democratic parliamentary form of government.

Secondly, for the first time an amendment to the Constitution purported to decide an election dispute between two contesting parties and to direct the Supreme Court to dispose of the appeal by holding that Article 329A(4) had declared the appellant's election valid.

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[45] AIR 1975 SC 2299, 2351–52. To put a stamp on the validity of the election of a candidate by saying that the challenge to such an election could not be governed by any election law and that the said election, in any case, would be valid and immune from any challenge runs counter to accepted norms of free and fair elections in all democratic countries.

[46] AIR 1975 SC 2299, 2383.

[47] The four features listed by Y. V. Chandrachud, J. were: sovereign democratic republic status; equality of status and opportunity of an individual; secularism and freedom of conscience and religion; and 'government of laws and not of men' i.e. the rule of law.

[48] AIR 1975 SC 2299, 2320.

Finally, for the first time it was contended that in exercise of its constituent power, Parliament could exercise judicial power and it had done so by enacting Article 329A.[49]

Despite the critical analyses and the shortcomings of the said case, one must appreciate that the *Indira Gandhi case* helped disclose the intimate connection between the various provisions of the Constitution, which at first sight might have appeared disconnected. If one reads the Constitution in this light, it would be clear that the framers of our Constitution succeeded in solving what Matthew J. described as the major problem of human society, namely, "to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licensed."[50] Our Constitution combines liberty with law by conferring fundamental rights to secure liberty and by imposing restrictions on those rights to prevent their degeneration into a licence. And liberty and law are secured by being rounded in a broad separation of powers and in an independent Judiciary with the power of judicial review. One must recall the spirit in which our Constitution was framed, for the same spirit ought to govern its amendment.

The *Indira Gandhi case* showed the futility of theories of parliamentary supremacy in the face of hard reality. While courts normally refused to be cowed down by arguments '*in terrorem*' and hold that the possibility of abuse of power is not the test of its existence, here was naked abuse of power manifesting itself in the form of amendments to the Constitution solely to keep one individual in office, passed by a pliant majority while members of the opposition were in jail. An anti-democratic doctrine had to be used to prevent the murder of democracy by a grotesque mutilation of the Constitution. At the same time, however, it must be remembered that the election of the Prime Minister was saved because the retrospective amendment to the electoral law passed the well-recognised judicial tests regarding validation.[51]

[49] Seervai *supra* n. 20, 2645.

[50] AIR 1975 SC 2299, 2380.

[51] Ramachandran *supra* n. 34, 117.

D. Review Bench Of The Kesavananda Case—Dissolved Two Days After It Was Formed

In the midst of emergency, two further developments took place. The first was an unsuccessful attempt on the part of the Government to get the *Kesavananda Bharati case* reconsidered, with Ray, C. J. willingly constituting a bench for the purpose. It must be remembered that no specific petition seeking a review of the same case was filed before the Apex Court—a fact noted with much chagrin by several members of the Bench. N. A. Palkhivala, appearing on behalf of a coal mining company, eloquently argued against the move to review the *Kesavananda Bharati case.*[52] Ultimately, Ray, C. J. dissolved the Bench after two days of hearings. One could suspect the Government's indirect involvement in this episode as seeking to undo an unfavorable judicial precedent set by the monumental verdict. However, no concerted efforts by the Government were made to pursue the case further.

The second was the enactment of the *Constitution (Forty-second) Amendment Act 1976,*[53] which amended Article 368 by completely shutting out judicial review of amendments to the Constitution.[54]

E. Sardar Swaran Singh Committee Report: Directive Principles Versus Fundamental Rights[55]

The next development was the Swaran Singh Committee Report. The Congress Party President constituted a 10-member committee, headed by Mr. Swaran Singh, on 26 February 1976.

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[52] N. A. Palkhivala, *We The People* (16th edn UBS Publishers' Ltd Calcutta 2001) 188–189.

[53] *Supra* n. 8. It is to be noted that though several features of the Forty-second Amendment were removed by the Forty-third and the Forty-fourth Amendments passed by the Janata Government, which came into power after Mrs. Gandhi's defeat. The Forty-fifth Amendment, which had proposed to amend the Article 368 with provisions for a referendum and with an enumeration of basic features in the article itself, fell through as the Janata Party did not have the requisite majority in the Rajya Sabha.

[54] Two other important aspects of the Forty-second Amendment were: (1) amendment of Article 31C by protecting all laws that purported to implement any of the Directive Principles as against the earlier Article 31C, which referred only to the Directive Principles, contained in Article 39(b) and (c) and (2) insertion of the words 'secular' and 'socialist' in the preamble in its description of the nature of state.

[55] *See* M. C. Kagzi, *June Emergency and Amendments* (1st edn 1977) 7–8.

Based on its recommendations, the Government incorporated several changes to the Constitution including the Preamble, through the Forty-second amendment. (The amendment was passed in 1976 and came into effect on 3 January 1977.) The wide span of the various proposals for constitutional reforms included among others:

- The plenarity of legislative power of Parliament, and also the State Legislatures in the sphere of social legislation in general and in particular for the implementation of the directive principles of state policy should be made unchallengeable. The laws made for the purpose should be deemed immune from judicial review by suitably expanding the scope of Article 31C.
- A Constitution Bench for consideration of constitutional matters should be bigger than a five-judge bench and such matters should be decided by a two-thirds majority instead of simple majority.

The Swaran Singh Committee basically proposed that the Fundamental Rights of the common man be made subordinate to Directive Principles of State Policy, such that individual rights are given up for common good. It can be said that the Fundamental Rights that represent the claims of the individual have a large social importance and that restrictions in the interest of society are imposed on the rights. It is true that the only article, which refers to justice—social, economic and political—is Article 38 in Part IV of the Constitution, but the concept of justice is not limited to directive principles only. There can be no justice without equality before the law of all persons as enshrined in Article 14 under Part III of the Constitution.

F. Basic Structure Doctrine Reapplied—The Minerva Mills Case And The Waman Rao Case

Within less than two years of the restoration of Parliament's amending powers to near absolute terms, the *Constitution (Forty-second Amendment) Act, 1976* was challenged before the Supreme Court by the owners of Minerva Mills, Bangalore.[56] The *Minerva Mills case*[57] represents the assertion of judicial supremacy without contest.

[56] Minerva Mills was a sick industrial firm that was nationalised by the Government in 1974.

[57] *Minerva Mills Ltd* v. *Union of India* (1980) 3 SCC 625 (*Minerva Mills case*).

In this case, it was argued by N. A. Palkhivala that Section 55 of the Amendment[58] had placed unlimited amending power in the hands of Parliament. The attempt to immunise amendments to the Constitution against judicial review violated the doctrine of basic structure that had been recognised by the Supreme Court in the *Kesavananda Bharati case* and the *Indira Gandhi case.* He further contended that the amended Article 31C was constitutionally bad as it violated the Preamble of the Constitution and the Fundamental Rights of citizens. It also took away the power of judicial review.

Y. V. Chandrachud, C. J., while delivering the majority judgment (4:1), upheld both contentions. The majority view upheld the power of judicial review of amendments to the Constitution. They maintained that clauses (4) and (5) of Article 368 conferred unlimited power on Parliament to amend the Constitution. They said that this deprived courts of the ability to question the amendment even if it damaged or destroyed the Constitution's basic structure. The judges, who concurred with Y. V. Chandrachud, C. J., ruled that a limited amending power itself is a basic feature of the Constitution.

Bhagwati, J., the dissenting Judge, also agreed with this view stating that no authority, howsoever lofty, could claim to be the sole judge of its power and actions under the Constitution. He also believed that such a position seems contrary to the philosophy of separation of powers that characterise the structure of governance in India. The Constitution provides for a scheme of checks and balances between the three organs of Government namely, the Legislature, the Executive and the Judiciary, against any potential abuse of power.[59]

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[58] The *Constitution (Forty-second) Amendment Act, 1976* (corresponding to Article 368(4) and (5)).

[59] For example, the Executive appoints the Judges of the Supreme Court and the High Courts in the States, i.e. the President acting on the advice of the Prime Minister and the Chief Justice of the Supreme Court. But they may be removed from office only if they are impeached by Parliament. This measure helps the Judiciary to function without any fear of the Executive. Similarly, the Executive is responsible to Parliament in its day-to-day functioning. While the President appoints the leader of the majority party or a person, who he believes commands a majority in the Lok Sabha, a Government is duty bound to lay down power if the House adopts a motion expressing no confidence in the Government.

It is, however, necessary to point out that a subsequent Constitution Bench, in *Sanjeev Coke Manufacturing Company* v. *Bharat Coking Coal Ltd*,[60] expressed serious misgivings about the decision in the *Minerva Mills case.*

> "[W]e confess that the case has left us perplexed. ... We have serious reservations on the question whether it is open to a court to answer academic or hypothetical questions on such considerations, particularly so when serious constitutional issues are involved. We (Judges) are not authorised to make embodied pronouncements on serious and cloudy issues of constitutional policy without the battle lines properly drawn. Judicial pronouncements cannot be immaculate legal conceptions. It is but right that no important point of law should be decided without a proper lis between parties properly arranged on either sides and on crossing of swords. We think it is inexpedient for the Supreme Court to delve into problems which do not arise and express opinions thereon."[61]

In the *Waman Rao case*, which relates to a similar dispute involving agricultural property, the Supreme Court held that all amendments to the Constitution made after the date of the *Kesavananda Bharati* judgment were open to judicial review.[62] All laws placed in the Ninth Schedule after the date of the *Kesavananda Bharati* judgment were also open to review in the courts. They could be challenged on the ground that they were beyond Parliament's constituent power or that they have damaged the basic structure of the Constitution. In essence, the Supreme Court 'struck a balance between its authority to interpret the Constitution and Parliament's power to amend it'. This balance was also possible because the Mrs. Indira Gandhi, who returned to power in 1980, was a different person. After having been chastened by her defeat in the 1977 elections and having had to live down her image as a destroyer of institutions, she could not have risked being seen again as tinkering with the Constitution or confronting the Judiciary.[63]

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[60] (1983) 1 SCC 147.

[61] (1983) 1 SCC 147, para 11.

[62] (1981) 2 SCC 362. The Supreme Court decided this case along the *Minerva Mills case*. Bhagwati, J., who was in the minority again, incorporated his opinions on both the cases in a single judgment.

[63] Granville Austin, "The Supreme Court And The Struggle For Custody Of The Constitution", in B. N. Kripal, Ashok Desai *et al* (ed), *Supreme But Not Infallible: Essays*

The *Minerva Mills case* and the *Waman Rao case* gave the Court the opportunity to regain the role of 'sentinel', which had suffered significant erosion during the Emergency. Though it had, in the *Indira Gandhi case*, struck down a constitutional perversion, it had failed to protect the citizen's liberty in *A. D. M. Jabalpur* v. *Shivkant Shukla.*[64]

G. Other Applications Of The Basic Structure Doctrine

In the *Indira Gandhi case*, the question whether the Basic Structure Doctrine could be used to invalidate ordinary legislation was negated by three judges, who clearly held that the doctrine could be applied only to amendments to the Constitution. This appears to be self-evident. An ordinary legislation would be unconstitutional if:

- It violates a fundamental right; or
- It is passed without legislative competence over the subject; or
- It offends a specific article of the Constitution.

Though the position was reiterated in *V. C. Shukla* v. *Delhi Administration*[65] and *Minerva Mills II* v. *Union of India*,[66] the Basic Structure Doctrine was resorted to in the case of *Ismail Faruqui* v. *Union of India*[67] to invalidate an ordinary legislation dealing with the demolished Babri Masjid, namely the *Ayodhya (Acquisition of Certain Areas) Act, 1993.* Similarly, in *G. C. Kanungo* v. *State of Orissa*,[68] the Court resorted to this doctrine to invalidate an arbitration law. These two cases illustrate the danger of an easy resort to the basic structure *mantra* when the Court could have invalidated the

in Honour of the Supreme Court of India (Oxford University Press New Delhi 2000). It is important to understand the circumstances that surrounded Mrs. Indira Gandhi. Her son, Sanjay Gandhi, died in 1981. In 1984, after her assassination, Rajiv Gandhi came to power. His primary focussed on technological modernisation and not on reassertion of parliamentary supremacy.

64 (1976) 2 SCC 521. This case is widely known as the *Habeas Corpus case*. The aggrieved was refused the writ of *habeas corpus* during emergency by the Additional District Magistrate of Jabalpur, which was struck down by the High Court. On appeal, the Supreme Court (with the exception of H. R. Khanna, J.) stated that during emergency the presidential proclamation suspending Article 21deprived the citizen of the right to protect his liberty.

65 (1980) 2 SCC 665.

66 (1986) 4 SCC 222.

67 (1994) 6 SCC 360.

68 (1995) 5 SCC 96.

concerned legislation on other well-recognised grounds. It is noteworthy that neither of these two decisions even attempted to distinguish the authoritative view laid down in the *Indira Gandhi case*, that ordinary legislation could not be challenged on the ground of violation of the basic structure of the Constitution.

IV. Judicial Review And Separation Of Powers

Mudholkar, J., in the *Sajjan Singh case*, while agreeing that the Seventeenth Amendment was valid also indicated that the *Sankari Prasad case* was not the last word. He could be said to have laid down the foundation for the Basic Structure Doctrine, thereby throwing light upon the concept of Separation of Powers in these words:

> "We may also have to bear in mind the fact that ours is a written constitution. The Constituent Assembly, which was the repository of sovereignty, could well have created a sovereign Parliament on the British model. But instead it enacted a written constitution; created three organs of state made the Union executive responsible to Parliament and the State executives to the State Legislature; erected a federal structure and distributed legislative power between Parliament and State Legislatures; recognised certain rights as fundamental and provided for their enforcement; prescribed forms of oaths of office or affirmations which require those who subscribe to them to owe true allegiance to the Constitution and further require the members of the Union Judiciary and of the higher judiciary in the States, to uphold the Constitution."[69]

In keeping with the above, it is urged that 'judicial review' is the quintessence of the existence of the Indian democracy.[70] Through the above-cited cases, we have discovered that judicial review, as a function of the Judiciary, is as important as the Legislature's function of making laws. Separation of Powers is a basic feature[71] of the Constitution as

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[69] AIR 1955 SC 845, para 45.

[70] *S. S. Bola* v. *B. D. Sardana* (1997) 8 SCC 522, para 153(D) and *High Court of Judicature at Bombay* v. *Shirish Kumar Rangrao Patil* (1997) 6 SCC 339, para 13.

[71] *State of Bihar* v. *Bal Mukund Saah* (2000) 4 SCC 640, para 32 and *S. R. Bommai* v. *Union of India* (1994) 3 SCC 1, as stated by Sikri, C. J. in the *Kesavananda Bharati case*.

enshrined in Article 50.[72] A system of checks and balances is in place to ensure the effective functioning of the three organs of the State and that while the functions of all three organs are interrelated they do not transgress their jurisdiction. The Legislature has the power to make laws and amend the Constitution and the Judiciary has the right to judicial review. The authors observe that the Executive, comprising of the majority party in the Parliament, has on a number of occasions steered its position in the law-making process in such a manner that it has found considerable success in passing several amendments that have in their times weighed to their own interests and at the same time ousted the power of the Judiciary to review.

However, in the *Kesavananda case*, the Court assured for itself a new and impregnable role in the constitutional politics of India. In enunciating the Basic Structure Doctrine and placing judicially created impediments on the plenary power to amend the Constitution, the Court made it clear that whatever the intention of the Constitution makers to evolve a democratic system of checks and balances, the final say belonged to the judges.

> "That constituent power is independent and above the Constitution itself because it operates on the Constitution and can displace it with, so to say, one stroke of its exercise.[73]
>
> "If we were to accept the theory as indicated above, it would make it unnecessary to have a Constitution beyond one consisting of a single sentence laying down that every kind of power is vested in the constituent bodies, which may, by means of a single consolidated order or declaration of law, exercise any or all of them themselves whenever they please whether such powers be executive, legislative or judicial. Could this be the ambit of constituent power in our Constitution? Would such a view not defeat the whole purpose of a Constitution? Does the whole Constitution so crumble and melt in the crucible of constituent power that its parts cannot be made out? Before we could accept a view, which carries such drastic implication with it, we will have to overrule the majority view in Keshavananda's case... ."[74]

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[72] Article 50 (Separation of Judiciary from Executive): "The State shall take steps to separate the Judiciary from the Executive in the public services of the State."

[73] AIR 1975 SC 2299, 2428.

[74] AIR 1975 SC 2299, 2428 (*per* Beg, J.).

V. Article 368—The Power To Amend The Constitution And Procedure Therefor[75]

The Indian Constitution is said to be partly rigid and partly flexible.[76] Matthew, J., in this context, held the view:

> "This distinction between the constitutional law and ordinary law in a rigid constitution like ours is that the validity of the constitutional law cannot be challenged whereas that of the ordinary law can be challenged on the touchstone of the constitution. But constitutional law is as much law as ordinary law. A Constitution cannot consist of a string of isolated dooms... ."[77]

In the *Golak Nath case*, there was a differing opinion on the source of the power to amend the Constitution.[78] Parliament passed the *Constitution (Twenty-fourth Amendment) Act, 1971* changing Article 368 in the following respects:

- The marginal note was changed from "Procedure for amendment of the Constitution" to "Power of Parliament to amend the Constitution and procedure therefor".
- The following sub-clause was added: "Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article."
- Sub-clause 3 was added, which read as follows: "Nothing in article 13 shall apply to any amendment made under this article."

This amendment was challenged in the *Kesavananda case* and other petitions. It was held by Sikri, C. J., in the same case, that the *Golak Nath case* had been decided on the un-amended Article 368, that the draft of the majority judgment contained an observation that fundamental rights could not be

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[75] Substituted by the *Constitution (Twenty-fourth) Amendment Act, 1971* for the 'Procedure for amendment of the Constitution'.

[76] *Supra* n. 8, 1.

[77] AIR 1975 SC 2299, 2375.

[78] The conflicting views of Subba Rao, C. J. and Hidayatullah, J. have already been discussed in Part III of this article.

amended even by amending Article 368, but he had objected to that observation and it was deleted from the judgment to which he was a party. The suggestion was that since Article 368 had been amended, the *Golak Nath case* did not directly apply and it was unnecessary to consider whether the said case was rightly decided.

The *Golak Nath case* brings to light that in the event of chaos in the country brought about by misrule or abuse of power, the existence of an all-comprehensive amending power cannot prevent revolutions. On the other hand, a restrictive power of the un-amended Article 368 gives stability to the country and prevents it from passing under a totalitarian or dictatorial regime.

Another interesting observation is that these amendments displace the reasoning of the majority judgment in the *Golak Nath case.* The obligation imposed upon the President to assent to the Bill was meant to negate the view expressed by Wanchoo, J. that under Article 368, the President could refuse to give his assent.[79]

As regards the nature of the power to amend, the counsel[80] defending Article 329A had been so eloquent that the learned counsel's words in his written submissions were used by Beg, J.:

> "In the hands of the constituent authority there is no demarcation of powers. But the demarcation emerges only when it leaves the hands of the constituent authority through well-defined channels into demarcated pools. The constituent power is independent of the fetters or limitations imposed by separation of powers in the hands of the organs of the government amongst whom the supreme authority of the state is allocated. The constituent power is independent of the doctrine of separation of powers. Separation of powers is when the Constitution is framed laying down the distribution of the powers in the different organs such as the legislative, executive and the judicial power. The constituent power springs as a fountainhead and partakes of sovereignty and is the power, which creates the organ and distributes the powers. Therefore, in a sense the constituent power is all embracing and is at once judicial, executive and legislative or in a sense super power. The constituent power can also change the system of checks

[79] (1967) 2 SCR 762.

[80] AIR 1975 SC 2299.

and balances upon which the separation of power is based."[81]

Thus it is sufficiently clear that the Parliament, who is the donee of a limited power, has used that very limited power to amplify or expand the scope of Article 368; it has enhanced its power to amend. An illustration of the complications that would arise from infinite amending power can be observed with the concept of Federalism:

- The distribution of legislative power between the Union and the regional legislatures is an essential feature of federalism, found principally in Articles 245 and 246 read with the three legislative lists in the Seventh Schedule. Changes can be made in the legislative lists by addition, variation or repeal of an entry or by transposing an entry from one list to another list, but the lists themselves cannot be repealed. It follows therefore that federalism is outside the scope of the amending power for it can be abrogated in favour of the unitary system only by repealing Article 246 and the Seventh Schedule and changing the essence of Article 245, which would in turn involve re-writing almost every part of the Constitution and, in substance, substituting a new Constitution. If, 'any change' in the 'provisions of this article', does not mean that Article 368 can be repealed, the amendability of the Constitution becomes a basic feature and the Constitution cannot be made un-amendable.
- The conversion of a rigid federal Constitution, like ours, into a flexible Constitution would destroy its federal character for if our Constitution were flexible, any law passed by Parliament, by a bare majority of members present and voting, would repeal the Constitution *pro tanto* and the distribution of exclusive legislative power between the Union and the State Legislatures would be rendered nugatory by a simple law giving Parliament the exclusive power to make laws for the whole of India. If the federal Constitution, with its distribution of legislative power is to be retained, the Constitution must be rigid, and cannot be converted into a flexible one.[82]

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[81] AIR 1975 SC 2299, 2427.

[82] This is an illustration that the authors consider necessary in order to understand complications arising out of the Basic Structure Doctrine. The example chosen is that of federalism which has been declared to be a part of the basic structure of the Constitution.

A. The Constitution (Forty-fifth) Amendment Bill, 1978: Proposed But Not Accepted[83]

The *Constitution (Forty-fifth Amendment) Bill, 1978*, as introduced in the Lok Sabha, proposed to amend Article 368 as it stood at that time as follows:

> "Amendment of Article 368—In Article 368 of the Constitution,
>
> (a) in clause (2), after the proviso, the following proviso shall be inserted, namely: 'Provided further that if such amendment—
>
> (a) seeks to make any change which, if made, would have the effect of:
>
> (i) impairing the secular or democratic character of this Constitution; or
>
> (ii) abridging or taking away the rights of citizens under Part III; or
>
> (iii) prejudicing or impeding free and fair elections to the House of the People or the Legislative Assemblies of States on the basis of adult suffrage; or
>
> (iv) compromising the independence of the referendum under clause (4)';... ."[84]

Further, they sought to provide for referendum by including clauses (4) and (5) that gave details of the persons eligible to participate and details of conducting the same. The Rajya Sabha did not accept this amendment and therefore Article 368 stands as it was amended by the *Constitution (Forty-second Amendment) Act, 1976.*

VI. Conclusion

It may be said that the Supreme Court has not pronounced the final word on the issue of the basic structure of the Constitution, a scenario that is unlikely to change in the near future. While the idea that there is such a thing as a basic structure to the Constitution is well established, its contents

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[83] Seervai *supra* n. 20, 2701.

[84] *Ibid.*

cannot be completely determined with any measure of finality until a judgment of the Supreme Court spells it out.[85] One certainty that emerged out of this tussle between Parliament and the Judiciary is that all laws and constitutional amendments are now subject to judicial review and laws that transgress the basic structure are likely to be struck down by the courts. In essence, Parliament's power to amend the Constitution is not absolute and the Supreme Court is the final arbiter over and interpreter of all amendments to the Constitution.

The Basic Structure Doctrine alters the emphasis of democratic constitutionalism and has an immediate effect on the thinking of many Constitution makers and judiciaries throughout the world. Some constitutions built the Basic Structure Doctrine into the text of the Constitution; others did not. The Indian Judiciary has used the Basic Structure Doctrine mostly to protect judicial power.

In the *Indira Gandhi case*, Y. V. Chandrachud, J. stated that for determining whether a particular feature of the Constitution is a part of its basic structure it is necessary that one examines every individual case and treats it as distinct from another.[86] It is unfortunate that the question whether a judicial determination of disputed elections was a part of the basic structure of our Constitution was raised with reference to the disputed election of one person. But the real question for the determination by the Supreme Court was not whether a constitutional amendment validating one disputed election by a legislative sentence or judgment could be upheld as a valid exercise of amending power without damaging or destroying the essential feature of democracy as envisaged in our Constitution. For once, the Supreme Court held that if the amending power extended to validating one disputed election such a power must be extended to all disputed elections, for the Parliament has the power or it has not.

Once the power to annul amendments to the Constitution, which is the highest form of activism, is conceded to the Court, the exercise of lesser

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[85] The sovereign, democratic and secular character of the polity, rule of law, independence of the Judiciary, fundamental rights of citizens, etc. are some of the essential features of the Constitution that have appeared time and again in the Supreme Court's pronouncements and therefore are established as part of the basic structure of the Constitution. But till today, no Bench has laid down with certainty all those elements that constitute the basic structure of the Constitution.

[86] AIR 1975 SC 2299, 2372.

powers is logical and ultimately judicial restraint based on the Court's own view of its area of competence and effectiveness becomes the only check on the exercise of judicial power. Through the 1980s and the 1990s, the Court has interfered in diverse areas through public interest litigation, leading to criticism of its 'activism' and to pleas that the Executive should be allowed to run the Government. In all these situations, however, the Court is not transgressing its jurisdiction. It is merely, through new strategies, enforcing rights that traditionally were not believed to possess 'adjudicative disposition'. Armed as it were with the ultimate power, the Court has over the past two decades made its presence felt by its frequent interventions in public interest litigation. Thin parliamentary majorities and consequently weak Executives have enabled the Court to occupy a space that it might not have otherwise.

The Basic Structure Doctrine rests on the unsure foundations of judicial perceptions and judicial majorities. It emerged for the first time in 1973 by a majority of one, 23 years after the working of the Constitution. Yet in 1980, in the *Minerva Mills case* the court found 'a limited amending power' to be a basic feature of the Constitution, when right from the *Sankari Prasad case* to the *Sajjan Singh case* the view put forth was that there were no limitations on the amending power.

The Basic Structure Doctrine proceeds upon a distrust of the democratic process, which itself must surely be a part of the 'basic structure'. In limiting the amending power, the Basic Structure Doctrine in fact stifles democracy, a basic feature. The limitations of the Basic Structure Doctrine were brought out by the Court's decision in the *Habeus Corpus case.* As per this judgement, a right which, applying the basic structure test could not be taken away even by amending the Constitution, could be taken away by an Executive proclamation. Also eventually, the strengthening of the right to life and liberty was done by Parliament itself, by providing in the *Constitution (Forty-fourth Amendment) Act, 1976* that the rights conferred by Articles 20 and 21 could not be suspended even during an emergency.

Fifty-three tumultuous years of the Republic have seen democracy and a culture of constitutionalism take firm roots in the country. The spectre of dictatorship loomed large but once. The Emergency was an aberration that was corrected through the political process itself. The Basic Structure Doctrine has served a certain purpose: it has warned a fledgling democracy

of the perils of brute majoritarianism. It was at these times that the courts took charge of the situation as 'custodians of the Constitution'. As custodian, the Court's work never will be done, nor will its performance, as an institution of human beings, be above reproach. Reduction of its overburdened agenda and reforms in its glacial processes have been called for over the years during Law Day and otherwise in speeches by judges and members of the Bar, strangely whose own conduct has rarely speeded up settlement of cases. In a society given to suspicions of nefarious influences in legal matters, the Court and the entire judicial community will have to labour to maintain its credibility.

However a few questions have been left unanswered...

Why has the Supreme Court been hesitant in laying down in clear and precise terms the basic framework of our Constitution? Will it ever do so in the future? This is something that would be eagerly awaited.

It will remain a mystery why four out of the 13 judges constituting the full bench in the *Kesavnanda Bharati case* refused to sign the summary report, when all of them signed the order passed? Does this go to show that there were discrepancies regarding the majority judgment? In which case, is it law as laid down under Article 141 of our Constitution?

Should the Apex Court have upheld the validity of the *Constitution (Thirty-ninth Amendment) Act, 1975* which *prima facie* dealt with the question of one election dispute? Should it be of some consequence that the Act was passed and gazetted within a period of four days immediately after the pronouncement of the Allahabad High Court decision declaring the election invalid?

The bigger question is whether the whole purpose of the Constitution—the distribution of powers among the three organs that are created—can ever be achieved. The ideal of Separation of Powers has remained just that. There is a constant battle between the Legislature and the Judiciary as to who will finally be the custodian of the Constitution, a situation the framers would never have dreamt of. The creatures of the Constitution have sought to gain supremacy over the Constitution. The doctrine of checks and balances has only led to disillusionment of the citizenry, which the three organs of the State pledged to serve!

CREDIT DERIVATIVES AS A MEANS OF CREDIT RISK MANAGEMENT†

*Ashika Visram**

I. INTRODUCTION

The early 1990s saw the introduction of financial sector reforms, which gave a fillip to the development of the banking industry. While this development will certainly yield dividends in the long run, they have also increased the number of risks faced by banks. Banks accept risks because they want higher profits. However, it is essential to manage risks in a manner that will be in the maximum interest of the bank. In fact, the main focus of banking is the management of risk.[1]

Banks are mainly subject to market risks, operational risks and credit risks. Market risks are the risks that the firm's value will be affected by movements in interest rates, exchange rates, stock prices or commodity prices.[2] Operational risks are risks caused due to inadequate systems and infrastructure. Credit risk is the risk that the counter parties to transactions in which the bank is engaged will fail to make obligated payments.[3]

A credit derivative is a mechanism for the bank to hedge[4] its credit risk. Credit derivatives are today being recognised as one of the most efficient methods of risk management, not only by banks but also by insurance companies, investment banks, corporations, hedge funds, pension funds, mutual funds and government/export credit agencies.[5]

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† This article reflects the position of law as on 31 March 2004.

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1 "Risk Management: An Overview", *ICFAI Press Release*, *available at* www.icfaipress.org

2 Kamal Sehgal, "Credit Derivatives: Source Of Market Stability", *India Infoline.com*, 1 January 2004, *at* www.indiainfoline.com/bisc cede.html.

3 *Ibid.*

4 Hedging is a way of reducing some of the risk involved in holding an instrument.

5 Emily R. Pollack, "Assessing The Usage And Effect Of Credit Derivatives", (International Finance Seminar 28 April 2003) 4, *at* http://www.law.harvard.edu/programs/pifs/pdfs/emily_pollack.pdf.

Many important issues, however, involving credit derivatives have yet to be explored. As of today, lack of regulatory certainty is probably one of the major impediments that prevent banks and financial institutions from entering into such transactions.

This article explains the concept of credit derivatives and its basic forms. This is followed by an assessment of the importance as well as the risks of credit derivatives and finally its applicability in India under the existing legal regime. This article focuses on the international market since the Indian market for credit derivatives is almost non-existent, though the Reserve Bank of India (RBI) is planning to permit this product in India.

II. Credit Risk

Credit risk is the risk of the default of the borrower. It is one of the greatest risks undertaken by banks and financial institutions and has been the root cause of many banking failures. The traditional approach to credit risk management consisted of making credit checks on the party before the deal, setting limits on loans and passing the risk to third parties through factoring and credit insurance.[6]

However, inspite of the various risk management approaches used by banks, it is not uncommon for banks and financial institutions to be saddled with a large number of Non-Performing Assets (NPAs). The *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002* (Securitisation Act) has taken large steps in the direction of helping banks to recover NPAs. Even if the Securitisation Act enables banks to recover some NPAs, it does not ensure that banks and financial institutions would not be faced with such risks again. What is required is that not only should there be some mechanism to cleanse banks of all the NPAs, but also some preventive mechanism, which enables banks and financial institutions to focus on their core area of business and eliminates the possibility of putting resources in legal brawls.[7] The RBI, in October 2002, issued a Guidance Note on Credit Risk Management. However, today, the solution that is being considered by the RBI and by banks and financial institutions is that of credit derivatives.

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[6] A. V. Vedpuriswar, "Managing Financial Risks", *Global CEO*, June 2002, 48, 49, *available at* http://www.vedpuriswar.org/articles/GCEO/managing_financial_risks.PDF.

[7] Sehgal *supra* n. 2.

III. Credit Derivatives

A. What Are Derivatives?

A derivative is a contract whose value depends upon or derives from the value of the underlying asset (say a share, forex, commodity or an index).[8] Derivatives are usually 'off balance sheet' and secondary market instruments, which are essentially meant to facilitate temporary hedging risks of inventory holding on a financial or commercial transaction, over a certain period of time. In practice, every such contract has a specific date of commencement and date of expiry. In market terminology, derivatives may be called 'Risk Management Tools'.[9]

For a derivatives market to develop, two kinds of participants are necessary. They are 'the hedgers' and 'the speculators'. A hedger is risk averse. For a hedging transaction to be completed, there must be another person willing to take advantage of the price movements—the speculator. The speculator may lose plenty of money if his forecast goes wrong but stands to gain enormously if he is proved correct. This structure is common to a wide variety of financial contracts, viz. futures, forwards, options, swaps and variations thereof. These contracts can be traded on the various exchanges in a standardised manner or by a customised design for individual requirements.[10]

In India, lack of instruments to hedge risk has been a hindrance to the development of better and accurate internal risk management systems within banks. It should be recognised that inadequate risk management systems coupled with a substantially large exposure to risk could be a recipe for disaster. A better alternative would be to encourage banks to hedge financial risks through appropriate 'derivative instruments' (namely credit derivatives) thereby reducing their risk exposure significantly and allocating capital more productively.[11]

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[8] Section 2(aa) of the *Securities Contracts (Regulation) Act, 1956* defines 'derivative' to include: 1) A security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of security, 2) A contract which derives its value from the prices, or index of prices, of underlying securities.

[9] Manoj S. Kamat, "Derivatives: Redesigning The Financial Architecture", *Chetana*, 2000 vol. 1.1, *available at* www.damodarcollege.org/final/Vol1.1/manojskvol1.1.htm.

[10] *See* Murti and Murti, "Derivative Trading In India", *at* www.murtiandmurti.com.

[11] Gangadhar Darbha, "Banking Reforms And Systems Risks", *The Financial Express*, 15 July 2002.

B. What Are Credit Derivatives?

Credit derivatives are one of the youngest derivatives in the global financing market. A credit derivative is an instrument designed to segregate market risk from credit risk and to allow the separate trading of credit risk. It is a financial instrument whose value is derived from the credit quality of an obligation such as a loan or a bond of a reference entity.[12] By this instrument, the credit risks inherent in loans, bonds or other risk assets (reference assets[13]) are transferred from "protection buyers" to third parties acting as "protection sellers", without the actual transfer of the reference asset.

The protection buyer sells the credit risk on a given claim (the reference asset) to another party, known as the protection seller, in return for regular interest or premium payments. The protection seller will, in turn, compensate the protection buyer on the occurrence of a pre-defined credit event. It is essential that the credit event in any credit derivative transaction is well defined since it is the recognition that such an event has occurred that triggers payment of the protection amount. The list of credit events must, therefore, span the entire spectrum of risks that the protection buyer wishes to guard against.[14]

Since the early 1990s, the International Swaps and Derivatives Association (ISDA),[15] has been involved in credit derivatives. Every few years, it has

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[12] This reference entity is usually a third party, but it can also be one of the parties to the transaction.

[13] *See* Report Of The Working Group On Introduction Of Credit Derivatives In India, (Reserve Bank of India 26 March 2003) para 2.4(iii). The reference asset for which credit risk protection is bought and sold is pre-defined. It could be a bank loan, corporate bond/debenture, trade receivable, emerging market debt, municipal debt, etc. It could also be a portfolio of credit products.

[14] *See* "Credit Derivatives: A New Source Of Financial Instability?", *Financial Services Review*, November 2002, 69, 70, *available at* http://www.banque-france.fr/gb/telechar/rsf/2002/et3_1102.pdf.

[15] *See* "ISDA's Comments On The Central Bank Of Ireland's Draft-Rules On Credit Derivatives", February 2000, 4, 13, *at* www.isda.org/c_and_a/cbicdr.pdf: "The International Swaps and Derivatives Association, Inc (ISDA) is keenly interested in the regulatory treatment of credit derivatives. ISDA's primary purpose is to ensure that the benefits accruing from the use of these products for risk management purposes are adequately reflected in their capital treatment. ... One of ISDA's primary roles is the development of standard form documentation for use in preparing privately negotiated derivatives transactions. ISDA has developed detailed documentation for use in relation to a wide variety of transactions including equity, foreign exchange, commodity, government bond and bullion derivatives."

modified the existing definitions to more particularly suit the needs of the time, taking into account various investor grievances. One of the most important considerations for ISDA in deciding the language of the credit events is the role that these products are designed to serve. On one hand, ISDA's documentation can limit the definitions to match the definition of 'default' used by credit rating agencies. On the other hand, the documentation can be expanded to capture other events that signal problems with a reference entity, which do not rise to the level of a 'default' as used by credit rating agencies. Ultimately, this is a choice embedded in the concept of what credit derivatives should be and opinions will differ depending on the needs of a variety of participants.[16]

There are six credit events included in the 1999 and the 2003 ISDA definitions: failure to pay,[17] restructuring,[18] bankruptcy,[19] obligation acceleration,[20] obligation default[21] and repudiation/moratorium.[22]

The use of credit derivatives makes it feasible to decrease credit risk exposure without removing the assets from the balance sheet. Usually, a cash payment or physical settlement arises on the occurrence of any one of a number of agreed credit events.[23] For example, a bank concerned that one of its customers may not be able to repay a loan can protect itself

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16 Pollack *supra* n. 5, 9.

17 *See* Vinod Kothari, "ISDA Credit Event Definitions", *at* http://www.credit-deriv.com/isdadefinitions.htm. Failure to pay is defined as a failure of the reference entity to make, when and where due, any payments under one or more obligations. Grace periods for payment are taken into account.

18 *Ibid.* Restructuring covers a situation where the terms of the initial borrowing become less favourable to the holders than they would otherwise have been.

19 *Ibid.* The definition of bankruptcy is widely drafted so as to be triggered by a variety of events associated with bankruptcy or insolvency proceedings under English law and New York law as well as analogous events under other insolvency laws.

20 *See* Pollack *supra* n. 5, 11–12. Obligation acceleration is triggered when an obligation becomes due and payable before it would otherwise have been due and payable as a result of the occurrence of a default other than failure to make a required payment.

21 *See* Pollack *supra* n. 5, 11. Obligation default captures all defaults other than failure to make any required payment. The credit derivatives market does not use this credit event due to its extreme broadness.

22 *See* Kothari *supra* n. 17. Repudiation/moratorium deals with situations where the reference entity or a government authority disaffirms, disclaims or otherwise challenges the validity of the relevant obligation.

23 Niall Duggan, "Credit Derivatives", *Financial Services Review*, Issue 55–July–September 2000, *available at* www.acca.co.uk/publications/fsr/55/22270.

against loss by transferring the credit risk to another party, while keeping the loan on its books.[24] This mechanism can be used for any debt instrument or a basket of instruments for which an objective default price can be determined.[25]

C. *Credit Derivatives Versus Financial Guarantees And Insurance*

1. Financial Guarantees

Credit derivatives are an evolution of conventional banking products for the transfer of credit risk such as guarantees, letters of credit and unfunded sub-participation. The guarantee, letter of credit and unfunded sub-participation are manners in which the credit risk on a third party can be transferred between two parties. Under such instruments, if the underlying credit (i.e. the borrower) defaults, then the guarantor has to make good the obligation to the lender; thus, the guarantor takes the risk of the borrower defaulting on the obligation. In a credit derivative, the protection buyer gets an assurance from the protection seller that if the underlying credit defaults, the protection seller will compensate the protection buyer for the loss that it suffers due to the default of the underlying credit.[26]

However, a guarantee differs from a credit derivative in the following ways:

- In the case of a guarantee, the guarantor promises repayment if and only if there is a default in repayment on the part of the principal borrower. Repayment, in the case of a credit derivative, depends upon the occurrence of a pre-defined credit event, irrespective of any actual default on the part of the principal borrower.
- The guarantee forms a part of the security given by the principal borrower to the bank. However, the protection seller is in no

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[24] *See* "Credit Derivatives Get Cracking", *Euromoney Magazine*, March 1996, *available at* www.euromoney.com/contents/publications/euromoney/em.96/em.96.03/em.96.03.1.html. Credit derivatives, however, are not used by banks alone. They can be used by companies, who are heavily exposed to a small number of key customers. In the case of project finance, an equity sponsor to a large project may be happy with the operational and project risk but not with the sovereign risk on the guarantees.

[25] Sehgal *supra* n. 2.

[26] Report Of The Working Group On Introduction Of Credit Derivatives In India (Reserve Bank Of India 26 March 2003), para 3.7.

way connected with the principal borrower or the transaction between him and the bank.

- In the event of default of the principal borrower, the guarantor is called upon to pay the amount that was due and payable by the principal borrower. The guarantor is in no way connected with the other assets of the principal borrower. However, in a credit derivative, on the happening of the credit event and upon payment of the amount due to the protection buyer, the protection buyer will usually hand over the reference asset to the protection seller.
- Credit derivatives also differ from conventional banking products in terms of pricing, regulatory restrictions and liquidity.

2. Insurance

The key to understanding credit derivatives is the notion of a premium. Some derivatives are comparable to insurance. Just as you pay an insurance company a premium in order to obtain some protection against a specific event, there are derivative products that have a pay-off contingent upon the occurrence of some event for which you must pay a premium in advance. However, though comparable to insurance contracts, the two concepts are not entirely similar.

A contract of insurance has the following two essential requirements: an insurable interest in the subject matter insured and utmost good faith.

A credit derivative transaction may fulfil the requirement of insurable interest in some cases. However, the requirement of proving loss to the insured and thereby showing an insurable interest is not always met in the case of credit derivatives. In transactions such as credit default swaps[27] used for trading purposes, an insurable interest is unlikely.

The requirement of utmost good faith requires both parties to disclose all material facts relating to all risks involved in entering into the contract. The principle of *caveat emptor*, which normally applies to commercial transactions, would be inapplicable if a credit derivative is treated as an insurance contract.[28]

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[27] For a discussion of credit default swaps, refer to Part V A of this article.

[28] *See* Pollack *supra* n. 5, 21–22.

To address these concerns, in 1997, ISDA sought legal opinion from Robin Potts Q.C. to determine whether a credit default swap could be construed as an insurance contract. Robin Potts Q.C. concluded that under British law, credit derivatives do not fall under the *Insurance Companies Act, 1982* because they are not structured to provide loss indemnity. Credit derivatives transactions are only concerned with the occurrence of a credit event, not with whether or not the protection buyer actually suffers a loss. According to this opinion, the fact that credit derivatives and insurance contracts are often economically equivalent is not determinative. Robin Potts Q.C. recommended that the ISDA documentation should include a clause, which clarifies that the parties do not intend to enter into an insurance contract.[29] However, the difference is not yet clear; and although most countries and regulatory authorities do recognise the difference between credit derivatives and insurance contracts, it is possible that courts may find a conceptual similarity between credit derivatives and insurance. This would result in the protection seller being required to comply with all the regulations, requirements and permissions under the relevant national legislation for setting up an insurance business in that country. It is therefore essential that before banks in India enter into such transactions, the position of such transactions vis-à-vis insurance is made clear by legislation and/or by regulators.

IV. Development Of Credit Derivatives

The concept of credit derivatives is not entirely new. Its origin can be traced back to the securitisation of mortgaged-backed market of the 1980s.[30] However, the credit derivative, in its present form, was formally launched by Merrill Lynch in 1991 (with USD 368 million). In 1992, the term "credit derivatives" was first used by ISDA to describe a new exotic type of "Over the Counter" contract.

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[29] *Ibid*, 22–23.

[30] *See* John Kiff and Ron Morrow, "Credit Derivatives", 2000, *Bank of Canada Review*, (Autumn) : 3–11, 3. In securitisation, however, the credit risk was hedged only by eliminating the credit product from the books of credit provider altogether as distinguished from credit derivatives, which reduce exposure of a bank to a particular borrower, without outright selling their claim on that particular borrower.

However, the market did not grow much until 1996. The size of the market was USD 40 and 50 billion respectively for the years 1996 and 1997. In 1999, ISDA published the ISDA Standard Credit Derivatives Confirmation and a Revised Credit Swap Documentation. Both helped to standardise credit derivative contracts and were important steps for the further growth of the market because they eliminated legal ambiguity to a great extent. In 2003, ISDA revised the set of definitions incorporating the experience of dealing with credit default swaps over several years and, more particularly, the problems associated with increasing sovereign and corporate defaults.

The market has now acquired a critical mass of over USD two trillion,[31] half of which is concentrated at London. The average transaction size is between USD 10 to 25 million and the average tenure, which was less than two years, has now gone up to five years. The main buyers and sellers of credit derivatives still comprise of banks, though securities houses, hedge funds, reinsurers and insurance companies also make up a large part of the market.[32]

Electronic trading platforms for credit derivatives have also been established in recent years.[33] This has contributed to increasing the transparency and liquidity of the credit derivatives market. However, there are only a few active players in the market and the secondary market is still illiquid.[34] The market is concentrated geographically in London and New York. Credit derivatives are subject to ongoing product development, but credit default swaps still account for approximately half of the market.[35]

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[31] Mayur Shetty, "A Hedge With An Edge", *The Economic Times*, 11 December 2002, *available at* http://economictimes.indiatimes.com/articleshow/30891026.cms.

[32] According to the 2001–2002 Credit Derivatives Survey, banks comprise 63 per cent of the buyers, followed by securities houses at 21 per cent and hedge funds at 12 per cent. On the selling side, banks comprise 37 per cent of the market followed by reinsurers at 20 per cent, securities houses at 16 per cent and insurance companies at 12 per cent.

[33] Some examples are Credit Trade (www.credittrade.com) and Credit Ex (http://www.creditex.com/).

[34] Report Of The Working Group On Introduction Of Credit Derivatives In India (Reserve Bank Of India 26 March 2003), para 2.1.

[35] Suzanne Hyldahl, "Credit Derivatives—Possible Implications For Financial Stability", *Monetary Review*, 4th Quarter 2001, *available at* http://www.nationalbanken.dk/DNUK/Publications.nsf/side/Monetary_Review_4_Quarter_2001/$file/nb03.htm.

V. Types Of Credit Derivatives

There are unlimited possible variations of credit derivatives. It has been said that: "[T]he only true limitation to the parameters of a credit swap is the willingness of the counter parties to act on a credit view."[36] Broadly, credit derivatives may be divided into two categories:

- Unfunded credit derivatives, being synthetic transactions, involving no financing cost for the protection seller, and
- Funded credit derivatives, where the protection seller purchases a security or claim.

Some of the most common types of unfunded credit derivatives are Credit Default Swaps (CDS) and Total Rate of Return Swaps (TROR Swaps). Funded credit derivatives primarily comprise of one type of transaction, i.e. Credit Linked Notes. However, terminology varies among market participants and, at times, varies according to geographical factors.

A. Credit Default Swaps

A Credit Default Swap (CDS) transfers the potential loss of a reference asset that can result from specific credit events, such as default, bankruptcy, insolvency and credit rating downgrades.[37] It is the most widely used credit derivative.[38] It involves a bilateral contract between the protection buyer and the protection seller in relation to the reference asset. The protection buyer wants to reduce his credit risk exposure. He therefore hedges his risk and protection is sold to him by the protection seller (speculator). The protection buyer pays the protection seller a 'premium', which is expressed in 'basis points' and the protection seller agrees to make certain 'protection payments (or par amount)', contingent on the occurrence of the credit event.[39] Such payment is usually made upon the issue of a bond by the protection buyer. The most common contingent payment is the

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[36] Christian Solbach, "Conventional Collateralised Loan Obligation (CLO)—Structure and Process" in Deloitte & Touche Germany (ed), *Conventional Versus Synthetic Securitisation—Trends In The German ABS Market*, (Düsseldoif 4 May 2001) 22 23, *available at* http://www.deloitte.com/dtt/cda/doc/content/finalfinal.pdf.

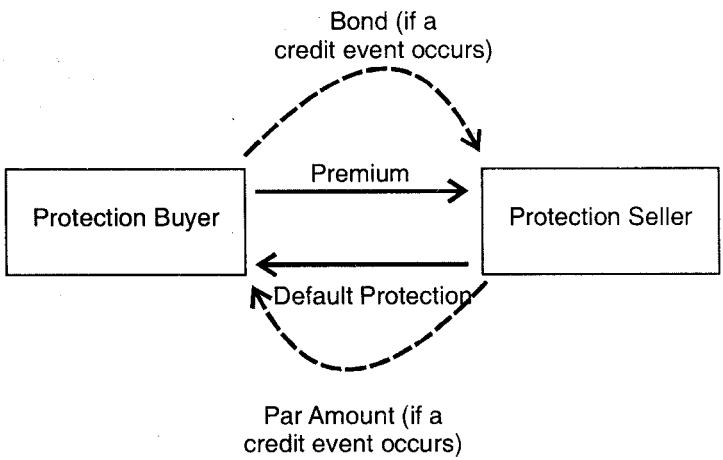
[37] Parties usually use the credit events described in ISDA documentation. *See supra* n. 15–22.

[38] According to the British Bankers' Association, 1998 Survey.

[39] "Implementing Credit Derivatives And Synthetic Securitisation: An Indian Perspective", *Strategym*, 2002, *at* http://www.jbims.edu/downloads/Credit%20derivatives.pdf.

delivery of the reference asset to the protection seller for the original amount or obtaining the difference between the original and the market value of the reference entity in cash.[40]

A typical CDS transaction can be explained with the following diagram.



Source: Report of the Working Group on Introduction of Credit Derivatives in India, (Reserve Bank of India 26 March 2003).

B. Total Rate of Return Swap

A TROR Swap transfers all the returns and risks on an underlying reference asset from one party to another. It involves the protection buyer (or TROR buyer), who agrees to periodically transfer the actual returns from the reference asset to the protection seller (or TROR seller) throughout the term of the contract. In return, the protection seller pays a periodic fee to the protection buyer. If there is any appreciation in the market value of the reference asset, the protection buyer will transfer that as well and if there is any depreciation in the value of the asset, the protection seller will pay the same.[41] A TROR Swap therefore provides an easy and effective way of acquiring a particular credit exposure without having to originate it.

The bank paying the premium in this kind of swap is effectively warehousing a loan, renting out its balance sheet while transferring the

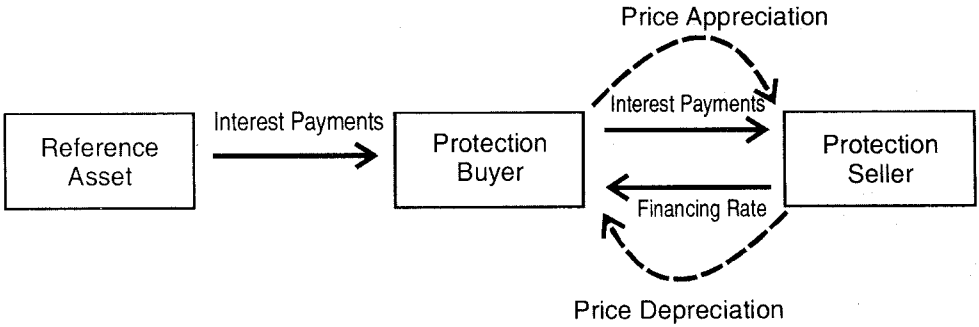
[40] Solbach *supra* n. 36, 24.

[41] *See generally ibid.*

economic value of the loan to a third party. The motivation behind this type of transaction is the need to get rid of an asset without entering into a physical transaction that might upset the borrower.[42]

In contrast to a CDS, which only transfer credit risk, a TROR Swap transfers not only credit risk but also market risk. In addition, a TROR Swap contrasts with a CDS since payments are exchanged among counter parties upon changes in market valuation of the underlying asset and not only upon the occurrence of a credit event as is the case with CDS.[43]

A typical TROR Swap transaction can be explained with the following diagram.



Source: Report of the Working Group on Introduction of Credit Derivatives in India, (Reserve Bank of India 26 March 2003).

C. Credit Linked Notes/Synthetic Securitisation

A Credit Linked Note (CLN) is a bond issued by the protection buyer. The protection buyer (or the originator/issuer) pools together assets and creates a reference pool. He then issues notes, which are linked to the reference pool. These notes are purchased by the protection seller (or the investor), for which the protection buyer receives cash. By this method, the protection buyer mitigates credit risk almost entirely. The protection seller mitigates the protection buyer's risk by opting for the issuance of CLNs in the form of bonds, by a Special Purpose Vehicle (SPV), which is specially created for the transaction and is bankruptcy remote. Money for the CLNs is paid by the protection seller to the SPV, which in turn uses

[42] *Supra* n. 24.

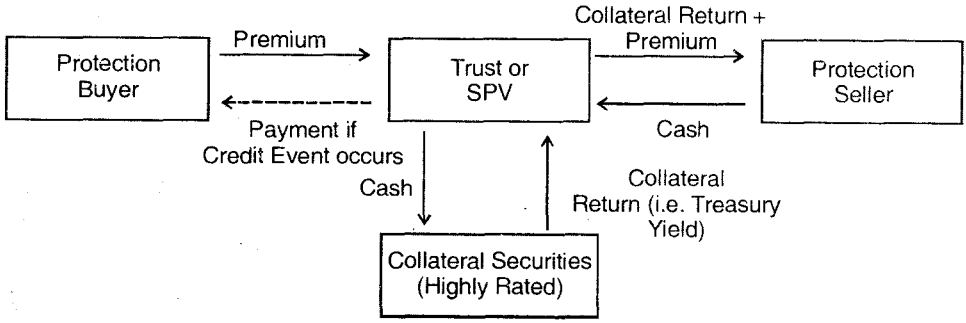
[43] Report Of The Working Group On Introduction Of Credit Derivatives In India (Reserve Bank Of India 26 March 2003), para 2.6.

the proceeds to purchase collateral of the same maturity as that of the CLN, which (collateral) is jointly agreed to by the protection buyer and protection seller.

Such bonds are to be redeemed at par value on maturity only if a pre-defined credit event does not occur for the reference asset. If the credit event occurs, the CLN is redeemed within a fixed period of time less a compensation amounting, for instance, to the difference between the par value and the recovery value of the reference asset.

A CLN is not a different 'type' of credit derivative, but a method of converting other credit derivatives into a funded form and carrying it into the capital markets. Thus, a CLN is essentially a method of implanting a CDS or TROR Swap in an investment product.[44] However, in contrast to the CDS and the TROR Swap, the protection seller makes his money payment in the amount of the loan in advance. On the part of the protection buyer, the collection of the proceeds from the issue of the CLN has the effect of a cash-collateralisation of the original credit risk.[45]

A typical CLN transaction can be explained with the following diagram.



Source: Report of the Working Group on Introduction of Credit Derivatives in India, (Reserve Bank of India 26 March 2003).

[44] *Supra* n. 39.

[45] "Treatment Of Credit Derivatives In Principle I according to Sections 10, 10a of the *German Banking Act (Gesetz über das Kreditwesen - KWG)* and under the Large Exposures and Million Loan Reporting Regime" (Cirucular 10/99 16 June 1999) (Unoffical translation), *at* bakred.de/texte/rundsch/rs10_99e.htm.

A CLN, also know as risk transfer securitisation or synthetic securitisation, is an application of credit derivatives to transfer credit risk from the protection buyer to the protection seller. In synthetic securitisation, the investors in CLNs synthetically create an exposure in a portfolio of loans or other assets of an originator without acquiring a beneficial interest in such portfolio.

CLNs are in many ways comparable to traditional asset-backed security notes. They are issued in different tranches with different risk characteristics. These are also rated by rating agencies. The bank usually enters into credit enhancement structures to receive higher rating for the tranches.[46] Conventional asset securitisation can combine the above-mentioned objectives: funding of future business, transferring of credit risks, achieving a capital market access and influencing the balance sheet. However, the credit protection costs using conventional securitisation exceed the costs of comparable unfunded credit derivatives. Also, the risks involved in synthetic securitisation are significantly less as compared to conventional securitisation. The most important advantage of CLNs compared to asset-backed notes (as in the case of conventional securitisation) is that the credit risk of the reference portfolio is completely shifted to the capital markets by avoiding the legal complexity of a true sale transaction.[47] Synthetic securitisation transactions combine the advantages of credit derivatives and conventional asset securitisations in order to circumvent the disadvantages of conventional securitisations.[48]

For banks, which mainly pursue regulatory capital arbitrage and credit risk management but are not interested in true sale funding, synthetic securitisation could be a better choice. There is no basic synthetic model. Some synthetic structures use an SPV and others do not.[49] Where an SPV is not used, the originator and the issuer are one entity. In either case, the credit risk exposure is transferred to the capital market using CLN by way of securitisation, leaving the underlying asset on the balance sheet.[50]

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[46] Solbach *supra* n. 36, 28.

[47] *Ibid*, 25. True sale treatment is avoided since the loans remain on the balance sheet and consequently, cost and documentation is significantly reduced.

[48] *Ibid*, 31.

[49] *Ibid*, 26.

[50] *Ibid*, 28.

VI. Benefits Of Credit Derivatives

Alan Greenspan, the Chairman of the Federal Reserve System in the United States (US), has on several occasions applauded credit derivatives. He credited credit derivatives for effectively spreading losses from defaults by Enron, Global Crossing, Railtrack, WorldCom and Swissair and from financial institutions with large short-term leverage to insurance firms, pension funds, or others.[51] According to him, "The greatly extended use of credit derivatives doesn't threaten the stability of the global financial system, on the contrary, credit derivatives have helped to defuse financial crises."[52] Derivatives transfer the risk from banks (the hedger) to insurers, reinsurers, pension funds and others more willing to hold it (the speculator).

A more widespread use of credit derivatives can contribute to increasing the stability of the financial system. Banks can use credit derivatives to enhance their management and diversification of credit risk, thereby reducing their vulnerability to risks like sector-specific price shocks. Moreover, the opportunity to transfer credit risk via credit derivatives can help to make the supply of credit to borrowers less dependent on the bank's willingness and ability to assume specific types of credit risk. This will contribute to avoiding credit crunch, i.e. inappropriate credit tightening.[53]

A liquid credit derivative market can also contribute to enhancing price information concerning credit risk and thereby improve a bank's pricing of loans and other credit exposures. This is beneficial to financial stability, since a bank's insufficient ability/opportunity for correct price fixing may constitute a risk.[54]

A. Motivation For The Protection Buyer

Protection buyers are motivated to securitise for a host of reasons, ranging from balance sheet management and dynamic allocation of credit exposure to increasing liquidity. Other benefits, as compared to traditional forms of securitisation, include an easier and far cheaper alternative to attaining

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[51] Shetty *supra* n. 31.

[52] "Alan Greenspan Praises Credit Derivatives Again", 15 January 2004, *available at* http://www.credit-deriv.com/crenewsjan03.htm.

[53] Hyldahl *supra* n. 35.

[54] *Ibid.*

regulatory or economic capital relief, avoidance of true sale and increasing assets under management.[55]

Credit derivatives are useful for reducing a bank's exposure to a particular borrower without losing its business. For instance, if Bank A has a huge exposure to borrower X, a steel manufacturer, and Bank B also has a large exposure to another borrower Y, an aluminium manufacturer, and neither bank wants to lose their business. Each of these banks can exchange part of their credit risk and thus reduce the risk of their entire portfolio turning bad.[56]

Investment banks, in particular, have very large bond and derivatives portfolios and need to manage them on a more dynamic basis than commercial banks.[57] Credit derivatives also allow banks to trade in cross border credits that may otherwise be restricted for banks. For example, due to foreign exchange restrictions, it may not be possible for banks to lend to overseas customers. Instead, the bank may enter into a TROR Swap with a local bank, thereby sharing the cash flows of the cross border customer without actually lending.[58]

Another incentive to use credit derivatives is that the transfer of a particular risk element from one bank to another may improve the positions of both banks. The reason may be that a more diversified risk exposure is achieved for the loan portfolios of both banks. For example, the bank may use credit derivatives to achieve a credit exposure, which it would otherwise not be able to obtain (for example in a specific sector or a particular geographical area). This management of the credit portfolio enables the bank to achieve the desired relationship between risk and yield without changing its customer base or balance sheet structure.[59]

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55 "FIs Find Securitisation A Practicable Option", *domain-b.com*, 13 May 2002, *at* http://www.domain-b.com/finance/rating/standard_poor/20020513_securitisation.html.

56 Shetty *supra* n. 31.

57 *Supra* n. 24. Commercial banks have smaller balance sheets and their portfolios are marked to market daily because they tend to move in and out of fashionable sectors more quickly than syndicated lenders.

58 *Supra* n. 39.

59 Hyldahl *supra* n. 35.

B. Motivation For The Protection Seller

Protection sellers are motivated to purchase credit derivative instruments to expand to an alternative asset class and diversify and to obtain the position of a lender to an obligor or a portfolio, without originating the same. Synthetic securitisation also allows the protection seller to create a tailor-made investment in terms of tenure and cash flow characteristics.

Insurance companies, asset managers, hedge funds, etc. are driven into the credit derivatives market due to the attractive returns it entails. The cost involved in such a transaction is also far less for the protection seller, who has to maintain a business relation only with the protection buyer, while the transaction in effect provides the protection seller with risks and rewards in a bunch of corporate or sovereign clients.[60]

VII. Risks Involved

Derivatives are essentially contracts whose value depends on an underlying asset, such as the value of a currency or a bushel of corn. They have been controversial for years, especially as they have exploded in popularity. This is because they are basically unregulated and have played a role in several financial scandals, from the fall of Barings Bank in Britain in 1995 and the collapse of the huge New England, US, based hedge fund Long-Term Capital Management in 1998 to the more recent demise of Enron Corporation. Billionaire investor, Warren Buffett, said in his annual letter to the shareholders of Berkshire Hathaway Inc., of which he is Chairman, that "Derivatives are financial weapons of mass destruction. ... The dangers are now latent—but they could be lethal."[61]

However, one of the main risks involved in credit derivatives is that many big dealers may let down investors when it comes to informing them of the real risks involved in a particular transaction. Investors, therefore, would have to make sure that they are being fully compensated for the risks they assume. For example, as Janet Tavakoli pointed out, investors with single-tranche synthetic credit derivatives may be in the dark about

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[60] *Supra* n. 39.

[61] John M. Berry, "Divided On Derivatives: Greenspan, Buffett At Odds On Risks Of The Financial Instruments", *The Washingston Post*, 6 March 2003, E01, *available at* http://www.wider.unu.edu/inmedia/inmedia2003/in-media-2003-6.pdf.

the cash flows related to them and the potential volatility of the transactions, which are not rated by the major ratings agencies because they are private deals and the target investors often do not require an explicit rating. She states, "I would say the single-tranche business is going to be ripe for a shake out."[62]

Another potential downside of credit derivatives, particularly with respect to bank loans, concerns loan monitoring incentives. For any given loan, the originating bank is usually in the best position to monitor the ongoing creditworthiness of the borrower. The bank's incentive to perform this monitoring function will be significantly reduced if the bank subsequently purchases credit protection on this loan via credit derivatives. However, a bank that shirks its monitoring responsibilities could suffer damage to its reputation making it costly to transact in this market.[63] Also the bank is not entirely free of risk by use of such instruments. The bank is still subject to a counter party risk on the protection seller, i.e. that the protection seller may default on or prior to the occurrence of the credit event. This counter party risk calls for close management and monitoring of the loan as well as the protection seller.

Also, there is a correlation issue. If an investment bank wishes to lay off Belgian sovereign risks, then the effect on its own overall credit risk portfolio will be different depending on whether it sells that risk to a counter party whose fortunes are linked to those of the Belgian economy or to one whose fortunes are not so linked. It would be advantageous for such a bank to sell the risk to an Asian bank, unlikely to be affected by a European economic crisis. The problem is, therefore, firstly, to evaluate the exact probability of joint default so that the net post-swap credit exposure can be worked out and secondly, to find enough uncorrelated counter parties interested in or knowledgeable about the credit risk that has to be sold.[64]

Another risk involved in derivatives is that the complex accounting rules for derivatives can lead to overstatement of profits (this was true of Enron) and confusion. Under conditions where the earnings of the derivatives traders are calculated according to the profits they return parties to

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[62] "Understanding The Risk In Structured Deals", 22 December 2003, *at* htpp:// www.tavakolistructuredfinance.com/reuters.html.

[63] Kiff and Morrow *supra* n. 30, 10.

[64] *Supra* n. 24.

derivatives have an enormous incentive to cheat in accounting for them. Therefore, it was possible to have a situation where two parties to a contract, using different models, could both show substantial profits on the same contract.[65] However, this risk is not particular only to credit derivatives and is common to any derivative transaction.

However, in the opinion of the author, such risks are not very significant, primarily because they can easily be guarded against. The risks listed above are rare and the events contemplated above would only arise on the failure of the parties to take due care before entering into such transactions. Sufficient regulation would also significantly reduce and alleviate such risks. The sheer volume of the international credit derivatives market and the rapidity with which it has expanded over the years are clearly indicative of the fact that the stakes and possible gains/profits are high enough to cause such risks to be willingly taken by banks and investors alike.

VIII. Some Credit Derivative Transactions

The first transaction involving synthetic securitisation was JP Morgan's BISTRO case in December 1997. The total exposure of the instrument was USD 9.7 billion, while the funding received from the market was only USD 697 million.[66]

Somewhat unusual transaction in the Asian market was one involving taxi and public light bus loans. This deal, involving USD 384.7 million, completed by Hong Kong and Shanghai Banking Corporation, was not only the first synthetic securitisation to feature an asset class of this kind but it was also the first non-Japan, Asia-based transaction to feature a portfolio of non-mortgage consumer and small-to medium-sized obligations.[67]

However, one of the most novel transactions was one entered into by Oriental Land Co., owner and operator of Tokyo Disneyland. The theme

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[65] Nick Beams, "Derivatives Pose 'Potentially Lethal' Threat To Financial System", 11 March 2003, *at* http://www.wsws.org/articles/2003/mar2003/deri-m11.shtml.

[66] *Supra* n. 24.

[67] Louis Beckerling, "Synthetic Securitised Loans A First For HSBC", *The Standard*, 25 October 2003, *available at* http://www.thestandard.com.hk/news_detail_frame.cfm?articleid=42811&intcatid=1.

park is located on shaky ground running adjacent to the convergence of three massive tectonic plates in nearby Pacific waters. The company was worried about coastal property damage from earthquakes and therefore devised a capital market transaction to hedge its more uncommon business risk. In 1999, Oriental Land entered into a USD 200 million deal through a privately arranged risk transfer. Under the terms of the transfer, if, within the subsequent five years, an earthquake of stipulated magnitude, depth and location wreaked havoc on Tokyo's Disneyland, then Oriental's bond investors would forfeit their principal to pay for the repairs.[68]

The above three transactions have only been cited to highlight the wide variety of credit derivative transactions that have been entered into in the last few years. These transactions reflect the willingness of market players to experiment with new methods of credit risk management.

IX. Application Of Credit Derivatives In India

According to Robert Pickel, Director and Chief Executive Officer of ISDA, it is expected that the global market for credit derivatives will continue to grow at its recent stunning pace, as the exotic hedging instrument gains more popularity in young and underdeveloped markets such as Asia. The history of interest rate swaps and currency options, the dominant and more mature components of the entire derivatives market as well as rising investor awareness of credit derivatives are indicative of the growth capacity of credit derivatives. According to him, the period of initial hesitation is over since most infirmities have been resolved. Though credit derivatives have still not made much headway in case of markets like Asia, recent deals in Singapore and Hong Kong exhibit increasing acceptability of credit derivatives deals by investment banks.[69]

India too is not going to allow herself to be left far behind. The Securitisation Act is the first legislation in India to deal with securitisation. Though the concept existed in India since the early 1990s, it was till now regulated solely by contractual terms and by application of the provisions of the existing laws like the *Transfer of Property Act, 1882.* The concept of

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[68] Frank Vetrano and Bill Lyons, "Credit Derivatives: Hedging Closer To Happiness", *Secondary Mortgage Markets*, December 1999, Vol. 16, No. 2, 1, *available at* www.credit-freddiemac.com/finance/smm/dec99/pdfs/credit.pdf.

[69] "ISDA Chief Optimistic About Credit Derivatives", 29 July 2003, *at* www.credit-deriv.com/crenewsjan03.htm.

securitisation has been introduced by the Securitisation Act in relation to reconstruction of impaired financial assets and therefore seems to indicate the securitisation only of NPAs. The Securitisation Act, however, reflects the attempt of the Legislature to grant legal certainty to and to regulate securitisation in India. It also reflects the recognition by the Legislature of new methods of finance and risk control.

Credit derivatives in India do not exist in any formal manner. However, the RBI has been actively looking at the possibility of permitting them in the Indian market. In March 2003, the RBI issued draft guidelines on introduction of credit derivatives in India (Draft Guidelines). The Draft Guidelines were prepared after considering the Report of the Working Group on Introduction of Credit Derivatives in India.

According to Vishakha Mulye, Joint General Manager of ICICI Bank, the potential for credit derivatives in India is huge. "In India there are a large number of regional banks and co-operative banks who are concentrated on local risks. So, if a co-operative bank is highly exposed to the sugar industry, it can run into trouble if the sugar industry goes through a downturn."[70] However, if this bank enters into a CDS or TROR Swap with another bank, its exposure to the sugar industry would reduce and it would not be significantly affected by a downturn in the sugar industry. There are other advantages as well. For instance, there are the new age banks that are not able to meet their priority sector obligations due to a lack of presence in the rural areas. At the same time, there are banks in rural areas that have a high concentration of risk. If regulators recognise such synthetic exposures to priority sector, both the protection seeking and the protection selling banks will gain.[71]

Secondly, in India, many banks are forced to follow narrow banking due to shortage of capital. By completely covering their credit risks, these banks can continue to do business without lowering their capital adequacy ratio.

The advent of credit derivatives will also give a fillip to corporate bonds, as the credit risk can be stripped off these bonds, and thereby develop the corporate bond market. Today, the finance market is averse to taking risk and is willing to subscribe only to bonds with a Triple A rating. Corporates with below double A ratings are unable to raise funds. According to

[70] Shetty *supra* n. 31.

[71] *Ibid.*

S. Vardarajan, Treasurer, JP Morgan, "Today corporate bonds have become more of a commodity, with most of them in the triple A category." He also says that the market for debt with a lower rated paper would develop if the investor was in a position to protect himself from credit risk. "For this we need to have a good CDS market with instruments such as credit default swaps and credit linked notes."[72]

On the other side, the protection sellers also have a lot to gain. Currently, intermediaries such as insurance companies and mutual funds are not permitted to take certain kinds of direct exposure like lending. However, they would be able to write credit protection and earn returns on assets to which they have no access today. Also, intermediaries that lack the selling relationships would be able to participate in exposures and returns that are otherwise not available to them.[73]

Lastly, the financial system as a whole stands to benefit. With credit exposures being transferred across institutions, capital is likely to be used more efficiently as players having excess capital can take up credit risks, allowing capital-scarce players to generate more business.[74]

X. Legal Issues In The Application Of Credit Derivatives

A. Reserve Bank Of India's Draft Guidelines

The most important concern that market participants are faced with when they use credit derivatives is the question of legal uncertainty. A number of question marks hang over the legal regime for credit derivatives. The Draft Guidelines issued by the RBI are, today, the only regulations on credit derivatives. Until these guidelines are finalised, credit derivatives would be governed only by the existing legal framework and, more specifically, the existing RBI notifications and guidelines that govern investments by commercial banks.

Some of the guidelines, that the RBI proposes to implement, appear to narrow the scope of credit derivatives in India. However, the RBI proposes to gradually phase out the restrictions imposed with the development of

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[72] *Ibid.*

[73] Report Of The Working Group On Introduction Of Credit Derivatives In India (Reserve Bank Of India 26 March 2003), para 3.9(b).

[74] *Ibid*, para 3.9(d).

the market. It is felt that what is required is not restrictions on the contractual freedom of the parties, but removal of the existing restrictions so as give a major impetus to banking sector reforms and the evolution of credit derivatives in India. This article will analyse some of the proposals in the Draft Guidelines and consider its need and applicability in the current legal framework.

1. Proposal I

Under current RBI regulations, banks are precluded from issuing guarantees favouring financial institutions, other banks and/or other lending agencies for the loans extended by the latter. According to the Draft Guidelines, these instructions relating to bank guarantees will not be applicable to transactions pertaining to use of credit derivatives, as derivatives are normally concluded under standardised master agreements, which are structurally different from plain bank guarantees and therefore subject to ongoing risk controlling, risk management and valuation procedures.

a. *Applicability*

Conceptually, this distinction between credit derivatives and guarantees is recognised worldwide by regulatory bodies. However while the provisions relating to guarantees do not apply to credit derivatives *per se*, it is not clear whether such provisions will apply to guarantees that form a part of the credit derivative transaction, whether by way of credit enhancement or otherwise. It is essential that this restriction is not applicable to banks, as many banks acting as protection sellers will rely upon the guarantee rather than the viability of the project.

2. Proposal II

According to the Draft Guidelines, banks will be initially permitted to use credit derivatives only for the purpose of managing their credit risk;[75] market making activities by banks in credit derivatives are not envisaged. Banks will also not be permitted to take long or short credit derivative positions with a trading intent. This means that banks may hold the

[75] *See* Draft Guidelines, para 3(iii). Managing their credit risk includes buying protection on loans and investments for reduction of credit risk and selling protection for the purpose of diversifying their credit risk and reducing credit concentrations and taking exposure in high quality assets.

derivatives in their banking books and not in the trading books except in case of CLNs, which can be held as investments in the trading book if the bank so desires.[76]

The Draft Guidelines also propose to restrict banks to use simple credit derivative structures like CDS and CLN only, involving single reference entities.

a. *Applicability*

It must be noted that the proposed restrictions limit the market to single reference entities, thereby clearly eliminating the possibility of synthetic securistisation as of today. Since all credit derivative instruments require risk assessment, the RBI should not restrict use of a particular credit derivative instrument. Instead, it should allow only those participants, who are equipped with requisite skills as well as technology, to quantify and manage credit risks to which they are exposed in credit derivative transactions. Thus, the RBI should conduct a phased implementation of credit derivatives in India, instead of mass opening up of the market.

3. Proposal III

The existing RBI guidelines allow transactions between banks and their financial services subsidiaries on the principle of arms' length relationship. The Draft Guidelines, therefore, propose not to allow credit derivatives transactions between related parties till the players gain experience and maturity. Except for the above, the Draft Guidelines impose no restrictions on the parties to the transactions.

a. *Applicability*

What is needed, as brought out above, is restrictions on market players according to their ability, not unreasonable restrictions on players that may be mature enough to deal with their subsidiaries. A complete opening up of the market of credit derivatives may cause a sudden chaos in the market, due to banks and financial institutions that lack infrastructure and facilities entering into credit derivative transactions. However, the Draft Guidelines do provide safeguards in the form of risk management policies,

[76] *See* Draft Guidelines, para 3(iv). The trading book typically consists of negotiable financial assets held for a short period. The banking book comprises loans granted in connection with the bank's traditional lending activities. Such loans are held for longer periods.

procedures and systems and controls, which are required by banks participating in credit derivatives. The Draft Guidelines also provide that the credit derivative should conform to the following minimum criteria, i.e. it should be direct, explicit, irrevocable and unconditional. The credit protection must represent a direct claim on the protection provider and must be linked to specific exposures so that the extent of the cover is clearly defined and incontrovertible.

4. Proposal IV

As regards exposure norms, while determining the overall sectoral/ borrower group/individual company exposure, suitable reduction will be allowed in the level of exposure with respect to credit protection bought by means of credit derivatives. Conversely, the protection seller's exposure would increase as the protection seller acquires what is equivalent to a credit exposure on the reference asset. For the protection seller, the method of measuring exposure that would be applicable would be similar to the manner in which non-fund based credit limits such as guarantees are reckoned. Once the exposure is computed to individual/group entities, banks will have to ensure that they are within the overall ceiling as laid out in the relevant RBI guidelines.[77]

a. *Applicability*

Calculation of the level of exposure of a bank is very important. The Financial Services Authority, United Kingdom has highlighted credit derivatives risks, one of them being that credit derivatives are essentially instruments for transfer of credit risk, but the ease with which risks may be transferred gives rise to possibilities of concentration of such risk.[78] The above proposal, therefore, appears to adequately prevent against such undesirable concentrations of risk.

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[77] *See* Draft Guidelines, paras 5.1.1–5.1.2. Exposure ceilings for all fund-based and non-fund-based exposures will be computed in relation to total capital as defined under capital adequacy standards. As per the present policy, from 1 April 2003 exposure calculation will be computed on the basis of 100 per cent of non-fund-based exposures in addition to fund-based exposures.

[78] "UK Financial Regulator Highlights Credit Derivatives Risks Again", 22 January 2004, *available at* www.credit-deriv.com/crenewsjan03.htm.

5. Proposal V

In addition to the above recommendations, the Draft Guidelines also recommend the use of the 1992 ISDA Master Agreement and the 1999 ISDA Credit Derivatives Definitions and subsequent supplements to definitions with suitable modifications to suit conditions in India as well as making disclosure of the kind of transactions, gains and losses—realised/unrealised—from various derivative deals, in the Notes on Accounts of the annual accounts of banks in respect of the credit derivative transactions.

It is hoped that before RBI confirms these Guidelines, it makes suitable adaptations as explained above to achieve its objective of effective management of credit risk. The RBI has issued the Draft Guidelines because it recognises that effective management of credit risk is a critical factor in comprehensive risk management and is essential for the long-term financial health of business organisations, especially banks. As a step towards enhancing and fine-tuning the existing risk management practices in banks, the RBI needs to study the need and scope for allowing banks to use credit derivatives and the regulatory issues involved and not impose unrequired restrictions on the same.

B. The Securitisation Act

As far as the Securitisation Act goes, the definition of securitisation given in the Act is broad enough to take, within its fold, securitisation transactions involving any originator, being a bank, financial institution or corporate. However, the provisions relating to the acquisition of financial assets by securitisation companies only contemplate financial assets being taken over from originators, who are banks or financial institutions. This anomaly questions the applicability of the Securitisation Act to companies that acquire financial assets exclusively from corporate originators. If the intention of the Act is only to serve as a clean up tool for NPAs, then the definitions need to be narrowed down from their existing generic forms. If however the Securitisation Act endeavours to enable securitisation, then clearly the Securitisation Act needs to go a long way.[79] The preamble of the Securitisation Act, however, mentions that "this is an act to regulate securitisation... ." Therefore it may be said that the provisions of the Act are not mandatory and not meant to limit the scope of securitisation but merely regulate it with respect to banks and financial institutions. Even if

[79] "One Size Fits All", *The Economic Times*, 8 February 2003.

the existing restrictions proposed in the Draft Guidelines are removed, the stakes involved in synthetic securitisation, being as large as they are, banks would be hesitant to engage in such transactions without being positive about the legality of the transaction and its permissibility under the Securitisation Act.

C. The Indian Contract Act, 1872

In the absence of any specific legislation on credit derivatives, these instruments will be governed by the *Indian Contract Act, 1872.* Parties are free, subject to the existing rules and regulations issued by the RBI and other regulatory authorities, to enter into contracts with such terms, as they desire. However, it is yet to be ascertained whether such contracts will be hit by Section 30 of the Act.[80] While Section 30 does not specifically lay down what exactly constitutes a wagering contract, the same was defined by the Queen's Bench, in *Carlill* v. *Carbolic Smoke Ball Co.*[81] and in a number of subsequent cases.

Wagering contracts have been distinguished from contracts of insurance, in as much as the insurer has to have an insurable interest in the subject matter that is insured. If, however, the insured has no insurable interest in the subject matter that is insured, the insurance contract is deemed to be a wagering contract and therefore void.

A credit derivative transaction, as explained earlier, differs from a contract of insurance in that the insured (i.e. the protection buyer) usually does not have an insurable interest in the subject matter that is insured. In credit derivatives, the protection buyer may not be required to incur any actual loss, nor is it necessary that he actually owns the reference asset. In general, when a CDS calls for valuation on the occurrence of a credit event, the insurable interest requirement is not met.[82]

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[80] Section 30 declares that all agreements by way of wager are void and cannot be enforced by a court of law.

[81] (1893) 1 QB 256: "A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependant on the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake, neither contracting parties having any other interest in that contract than the sum of stake he will win or lose, there being no other real consideration for the making of such contract by either parties... ."

[82] *See* Jean S. Chin, "Credit Derivatives: Current Legal Issues", 16 July 2003, *at* http://www.mayerbrown.com/cdo/news/derivatives_docsCreditDerivatives_CurrentLegalIssue.pdf.

In the absence of insurable interest in a credit derivative transaction, it would be left to the discretion of courts to determine if credit derivatives fall under the definition of a wagering contract. In the alternative, regulators need to push for legal amendments to remove the uncertainty in this regard.

D. Rulings On Credit Derivatives

One of the few cases dealing with credit derivatives is the ruling of the US Court of Appeals for the Second Circuit in *Ursa Minor Limited and Bankers Trustee Company Limited* v. *Aon Financial Products, Inc.* The ruling in the case was given on 11 April 2001. The court ordered that the case will not be cited as a precedent, but in any case its ratio is worth consideration.[83]

The case involved a CDS where the defendant had sold protection in a swap in a surety bond issued by a Philippine government body. The bond issuer denied liability on the bond, asserting its invalidity, and the plaintiffs sought to recover from the defendants under the CDS. The defendant refused to pay. The Court held in favour of the plaintiffs, on the ground that there was a clear waiver in the swap papers that the defendant will not raise defences concerning the invalidity, illegality or unenforceability of the GSIS surety bond. The Court cited from *Compagnie Financiere de CIC et de L'Union Europeenne* v. *Merrill Lynch, Pierce, Fenner and Smith, Inc.*,[84] and *Grumman Allied Indus., Inc.* v. *Rohr Indus., Inc.*,[85] which held that where the parties to an agreement have expressly allocated risks, the Judiciary shall not intrude into their contractual relationship. The case as well as the citation relating to the Judiciary's disinclination to interfere against specific allocation of risks by parties is a significant ruling for credit derivatives.[86]

XI. Conclusion

Credit derivatives, as of today, occupy a very small proportion of the international derivatives market. In India, securitisation is still in its infancy and credit derivatives are almost non-existent. Banks and other financial

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[83] "Legal Enforceability Of Credit Default Swaps", *at* htpp://www.credit-deriv.com/legalissues.htm.

[84] 188 F.3d 31, 34–35 (2d Cir. 1999).

[85] 748 F.2d 729, 735 (2d Cir. 1984).

[86] *Supra* n. 83.

institutions are only just beginning to explore the potential of securitisation. However, there is no doubt that credit derivatives transactions will give a fillip to the development of commercial activity and the banking industry in India, by successfully reducing credit risk and divesting funding and interest rate risks from credit risk.

Credit derivatives and synthetic securitisation are and should be allowed to remain contractual concepts. Other than broad definitions, general guidelines and relaxation of the regulatory framework, no further legislation or regulations are required. Banks need to be given a free but guided hand when stepping into this new field. The ruling of the US Court of Appeals indicates the reluctance of courts to interfere with contractual relations between the parties. It is time that legislators and regulators give the same importance to contractual relationships involving credit derivatives.

The impact that these instruments will have on the Indian banking industry cannot be over-emphasised. By successfully transferring credit risk to those who are more capable and willing to shoulder it, banks will be able to concentrate on their core areas, without being restricted in the sanctioning of otherwise favourable loans due to overexposure of risk in a particular segment. It would thereby increase the appetite of banks to measure and assume credit risk. Such transactions would lead to efficient reallocation of assets and thereby lead to an efficient utilisation of capital. This will contribute to increasing the stability of the financial system as a whole.

SAFETY NORMS FOR UNSAFE WASTES! HAZARDOUS WASTES IN INDIA†

*Gargi Shah** and *Ramya Mahesh*Φ

I. INTRODUCTION

Although the Industrial Revolution commenced in the 16th century in the occidental countries, in today's world, industries are not alien to the oriental countries either. A plethora of industries has not only given man novel luxuries but has also saddled him with the tribulations of push-button living. Industries generate, use and discard toxic substances that lead to the generation of enormous wastes possessing hazardous characteristics. This is a matter of grave concern to nations. Exposure to toxic or hazardous wastes has been scientifically proven to have an adverse impact on human health and environment. Contamination of life resources like water, air and land by metals and chemicals such as lead, mercury, tin and hexavalent chromium can cause reduction in intelligence quotient, shortened attention span, hyperactivity, aggressive behaviour and other learning and behavioural problems.[1] High concentrations of these can lead to mental retardation, coma, convulsions, brain damage, digestive tract cancers, cutaneous and nasal mucous membrane ulcers, dermatitis and also death.[2] India generates about two thousand tons of hazardous waste per day.[3]

This article emphasises the crucial functioning of environmental laws and regulations pertaining to the management and handling of hazardous

† This article reflects the position of law as on 31 March 2004.

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1 Report of the High Powered Committee on Management of Hazardous Wastes (January 2001) part 2.1.

2 *Ibid.*

3 *Research Foundation for Science, Technology and Natural Resource Policy, New Delhi* v. *Union of India and others* (Writ Petition No. 657 of 1995 Supreme Court 5 May 1997) (recording the factual position given in the Statement of the Additional Solicitor General).

wastes. It seeks to scrutinise the considerable changes that these regulations have undergone and whether they provide adequately for the purposes for which they were enacted. In this endeavour, it also attempts to examine how far the Indian Ministry of Environment and Forest (MoEF) and other concerned authorities shoulder responsibility and the reasons for their inefficiency in ensuring abidance of environmental regulations. The role played by the Judiciary to counterbalance the inaction and failure of the statutory organs of the Government is also discussed.

II. Environmental Legislative History

The Stockholm Conference[4] provided guidelines for action by Governments and international organisations to protect and improve the human environment through international co-operation.[5] The Government of India, in the aftermath of the Bhopal tragedy, enacted the *Environment (Protection) Act, 1986* (EPA) to regulate the discharge of pollutants and handling of hazardous substances, to ensure a speedy response in the event of accidents threatening the environment and to provide for punishment to deter those who endanger human environment, safety and health. Section 3(2)(vi) and (vii) of the EPA empowers the Central Government to lay down procedures and safeguards for the handling of hazardous substances by establishing an effective machinery. Hazardous substances include hazardous chemicals and hazardous wastes. The Government of India notified the *Hazardous Waste (Management and Handling) Rules, 1989*[6] (1989 Rules) under the EPA[7] to establish a control mechanism to deal with issues relating to indigenously generated as well as imported hazardous wastes.

The growing concept of "NIMBY" (i.e. Not In My Back Yard) in most of the developed countries led to several instances of illegal traffic of hazardous wastes in the developing countries, which have been exposed

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4 At the United Nations (UN) Conference on the Human Environment held at Stockholm, the international community adopted the *Stockholm Declaration on the Human Environment*, UN Doc. A/CONF.48/14/Rev.1 (1972).

5 The UN General Assembly affirmed this objective at its 24th session in Resolution 2581 (XIV) at Sweden.

6 Vide Notification No. S.O. 594 (E) dated 28 July 1989 published in Gazette Of India, Extraordinary, Pt. II, Section 3(ii).

7 Under Sections 6, 8 and 25 of the EPA.

by Greenpeace.[8] Thus the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (Basel Convention) came into force in May 1992. The scope of the Basel Convention is limited to the governance of the movement of scheduled hazardous wastes from countries that are members of the Organisation for Economic Co-operation and Development (OECD) to non-OECD countries like India. Agenda 21[9] states that sound management of wastes is among the major environmental issues for maintaining the quality of the Earth's environment. The inaction and failure of the statutory authorities to ensure abidance of environmental regulations resulted in the growth of Public Interest Litigation (PIL) for the redress of environmental issues. These PILs evidenced the bold and pragmatic initiative taken by the Judiciary in acting against complaints made *pro bono publico.*

A. A Landmark Judgment

In India, the first ever meticulous and far-reaching Committee to look into the problem of hazardous wastes was the result of a PIL[10] challenging the unauthorised import of hazardous wastes into the country. The petitioner, Research Foundation for Science, Technology and Natural Resource Policy, alleged in the petition that, "the import of hazardous or toxic wastes endangering the environment and life of the people of India is unconstitutional."[11] Authorisation or permission granted so far without ensuring the availability of the required safe disposal sites is a matter of serious concern requiring further examination to fix the responsibility of persons whose duty it was to ensure availability of safe disposal sites at the time of granting authorisation or permission.[12] It was deemed necessary that suitable directions be given to prevent as much damage in the future as possible on account of the unchecked activity of import or generation or disposal of hazardous waste in the country. The Supreme Court issued a

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8 For more information, *see* "In Depth: Hazardous Waste Trafficking", *at* http://www.choike.org/nuevo_eng/informes/1157.html.

9 *Agenda 21*, Chapter 20 "Environmentally Sound Management Of Hazardous Wastes, Including Prevention Of Illegal International Traffic In Hazardous Wastes", adopted by the Plenary at the Earth Summit dealing with aspects of sustainable development in Rio de Janeiro on 14 June 1992.

10 Writ Petition No. 657 of 1995 filed in the Supreme Court.

11 Report of the High Powered Committee on Management of Hazardous Wastes (January 2001) part 1.1.

12 *Supra* n. 3.

notice to the respondent, the Union of India, to this effect. The failure on the part of the Central and State Governments and the Pollution Control Boards (PCBs) to appreciate the gravity of the situation and the need for prompt measures left the Court with no option but to constitute the 'High Powered Committee' on Management of Hazardous Wastes (HPC).[13] The Government accordingly notified the Terms of Reference on 17 October 1997. These were amended on 27 November 1997. The 14 Terms of Reference went well beyond the original scope for which the HPC had been constituted. After extensive research on the matters referred, the Report of the High Powered Committee on Management of Hazardous Wastes (HPC Report) was submitted to the MoEF.[14] On the basis of this report, pending the petition under reference, the *Hazardous Waste (Management and Handling) Amendment Rules, 2003* were brought into force.

III. What Are Hazardous Wastes?

A subjective definition of 'hazardous wastes' is not possible as the term may include various chemicals and metals at different concentrations. Hazardous wastes are usually by-products of industrial operations; moreover, recycling of hazardous wastes itself generates hazardous wastes that are often more toxic in concentration than the material recycled. Such toxic wastes pose a threat to humans as well as to the environment. Hazardous wastes include heavy metals such as arsenic, cadmium, chromium, lead and mercury, processes which utilise different categories of oil and petrochemicals, products such as poly-vinyl chloride and other plastics, waste products from photocopiers, chemicals such as polychlorinated biphenyls and by-products such as dioxins and furans, which are now recognised as toxic substances affecting all forms of life. In fact, depending upon their characteristics and the nature and concentration of contaminants, some of these wastes are extremely toxic and hazardous.[15] The 1989 Rules defined 18 waste categories in its Schedule with their respective regulatory quantities which when exceeded would be hazardous wastes. These wastes *inter alia* included cyanide wastes, metal finishing

[13] *Research Foundation for Science, Technology and Natural Resource Policy, New Delhi* v. *Union of India and others* (Writ Petition No. 657 of 1995 Supreme Court 13 October 1997).

[14] The full text of the HPC Report is *available at* http://www.cpcb.delhi.nic.in/hpcreport/contents.htm.

[15] HPC Report, part 2.1

wastes and mercury, arsenic, thallium and cadmium-bearing wastes. The 1989 Rules, however, did not provide for imports. In 2000, a distinct list applicable only to import and export was included in Schedule 3. The 1989 Rules, as amended in 2003, defines hazardous waste as "any waste which by reason of any of its physical, chemical, reactive, toxic, flammable, explosive or corrosive characteristics causes danger or is likely to cause danger to health or environment, whether alone or when in contact with other wastes or substances" and includes wastes listed in the Schedules 1, 2 and 3.[16] Article 1.1 of the Basel Convention also defines hazardous wastes.[17]

After a careful study, the HPC Report defines hazardous wastes as:

> "Any substance, whether in solid, liquid or gaseous form, which has no foreseeable use and which by reasons of any physical, chemical, reactive, toxic, flammable, explosive, corrosive, radioactive or infectious characteristics causes danger or is likely to cause danger to health or environment, whether alone or when in contact with other wastes or environment, and should be considered as such when generated, handled, stored, transported, treated and disposed of."[18]

IV. Scope Of Hazardous Waste Rules In India—A Regulatory Overview

A. The Hazardous Waste (Management and Handling) Rules, 1989

The Government of India formed the MoEF in 1985 for formulating Environment Policy Planning. The Central Pollution Control Board (CPCB), that was already in existence came under its purview as a statutory authority. PCBs are responsible for the prevention, control and abatement of water and air pollution. The 1989 Rules provided for control of generation, collection, treatment, transport, storage and disposal of hazardous wastes and accordingly set out the duties of the MoEF and PCBs for the establishment of a control mechanism.

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[16] *See* Rule 3(14) of the 1989 Rules as amended by Rule 3 of the 2003 Amendment.

[17] Article 1.1 of the Basel Convention: (i) Wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex III; and (ii) Wastes that are not covered under paragraph (i) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit.

[18] HPC Report, part 2.2.

To this effect, the MoEF issued an Environment Action Programme in 1994 that identified improper management of hazardous wastes generated from industrial and commercial activities as one of the priority problem areas. It recognised that the indiscriminate disposal of wastes including heavy metals, cyanides and pesticides, complex organic compounds (such as H-acids) that are toxic, flammable, corrosive or explosive have high chemical reactivity, resulting in land, surface and ground contamination.[19]

The CPCB was an advisory body to the Central Government and had no statutory role in the management of hazardous wastes except as a State Pollution Control Board (SPCB) for the Union Territories. The State Government or a person authorised by it were supposed to identify disposal sites and undertake Environment Impact Assessment (EIA) in consultation with a Committee of Experts.[20] Consent for establishment of a plant for disposal of effluents or for establishment or operation of any industrial plant in an air pollution control area is required under the *Water Act (Prevention and Control) Act, 1974* (Water Act)[21] and the *Air (Prevention and Control) Act, 1981* (Air Act)[22] respectively. If the industry was likely to generate hazardous wastes listed in the schedule and/or intended to operate as a facility for the collection, reception, treatment, transport, storage and disposal of such wastes, grant and renewal of authorisation had to be obtained under Rule 5(4)[23] and Rule 8[24] along with that under the Water Act and the Air Act respectively. These Rules lacked standardisation of

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19 "India—The Hazardous Waste Management Project", Sectoral Environmental Assessment Report, (Submitted to The World Bank by Ministry of Environment and Forests, New Delhi, September 1997) vol. 1, para 5 (Executive Summary).

20 Rule 8 of the 1989 Rules.

21 Section 25 of the Water Act.

22 Section 21 of the Air Act.

23 Rule 5(4) of the 1989 Rules: "The State Pollution Control Board or Committee shall not issue an authorisation unless it is satisfied that the operator of a facility or an occupier, as the case may be, possesses appropriate facilities, technical capabilities and equipment to handle hazardous wastes safely."

24 Rule 8 of the 1989 Rules: "(1) The State Government or a person authorised by it shall undertake a continuing programme to identify the sites and compile and publish periodically an inventory of disposal sites within the State for the disposal of hazardous wastes. (2) The State Government or a person authorised by it shall undertake an environment impact study before identifying a site as waste disposal site in the state. (3) The State Government or a person authorised by it shall undertake a continuing programme to compile and publish an inventory of sites within the State at which hazardous waste have at any time been stored or disposed of and such inventory shall contain, besides the

steps[25] to be taken by the occupier generating hazardous wastes, as they did not provide for technical guidance to conduct activities, which are environmentally sound. The 1989 Rules were merely preliminary guidelines. They were ambiguous in their standards and their implementation was largely dependent on the PCBs. The State Government or a person authorised by it was also required to publish an inventory to help them monitor and control the generation of hazardous wastes in the State.[26]

The MoEF was required to examine the imports of hazardous wastes proposed in Form 6 and grant authorisation for the same. But, the 1989 Rules were uncertain, as they failed to provide for any categorisation of hazardous wastes imported for recycling as distinguished from final dumping and disposal, as all wastes may not possess the ability of being recycled. This was a blanket cover as the actual portion of the imports recycled was a meagre per cent and the rest was dumped in the area around the plant without being detoxified. In case of such violation, the SPCB has powers under the EPA to inspect, collect samples and prosecute these industries.[27] The 1989 Rules therefore suffered from several shortcomings, which rendered them ineffective.

B. The Hazardous Waste (Management and Handling) Amendment Rules, 2000

India's ratification of the Basel Convention[28] on 24 June 1992 gave rise to the need to bring national legislation in line with the commitment made

location and description, information relating to the amount, nature and toxicity of hazardous wastes at each such site as may be associated with such sites."

[25] The expression "all practical steps" in Rule 4(1) of the 1989 Rules: "The occupier generating wastes listed in column (2) of the Schedule in quantities equal to or exceeding the limits given in column (3) of the said Schedule, shall take all practical steps to ensure that such wastes are properly handled and disposed of without any adverse effects which may result for such wastes and the occupier shall also be responsible for proper collection, reception, treatment, storage and disposal of these wastes either himself or through the operator of facility."

[26] *Supra* n. 20.

[27] Section 10 (Powers of entry and inspection), Section 11 (Power to take sample and procedure to be followed in connection therewith) and Section 19 (Cognizance of Offences) of the EPA.

[28] The Basel Convention was adopted by the Conference of the Plenipotentiaries on 22 March 1989. It came into force in May 1992. The text of the Basel Convention is *available at* http://www.basel.int/.

thereunder.[29] The MoEF, in 1996, appointed an expert committee headed by Dr. R. A. Mashelkar to work on amendments.[30] The Terms of Reference of the committee were characterisation of hazardous wastes, prohibition or restriction of hazardous wastes for imports, environmentally sound waste reprocessing technologies and listing and characterisation of wastes containing arsenic, cyanide and mercury on a priority basis.[31]

The *Hazardous Waste (Management and Handling) Amendment Rules, 2000* (2000 Amendment), which came into force on 6 January 2000,[32] is in addition to the 1989 Rules. Schedule 4 of the 2000 Amendment clarifies the ambiguities and distinctly outlines the duties of various authorities like the MoEF, CPCB and SPCBs constituted under the Water Act, the Directorate General of Foreign Trade constituted under the *Foreign Trade (Development and Regulation) Act, 1992* and the Port Authorities and Customs Authorities under the *Customs Act, 1995.*

The CPCB has been assigned an enlarged and specific role for which it has undertaken several programmes.[33] To recommend procedures for characterisation, sampling and analysis of hazardous waste, it has taken up a project with Environmental Protection and Training Research Institute, Hyderabad, the report whereof has been finalised. It has also undertaken a project on "Identification of Hazardous Wastes, their Characterisation and Waste Minimisation Options in Petrochemical, Pesticides, Dye & Dye Intermediates and Bulk Drugs & Pharmaceutical Sectors" with a view to identify and characterise hazardous waste streams generated from unit operations during production for suitable treatment and disposal and estimation of its generation per tonne of product.[34] Moreover, it has to recommend standards for treatment, disposal of wastes and specifications of materials. For this purpose, the CPCB has constituted a sub-committee at its Peer and Core Committee meeting to undertake a study to prepare

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[29] India signed the Basel Convention on 15 March 1990, ratified it on 24 June 1992 and acceded to it on 22 September 1992.

[30] MoEF (Hazardous Substances Management Division) order dated 23 August 1996. The text of the order is *available at* http://envfor.nic.in/cpcb/hpcreport/vol3a.htm#ANNEX – B – 4.

[31] *Ibid.*

[32] Vide Notification No. S.O. 24(E) dated 6 January 2000 published in the Gazette of India, Extraordinary, Pt. II, Section 3(ii).

[33] Schedule 4(2).

[34] The Annual Report of CPCB, 2001–2002, Chapter XIV, para 14.6.1.

guidelines. The draft guidelines stated that, in general, qualitative requirements should be considered for the disposal of hazardous wastes in secured landfills.[35] It also listed wastes not allowed to be disposed of directly (without pre-treatment) into the landfill facility and recommends that wastes coming to the facility should pass through the paint filter test.

A nationwide environmental planning and mapping programme for sustainable development of industries called Zoning Atlas Programme was initiated in 1995.[36] The programme is a compilation of information related to environment in the form of maps and text including statistical data. This programme is being executed by the CPCB under the World Bank funded 'Environment Management Capacity Building Project' and receives technical support from the German Agency for Technical Co-operation under the Indo-German Bilateral Programme on "CPCB/ SPCBs Strengthening of Environmental Quality Assessment and Control".[37] The CPCB has to monitor compliance of the conditions of authorisation of import and export in co-ordination with the Directorate General of Foreign Trade, the Port Authorities and Customs Authorities. These authorities, in turn, have to verify and monitor documents at the port and report cases of illegal traffic to the MoEF.[38] The CPCB is to conduct training courses for authorities to deal with the management of hazardous wastes. Yet, the 2000 Amendment failed to provide any channel for co-ordination between the CPCB and the SPCBs. The SPCBs, in addition to their responsibility under the 1989 Rules, now have to approve the design and layout of the facility.[39]

The MoEF was under the mistaken impression that these above referred duties of the authorities needed no further clarification. However, due to inadequate legislation for levying sufficient fees payable by the occupier or the operator of the facility,[40] technical expertise to inventorise hazardous wastes was absent. This lack of inventorisation caused failure on the part

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[35] *Ibid*, para 14.6.2.

[36] *Ibid*, para 14.1.

[37] *Ibid.*

[38] Schedule 4.

[39] Rule 8A of the 1989 Rules as inserted by Rule 9 the 2000 Amendment.

[40] Rule 5(2) and 5(3) of the 1989 Rules as amended by Rule 6(b) of the 2000 Amendment: "along with a sum of rupees seven thousand five hundred only for processing application for authorization and analysis fee, if required as prescribed under the Environment (Protection) Act, 1986."

of the implementing bodies at various levels to monitor the effective working of the units. The point worth noting in the 2000 Amendment is that Rule 16 brings out the liability of the occupier, transporter and operator of a facility on the well-established 'Polluter Pays' Principle and holds them responsible for restoring any damage caused to the environment by the improper handling and disposal of hazardous wastes rather than letting them get away by paying an unjustified compensation. Rules 8 and 8A impose a responsibility on the occupier or the operator of the facility to conduct a preliminary impact assessment study and thereafter an EIA to identify, design and set up sites for common hazardous waste disposal facility on the guidelines issued by the Government, which have to be approved by the SPCBs. The State Government, on receiving the EIA report, has to cause a public notice inviting objections and suggestions within 30 days and conduct a public hearing on receipt of any objection.[41]

To meet the techno-economic constraints of small-scale units, common effluent treatment plants are set-up in areas such as the Maharashtra Industrial Development Corporation (MIDC) in Maharashtra for treatment of waste. Illegal waste trade rackets continue to flourish. In 1999, a newspaper report exposed Sunil Chemicals Works, a chemical plant in the MIDC estate, which bought toxic effluents and simply dumped them without treatment. The Maharashtra Pollution Control Board (MPCB) admits of such incidents being observed in other parts of the State as well.[42] It is pertinent to note that Treatment Storage Disposal Facilities (TSDFs) have not been set up despite the fact that the Rules have been notified in 1989.[43] This is because in India they are generally managed by the units themselves or are disposed of in municipal dumps inexpensively. The 2000 Amendment, however, failed to identify model methods for final disposal of hazardous wastes that are environmentally sound. Incineration and landfills as methods of final disposal are not environmentally sound, unless the disposal is conducted capably, as they release highly toxic pollutants and have to be located outside the city. In comparison to the landfill method, disposal by incineration is preferable as it breaks down the toxicity of various hazardous wastes at certain temperatures. The landfill method can only be preferred after the

[41] Rule 8 of the 1989 Rules as amended by Rule 8 of the 2000 Amendment.

[42] Anil Singh, "Firms Dump Toxic Waste In Mumbai", *The Times of India* (Mumbai), 21 October 1999.

[43] *See generally ibid.*

hazardous wastes are treated or else they penetrate and contaminate the ground. Although Rule 8B[44] requires that the occupier or the operator ensure that the closure of the landfill is as per the design approved and is regularly monitored by the SPCBs, the same is done sloppily. Presently, 60 per cent of 4.4 million tons of hazardous wastes generated annually are disposed of in landfills.[45] As compared to the 88 incinerators in the country, there are only two scientifically designed landfills.[46]

C. *The Hazardous Waste (Management and Handling) Amendment Rules, 2003*

The *Hazardous Waste (Management and Handling) Amendment Rules, 2003*[47] (2003 Amendment) has extensively defined more pertinent terms, which will aid a more effective implementation of the Rules. The definition of the term 'disposal'[48] provides for an uncontentious liability on the part of the waste generators. The grant of authorisation under Rule 5, on satisfying pre-requisites like submission of annual returns, reduction in waste generated, recycled and reused, fulfilment of conditions prescribed in the authorisation and remittance of a required processing application fee and analysis fee,[49] was subsequently extended from two years to five years in the 2000 Amendment. However, no limitation to the validity of the authorisation has been specified in the 2003 Amendment[50] and the same is at the discretion of the SPCBs due to which renewal of authorisation does not take place at regular intervals. If there is inaction on the part of the authorities in checking whether handling and disposal facilities of hazardous wastes are being operated in an environmentally sound manner, the occupier or the operator who violates the law will escape liability.

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[44] Rule 8B was inserted in the 1989 Rules by Rule 9 of the 2000 Amendment.

[45] Lakshmi Raghupathy, "Hazardous Waste Management—Scenario in India", National Safety Council's 10th National Conference, 9–11 April 2002, New Delhi.

[46] National Safety Council, "Course Material on Hazardous Wastes Management" (2002).

[47] The Gazette of India, Pt. II, Section 3(ii), published by Authority No. 471, New Delhi, 23 May 2003.

[48] Rule 3(8) of the 1989 Rules as amended by Rule 3 of the 2003 Amendment: "Disposal means deposit, treatment, recycling and recovery of any hazardous wastes."

[49] Rule 5(8) of the 1989 Rules as amended by Rule 5(d) of the 2003 Amendment.

[50] Rule 5(6)(i) as amended by Rule 5(c) of the 2003 Amendment: "An authorization granted under this rule shall, unless suspended or cancelled, be in force during the period of its validity as specified by the State Pollution Control Board or Committee from the date of issue or from the date of renewal, as the case may be."

In *K. Purushotham Reddy* v. *Union of India*, the petitioner sought the issuance of a writ of *mandamus* to direct the respondent to strictly follow the 1989 Rules while handling and disposing used oil for re-refining or re-processing and disposal of wastes generated during the process. The Court ordered accordingly:

> "Having regard to the facts and circumstances of this case and particularly in view of the fact that thousands of kilolitres of such waste lubricants are recycled for its reuse, it is necessary that all authorities including the A. P. State Pollution Control Board must strictly comply with the provisions of the said Rules. We further direct that in the event if any person is found to be unauthorisedly handling such hazardous waste products and/or if any person authorised therefore violates any of the terms and conditions or directions or any law operating in the field, the State Pollution Control Board should take strict view of the matter and shall take steps for cancellation of their authorization in terms of Rule 6."[51]

Rule 5(9)[52] does not prescribe standard conditions and therefore conditions imposed for acquiring authorisation for disposal of hazardous wastes may differ from case to case due to which environmentally sound management cannot be accomplished. Rule 8(8)[53] also incorporates onsite facility under the purview of the authorities, whereby an initial impact assessment executed will no longer make it possible to dispose of the wastes in municipal dumps or in any manner that is not environmentally sound. On the other hand, it leaves scope to explore possibilities for recycling, reuse, recovery and treatment for safe storage and disposal onsite. However, proper treatment and disposal of hazardous wastes are more expensive and complex than common air and water pollutants. Further,

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[51] *Per* S. B. Sinha, C. J. in *K. Purushotham Reddy* v. *Union of India* (Writ Petition No. 29629 of 1998 Andhra Pradesh High Court 20 June 2001).

[52] Rule 5(9) of the 1989 Rules as inserted by Rule 5(e) of the 2003 Amendment: "Every State Pollution Control Board or Committee shall maintain a register containing particulars of the conditions imposed under these rules for any disposal of hazardous wastes, on any land or premises and it shall be open for inspection during office hours to any person interested or affected or a person authorized by him in this behalf. The entries in the register shall be considered as proof of grant of authorisation for management and handling of hazardous wastes on such land or premises and the conditions subject to which it was granted."

[53] Rule 8(8) of the 1989 Rules as amended by Rule 7 of the 2003 Amendment.

the units must be willing to undertake such responsibility to minimise risks to environmental resources before the grant of authorisation.

The duties of the authorities under Schedule 4 of the 2000 Amendment have not undergone any change in the 2003 Amendment.[54] The authorities are to prepare inventories of hazardous wastes and information related to its treatment and disposal based on returns filed by the occupier or the operator.[55] Lack of funds, technology, infrastructure and awareness all compound the existing difficult situation for inventorisation. India's spending on environmental protection is as low as 0.5 per cent of Gross National Product compared to 2–3 per cent in the developed countries, though it is among the world's largest recipients of bilateral and multilateral funding for environmental programmes. According to the Asian Development Bank, an estimated USD 1.1 billion of ongoing projects are being funded by various donor agencies in many sectors.[56]

Reiterating the concept of 'Polluter Pays', the occupier, the transporter or the operator concerned is liable to pay the entire cost of remediation or restoration in case of any damage caused to the environment.[57] It is pertinent to note the *Bichhri case*,[58] where the manufacture of H-acid by Silver Chemicals (Respondent 5) and Jyoti Chemicals (Respondent 8) gave rise to enormous quantities of highly toxic effluents like iron-based and gypsum-based sludge in addition to other untreated pollutants of about 2400–2500 MT that were allowed to flow out freely. Furthermore, the H-acid was meant for export exclusively. If these industries do not treat their toxic substances in an environmentally sound manner they may pose a threat to the ecology, as they percolate deep into the ground polluting aquifers and subterranean supply of water. The Supreme Court, in the *Bichhri case*, directed Respondents 5 and 8 to pay the remedial cost of damages caused due to the production of H-acid as determined by the Central Government. The Court also ordered closure of all the plants and factories of Respondents 5 and 8 located in Bichhri village. The Rajasthan

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[54] Rule 4B of the 1989 Rules as amended by Rule 4 of the 2003 Amendment: "For the word and figure 'Schedule 4', 'Schedule 7' shall be substituted."

[55] Rule 9(3) of the 1989 Rules as amended by Rule 8 of the 2003 Amendment.

[56] Ravi Raghavan, "India Emerges As Significant Market For Environment Services And Equipment", *Chemical Weekly*, vol. XLIX No. 12, 11 November 2003, 97.

[57] Rule 16(2) of the 1989 Rules as amended by Rule 12 of the 2003 Amendment.

[58] *Indian Council for Enviro-Legal Action* v. *Union Of India* (1996) 3 SCC 212.

Pollution Control Board was directed to "seal all the factories/units/plants of the said respondents forthwith."[59]

Significantly, Rule 20 of the 1989 Rules[60] lays down responsibilities of the waste generators such as filing annual returns of auction and sale to ensure that the wastes are sold only to registered re-refiners and recyclers and in the case of final disposal, disposing of in incinerators installed with air pollution control devices and meeting emission standards.[61] The HPC observed:

> "Incineration is the most important treatment method for the destruction of all high calorific and highly toxic wastes. High temperature incineration at 12000 C mineralises (breaks down into basic non-toxic components) all kinds of organic matter. Destruction efficiencies of effectively 99.99% of toxic compounds with no generation of persistent organic pollutants should be the prime criteria for design of such disposal systems. In addition, while designing the disposal system, relevant operating parameters (e.g. temperature, residence time and turbulence) should be considered. There seems to be an urgent need to develop the design criteria and emission standards for incinerators to safeguard the environment."[62]

In addition to recycling and re-refining of hazardous wastes, a list of environmentally sound technologies[63] have been provided allthough the concept of Environmentally Sound Management (ESM)[64] of hazardous wastes has still not found recognition in the regulatory framework. ESM aims to protect health and environment by minimising materials for production as well the production of products that generate highly toxic

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59 (1996) 3 SCC 212, para 70.2.

60 As amended by Rule 14 of the 2003 Amendment.

61 Rule 20 of the 1989 Rules amended by Rule 14 of the 2003 Amendment.

62 HPC Report, part 3.5.

63 Rule 21 of the 1989 Rules as amended by the 2003 Amendment: "(1)(a) Vacuum distillation with clay treatment; (b) Vacuum distillation with hydrotreating; (c) Thin film evaporation process; or (d) Any other technology approved by the Ministry of Environment and Forests."

64 As defined in Rule 3(11) of the 1989 Rules as amended by Rule 3 of the 2003 Amendment, "Environmentally sound management of hazardous wastes means taking all steps required to ensure that the hazardous wastes are managed in a manner which will protect health and the environment against the adverse effects which may result from such wastes."

and enormous quantities of hazardous wastes. Alternatively, reuse and recycling is ideal but this may generate wastes that may be more hazardous in nature, unless done through environmentally sound technologies. Agenda 21, while promoting the objective of hazardous waste minimisation, asserts that "among the most important factors in these strategies is the recovery from hazardous wastes and their transformation into useful material and also application, modification and development of new low-waste technologies."[65] In view of this, it is imperative to refer to the position posited by the Confederation of Indian Industry at the National Seminar on 'Zero cost fuel', where it strongly advocated the use of hazardous waste material as a supplementary fuel by the cement industry. They appealed to the State Governments to come up with a new set of rules facilitating the inter-state transportation and use of such waste materials.[66] The practice of fuel replacement or fuel supplementation using hazardous and non-hazardous waste material in the cement industry is very much prevalent in the developed countries where the fuel replacement ranges from 25 per cent to 70 per cent. The CPCB has asked the states of Andhra Pradesh, Karnataka, Tamil Nadu, Gujarat and Maharashtra who generate 70 per cent of the country's hazardous wastes to replicate the western model of fuel supplementation.[67]

As experienced over the years, realities have been far short of the expectations and the compliance status in India is alarming. There are 11,358 hazardous waste producing units of which 10,229 have been granted authorisation. As many as 118 units have been closed of which the maximum number units were in Rajasthan and Orissa. A total of 9,342,404 MT of hazardous waste is generated in the country of which 15 per cent is recyclable and about two per cent is incinerable. Of the 188 recycling units, only seven units were authorised by the MoEF under the 1989 Rules to use imported waste. New permissions have been granted for importing hazardous wastes into India and 21 units now use imported waste.[68] Lack of awareness of the risks associated with such wastes is the main reason

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[65] *Supra* n. 9.

[66] "Utilise hazardous wastes as supplementary fuel: Experts", *Chemical Weekly*, vol. XLIX No.16, 9 December 2003, 110.

[67] *Ibid* (quoting Mr. Dominique Bernard).

[68] *See* Annex A15 of the HPC Report (List of seven permissions for imports of hazardous wastes granted by MoEF under the said Rules) and Annex A21 of the HPC Report (List of new permissions granted by MoEF in 1999–2000 for imports of recyclable materials).

for the problem of hazardous wastes not having received much-needed attention. Awareness can only be achieved if adequate research is devoted to learning the adverse impacts on public health and environment. By the time hazards are known, it is too late or new chemicals have been added or replaced. Infrastructure for treatment and disposal needs to be improved for assisting minimisation and prevention of future discharges of hazardous wastes. The emphasis must be on working out methods to recycle hazardous effluents and preventing further generation of hazardous effluents. However, where generation of such wastes is unavoidable, institutional models and technologies should be used for safe destruction and disposal of hazardous residues. The want of solutions to resolve this problem could be addressed if more information about the quantity and characteristics of hazardous wastes were available. India, however, has no national inventory of hazardous wastes at all. Consequently, any development strategy for clean up and remediation of contaminated dumpsites is not possible.

Primarily, the 1989 Rules cannot work alone without the back-up of an enforcement mechanism. Though the CPCB and the SPCBs have been assigned duties under the 1989 Rules, they are already saddled with the tasks of enforcing the Air Act and the Water Act besides holding public hearing before granting environmental clearance to projects and the like. To shoulder such varied responsibilities, the PCBs need support in terms of funds, professional manpower and infrastructure. These issues have not been properly addressed by the 1989 Rules. The Supreme Court has also remarked that:

> "The problem is not as much of absence of the Rules as it is of implementation ... If the HW Rules as in 1989 had been properly implemented, the problem would not have been as grave as faced now. Likewise, if the Rules as amended in the year 2000 (and further amended in 2003) are implemented the problem would not have been as grave as faced presently."[69]

[69] *Research Foundation for Science Technology National Resource Policy* v. *Union Of India and others* (Writ Petition No. 657 of 1995 Supreme Court 14 October 2003) para 7.

V. Waste Trade And Illegal Traffic

Developed countries have strict environmental norms that place tighter restrictions and involve high costs on domestic disposal of hazardous wastes in an environmentally sound manner. Consequently, the cost of production could not take into account the cost of waste disposal, which led the industrial sectors of developed countries to ship such wastes to third world countries at lower costs. For example, in the United States (US), the cost to dispose of one barrel of hazardous waste could be as high as $250 but to ship it to a third world country could be as low as $2.50.[70] The third world countries neither have the infrastructure nor stringent regulations to deal with such imports. When notorious incidents[71] of unlawful dumping of hazardous wastes occurred in the mid-1980s, international outrage led to the adoption of Basel Convention to reduce the generation and transboundry movement[72] of such wastes, particularly their transportation to and disposal in developing countries. Investigations by environmental groups like Greenpeace and Toxic Links[73] into customs data revealed that waste traders export huge quantities of hazardous wastes to India due to its low environmental standards and lax enforcement of laws. The US sent over 7.8 million kg of plastic waste, 26.8 million kg of tin waste, 917,000 kg of lead ash and 14,500 kg of lead-acid batteries to India in 1993. Australia has sent over five million kg of metal processing waste and 2.85 million kg of metal scraps to India between January and June of 1994. Germany, Britain and Canada have also contributed to the loads of waste sent to India.[74] Import of hazardous wastes into India for final disposal or dumping is banned. However, permission may be granted by an SPCB for importing wastes for the purpose of recycling or reuse. Ratification of the Basel

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70 Jim Masterson, "The Exports Of Hazardous Wastes", *at* http://www.gsid.nagoya-u.ac.jp/user/prof/p2kubotat/jim.htm.

71 *See* Jim Vallette (ed), *The International Trade In Wastes: A Greenpeace Inventory* (3rd edn Greenpeace Washington DC 1988) and Report of the Secretary General to the UN General Assembly on Illegal Traffic in Toxic and Dangerous Products and Wastes, UN Doc. A/44/362 (1989).

72 Article 2(3) of the Basel Convention: "Transboundary movement means any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State provided at least two States are involved in the movement."

73 For more detials, *see* http://www.toxicslink.org/index.php.

74 Masterson *supra* n. 70.

Convention will not prevent hazardous wastes coming into India from countries such as the US which have not ratified the Convention.

While the amendments to the 1989 Rules have ostensibly widened the scope of prohibited items of import with regard to hazardous waste, Schedule 8[75] still fails to recognise all 76 banned items of import under the Basel Convention despite the Supreme Court directions stating:

> "The import of 29 items has already been prohibited under Schedule - 8 of the Hazardous Waste Rules as amended in May, 2003. We see no reason why Notification under Section 11 prohibiting the import of the said 29 items shall not be issued forthwith. We direct the Central Government to issue such a Notification without any further delay. Basel Convention has banned 76 items. We are contemplating issuance of directions to Ministry of Environment and Forests to examine the remaining items. It is implicit that if more items are banned, the corresponding Notification shall be issued by the Central Government under Section 11 of the Customs Act."[76]

The problem lies in the country's incapacity to handle and dispose of such wastes in an environmentally sound manner. The Basel ban is, really, an export ban and not an import ban. In this regard, the HPC observed:

> "Even if India wishes to import hazardous wastes, it will be unable to source these wastes from OECD countries because of the ban. For India, imports of recyclable materials are important to provide resources/employment, but only when such recycling is done in an environmentally acceptable manner by units so authorised. But availability of materials through imports now constitutes a problem. It must be noted that the Convention not only deals with transboundary movement of hazardous wastes, but also requires signatory countries to deal with hazardous wastes generated within their own countries in an environmentally safe manner."[77]

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[75] Schedule 8 of the 1989 Rules, as amended by the 2003 Amendment, lists the hazardous wastes prohibited for import and export.

[76] *Research Foundation for Science Technology National Resource Policy* v. *Union Of India and others* (Writ Petition No. 657 Supreme Court 14 October 2003) paras 24 and 25 (reproducing the order dated 24 September 2003).

[77] HPC Report, part 4.1.1.

Article 4 of the Basel Convention recognises the right of States to ban the import of hazardous waste and establishes a regime of 'Prior Informed Consent' to govern trade in hazardous wastes. Rule 12(6) of the 1989 Rules[78] imposes responsibility on the occupier exporting or importing hazardous waste to comply with the articles of the Basel Convention. Further, the underlying object of the Basel Convention is that the countries exporting hazardous wastes will do so only when they lack the facility to dispose of such wastes in an environmentally sound manner in their own country. However, the factual position is in gross violation of this Convention since developing countries, like India, have neither the infrastructure nor stringent implementation of the regulations. The United Nations General Assembly requested "each regional commission, within existing resources, to contribute to the prevention of the illegal traffic in toxic and dangerous products and wastes by monitoring and making regional assessments of that illegal traffic and its environmental and health implications."[79]

Despite the Supreme Court order regarding the ban of hazardous wastes imports, there has been illegal traffic in India. In *Research Foundation for Science Technology National Resource Policy* v. *Union Of India and others*, the Court directed that no authorisation or permission would be given by any authority for the import of hazardous waste items, which have already been banned by the Central Government or by any order made by any Court or any other authority, and no import would be made or permitted by any authority or any person of any hazardous waste already banned under the Basel Convention or to be banned thereafter with effect from the dates specified therein. In view of the magnitude of the problem and its impact, the State Governments were directed to show cause as to why an order not be made directing closure of units utilising the hazardous waste, where provision is not already made for requisite safe disposal sites. It was further ordered that cause be shown as to why immediate order should not be made for closure of all unauthorised hazardous waste handling units.[80]

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[78] As amended by Rule 9 of the 2003 Amendment.

[79] Para 1 of Part I "Traffic in Toxic and Dangerous Products and Wastes" of the *UN General Assembly Resolution on Traffic in and disposal, control and transboundary movements of toxic and dangerous products and wastes,* UN Doc. No. 44/226 (22 December 1989).

[80] *Research Foundation for Science, Technology and Natural Resource Policy, New Delhi* v. *Union of India and others* (Writ Petition No. 657 of 1995 Supreme Court 5 May 1997).

The Supreme Court has identified two aspects to illegal traffic in India. The first aspect relates to illegal import consignments that have been cleared and have already found their way into the market. In respect of this category of illegal imports, the Court directed that "action against all concerned shall be taken by the concerned authorities in accordance with law."[81] The second aspect relates to the stock of such wastes lying at various ports or Indian Container Depots or Containers Freight Stations. This can again be divided into two categories: firstly, those banned under the Hazardous Waste Rules as amended upto date and secondly, those falling under a banned category in terms of the Basel Convention. The Court further observed: "[S]uch consignments have either to be re-exported, if permissible, or destroyed at the risk, cost and consequence of the importer. There cannot be any question of permitting these consignments making their way into the Indian soil."[82] One hundred and fifty one different companies have imported about 66,000 tons of toxic zinc and lead ash residues, skimmings and dross from 49 countries, clearly indicating that India is unable to monitor and control imports of hazardous wastes.[83] It is interesting to note that Bharat Zinc Ltd. had been held out as an "example of a factory recycling imports of such waste in an environmentally sound manner" by the Indian Government of India.[84] Conversely, a writ petition[85] filed against the Government of India and Bharat Zinc Ltd. led to the revelation that they were engaged in illegal traffic of highly dangerous toxic waste, which was due to the alleged illegal and unconstitutional decision of the MoEF to grant permission for recycling, knowing that the real purpose of such exports was to make India a dumping ground for such wastes.[86]

In conclusion, is a complete ban on the imports of hazardous waste practical? The question raises two important issues:

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[81] *Research Foundation for Science, Technology and Natural Resource Policy, New Delhi* v. *Union of India and others* (Writ Petition No. 657 of 1995 Supreme Court 14 October 2003) para 62.

[82] *Ibid*, para 63.

[83] "Toxic Link Initiative", (1996) *Asia Pacific Journal of Environmental Law*, vol. I, Issues 1 and 2, 91.

[84] Masterson *supra* n. 70.

[85] Writ Petition No. 657 of 1995 filed in the Supreme Court.

[86] *See generally* HPC Report.

- The need to have serious implementation of the regulations; and
- The need for facilities conducting recycling, reuse and final disposal in an environmentally sound manner.

If these issues are addressed, waste trade industries can become a source of revenue for importing countries. Industrial waste management offers the largest opportunity for revenue generation since around five million tons of industrial waste (likely to touch eight million tons by 2005) is produced in India, 90 per cent of which is accounted for by the States of Maharashtra, Andhra Pradesh, Gujarat and Tamil Nadu.[87]

VI. Shipbreaking And Hazardous Wastes

Shipbreaking activity, which grew in 1979, is recognised as a manufacturing industry that generates waste and is carried out at various ports in the country, the main centre lying on the west coast at Alang, Gujarat. On an average, 200 ships per year containing substances such as asbestos, polychlorinated biphenyls and oils known to damage human health and the environment are being cut at the Alang Ship Breaking Yard. In addition, presence of other substances like fuel or gases in tanks increases the risk of explosion and other accidents, thereby endangering the safety of workers. Greenpeace alleged that the import of ships for breaking constitutes a violation of the Basel Convention as they carry asbestos and other hazardous materials. In its investigative report titled "Ships for Scrap: Steel and Toxic Wastes for Asia", Greenpeace released technical and environmental data on the toxic contamination caused by shipbreaking in India. Greenpeace noted; "All the toxic substances found by Greenpeace on ships-for-scrap are hazardous wastes covered under the Basel Convention. Prevailing Indian legislation, international law and European Union regulations expressly prohibit the sending of hazardous ships-for-scrap, containing these contaminants, to India ... for breaking."[88]

In India, there has been a want of legislation to enforce the decontamination of these ships prior to their import. Such legislation is necessary as shipyards

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[87] *Supra* n. 66.

[88] "Shipbreaking Is Dangerously Polluting—Greenpeace Report Finds", 18 February 1999, New Delhi, *at* http://archive.greenpeace.org/pressreleases/toxics/1999feb18.html.

in the developing nations do not have the facilities to cope with contaminated ships. Shipbreaking is identified as a new aspect of waste trafficking and ships are also considered hazardous wastes. In compliance with the MoEF's directions, the CPCB prepared guidelines in December 1997 that were communicated to various SPCBs and individual shipbreaking companies in order to prevent off-loading of hazardous wastes at the Indian coasts.[89] In 1998, it was found that these guidelines had proved ineffective in bringing about any change in pollution levels at the coasts.[90] Thus, in 1999, the Supreme Court directed the CPCB to investigate an allegation made by Greenpeace regarding unauthorised off-loading of hazardous materials at the Alang Shiprebreaking Yard.[91] The CPCB, while investigating this allegation, reviewed the implementation of the guidelines prepared in 1997.[92]

Despite shipbreaking activities being a major industry in developing countries, their national laws have neither the provisions nor the implementation force to deal with the problems resulting from shipbreaking. As a result of this, the environmental safety of the developing nations is at stake. There is no statutory framework in India, to deal with hazardous wastes from shipbreaking industries. Even after the 2003 Amendment, neither have any provisions been incorporated nor have any separate rules akin to the *Bio-Medical Wastes (Management and Handling) Rules, 1998*, the *Municipal Solid Wastes (Management and Handling) Rules, 2000* or the *Batteries (Management and Handling) Rules, 2001* been passed. Despite the inadequacy of statutory provisions, the Supreme Court, in its directives, stated:

> "The shipbreaking industries should be given authorisation under Hazardous Waste Rule 5 of the Amendment Rules, 2003, only if they have provisions for disposal of the waste in environmentally sound manner. All authorizations should be renewed only if an industry has facilities for disposal of waste in environmentally sound manner."[93]

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89 HPC Report, Annexure B-6(2), para 5.

90 *Ibid*, para 6.1.

91 *Research Foundation for Science, Technology and Natural Resource Policy, New Delhi* v. *Union of India and others* (Writ Petition No. 657 of 1995 Supreme Court 10 December 1999).

92 *Supra* n. 89, para 6.2.

93 *Research Foundation for Science, Technology and Natural Resource Policy, New Delhi*

Ships move between jurisdictions and this makes regulation difficult. The Basel Convention works towards the crucial issue of shipbreaking by imposing an obligation on countries not to allow the export of ships to another country unless there is:

- Proof that the hazardous waste will be dealt with in an environmentally sound manner in the shipbreaking state;
- The legal recognition that a ship is hazardous waste; and
- An established 'intention to discard' by the owner of the ship.[94]

However, the Basel Convention has not been ratified by all nations who send ships for breaking, leading to ineffectiveness in preventing countries from engaging in shipbreaking activity. For example, the US has not ratified the Basel Convention. Moreover, the Basel Action Network, working to implement the Basel Convention ban on export of hazardous wastes from developed to developing countries, holds that:

> "It is essential to remember that it was only due to the unique nature of ships-as-waste that the global community overlooked shipbreaking in the quest to ban hazardous waste exports. The Basel Convention and its ban amendment are ineffectual at completely regulating end-of-life ships as hazardous waste exports."[95]

In order to ensure environmental and occupational safety in shipbreaking industries, ships should be recognised as toxic wastes under the Hazardous Waste Rules and authorisation should be given thereto. The Supreme Court has, on the recommendations of the HPC, taken the view that, "A complete inventory of hazardous waste on board of ship should be made mandatory for the ship owner. And no breaking permission should be granted without such an inventory."[96] The HPC, after considering the balance to be maintained in these circumstances and the large number of

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v. *Union of India and others* (Writ Petition No. 657 of 1995 Supreme Court 14 October 2003), para 70.2.

94 Article 4 of the Basel Convention.

95 Jim Puckett, "The Basel Treaty's Ban On Hazardous Waste Exports: An Unfinished Success Story", 6 December 2000, *International Environmental Reporter*, 23 INER 984, *available at* http://www.ban.org/Library/ierarticle.html.

96 *Supra* n. 93.

people that are employed in the industry, has concluded that there are several advantages to shipbreaking activities.[97]

VII. Conclusion

National and international laws governing hazardous wastes primarily focus on the disposal of such wastes instead of on the prevention of its generation. In order to avoid generation of such wastes, clean production schemes should be followed by industries. To this effect, national and international legislations should adopt policies towards monitoring the inputs of production. Establishment of such policies requires a scientific approach, which the PCBs cannot single-handedly formulate without technical assistance and financial aid. This necessitates the constitution of a separate authority to implement the law regulating hazardous wastes. Although the Rules have been amended, there has been no significant change in the degree of degradation of the environment. The core of the problem lies more in the need for effective implementation of existing laws than in the execution of more stringent laws. Technical assistance would act as an aid to carry on tasks such as preparing inventories of disposal sites, conducting environmental audits, identification of new industrial sites and relocation of old industries and in setting up TSDF with environmentally sound technologies. Further, this would help fill up the inadequacy of the 1989 Rules to initiate action to redeem contaminated sites.

Globalisation has not only given developed countries a market for finished goods but also one for waste trade. Waste trade, as distinguished from illegal traffic, cannot be stopped since recycling and reuse of waste material generate resources. Without this generation, the resources would be taken from ores resulting in a further depletion of natural resources. Thus, waste trade could be a profitable business provided the countries manage and handle the waste in an environmentally sound manner. For effective ESM, a control mechanism for the generation, storage, transport, treatment, recycling, recovery and final disposal needs to be ensured.

[97] HPC report, part 4.2.4.

PHARMA PATENTS: THE NEW REGIME AND PRICING IMPLICATIONS†

*Mallika Iyer**

> "Affluent societies are spending vast sums of money understandably on their research for new products and processes to alleviate suffering and to prolong life. In the process, drug manufacturing has become a powerful industry. My idea of a better-ordered world is one in which medical discoveries would be free of patents and there would be no profiteering from life or death."[1]

I. INTRODUCTION

It might appear as though this article has been written from an anti-patent viewpoint. Well, the truth is, while I recognise and in fact fully endorse the need for a globally standardised and effective patent system, in so far as it relates to the Pharmaceutical Industry, I have my reservations, the reasons for which have been examined in the course of the article. Yet the article seeks to analyse the impact of the new product patent regime for India and examine other aspects related to Pharma Patents.

A. Product Versus Process Patents

A patent granted in respect of a product is known as a product patent. The patentee has exclusive rights of manufacturing, marketing and licensing the product such as a machine or an electronic device. It is a bundle of rights over the product.

A process patent, on the other hand, is a patent granted for a process or a method, which is capable of industrial application and use. For example, the process of manufacturing an article or synthesising a compound.

A third classification of patents known as 'product by process', covers the product as a result of a process. As per the *Agreement on Trade Related*

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† This article reflects the position of law as on 31 March 2004.

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1 Mrs. Indira Gandhi at the World Health Organization (WHO) conference in Geneva in May 1981.

Aspects of Intellectual Property Rights (TRIPs Agreement),[2] process patent protection must give rights not only over use of the process but also over products obtained directly by the process.[3] To illustrate, if one invents a new mixture for garment dyes by mixing two compounds, the claim in respect of the process of mixing the compounds will cover not just the method of manufacturing the dye but also the mixture i.e. the product that resulted from the process. The patentee gets protection for the process invented as well as for the product which is manufactured as a result of that process.

At present, India only grants patents in respect process claim but does not grant product patents in respect of, *inter alia*, pharmaceutical products. Under the TRIPs Agreement, member nations are required to make patents available for product and process inventions[4] and India is required to comply with these provisions by 31 December 2004. Hence the imminent shift to the Product Patent Regime.

It is pertinent to note that although it is stated that a patent grants rights, a patent is really a negative right, which prevents third parties from manufacturing or selling the patented product rather than a positive right, which permits the patentee to do so.

B. Reverse Engineering And The Generic Drug Market

The product patent claim in respect of a drug can be for the drug as an entire product or for the active chemical ingredient in the drug. The former would encounter difficulties since the use of a substance is a method of medical treatment, which is specifically excluded from patenting the world over as also under the TRIPs Agreement. Hence the claim is made in

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[2] The TRIPs Agreement was negotiated by the General Agreement on Tariffs and Trade (GATT) at the Uruguay Round of Negotiations in 1994 and today is a part of the World Trade Organization.

[3] Article 28 of the TRIPs Agreement.

[4] Article 27.1 of the TRIPs Agreement requires member nations to make patents available for any inventions, whether products or processes, in all fields of technology without discrimination, subject to the standard tests of novelty, inventiveness and industrial applicability. It also requires that patents be available and patent rights enjoyable without discrimination as to the place of invention and whether products are imported or locally produced.

respect of the active chemical ingredient. The advantage of this sort of a claim is that it covers the compound whether it is contained in a cough syrup or in a vitamin supplement.

A generic drug is nothing but a drug sold under the name of its active chemical ingredient. For instance, 'Ampicillin' is the chemical name of a commonly prescribed antibiotic. In India, it is marketed under a variety of brand names such as 'Roscillin' and 'Albercilin'.[5] In a country following a product patent regime, if the innovator of 'Ampicillin' is granted a patent for the drug, none of the other companies can make 'Ampicillin' until the patent on it expires since the product remains the monopoly of the patentee. In India, on the other hand, 'Ampicillin' itself is not out of bounds. A company can only patent the chemical process to make 'Ampicillin'. The product can be made by anyone who uses a different process to make it. This change in process can be loosely called 'Reverse Engineering'. The details of the chemical composition, active chemical ingredient and other details are available in the patent specification of the original inventor, the pack insert of the drug or in the public domain in countries where marketing approval has already been obtained.

The original inventor spends several millions of dollars on the development of a new drug not to mention much over a decade of research. It is estimated that on an average, it takes about 8–12 years to produce a new drug from the laboratory to the shelf[6] and the cost of the exercise is in the region of

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5 Sanjiv Shankaran, "What Is The Generic Market All About?", *Business Line's Investment World*, 8 October 2000.

6 *See* Philip Grubb, *Patents for Chemicals, Pharmaceuticals and Biotechnology, Fundamentals of Global Law, Practice and Strategy* (3rd edn Oxford University Press London 1999) 365. Globally, before a drug can get from the laboratory to the market, it goes through several stages of trials. The first stage of drug discovery, which takes one to two years, involves research planning, biochemical screening, making samples, etc. The second stage is the stage of pre-clinical trials that consists of two sub-stages, which totally takes approximately four to six years. The third stage is the final stage comprising Phase I, II and III trials, which again takes about four to six years. Phase I trials are conducted on healthy volunteers, Phase II is conducted on patients and Phase III is carried out on patients at several centres for proof of efficacy. Thereafter, the drug goes through regulatory checks to meet safety standards. In India, the Drugs Controller General of India (DCGI) is responsible for enforcing drug legislation, evaluating and granting approval for new drugs, controlling quality of imported drugs, etc.

USD 800 million. Moreover, only one in every 5000 new compounds developed and tested in the laboratory finally reaches the markets.[7] That is the real reason why the inventor is given the protection of a patent as a reward for the contribution. It is the security of a patent that mitigates part of the risk involved in investing huge sums of money in the research of a new drug. It assures the inventor of an exclusive market for his product so that he can make good the investment. It is inequitable for an imitator to develop his version of the drug and eat into the market of the original inventor by merely reverse engineering the process of manufacture.

Further, there has been no proof that the quality of the generic differs from its branded counterpart and no evidence to suggest a different or higher rate of adverse drug reactions in respect of the generic drugs.[8] Quality remaining the same and armed with the potential of charging prices far less than the original inventor, owing to the minimal cost incurred on Research and Development (R&D), the generic drug manufacturers were clearly a threat. The global pharmaceutical companies were unhappy with countries that had huge potential markets but weak patent regimes. This is the principal reason why the United States (US) backed by its influential pharmaceutical industry has been pressurising India, amongst other countries, through the World Trade Organization (WTO) to shift to a product patent regime.

While discussing the duration involved in bringing a drug from the laboratory to the market, it is pertinent to note that a patent application for a drug is made quite early on in the drug-discovery process. Hence if it is presumed that the entire process is to take 12 years, the patent application is made around the second or third year of the process. Assuming it takes two years to get the patent sealed, the patent is obtained at the fourth or fifth year of the drug-discovery process, which is still eight odd years before the drug is ready to enter the market. Hence even a patent of 20 years has an effective life of 20 less 8, i.e. roughly 12 years. The laws in the US, Japan and Europe contain provisions for extension of the term of a patent to compensate for this loss of term.[9] Without these provisions, the effective period of patent protection is shorter than 20 years.

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7 "Pharmaceutical Sector—Towards Self-Reliance", *at* http://pib.nic.in/feature/feyr2001/fjan2001/ f240120011.html.

8 "Myths About Generic Drug Use", *at* www.worstpills.org/public/myths.cfm.

9 Grubb *supra* n. 6, 367.

Acceding to the argument that reverse engineering is tantamount to a brazen violation of the spirit of the law, I wonder if there is a squaring-off effect of it all. Is reverse engineering the real reason why drug prices in India are the lowest in the world? I wouldn't be wrong to call it a Robin Hood effect. If that is so, will the shift to the product patent regime cause drug prices to soar?

C. Patents For Pharmaceutical And Medical Inventions

A patent is granted for an invention, which involves an inventive step, is capable of industrial application and which does not fall within the subject matter specifically excluded.

Methods of treating the human body or animal body is a category of inventions that have been specifically excluded in patent laws the world over, including India. The reason behind the bar is fairly evident—patents for such inventions would be contrary to public policy and health care.[10]

However, pharmaceutical inventions were outside the ambit of patent protection (product and process) till recently in several countries[11] and were made subject matter of patents as a result of intense lobbying by the pharmaceutical industry. Says W. R. Cornish:

> "The obligation in the TRIPS Agreement to allow such patents is a tribute to the lobbying power of the pharmaceutical industry worldwide. ... There is a considerable lobby against the 'patenting of life'. This emotive but vague expression certainly covers procedures directly involving the human body; and for many protestors the animal body as well."[12]

The absence of patents may appear as a disincentive to medical R&D and the 'patenting of life', if one were to call it that, a necessary evil. Yet for a

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[10] *See* W. R. Cornish, *Intellectual Property* (3rd edn Sweet and Maxwell London 1996) "The spectre of a single doctor reserving the performance of the most satisfactory, possibly life-saving, operation to his or her own team and extracting therefrom monopoly profits on the scale of a successful pop-star seems to put the matter behind argument."

[11] *See* Grubb *supra* n. 6, 97. Italy had a law prohibiting patent protection for pharmaceuticals which scenario changed only in 1978. Brazil did not allow patenting of drugs till as late as 1997 on the grounds that it was contrary to public policy. Turkey is another country where such a practice was followed.

[12] Cornish *supra* n. 10, 190.

moment if we were to imagine a world *sans* patents for pharmaceuticals, would investment in medical research and as a result medical inventions cease completely? Probably not. I do not believe that the additional profits associated with the introduction of product patent protection in developing countries will have any impact on world drug discovery.

II. Viewpoint: Developed World v. Developing Nations

A. The WTO Obligation

The objectives of the TRIPs Agreement clearly establish that the protection and enforcement of Intellectual Property Rights (IPRs) do not exist in a vacuum.[13] They are supposed to benefit society as a whole and do not aim at the mere protection of private rights. Pursuant to the objectives, Article 8.1 of the TRIPs Agreement[14] grants member nations the liberty and the discretion to adopt methods to protect public health and interest in the implementation of the provisions of the Agreement.

For several years, India had skirted its obligations under the TRIPs Agreement until a complaint was filed by the US against India at the Dispute Settlement Unit (DSU) of the World Intellectual Property Rights Organization (WIPO) for not having the required transitory provisions in place. The pharmaceutical industry of the developed world alleged that they were suffering huge losses on account of the imitation of their inventions.[15] Yet these entities are by no means passive sufferers or victims

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[13] Article 7 of the TRIPS Agreement (The Objectives of the TRIPs Agreement): "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to the balance of rights and obligations."

[14] Article 8.1 of the TRIPS Agreement: "Members may, in formulating or amending their national laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement."

[15] *See* WTO Dispute and Graham Dutfield WTO Dispute No. DS50, *India: Patent protection for pharmaceutical and agricultural chemical products (Brought by US)* 9 July 1996, *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1996. *See* Graham Dutfield, *Intellectual Property Rights, Trade and Biodiversity* (1st edn Earthscan Publications Limited London 2002). As far back as 1988, it was estimated that the US alone was losing between USD 40 to USD 60 billion per year on account of foreign 'intellectual piracy'.

as they were made out to be. They played a key role in determining the framework of the TRIPs Agreement and emphasised that a stronger IPR system would boost foreign investment in R&D in the developing countries and thereby contribute to their growth. Governments of the developing countries adamantly opposed this view, worrying about the higher prices that stronger IPRs would entail and the harm that these rights might cause to infant indigenous industries. In spite of the strong opposition, India now finds herself in the transitional phase and is required to meet the TRIPs deadline of 1 January 2005 before which measures for the grant of full patent protection are to be made effective.

The WTO has often been criticised as a medium used and abused by the developed nations for their personal gains, all in the name of 'free and fair trade'. I, for one, believe that this underlying principle of the WTO is an illusion. It is commonplace that a global system is no doubt necessary for the sake of orderliness and uniformity. However, when it comes down to the real differences, it is difficult to arrive at a harmonious settlement. A fundamental principle of Jurisprudence is that 'equality amongst unequals amounts to inequality'. How, then, can a universal system be put into place without injuring the interests of one or more nations?[16] The argument of the need to 'level the playing field' and avoid distortions in free trade is unacceptable since the real world is characterised by asymmetries arising from different levels of development and the playing field is not level.

In fact, the very same nations that are now advocating the doctrine of free trade built their giant industries by banning imports of cheaper goods from other nations and restricting the flow of goods into their markets.[17] It is a myth that the rich nations became rich through free trade. The countries of the developed world, that today actively advocate the implementation

[16] *See* Lester C. Thurow, "Needed: A New System Of Intellectual Property Rights" (1997) *Harvard Business Review*, Sept–Oct 1997, 103. "In a global economy, a global system of intellectual property rights is needed. This system must reflect the needs both of countries that are developing and of those that have developed ... the Third World's need to get low-cost pharmaceuticals is not equivalent to its need for low-cost CDs. Any system that treats such needs equally as our current system does, is neither a good nor a viable system."

[17] *See* Tanu Thomas (interview with George Monbiot), "Trade By Default", *The Times of India*, 6 November 2003. Britain banned the import of woollen and cotton cloth from India. The US was at one time the most heavily protected economy on earth.

of product patent regime under the TRIPs Agreement, permitted product patents to be granted only after their own pharmaceutical sectors had reached a certain level of self-reliance. They opened their borders to foreign trade only after having become strong economies and now they insist that everyone do the same.[18]

The industrial world is going to gain immensely from ensuring that the developing nations adhere to the TRIPS Agreement. Corporations in the rich world own 97 per cent of the IPRs. The imminent shift in the system is estimated to cost the poor nations USD 40 billion a year in licence fees, half of which will be payable to companies based in the US.[19]

Yes, the world needs a standardised system, but I cannot help but wonder why this must be achieved at the cost of the interests of the developing economies. The WTO demonstrated that it had a heart with its decision to waive the requirement of Article 31.5(f) of the TRIPs Agreement at the Doha Summit, which allowed African countries amongst others to import life saving drugs from nations that can grant compulsory licences for the export of drugs and medicines. The Compulsory Licensing clause is otherwise restricted for purposes of sale in the domestic market. This waiver was a short-term measure. There is no long-term measure forthcoming from the WTO for the welfare and benefit of the poorer world, even in the particularly vital sector of healthcare. In the long run, the licence fees earned from the developing world will fill the coffers of the multi national pharmaceutical companies (Pharma MNCs) in the developed world.

B. WTO Commitment: Where Did India Go Wrong?

It appears that the basis on which the developed world convinced the South that they were required to provide patent protection for pharmaceuticals seems to be slightly flawed. With reference to Article 27 of the TRIPs Agreement,[20] the first question that arises is whether the

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[18] *Ibid.* "For 500 years Europe and then the US operated very effectively without one, forcing other nations to trade at gunpoint, impressing their people into slavery and plundering their resources. They are happy to revert to that model, albeit in a modified form."

[19] *Ibid.*

[20] Article 27 of the TRIPs Agreement: "Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields

pharmaceutical industry is a 'field of technology'. This might be, in the strict sense, a highly technical argument since the words used in Article 27 are "in all fields of technology" as opposed to words such as "in all fields or industries".[21]

The next contentious phrase in Article 27 is 'without discrimination'. Discrimination is a subjective term and cannot have an absolute definition. It must necessarily lead to inequality i.e. where members of a certain trade are treated unfavourably as compared to their counterparts in another industry. Yet, this is an issue-based question and whether there is, in fact any discrimination or not, under the provisions of the TRIPs Agreement, cannot be decided in isolation without having regard to the objects and underlying principles of the Agreement. Whether measures, that are limited to a certain field, are necessarily 'discriminatory' by virtue of that fact alone or whether under certain circumstances, in view of the larger picture, they may be justified as special measures needed to restore equality of treatment to the area of technology in question was never contended by the developing countries, including India.

Further, when it became abundantly clear that acceding to the TRIPs Agreement was not something India could escape, it was open to India to insist on the non-application of the same to pharmaceutical products. No doubt the strong pharmaceutical lobby would have opposed such a move tooth and nail, yet the southern block could have insisted that they would accede subject to that condition alone. To narrow this down further and make it more negotiable, India could have insisted on product patents not being available in the limited field of life-saving drugs and drugs for diseases which account for several deaths in India and other third world nations.

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of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether the products are imported or locally produced."

[21] *See* James Love, "Compulsory Licensing: Models For State Practice In Developing Countries, Access To Medicine And Compliance With The WTO TRIPS Accord" (Paper prepared for the United Nations Development Programme) para 44, *available at* http://www.cptech.org/ip/health/cl/recommendedstatepractice.html: "The meaning of this text isn't clear, because the phrase, "field of technology" is not a well established legal term."

The right and power for India to have done so emanates from Article 30 of the TRIPs Agreement, which is entitled "Exceptions to Rights Conferred".[22] Excluding life-saving drugs and drugs and medicines for certain specific diseases from being granted product patent rights would clearly fall under the above exception clause. The intent of Article 30 seems to be that exceptions that are 'limited' and not applicable to 'all fields of technology', which reflect the basic objectives of the TRIPs Agreement, would serve other important social interests as opposed to applying the provisions of the TRIPs Agreement across the board without regard to specific facts and circumstances.

In a dispute that arose at the WTO involving an exception created by Canada for research and testing on generic drugs used for drug registration, the European Union (EU) asserted that Article 27 was absolute in nature and that violations of its provisions could not be justified under Article 30. Nevertheless, the WTO Panel found that there was nothing in the drafting history to suggest that the prohibition against discrimination on the basis of field of technology was ever meant to override limited exceptions as provided for under Article 30 thereto. On 17 March 2000, the WTO Panel Report finally held that the Canadian provisions were not violative of Article 27 of the TRIPs Agreement.[23]

It appears therefore that India could well have lobbied, along with similarly placed nations, to exclude the area of life saving drugs from the ambit of application of the TRIPs Agreement in their case.

C. Killer Diseases

The most alarming situation in so far as the need for cheap drugs is concerned is in the area of Acquired Immuno Deficiency Syndrome (AIDS), which is caused by the Human Immunodeficiency Virus (HIV). Yet there are drugs and medicines available for the treatment of this killer virus.

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[22] Article 30 of the TRIPs Agreement: "Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties."

[23] *Canada-Patent Protection of Pharmaceutical Products: Complaint by the European Communities and their member States* (Report of the WTO Panel Geneva 2000 (WT/DS114/R 17 March 2000 (00–1012)), *available at* http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm.

Anti-retroviral (ARV) treatment is used to treat HIV-positive patients who have developed AIDS. The availability of ARV drugs is believed to have transformed AIDS from a death sentence to a chronic disease for those who have access to treatment. Treatment of AIDS with a combination of drugs called 'highly active anti-retroviral treatment' (HAART) has in fact brought down the mortality rates in HIV-positive patients worldwide. Unfortunately, less than five per cent of HIV-positive persons across the globe have access to such treatment, because the estimated cost of treatment by HAART is about USD 12,000 per patient per year.[24] The irony however is that these drugs can be manufactured quite cheaply, at approximately less than USD 300 per patient, per year.[25] However Pharma MNCs, who hold the patents for these drugs, are overpricing their drugs to the tune of forty times their actual costs, all in the name of recovering research costs. Whether such practices are justified in the name of 'free and fair trade' is not even a debatable issue and it is these very practices that compel us to believe that excessively high levels of IPR protection required by the TRIPs Agreement have shifted the balance away from public interest towards the monopolistic privileges of the IPR holders.[26]

Several Pharma MNCs are charging astronomical prices on the pretext of recovering research costs when, in fact, these research costs have been incurred only on paper. Often the patentee is not the original inventor but the one who first made an application to a claim. For example, the first anti-AIDS drug, known as 'AZT' was first introduced in the market and experimented upon for entirely different applications. Even its application in the treatment of HIV/AIDS was researched at the National Institute of Health in the US, using public funds. Yet Merck holds the patent for AZT and denies access to millions of people across the globe by charging high prices under the garb of recovering research costs.[27]

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[24] Amit Sen Gupta, "TRIPS Agreement Under Attack", *at* http://pd.cpim.org/2001/may27/may27_snd.htm.

[25] *Ibid.*

[26] *See* "NGOs Demand 'Re-Thinking' On TRIPs", *at* http://www.southcentre.org/info/southbulletin/ bulletin21/bulletin21-01.htm: "Contrary to the so-called free trade and trade liberalisation principles of the WTO, TRIPS is being used as a protectionist instrument to promote corporate monopolies over technologies, seeds, genes and medicines."

[27] Gupta *supra* n. 24

Competition introduced by the entry of generic drug manufacturers has led to a sharp fall in prices of ARV drugs. In 2001, Indian pharmaceutical companies made offers that were then the cheapest that had been made anywhere in the world.[28] Such low prices can no doubt save millions of lives.[29]

Needless to say, the new patent regime will leave no room for such occurrences in the future.

D. Saving Some Ground

India and several other nations are now faced with the new patent regime whether they like it or not. It is a little too late in the day to ask for an amendment to the TRIPs Agreement. Given that the shift is just around the corner and having seen at Cancun that together they can be a formidable force, what, if anything, can India and the other developing nations do to save some ground?

- India may look into the possibilities of pressing the US and other developed nations for a resolution whereby they undertake not to exert any bilateral or regional pressure on developing countries which take measures to exercise their rights under the TRIPs Agreement to protect public health and promote access to medicines, especially in the area of life-saving drugs.
- India may demand that the developed nations should not invoke dispute settlement action, which would hinder the ability of nations to promote access to life-saving medicines and protect public health, including in the area of use of the compulsory licensing provisions.
- India may insist that the developed nations do not interfere in matters relating to the domestic laws of the developing nations,

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[28] *See* Gupta *supra* n. 24. In March 2001, Cipla announced that it would offer the combination of anti-AIDS drugs at a cost of USD 600 per patient per year, and later announced that it would further bring it down to USD 350 per patient per year. Within weeks, two other pharmaceutical companies, Hetero Drugs and Ranbaxy came up with matching offers. These prices are one fortieth of global prices for the same drug.

[29] *See* Gupta *supra* n. 24. In April 2001, Nigeria announced a deal with Cipla to buy enough drugs to treat 10,000 AIDS patients a year. This was the first substantial AIDS package purchased by an African nation for its people, in a continent that is plagued by the virus.

> which are well within the room for flexibility granted under and in accordance with the TRIPs Agreement. Members may provide for the grant of outright exemptions to certain drugs and medicines in critical areas such as HIV/AIDS and other fatal illnesses, from the ambit of the domestic patent laws, or the declaration of an outright emergency for such illnesses.

No doubt, negotiating the above demands will be easier said than done. Such measures, if in fact they come through, will avoid wasteful and time-consuming litigation which the Pharma MNCs can well afford, but for which the third world nations do not have the resources.

III. The Imminent Shift To The Product Patent Regime And Its Impact

A. The Transition

The TRIPs Agreement provides a three-stage time frame for developing countries to comply with its obligations. As of date, India has complied with Phases I and II of the transition and the third amendment to the *Patents Act, 1970* is to be made soon.[30] Come January 2005 and these nations are required to be fully TRIPs compliant. The Least Developed Countries (LDCs) have been given until 2016 to comply with the provisions of the TRIPs.

B. The New Patent Law

While it is true that the TRIPs Agreement contains enough room for countries to evolve ways and means to protect public health and interests, it is also true that no nation has really been allowed to do so freely. The *Patents Act, 1970* contains provisions such as compulsory licensing; the question is whether they will ever be used and if in fact they are invoked, how long will it be before the US comes down heavily on the measures taken. It is important to look at the provisions in the amended law and also do a reality-check as regards the use and applicability of these provisions in other countries.

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[30] (i) Phase I of the shift was brought into effect through an ordinance and thereafter through the *Patents (Amendment) Act, 1999* whose provisions are to have effect with retrospective effect from 1 January 1995. This amendment provided for the 'mail box' system to receive applications for product patents in the pharmaceutical,

1. Protection To Grand-Ma's Remedies

The *Patents Act, 1970* provides for a mechanism of opposition and even revocation of a patent where the invention is anticipated by traditional knowledge available with any local indigenous community in India or elsewhere.[31] Further, an invention which is born out of traditional knowledge, is not an invention for the purposes of the Act.[32] This means that the several house-hold Indian 'grand-ma's remedies', such as *neem*, *methi* and garlic, cannot be made subject to patent protection. Further, unlike other countries knowledge need not be evidenced in a written form in India. For instance, in the US, the examiner is not required to accept the evidence of traditional knowledge held outside the US unless it is reported by scientists.[33] Such a provision will protect the rights of traditional knowledge holders or what is known as 'prior art', whether in India or outside, and prevent pharmaceutical companies, Indian or foreign, from cashing in by obtaining a patent and thereby creating a virtual monopoly

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agricultural and chemical industries. These applications are to be held in the mailbox till 1 January 2005 and referred to examiners only after 31 December 2004. Provisions for the grant of Exclusive Marketing Rights (EMRs) were also made, whereby the applicant can be granted EMRs for a period of five years or till the product patent was granted or rejected, whichever is earlier.

(ii) Phase II was effected via the *Patents (Second Amendment) Act, 2002*, which was passed in May 2002, notified in June 2002 and came into force on 20 May 2003. This amendment made provisions for compulsory licensing, revised term of patent protection, reversal of burden of proof, etc.

(iii) Phase III, the third and final phase, mandates the introduction of product patent protection in all fields of technology by the cut-off date of 1 January 2005. All the applications held in the mailbox will be opened and examined and such applications will be eligible for product patent protection. Owing to the dissolution of the Lok Sabha in February 2004, the *Patents (Third Amendment) Bill* lapsed. This Bill sought to amend Section 5 of the *Patents Act, 1970*, which currently prohibits product patents in all fields of technology. It will be taken up after the new Parliament is formed.

[31] Section 64(1)(q) of the *Patents Act, 1970*: A patent may be revoked on the ground that "The invention so far as claimed in any claim of the complete specification was anticipated having regard to knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere." A similar provision exists under Section 25(1)(k) for opposing grant of a patent.

[32] Section 3(p) of the *Patents Act, 1970*: The following are not inventions within the meaning of this Act—"an invention which, in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components."

[33] *See generally* Dutfield *supra* n. 15.

on existing traditional remedies into which no inventive faculty has been applied.[34]

2. Compulsory Licensing

a. *Meaning, Need And Justification*

Compulsory licences are granted by a Government to use patents and other intellectual property as an instrument to correct market failures. Compulsory licences are issued for a public purpose viz. when the patent owner does not work the patent and make it available to the public or to remedy the problems of monopolistic or anticompetitive practices or to correct cases where the patented article is available to the public in insufficient quantity or at abnormally high prices.

The legal justification for the grant of compulsory licences is that inventions are ultimately made for community welfare and patents are granted to reward the inventor's contribution to society as also to give him the security of recovering his investment and making good his risk. Thus, when the inventor does not work the patent or make it available at affordable prices, the community welfare is no longer served. Hence, the right of intervention by the Government is a measure taken to rectify this anomaly. The provisions for compulsory licensing strike a balance between the private interests of a patentee and the larger public interest of the need to make the invention available to the public.

b. *Legal Provisions*

The *Paris Convention for the Protection of Industrial Property* and the TRIPs Agreement clearly recognise and uphold the rights of States to grant compulsory licences.[35] While Article 31 of the TRIPs Agreement contains provisions for the grant of compulsory licences, it also contains a list of restrictions and conditions on the powers of a State in the use of the

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[34] *Ibid.* The much-heard of turmeric patent case in the US, where a patent was granted by the US Patent and Trademark Office for the use of turmeric in wound healing to the University of Mississippi Medical Center, is not an isolated case. In fact, six Indian manufacturers had applied for *neem*-related patents in the US.

[35] Article 5(A)(2) of the *Paris Convention for the Protection of Industrial Property*: "Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work."

compulsory licences.[36] The grounds contained therein are not exhaustive and member nations are free to provide for additional grounds in the national laws.

The *Patents Act, 1970* extends the scope of the general principles relating to compulsory licences laid down in Article 31 of TRIPs Agreement. It provides for specific grounds for the grant of compulsory licences, which are substantially wide to cover any given situation. Section 84(1) of the Act contains the broad grounds for the grant of a compulsory licence for which an application may be made by any person at any time after the expiration of three years from the sealing of the patent. They are:

- that the reasonable requirement of the public with respect to the patented invention has not been satisfied [Section 84(1)(a)];
- that the patented invention is not available to the public at a reasonably affordable price [Section 84(1)(b)];
- that the patented invention is not worked in the territory of India [Section 84(1)(c)].

Section 84(7) thereafter contains a deeming provision wherein certain situations are deemed to be conditions where the reasonable requirement of the public is said not to have been satisfied, i.e. such cases would be deemed to fall under Section 84(1)(a). They include cases where a trade or industry and the development thereof is being prejudiced and where the demand for the patented article is not met to an adequate extent on reasonable terms.

c. *Ground Realities*

Several countries have provisions in their patent laws allowing the compulsory licensing of patented articles on the grounds mentioned hereinabove. Yet, it is relevant to examine the usage and practical enforcement of these provisions and to ascertain if in fact they have served their purpose. The key question is whether legal safeguards are secure enough to reconcile ourselves to the belief that the developed world so persistently thrusts upon us—that the TRIPs Agreement and the laws made

[36] The grounds on which compulsory licences can be granted under the TRIPS Agreement are refusal to deal, emergency and extreme urgency, anticompetitive practices, non-commercial use and dependant patents.

in compliance thereof are fair and equitable. Well, the ground realities are quite startling.

The Pharmaceutical Research and Manufacturers Association PhRMA of the US and the International Federation of Pharmaceutical Manufacturers Associations IFPMA are actively lobbying the US and EU trade officials to support international treaties and policies that would ban or restrict the use of compulsory licensing for medicines.[37] The US exerts considerable bilateral pressure to stop developing countries from using compulsory licensing for pharmaceuticals. For example, the US actively pressurised South Africa and Brazil against the use of compulsory licences of pharmaceuticals to treat AIDS. In fact, every country that has tried to interpret the TRIPs Agreement in a manner that allows access to cheaper drugs for its people is faced with a hostile reaction from the US.

In February 2001, the WTO set up a dispute panel to examine a complaint by the US that the Brazilian patent law, which requires products to be manufactured domestically, discriminates against imports. If within three years the product is not manufactured locally, then a domestic company can win the legal right to produce another firm's patented product in Brazil. The US dragged Brazil to the WTO for trying to offer cheap ARV drugs to its people by using this provision in its patent laws. The dispute threatened Brazil's much acclaimed National AIDS Drug Program, which facilitated sustainable access to treatment for HIV/AIDS and had resulted in plummeting rates of death due to AIDS.

Going back to the letter of the law, the TRIPs Agreement allows a State the flexibility to structure its patent laws to adopt methods to protect public health and interest. Further, the object of the TRIPs Agreement makes it amply clear that protection and enforcement of IPRs do not exist in isolation. They are intended and meant to benefit society as a whole and that they are not made with a sole view to protect private rights. Yet Brazil found itself at the dispute settlement panel of the WTO trying to justify its socially beneficial patent laws at the instance of the US.

[37] "Frequently Asked Questions About Compulsory Licenses", *at* http://www.cptech.org/ip/health/cl/faq.html.

In South Africa, 39 Pharma MNCs backed by the US and the EU brought a lawsuit against the Government of South Africa in Pretoria's High Court. The lawsuit targeted a South African law viz. *The Medicines and Related Substances Control Amendment Act, 1997*, which enabled the Government to give its people access to cheaper ARV drugs. This evoked a massive counter-response from voices across the globe including the Nobel Prize winning 'Medecins Sans Frontières'. Ultimately, the Pharma MNCs suffered a major defeat when they were compelled to withdraw their case unconditionally in April 2001.

It is not that developing countries alone have been forced to change their policies due to external pressures. The US pressurised Canada to abandon the compulsory licensing approach for pharmaceuticals, as a pre-condition for Canada to join the North American Free Trade Association.[38]

I cannot help but wonder if the Government of India, which has seldom shown the courage to take on or invoke the wrath of the US, will ever utilise the compulsory licensing provisions in the new patent law to protect its own interests. It is beyond dispute that the provisions are present in the law and are more than adequate. However, whether they will be invoked if required and more importantly, whether the Government will stand by its decision, without yielding and giving in to external pressures, is anybody's guess.

It is these harsh ground realities that turn the tables against the new patent regime in so far as it relates to the pharmaceutical industry.

d. *Overcoming The Hurdles*

Since the provisions on paper are not enough and it is the enforcement that is key, it becomes relevant to search for ways and means by which the enforcement obstacles can be overcome.

- Since the most alarming health problem India faces today is in the area of HIV/AIDS, the Government might begin with straight

[38] *See* Love *supra* n. 21, para 5. Canada, which has often used the compulsory licensing provisions for pharmaceutical drugs, (according to WHO, Canada is the most extensive user of the compulsory licensing provisions) has been compelled to change its approach and bring it in conformity with the interests of the pharmaceutical lobby. Canada routinely granted compulsory licences on pharmaceuticals, with compensation based upon royalties, typically set at four per cent of the competitor's sales price.

away declaring an emergency for HIV/AIDS and other diseases, such as tuberculosis, the incidence of which is relatively high in India.[39] Such a measure will authorise the Government to procure the drugs required for the treatment or cure of the said diseases from the patentee, subject to paying a modest royalty.

- The statute should lay down a procedure and the manner in which the compulsory licensing provisions will be invoked. The procedure must be such that it cannot be challenged by the patentee to obtain injunctive relief. Judicial remedies such as writs will always be open to the patentee but the law must lay down that no injunctions will be granted in favour of the patentee, which would bar the Government from acting upon the compulsory licence even as and by way of interim relief. Article 44 of the TRIPs Agreement, which covers the question of injunctions, specifies that members may limit the remedies against compulsory licences granted to payment of remuneration.
- The provisions in the present patent law, which provide for government use of a patent are narrow and lack teeth. Section 100 of the *Patents Act, 1970* gives the Central Government the power to use inventions for the purpose of the Government.[40] Section 47 of the *Patents Act, 1970* provides that the grant of a patent is to be subject to certain conditions and sub-section 4 thereof provides for use of patented medicines and drugs by the Government.[41] The parallel provisions in some other

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[39] Para 5(c) of the *Declaration on the TRIPs Agreement and Public Health,* WT/MIN(01)/DEC/2 (20 November 2001): "Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency."

[40] Section 100(1) of the *Patents Act, 1970*: "Notwithstanding anything contained in this Act, at any time after the application for a patent has been filed at the patent office or a patent has been granted, the Central Government and any person authorised in writing by it, may use the invention for the purposes of Government in accordance with the provisions of this Chapter."

[41] Section 47(4) of the *Patents Act, 1970*: "In the case of a patent in respect of any medicine or drug, the medicine or drug may be imported by the Government for the purpose merely of its own use or for distribution in any dispensary, hospital or other medical institution maintained by or on behalf of the Government or any other dispensary, hospital or other

jurisdictions are stricter and more specific. For example, the patent law in Switzerland provides for the whole or partial expropriation of the patent. In Italy, the Government has the right to expropriate patents for "military or public interest" uses. In Germany, "a patent shall have no effect where the Federal Government orders that the invention be exploited in the interest of public welfare."[42] In contrast thereto, the Indian law provides for mere use by the Government.

The method of computing compensation to be paid for the grant of a compulsory licence must be clearly established.[43] This will avoid unnecessary litigation and delay. Guidelines for calculation of royalty payments must be issued under the Patent Rules, which lay down industry-wise rates, per cent for royalty payments. The lowest rate must be applicable for medicines and drugs. In addition, provisions for royalty-free compulsory licences are also required, whereby the Government may authorise third party use without payment of royalties to the patentee in appropriate cases where the Government so thinks fit. This would widen the ambit of power in the hands of the Government.

IV. Post-2005: Impact Of The New Regime

In the new patent regime, there will be gains and there will be losses. What is essential to examine is whether the trade-off between the gains and losses benefits India or affects her adversely. That is the crucial question.[44]

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medical institution which the Central Government may, having regard to the public service that such dispensary, hospital or medical institution renders, specify in this behalf by notification in the Official Gazette."

42 Love *supra* n. 21, paras 25, 27 and 33.

43 Article 31(h) of the TRIPs Agreement states that the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorisation.

44 *See* Jean O. Lanjouw, "The Introduction Of Pharmaceutical Product Patents In India: Heartless Exploitation Of The Poor And The Suffering?" (NBER Working Paper No. 6366), 7, *available at* www.oiprc.ox.ac.uk/JLWP0799.pdf. "It has been argued that the offsetting dynamic gains to additional patent rights may also be minimal in a world where patents are already available to protect much of the global market. With profits coming from other patent protected markets, those created by the newly available rights

A. Sky Rocketing Prices—Reality Or Myth?

It is argued that product patents, in the absence of reverse engineering possibilities, would result in a temporary monopoly in favour of the patentee and hence raise drug prices. To test this theory, one would need to look back into the historical relationship between IPRs and price, the provisions for drug price control as also the present Indian scenario.

1. Relationship Between IPR Protection And Price

It is believed that IPR protection has an adverse impact on price. To take the argument down to basic economics, price is determined by market forces i.e. demand and supply. A monopolist is one who can control price by controlling supply since he knows that there is no alternative to his product or service in the market. That being the case, it becomes necessary to examine if product patents for pharmaceuticals give monopolistic rights to the patentee.

Most consumers in India are known to switch easily to alternative drugs, which are cheaper and sometimes less effective. We have all at some point experienced that chemists in India are not averse to substituting the prescribed drug for a cheaper alternative drug, upon the request of the consumer, even though the alternative is not an over-the-counter drug, but is to be given by prescription only. More often than not, an alternative method of therapy is also available. These factors are bound to exert a downward pressure on the price of drugs.

Further, consumers in India are known to be extremely price sensitive. Less than four per cent of the population is covered under medical insurance,[45] which means that the burden of medical expenses are essentially borne by the ultimate consumer which makes him even more sensitive to price. Pricing of products is done after taking into consideration factors such as level of income and purchasing power.

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are only incremental, may be small and, with diminishing returns to R&D, may stimulate negligible amounts of additional innovation. ... This suggests that the group of countries who are introducing product patents as a result of WTO membership may face higher consumer drug prices and a loss of industry profit and employment, for little gain in new pharmaceuticals."

[45] *Ibid*, 9.

There is empirical evidence to show that prices do not rise after grant of IPRs.[46] Although one would believe that prices would naturally rise upon the grant of IPR protection, the reality at the ground level is quite to the contrary.

2. A Look Into History

In the 1960s, India had laws that provided for strong protection to IPRs. Meanwhile the prices of drugs and medicines were at par with the highest in the world. The *Patents Act, 1970* weakened the patent regime by recognising only process patents. The Drug Price Control Order (DPCO) came into being at the same time. Drug prices today in India are some of the lowest in the world. Yet it would be inappropriate to draw lessons from the past to fathom the future.[47]

In today's scenario, I do not find reason enough to believe that product patents will make drug prices soar to an extent that they become unaffordable. Although a small increase in prices seems evident, while the greater anxiety that surrounds the issue seems uncalled for. To begin with, the product patent claims will not cover the drugs that are currently in the market but will only be applicable to new inventions, which form a relatively small part of the total market. It has been estimated that in 1993 the drugs that would have been patented in India if India had a 'Western' patent law represented only about 10 per cent of the total drug market in India, and that it is unlikely to change dramatically when India finally does have product patent protection for pharmaceuticals.[48] Further the large majority on the list of essential drugs of the World Health Organization (WHO) are no longer patented in any country.[49] Even after India commences granting product patents, by the time patented products become a significant proportion of the market it will be another 10 odd years.

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[46] *Ibid. See also* "Study By The National Economic Research Associates" (NERA Washington January 1998) and Dr. Heinz Redwood, "New Horizons In India" (1994).

[47] *Ibid.* In the 1960s, most of the players were subsidiaries of foreign companies and most of the demand for drugs was being met by imports. The scenario today is quite different. While eight of the top ten pharma players in the 1970s were foreign owned Indian subsidiaries, only four of the top ten in the 1990s belong to the foreign brigade.

[48] Grubb *supra* n. 6, 48.

[49] *Ibid.*

3. Pricing And Price Control Laws

The DPCO is an order issued by the Government of India under the *Essential Commodities Act, 1955*, that enables it to fix the prices of some essential bulk drugs and their formulations. The ceiling prices of drugs covered by the DPCO are notified by the National Pharmaceutical Pricing Authority (NPPA) and periodically revised.[50] The Maximum Retail Price (MRP) is fixed on a 'cost plus' basis for a period of three years. However, the NPPA does have the power to intervene if circumstances so warrant and revise the MRP before the expiry of the three-year period.

The main criteria for inclusion or exclusion under the DPCO are:

- Drugs under price control should have a minimum annual turnover of Rupees four crore;
- Drugs of popular use, in which there is a monopoly situation, will be kept under price control. A monopoly exists if for any bulk drug, with an annual turnover of Rupees one crore or more, there is a single formulator with a market share of 90 per cent or more; and
- Drugs in which there is sufficient market competition viz. at least five bulk drug producers and at least 10 formulators and none having more than 40 per cent market share in the retail trade (as per ORG) may be kept outside price control.[51]

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[50] *See* "What Is Drug Price Control Order?", *The Economic Times*, 11 February 2002, *available at* http://economictimes.indiatimes.com/articleshow/607491.cms. The origin of this control dates back to 1970 when for the first time the Government placed limits on profitability of pharmaceutical companies. But the kind of DPCO regime that we have today, in which the government fixes prices of some drugs, was put in place in 1979. At that time, over 350 bulk drugs were subject to price controls. Now, only 74 bulk drugs (12 of them imported) and their formulations are covered by the DPCO.

[51] *Ibid.* As per the Pharmaceutical Policy of 2002, the products under price control were to be based on the twin criteria of annual turnover and monopoly situation of a particular drug and for this purpose ORG-MARG data of March 2001 was to be adopted. As per the criteria announced in the policy, only about 30 to 35 drugs would fall under the purview of the price control which is believed to cover approximately 38 per cent of the drug market today.

As regards India's list of essential drugs, the DPCO would logically have the impact of keeping prices of essential drugs low and affordable. Yet industry experts recall the 1970s when most drugs were covered by the DPCO, which had led to periodic shortages of medicines and hardship for consumers. Contrary to expectations, one of the benefits of liberalisation and decontrolling prices was that the industry was able to charge remunerative prices for essential drugs and as a result production volumes rose leading to easy availability for consumers. Simultaneously, competition ensured that prices were not driven up and in many cases companies had to resort to price cuts.[52] This phenomenon establishes the fact that market forces are sufficient to arrive at a competitive and fair price.

However, in case the product patent regime leads to the creation of a monopoly in favour of the patentee and should there be no market forces to arrive at a fair price, the provisions of the DPCO are invoked in case an invention falls into the criterion laid down therein, one of which covers a monopoly situation where there is a single formulator of a bulk drug with a market share of 90 per cent or more. Hence in case of a monopoly, the prices will be regulated under the DPCO; otherwise, the market forces will keep the prices competitive. The anxiety of sky rocketing prices under a product patent regime therefore seems unwarranted.

Further, it has been observed that Pharma MNCs do not have a standard pricing policy for its products all over the world. Most international manufacturers base their pricing strategy for countries, like India, on 'affordability criteria'.[53] Several factors such as low income and high price sensitivity will contribute to the price elasticity of demand for a new patented drug and the patentee may not get away with charging a monopoly price.

Yet, there is one interesting finding that proves the above analysis completely wrong. Pakistan already has a product patent regime in force. Conditions as regards affordability criterion and price sensitive consumers

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[52] "Drug Prices Fall But Industry Worried", *The Hindu*, 10 October 2003, *available at* http://www.hindu.com/2003/10/10/stories/2003101002201600.htm.

[53] "Myth of 'High Priced Medicines After Change In Patent Laws'", *at* http://www.indiaoppi.com/intelprop.htm.

are also equally applicable in the case of Pakistan. A study conducted has shown that prices for four sampled drugs were 3 to 14 times more expensive in Pakistan than they were in India.[54]

Further, the looming question that remains is whether the DPCO would be construed by the WTO as an unreasonable barrier to free trade. Most countries have governmental regulation over drug prices. Although there is still not much clarity about the maintainability of the DPCO vis-à-vis the provisions of the WTO, it appears that it is possible to have price controls on drugs as long as there is no discrimination between imported drugs and locally produced drugs. Besides, the TRIPs Agreement does not prohibit governmental regulation of prices.

Yet in the case of price control, there is a loophole. The DPCO uses input cost as a benchmark for ascertaining the MRP to be charged for a drug. The material cost, conversion costs such as labour and R&D, packing material cost and other charges form the input cost and the MRP is determined under the DPCO as a mark-up on these input costs.[55] Hence, the pharmaceutical company could raise the price of the inputs it supplies to its Indian subsidiary, i.e. the Indian company gets the inputs at an artificially high transfer price, and be given a higher controlled price for its drugs. Studies have shown that this loophole has been used extensively by Pharma MNCs to increase the prices of their drugs. For instance, in

[54] Price Comparisons—Four largest 'on patent' drugs by sales in India:

Drug name	Dosage	Price in India (in Rupees)	Times costlier in Pakistan than in India	Times costlier in the UK than in India	Times costlier in the US than in India
Ranitidine	300 tabs/10 pack	18.53	14.1	26.1	56.7
Famotidine	40 tabs/10 pack	18.61	14.0	27.1	54.0
Ciprofloxacin	500mg/4 pack	28.40	8.3	10.3	15.4
Norfloxacin	400mg/10 pack	39.00	3.2	6.5	23.2

See Table 2 in Lanjouw *supra* n. 44, 37.

[55] Retail Price (RP) calculation under the DPCO:
RP = (MC + CC + PM + PC) x (1 + MAPE) + ED
(CC–Conversion Cost, ED–Excise Duty, MAPE–Maximum Allowable Post-Manufacturing Expenses, MC–Material Cost, PM and PC–Packing Material and Charges).

India, Pfizer charges USD 9000 per kg for material that is available in Italy for USD 125 per kg and Sandoz imports a certain item into India at USD 60,000 per kg while the same is available in Germany for USD 23,000 per kg.[56] This is a considerable difference and even the controlled marked up price on the cost price can still be high enough for the Pharma MNC to make good profits and more importantly such a case defeats the purpose of drug price control measures.

4. Impact Of Price Change

Assuming that the prices of drugs will increase post-2005, it is necessary to examine whether the poor and those who cannot afford expensive drugs will really be affected. For that, it is necessary to identify who ultimately bears the burden of medical expenses.

Allopathic medicines are consumed in India by approximately 30 per cent of the population. Within this universal set, employers pay six per cent of health care expenses.[57] Further, it is reported that four per cent of the population is covered under medical insurance which takes care of the expenses in their case. With private insurance, this number is bound to increase. Moreover, those who are able to afford the drugs will be able to afford them at slightly higher rates.

As regards the other end of the spectrum, the poor get treatment from government-run hospitals and clinics. The Government procures drugs and medicines on the basis of tenders. Under the rate contracts of the Government, the quantity and prices are fixed for the period of the contract. The Government gets the best prices, which are much lower than the market price of the drugs. Hence, the prices for those at the lower end of the income ladder will not change.

To end the case on price impact, I find there are more grounds to believe that drug prices will not soar with the advent of the new regime than reason to believe they will. Patents and IPR protection have, in the past, proven to not have an adverse impact on price. I think it is a myth that drug prices will rocket once the new patent regime is put into place.

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[56] Lanjouw *supra* n. 44, 11.

[57] Pharma-Prognosis—Asia, 2001–2005, "Rationalising Uncertainty In The Planning Process".

B. Impetus To R&D

India's potential as a large scientific and intellectual base of manpower is much-renowned. However, Indian pharmaceutical companies invest very little in R&D while the investment of Pharma MNCs is almost non-existent. For instance, in 1999, Indian firms spent only 1.8 per cent of sales in R&D.[58] The lack of investment in R&D has been attributed mainly to the poor patent protection available in India. The near absolute dependence of the Indian pharmaceutical sector on reverse engineering has an unfavourable impact on substantial foreign investment in the pharmaceutical sector as also on India's own emergence as a technology and R&D-driven economy.

Many research-based Pharma MNCs have a presence in China, which provides product patent protection, despite a difficult political and business environment. As a result, China attracts far greater investment than India. A stronger patent regime will bring in the benefits of investment into R&D, which has the potential of thriving in a country like India given its significant intellectual class. That in turn will enhance employment opportunities and might be capable of reversing the brain drain to some extent. It has been observed that the enforcement of IPR is key when choosing an outsourcing jurisdiction and there is a global trend towards outsourcing R&D.[59] Pharma MNCs will be more willing to outsource R&D to Indian companies if they are assured of stronger patent protection for their innovations here. The innovating firm is able to reveal its innovation without losing control and hence can sub-contract parts of the development work at a lower cost to countries like India.[60]

The impetus to R&D will not only increase foreign investment but it will lead to research in the area of diseases that are peculiar to India or tropical

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[58] Robert Tancer and Srinivas Josyula, "Investing In The Indian Pharmaceutical Industry", (1999) *The American Graduate School of International Management*, 6, *available at* www.t-bird.edu/pdf/about_us/case_series/a03990015.pdf.

[59] Gina Singh and T. Surendar, "Small and Smart: Pharma SMEs' plans for 2005 and beyond", *Business World*, 20 October 2003, 42. The Pharma MNCs currently conduct nearly 80 per cent of their research in-house but that this figure is likely to come down to 40 per cent as a result of which the R&D outsourcing market was estimated to be in the area of USD 9.3 billion in 2001.

[60] *Ibid.* In fact, with the gradual shift in the patent laws, it has been observed that 20 independent clinical research organisations have been set up in India in the last two years.

areas. For instance, Pharma MNCs have no incentive to research for the discovery of a cure for leprosy, since it has been completely eradicated from the developed world. Indian researchers can work towards finding therapies for diseases that are still prevalent in India, some of which are peculiar to India.

C. Competition—The Death Knell For Small-Scale Indian Companies?

The idea of foreign competition drives one into believing that the Indian counterpart would collapse under pressure and find it hard to survive. In the early 1990s, advocates of *swadeshi* screamed from rooftops that liberalisation spelt doomsday for the Indian economy. Well, the Indian economy is doing just fine. Survival of the fittest is not a *mantra* I believe in, but there is so much in the market that there is room for all. 70 per cent of the Indian population does not consume allopathic drugs. This is a huge potential market. With rising incomes as also private medical insurance becoming available in India, the markets are bound to grow.

It is reported that less than five per cent of the drugs available in the Indian market are copies of patented products.[61] And even the manufacturers, who thrived on the reverse engineering possibilities that the old patent regime offered, have had plenty of time to adjust their systems to the new patent law. Some of them have entered into various sorts of tie-ups and arrangements to safeguard their positions post-2005.[62] Moreover, they can still continue to manufacture and sell the drugs they make currently as the new patent law does not affect the drugs that are already in the market.

To my mind, it is a case of incurring short-term losses for reaping long-term gains. There may be certain interests that suffer as a result of the shift—prices might increase marginally and some small business units might have to struggle to survive—but the temporary losses that may accrue outweigh the long-term gains that the new regime promises to usher in.

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[61] Singh and Surendar *supra* n. 59, 43.

[62] *See* Singh and Surendar *supra* n. 59.

V. Pharma Patents And The CBD

A. Convention On Biological Diversity

While analysing patent protection for pharmaceuticals, it may be relevant to look into certain provisions of the *Convention on Biological Diversity* (CBD).[63] Several pharmaceutical products are born out of remedies arising from natural properties in plants and other life forms (traditional knowledge[64]) for instance, the medicinal properties of *neem*, turmeric, *methi* and *jamun*. These fall within the ambit of protection afforded by the CBD. But *neem* and turmeric are not isolated cases. Often, local inhabitants are completely unaware of the natural resources available and hence legal protection to these resources is absolutely necessary.[65]

It is believed that 90 per cent of all drugs are obtained or derived from sources in the 'South'.[66] A recent study by an Indian expert group examined randomly selected 762 US patents having a direct relationship with medicinal plants, out of which 374 patents were found to be based on traditional knowledge.[67] It is only fair that if the corporates of the developed world are to get patent protection for their inventions, the holders of the traditional knowledge in the developing countries must also get royalties

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[63] The CBD was negotiated at the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992. It came into force on 29 December 1993, before the TRIPS Agreement came into effect. The purpose of the Convention is the conservation of biological diversity, its sustainable use and sharing of benefits arising thereof. The underlying principle is that States have complete rights and absolute sovereignty over their natural resources, which is also one of the fundamental principles of Public International Law.

[64] The WHO defines traditional medicine as "the sum total of all the knowledge and practices, whether explicable or not, used in diagnosis, prevention and elimination of physical, mental or social imbalance and relying exclusively on practical experience and observations handed down from generation to generation, whether verbally or in writing."

[65] *See* R. V. Anuradha, "Biopiracy And Traditional Knowledge", *Earthscapes*, 20 May 2001, *available at* http:// http://www.hinduonnet.com/folio/fo0105/01050380.htm. For instance, aloe vera is used today in shampoos and face-packs and much of this knowledge is learnt by us from the West. This commonly found plant known as *ghitrakamari* has been used for centuries in the Himalayan region to moisturise skin and is even eaten as a vegetable in many parts of India.

[66] Grubb *supra* n. 6, 45.

[67] R. A. Mashelkar, "Intellectual Property Rights And The Third World", 2001 *Current Science* 81(8): 955, 961, *available at* www.isa.ac.in/currsci/oct252001/955.pdf.

or a share of the benefits for parting with or sharing their knowledge. This is what the CBD seeks to achieve.

It comes as no surprise therefore that the US has not ratified the CBD although it has been 10 years since it came into force.[68] In fact while India and several other developing countries have highlighted at various WTO meetings that the rights of holders of traditional knowledge to share benefits arising out of innovation on the basis of their knowledge and the biological resources nurtured by them should be recognised. They recommended that applications for patents should compulsorily disclose the source of origin of the biological resource and knowledge pertaining to it, so as to facilitate benefit sharing with the originators of the knowledge and resource, the US has strongly opposed this as a "legal and administrative nightmare".[69] So much for the noble principles of 'equal protection'!

B. The Conflict Between CBD And Patent Laws

The TRIPs Agreement mandates the introduction of a form of legal protection on plant varieties. Article 27.3 thereof allows member-countries the liberty to "provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof". Article 27.3(b) of the TRIPs Agreement provides that plants and animals, except microorganisms, may be excluded from patentability. Following suit, the *Patents Act, 1970* was amended to disallow patenting for plants and animals.[70] India has chosen to have a *sui generis* system for protection of plant varieties and has enacted the *Plant Varieties and Farmers' Rights Act, 2001*, which focuses on the definition of formal plant breeders' rights and follows closely on the model of the *International Convention for the Protection of New Varieties of Plants*. Hence as far as India is concerned, the patenting of plant varieties is out of the question. The problem area relates to medicines and remedies derived from or based upon plant varieties.

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[68] Dutfield *supra* n. 15, 11.

[69] Anuradha *supra* n. 65.

[70] Section 3(j) of the *Patents Act, 1970*: The following are not inventions within the meaning of this Act—"plants and animals in whole or any part thereof other than micro-organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals."

While there is a pro-patent view, which believes that the provisions of the CBD and patent laws do not conflict with each other since corporations that are assured of strong patent protection for their products will be willing to invest in natural product research and enter into a benefit-sharing arrangement with the resource providers, there are others who hold the view that patents create incentives to destroy bio-diversity and give rise to what has been termed 'bio-piracy'.[71]

C. Measures To Protect Biological Diversity

India has enacted the *Biological Diversity Act, 2002*,[72] which provides for the protection of local community rights and also puts into place a system for sharing the benefit with local communities for the traditional knowledge held by them. Moreover, the Government of India has taken steps to create a Traditional Knowledge Digital Library (TKDL) on traditional medicinal plants and systems, which will lead to a Traditional Knowledge Resource Classification (TKRC). This system is to be linked up to the internationally accepted International Patent Classification (IPC) System thereby eliminating the problem of the grant of wrong patents since the Indian rights to that knowledge will be known to a patent examiner anywhere in the world.[73]

1. Biodiversity Registers

In order to protect their interests, villagers in certain parts of India have prepared Community Biodiversity Registers for safeguarding their traditional knowledge. The Register processes documents of community and individual knowledge of economic uses of biodiversity resources. All information accumulated in the Register can be used or distributed only with the knowledge and consent of the local community, so that it is in a position to refuse access to the Register and to set conditions under which access would be allowed. The community, while consenting, can charge fees for access to the Register and collection of biological resources. Decisions on how to disburse the funds are to be made through village community meetings. Moreover, the record of the knowledge in the Register defeats a claim to a patent since it acts as proof that the product is

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[71] Bio-piracy is the unauthorised commercial exploitation of the knowledge and biological resources of indigenous peoples and/or developing countries.

[72] The *Biological Diversity Rules* have still not been framed under the Act.

[73] Mashelkar *supra* n. 67, 962.

not a novel invention but merely the discovery of an existing property. Databases of traditional knowledge have been created by NGOs in parts of India to record and recognise such traditional knowledge.

2. Benefit-sharing Arrangements

Benefit-sharing, another manner in which the holders of traditional knowledge can protect their interests, has been recognised in the *Biological Diversity Act, 2002.* The law is at a nascent stage and model benefit-sharing agreements and guidelines to work the provisions of the Act will be required before the holders of traditional knowledge can participate in benefit-sharing exercises of this nature. Across the globe, benefit-sharing arrangements have worked. The contrast of the Peruvian case where the Aguaruna people entered into and successfully administered a benefit-sharing arrangement with a Pharma MNC to the Indian case of the tribal Kanis losing out on the opportunity to participate in the royalty proceeds of the medicine based on their traditional knowledge, demonstrates that for the formula to work, the Government needs to play a more pro-active role.[74] In the latter case, the apathy of

[74] *See* Dutfield *supra* n. 15, 42–43. The people of Aguaruna in Peru negotiated a know-how licence with Searle, a pharmaceutical division of Monsanto, for passing on the knowledge of medicinal plants in their region to the company, in return of which they receive an annual know-how licence fee. The fee increases with R&D in the knowledge so shared (so the money is earned by the locals even before and regardless of whether the product finally enters the market) while the licence is non-exclusive in that it does not affect the rights of the Aguaruna people to use, share or sell or transfer the knowledge. A trust fund has been established into which the monies so received are deposited and the board of trustees, appointed within the Aguaruna people to administer the fund, are responsible for the distribution of the benefits.

In 1995, in Kerala, the Tropical Botanic Garden Research Institute (TBGRI) of Trivandrum, granted Arya Vaidya Pharmacy (AVP) an exclusive seven year licence to manufacture and sell a product based on the extracts of the Trichpos plant called '*Jeevani*'. Study of the leaves of the plant revealed it had anti-stress properties amongst others, of which the TBGRI had learnt from members of the local tribal Kani people. The TBGRI, which had a patent for the same, entered into an arrangement with the Kani people to share the licence fee and the royalty payments received by it from the AVP. The Kani people set up a Trust to receive the above funds and registered the trust with the State Government of Kerala, which took three years to permit the transfer of funds into the trust. Further, the Kerala Forest Department demanded a share in the licence fees and royalties received. To negotiate the same, the Forest Department prevented the Kanis from harvesting the plant in the locality. Meanwhile, outsiders have been pouring into the area and have been illegally uprooting the plant.

the Government of Kerala in recognising the rights of its own people and giving the tribals access to what was rightfully theirs has lead to the literal bio-piracy of the plant itself.

Regulatory procedures that monitor and detect bio-piracy at an early stage are also the need of the day. Most importantly, it is necessary to educate the holders of traditional knowledge about the power and the implications of sharing the knowledge they have and inform them of the clauses that a typical benefit-sharing agreement must have to protect their interests. This may be in the form of non-exclusivity clauses[75] or structuring the provisions for the payment and receipt of royalty in a manner that the community as a whole can draw benefits from the money received.[76]

The following measures may be taken to enforce the biodiversity law strictly:

- Drugs derived from traditional knowledge without going through the legal procedure should be denied marketing approval by the DCGI and the marketing approvals of the drugs already in the market must be revoked.
- The *Patents Act, 1970*, as amended, contains provisions to have such a patent revoked in India. The law must further require the Government of India, through the Indian Patent Office, to pursue the matter in other member countries where the same company has obtained a patent for such a drug and take measures to have it revoked. In the alternative, the Government may enforce the rights of the holders of such traditional knowledge at an international forum and require the foreign company to enter into a benefit-sharing arrangement with the holders of the traditional knowledge.

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[75] Under a non-exclusivity clause, the locals would not be prohibited from using the knowledge that they have shared and the use by them would not amount to a violation of the patent.

[76] *See* The United Nations Conference On Trade And Development (UNCTAD) Secretariat Paper On Biotrade Initiative: "On equity grounds it is ... essential that information provided by traditional healers, farmers or other local residents which is used to identify potentially valuable biological materials, is obtained through informed consent and results in appropriate compensation."

- The defaulter must be required to pay into a trust, established for this purpose, the profits and benefits so derived or even upto two times the profits so derived.

Sanctions and heavy penalties must be slapped on the patentee, the proceeds of which must go into creating, improving and updating the TKDL.

If security laws in the country can be strengthened in the interests of the investors wherein the Securities and Exchange Board of India has been given the authority to impose a penalty of up to Rupees 250 million or up to three times the amounts earned by the violation, there is no reason why laws relating to patents and biological diversity cannot include strong deterrents that really serve the purpose of their *raison d'être* instead of merely filling in the Consolidated Fund of India with penalties collected.

VI. Conclusion

It is difficult to arrive at a standard law for the entire world comprising varied and divergent interests. It is unjust for nations to abuse their lobbying power and imposes upon the lesser powers terms and conditions that they themselves did not follow on the road to their super power status, all in the name of 'free trade'. It is morally wrong to place commercial private property rights above social public interests. Yet it is pointless to go on fighting an idealistic battle.

The 21st century heralds the information age. The voices of the powerful have been heard. The law is settled. The product patent regime is at India's doorstep.

India has the manpower, in abundance; the intellect, far superior; potential markets, the second largest. The investment that the product patent regime promises to generate will bring in the money and complete the missing link. There need be neither pessimism nor reason to look back.

DECRIMINALISATION OF HOMOSEXUALITY IN INDIA†

*Sonal Rangnekar** and *Kabir Duggal*Φ*

"Why is it that, as a culture, we are more comfortable seeing two men holding guns than holding hands?"

Ernest Gaines

I. INTRODUCTION

Sexuality in all its manifestation was celebrated and embraced in India prior to the entry of the Victorian dictators. Homosexuality[1] has ever since been a tabooed subject—prevalent but never spoken of or discussed. The severely punitive Section 377 of the *Indian Penal Code of 1860* (IPC), which criminalises 'unnatural offences' in India, was influenced by the British law at that time. This section does not criminalise homosexuality *per se*; however it has been chiefly instrumental in the criminalisation of the homosexuality in India. Even today, this section stands out as an anachronism and is contradictory to the Constitution of India and international covenants like the *International Covenant on Civil and Political Rights* (ICCPR) to which India is a signatory.

† The article reflects the position of law as on 31 March 2004.

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1 The term 'homosexuality' was coined in 1869 by Karl Maria Kertbeny in an anonymous pamphlet advocating the repeal of Prussia's sodomy laws. It was listed in 1886 in Richard Von Krafft-Ebing's detailed study on deviant sexual practices, *Psychopathia Sexualis*. The word 'homosexual' translates literally as 'of the same sex', being a hybrid of the Greek prefix meaning 'same' and the Latin root meaning 'sex'. It is intended to describe erotic love between two persons of the same sex. The term GAY (acronym for Good As You) refers to homosexual relation between men. It is referred to as lesbianism—when the persons involved are females. *See also* "Wikipedia—The Free Encyclopaedia", *at* http://en.wikipedia.org/wiki/Homosexuality.

While the homosexual community around the world is advancing towards emancipation, the position in India regarding this issue is still suppressed under the shackles of this law. Even as others are demanding their rights by challenging the marriage and adoption laws in their respective countries, for the homosexual community in India, leading a normal and liberated life is a distant dream. The issue of 'Decriminalisation of Homosexuality' by repealing Section 377 of the IPC has been raised before the Courts in India several times.

This is reflected from the petition filed by AIDS Bhedbhav Virodhi Andolan (ABVA) in 1994 before the Delhi High Court.[2] However, ABVA became defunct soon after and the petition did not come up for hearing. It was only in 2001 that the legal process regarding the repeal of Section 377 was revived with the filing of a petition by NAZ Foundation (India) Trust.[3] It also brings the legal position of the homosexual community in India to the forefront.[4]

This article attempts to provide a pragmatic analysis of the socio-legal position of the homosexual community in India with a reference to the changing global perspective on this issue.

II. Section 377 Of The IPC

Section 377 of the IPC is the root cause of the disheartening conditions of the homosexual community in India. Repealing Section 377 has therefore

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2 *See* Thomas W. Holt Jr., "India's Anti-Sodomy Law Prevents Condom Distribution To Prisoners", 13 October 1994, *at http*://www.qrd.org/qrd/world/asia/india/no.condoms.for.prisoners. In 1994, ABVA, a human rights activist group, filed a public interest petition in the Delhi High Court challenging the constitutional validity of Section 377of the IPC. The petition was filed in the wake of the findings of the medical team that visited Tihar Jail in Delhi, which recorded a high incidence of sodomy in the wards.

3 The NAZ Foundation is an international Non-Governmental Organisation (NGO) having an office in India. It works for Human Immuno-deficiency Virus/Acquired Immune Deficiency Syndrome (HIV/AIDS) related issues. In 2001, it approached the Delhi High Court with a request to read down Section 377 of the IPC as not criminalising private consensual sex between adults.

4 "Centre Given A Deadline To Decide On Homosexuality", *Express News Service*, 15 January 2003, *available at* www.nfi.net/Pukaar/2003/Pukaar%20-%20April%202003.pdf. *See also* Siddharth Narrain, "Sexuality And The Law", *Frontline*, vol. 20 Issue 26, 2 January 2004, 95.

been on the agenda of every organisation and activist championing the cause of equality for homosexuals. Thus, it is essential to scrutinise this section. A brief discussion on this section is provided below.

A. A Brief Background Of Section 377: Beginning Of An End

Homosexuality has an ancient history in India. Ancient texts like the *Rig Veda* and the *Kamasutra*[5] as well as the ancient architecture have homosexual references.[6] Indian culture has traditionally tolerated homosexuality although the *Manusmriti* prescribed certain reservations against homosexuals (referred to as '*kliba*'[7,8] in the text). The position, however, changed with the advent of British colonial era in India.[9]

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5 *See* Shamona Khanna, "Gay Rights" in Bina Fernandez (ed), *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India* (India Centre for Human Rights and Law Mumbai 1999) 38, 39. The *Kamasutra* contains an entire chapter entitled '*Auparishtaka*' (oral congress) by Vatsyayana. The author insists that the practice is permitted by the orders of the holy writ (*Dharma Shastra*). Alain Danielou in his book, *Shiva and Dionysous*, states, "[T]he hermaphrodite, the homosexual and the transvestite have a symbolic value and are considered 'privileged beings', images of Ardhanarishwara (Lord Shiva)."

6 Joseph Sherry, "Emerging Gay Movement In India: A Liberal-Conservative Movement" in Balachandran and Baalagaopalan (ed), *The Indian Closet: 'In And Out'* (University of Illinois Press US forthcoming).

7 A '*kliba*' is defined as a sexual dysfunctional man, who might be, according to the context, impotent, homosexual, a transvestite or, in some cases, a man with mutilated or defective sexual organs. Wendy Doniger and Brian K. Smith (tr), *The Laws of Manu* (First edn. Penguin Classics New Delhi 1991), 328. Refer to following chapters-verses in the *Manusmriti*, which deal with '*kliba*': 2.158; 3.150; 3.165; 3.239; 4.167; 4.201; 4.205; 4.211; 7.91; 9.167; 9.201; 11.68; 11.134; 11.174 and 11.175.

8 The authors would like to note that the term '*kliba*' is a generic term, which includes a wide range of meanings. It is often translated to include even homosexuals. The Sanskrit language includes a wide range of words, which would *actually* describe homosexuals. Manu's approach to '*kliba*' was more protective than punitive in nature. The rationale of Manu not using the direct term for homosexuals could actually mean that he did not want to include homosexuals. *See also* Louis Crompton, *Homosexuality and Civilization* (Belknap Press 2003) and Amara Dasa, "Sanskrit Words Referring To Homosexuals", *available at* http://www.chakra.org/discussions/GenMar20_03.html: "There is no question that Sanskrit words such as 'kliba', 'sandha', 'napumsaka,' etc., can be used to refer to homosexuals.".

9 Khanna *supra* n. 5, 39–40.

In England, the proscription of sodomy[10] (*sodomoia est peccatam contra naturam*)[11] began in 1533, when King Henry VIII adopted the contemporary church doctrine into a system of laws at the time of the English withdrawal from the Catholic Church.

Sodomy became both a sin and a crime,[12] since ecclesiastical law recognises no distinction between the concepts of 'sin' and 'crime'. Sodomy included any form of non-procreative acts.[13] The British found the practice in India to be inconsistent with the Christian beliefs and, in 1860, enacted the

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[10] The term sodomy is found in the Bible. Genesis 19 is one of the most commonly cited anti-homosexual passages in the Bible. This term was so frequently used that the term 'Sodomite', which once referred to an inhabitant of Sodom, became a legal term for criminal sexual acts and now has become a derogatory synonym for a homosexual. Sodom was derived from the Hebrew word 'S'dom', which means 'burnt'. The Courts in the United Kingdom and the United States have often referred to this incident while deciding issues on homosexuality. *See Commonwealth* v. *Poindexter et al.*, 118 S. W. 943, 944, (Kentucky Court of Appeals, 1909): "[T]he word 'sodomy' is derived from the city of Sodom, where the crime against nature had its origin, and was universally prevalent until that city was destroyed by the wrath of God."
See Laxmi Murthy, "Big Brother In The Bedroom: 'Unnatural' Offences And Section 377", *InfoChange,* October 2003, *available at* http://www.infochangeindia.org/analysis08.jsp: "Sodomy referred only to two sexual acts: anal intercourse between two men or a man and a woman, or sexual intercourse between a human being and an infrahuman animal of the opposite sex. Due to the profound ignorance of biology of people in medieval times, it was thought that bestiality could lead to the conception of a half-human, half-beast offspring."

[11] The Latin expression means that sodomy is the sin against nature. *See* Robert Goss, *Jesus Acted Up* (Harper Collins Publishers San Francisco 1994).

[12] *See* http://milepost1.com/~gaydad/FAQ/Myths.Facts.html. It is interesting to note that the Bible contains six admonishments to homosexuals and 362 admonishments to heterosexuals. If the Bible is regarded as a basis to condemn homosexuality, should not the same rules also apply to heterosexuals? *See also* "The Bible And Homosexuality—An Introduction", *at* http://www.religioustolerance.org/hom_bibi.htm#cau. Interestingly the words 'homosexual' and 'homosexuality' are not found in the original Hebrew, Aramaic and Greek texts. These words date from the late 19th century. Biblical writers had little or no understanding of same-sex committed relationships; therefore these languages had no words for these concepts. They proceeded on the assumption that everyone was heterosexual, but that some heterosexuals engaged in sex with persons of the same gender. It is only when these scriptures were consolidated and translated into the English language that these words appeared with a muddled interpretation. Thus, when you see one of these words in an English translation of the Bible, it is important to dig deeper and find what the original Hebrew or Greek text really means.

[13] Murthy *supra* n. 10.

IPC, which criminalised the act (Section 377).[14] While United Kingdom (UK) has moved on, enacting, the *Sexual Offences Act, 1967*, which decriminalised homosexual acts between *consenting adults*, the Indian law continues in its outdated form![15]

B. A Critical Analysis

"Bad laws are the worst sort of tyranny."[16]

Legal discrimination against 'sexual minorities'[17] takes many forms, the most notorious being Section 377 of the IPC. It poses a serious threat to the homosexual community in India.

Although Section 377 does not criminalise homosexuality *per se*, it is used as a tool to harass and abuse sexual minorities while depriving them of their rights.

Section 377 of the IPC states:

> "Unnatural offences—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
>
> "Explanation—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

The section, an anti-sodomy law and a remnant of the British, is repugnant on a number of counts. In order to analyse the scope of Section 377, it is necessary to delve into some of its key words and the extent of this appalling section's interpretation.

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[14] *See Legislating An Epidemic—HIV/AIDS In India* (Universal Law Publishing Co. Ltd. New Delhi 2003) 89, 90: "This provision is based upon traditional Judeo-Christian values imposed by Victorian moral standards, which conceive of sexual intercourse in purely functional terms, that is, for the purpose of procreation."

[15] Murthy *supra* n. 10.

[16] Edmund Burke (1729–1797), a British statesman, parliamentary orator and political thinker.

[17] 'Sexual minority' refers to lesbian, gay, bisexual, transgender and questioning people as a minority in a predominantly heterosexual population. *See* glossary *available at* http://www.lgbt.ucla.edu/findout_gloss.html.

1. Ambiguous And Arbitrary

The exact scope of the definition "carnal intercourse against the order of nature" has been a major subject of debate in existing case law.[18] It has generally been interpreted to include acts of anal sex (*coitus per annum*) as well as oral sex (*coitus per os*) between males.[19]

It is important to note that this section does not prohibit homosexuality, but only prohibits certain sexual acts, which both homosexuals and heterosexuals, married and unmarried people, might engage in. However, it is almost always used to target the sexual minority population as they are erroneously seen as the only ones to perform "carnal intercourse against the order of nature".[20] There is a possibility of the application of this definition being extended to heterosexual acts of anal or oral sex also. However, this has not yet been considered by the Courts.[21]

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18 Carnal means sensual, sexual: *The Concise Oxford Dictionary of Current English*, (9th edn Oxford University Press New Delhi 1995), 198. *See also* Alok Gupta, "The History And Trends In Application Of Section 377 In The Indian Courts", *From The Lawyers Collective*, July 2001, 9,10: "Carnal intercourse against the order of nature is not necessarily synonymous with sodomy. But, for the sake of convenience, these terms are used interchangeably in many judgments. There are no specific explanations available from the courts on the different types of sexual acts that comprise sodomy. Sodomy in common English would mean anal intercourse. Different cases and interpretations have led, over a period of time, to a broadening of the definition of sodomy."

19 Khanna *supra* n. 5, 40.

20 *See* "Human Rights Violations Against Sexuality Minorities In India: A PUCL-K Fact-Finding Report", *available at* http://www.pucl.org/Topics/Gender/2003/sexual-minorities.pdf. This report has been prepared by People's Union for Civil Liberties (PUCL), Bangalore, an organisation which espouses the social and economic issues of the rural poor, the working class and minorities.

21 *See* Gupta *supra* n. 18. It is interesting, however, to note that in one particular case the issue of anal sex had arisen before the Karnataka High Court. In *Grace Jeyramani* v. *E. P. Peter,* AIR 1982 Kant. 46, the petitioner filed an application of divorce against her husband on grounds of oral and anal sex and physical assault. The Court granted her divorce mainly on the grounds of 'sodomy'. Borrowing from *B* v. *B*, 1882 Punjab Record 68. it was stated that, "A husband could be an offender of sodomy towards his wife, if she is not a *consenting partner.*" In this case, the issue of consent gained primary importance along with the unnatural nature of the act. Consent is otherwise irrelevant in Section 377. This suggests that sodomy may be acceptable between consenting "heterosexual" couples!

Section 377 holds the act of sodomy and not homosexuality *per se* as an offence. As a pre-requisite for conviction under this section, an act of unnatural intercourse has to be proved. In *Queen Empress* v. *Khairati*,[22] it was held that medical evidence showing that the accused was a 'habitual catamite'[23] was insufficient for a conviction under Section 377, since no single instance of sodomy could be proved. Thus, *de jure* it is an attempt to criminalise sodomy, while *de facto* it operates to criminalise and stigmatise homosexuality.[24] Hence, conventionally homosexuality is brought as an offence under the IPC.

The terminology 'carnal' read with 'penetration' has a very penile nature. Critics therefore observe that this section applies only to homosexual men (gays) and not to homosexual women (lesbians), as there is no penetration! The section, thus, does not only single out the homosexuals from the heterosexuals but also singles out the gays from the lesbians. This is an apt example of the arbitrary application of this section.

This section has an ambiguous aspect as well. It serves to legislate into being a new morality, a morality that condemns many forms of sex between two 'consenting adults' (including oral sex, anal sex and other kinds of sex), which the 'judges might decide', fall within the definition of "carnal intercourse against the order of nature."[25]

2. Order Of Nature

An ideal law is one which changes with changing conditions of society. This highlights the cardinal rule that law must be dynamic and not static. The legislative intention of Section 377 is to criminalise sexual activities, which are "against the order of nature",[26] thus, punishing 'unnatural sex'. This invites questions such as 'what is the order of nature?' and 'as

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[22] 1884 6 All. 204. *See* Khanna *supra* n. 5, 40.

[23] Catamite means a boy for homosexual practices, the passive partner in sodomy: *The Concise Oxford Dictionary of Current English* (9th edn Oxford University Press New Delhi 1995) 205.

[24] Joseph Sherry, "The Law And Homosexuality In India", 150–154. The paper was presented at the CEHAT: International Conference on Preventing Violence, Caring for Survivors: Role of Health Professionals and Services in Violence, 28–30 November 1998.

[25] Murthy *supra* n. 10.

[26] *See* William Blackstone, *Commentaries on the Laws of England*, vol. IV (Oxford 1769), 215. It is interesting to note that while the law in India used the term "order of nature", the English equivalent of the same is "crime against nature". William Blackstone, an

conceived by whom?'. Section 377 assumes that a natural sexual act is that which is performed for "procreation".[27] It thereby labels all forms of non-procreative sexual act as unnatural. This gives a very narrow view to the distinction between the procreative and non-procreative sexual act. Hence, the legislative intent of creating a public code of 'sexual morality' has no rational nexus with the 'classification created'.

Recent empirical evidence clearly shows that homosexuality and bisexuality is widespread in the Indian society, covering a large section of people belonging to different regional, linguistic and religious backgrounds and social strata. Section 377 denies these people a right to their sexuality.[28] Considering the large number of homosexuals and bisexuals in our society, the present interpretation of the words "order of nature" is a travesty on the homosexual community. The application of this terminology should not be construed in a strait-jacket of rigid formulae.

3. Application To Consensual As Well As Coercive Sex

The section does not distinguish between consensual and coercive sex. Thus, cases of abuse as well as those of voluntary sex between two 'consenting adults' can be prosecuted under this provision.[29] In *Fazal Rab* v. *State of Bihar,* a case dealing with a man who had consensual homosexual relations with a boy, the Supreme Court observed: "The offence is one under Section 377, IPC, which implies sexual perversity. No force appears to have been used. Neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence, has influenced our thinking."[30]

English jurist, coined the appellation "crime against nature" but he failed to delineate the limits, if any, of the term. *Available at* http://www.sodomylaws.org/sensibilities/introduction.htm#fn38.

27 Murthy *supra* n. 10.

28 Sherry *supra* n. 6.

29 *See* Khanna *supra* n. 5, 40–41. Contrary to popular belief several cases have arisen before the courts with reference to Section 377. Though the scope of this section covers all cases of sodomy, whether consensual or non-consensual, an overview of the cases actually prosecuted reveals that they were mainly rape cases. Of the 30 cases decided by the Supreme Court and the High Courts between 1830 and 1989, there have been 18 convictions, awarding a maximum sentence of five years rigorous imprisonment.
The authors would like to point out that the definition of rape under the Section 375 of the IPC is restricted to rape of women by men. It does not cover rape of a man by a man.

30 AIR 1983 SC 323, para 3.

However, considering the consent of the boy, the Supreme Court reduced the sentence from three years rigorous imprisonment to six months rigorous imprisonment. Although the consent of the other party is immaterial for conviction, it 'may' be significant while fixing the quantum of punishment.[31] Thus, it can be fairly concluded that even consensual homosexual relationship is punishable under this law.

4. Abetment

Abetment is another issue which arises under the scope of Section 377. Abetment read along with Section 377 has a very severe negative impact. Instigation of a crime amounts to abetment.[32] This could either be through direct or indirect participation. Thus if a landlord were to rent his house to a homosexual couple for cohabitation it would amount to abetting a crime. This, if read with Section 116 of the IPC (which deals with punishment for abetment), may be interpreted to constitute a crime of abetting the offence by instigating and encouraging unnatural sex.

Various NGOs, espousing the cause of HIV/AIDS prevention and care among the homosexual community anticipate the threat of being criminalised under Section 377. They disseminate information about safe anal and oral intercourse in the form of literature, organise seminars and also distribute condoms. One apt example of such a threat is the 'Lucknow Incident'. The police arrested members from NAZ Foundation International (NFI) and Bharosa,[33] NGOs involved in HIV/AIDS-related work. The police also raided and sealed their offices. They reported it to the local media claming credit for busting a 'gay club', a 'sex racket' and a 'call-boy racket'. They also stated that the NGOs were allegedly promoting homosexuality, which was against Indian culture and morals.[34]

This is a clear example where social workers, who support the cause of giving equality for and safety to the homosexual community in India, are willingly or unwittingly arrested on charges of instigating crimes.

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31 Khanna *supra* n. 5, 40.

32 Section 107 of the IPC states, *inter alia,* that "A person abets the doing of a thing, who—firstly—instigates any person to do that thing."

33 NAZ Foundation and Bharosa are NGOs that conduct HIV/AIDS intervention work with men who have sex with men.

34 Aditya Bondyopadhyay, "Where Saving Lives Is A Crime", *Combat Law*, April–May 2002, 51.

III. The Law And The Homosexual Community In India: A Critical Study

The bigotry regarding homosexuality is clear and evident from the laws which govern our land. Although these laws guarantee fairness and equality to all, its guarantees seem wane when it comes to the protection of homosexuals. A brief discussion of such paradoxical laws is provided below.

A. Constitutional Paradox

"Injustice anywhere is a threat to justice everywhere."[35]

The Constitution of India grants "equality before law" and "equal protection of law".[36] On paper, theoretically, we have constitutional guarantees, which do not discriminate between citizens except in cases permitted by it.[37] But reality speaks otherwise. The existence and the use of Section 377 contradict the values of the Constitution that are stated in the Preamble. One such contradiction is discrimination on the basis of sexual orientation.[38] It, therefore, becomes imperative to analyse the conditions of the sexual minorities in India in the background of the constitutional provisions.

1. Article 14

"The only stable state is the one in which all men are equal before the law."[39]

Article 14 states that: "The State shall not deny to any person equality before the law or the equal, protection of the laws within the territory of India."

Infringement of the right to equal protection before the law is justified when there is a rational and objective basis to the classification introduced.

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[35] Martin Luther King, Jr. (1929–1968).

[36] Article 14 of the Constitution of India.

[37] Article 15 of the Constitution of India.

[38] Sexual Orientation refers to one's sexual and romantic attraction. Those whose sexual orientation is to people of the opposite sex are called 'heterosexual', those whose sexual orientation is to people of the same sex are called 'homosexual' (lesbian or gay) and those whose sexual orientation is to people of both sexes are called 'bisexual', The term 'sexual preference' is misleading because it implies that this attraction is a choice rather than an intrinsic personal characteristic. Sexual orientation is not necessarily the same as sexual behaviour, *available at* http://www.lgbt.ucla.edu/findout_gloss.html.

[39] Aristotle (384 B. C.–322 B. C.).

There should be a just and reasonable nexus between the classification and the object sought to be achieved by the legislation. Article 14 seeks to prevent arbitrary and unreasonable legislative action.

The very object of Section 377 is vague, unreasonable, arbitrary and based on the conventional notion that sex is only for procreation. Now, if this presumption is accepted as correct, then what justifies the policies of family planning and the use of the contraceptive devices? Terming homosexual activity as unnatural is unscientific. Modern understanding of psychiatry and psychology,[40] no longer views homosexuality as a disease or a disorder.[41]

Thus, the very objective of the section is facile, unscientific and based upon prejudice alone. Therefore, the section, which talks about criminalising the homosexual conduct, is violative of Article 14 of the Constitution.

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[40] Around the period 1950–1970, homosexuality was regarded as a disorder and could be cured with the help of medical treatment. Homosexuals were therefore subject to treatment, which even included electrical shocks and other such therapies, however the position today is different. Several international bodies have carried out independent research to prove that homosexuality is not a disorder. In 1973, the American Psychiatric Association removed homosexuality from its Diagnostic and Statistical Manual of Psychiatric Disorders. In 1975, the American Psychological Association declared that it was not a disorder. In July 1994, the American Psychological Association released a statement on homosexuality, "Homosexuality is neither mental illness nor moral depravity. It is simply the way a minority of our population expresses human love and sexuality."
The World Health Organization removed homosexuality from its list of mental illnesses in 1981.
As of 2001, all of the major professional organisations in the field state that homosexuality is a normal, natural and fixed sexual orientation. *Available at* http://www.religioustolerance.org/hom_prof.htm.

[41] In a now-famous letter to an American mother in 1935, Sigmund Freud, the Father of Modern Psychology, wrote: "Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be *classified as an illness.* ... It is a great injustice to persecute homosexuality as a crime, and cruelty too." (emphasis supplied) *Available at* http://psychology.ucdavis.edu/rainbow/html/facts_mental_health.html.
In a review of published studies comparing homosexual and heterosexual samples on psychological tests, Gonsiorek (1982) concluded: "Homosexuality in and of itself is unrelated to psychological disturbance or maladjustment. Homosexuals as a group are not more psychologically disturbed on account of their homosexuality." (Gonsiorek, 1982, 74. *See also* reviews by Gonsiorek, 1991; Hart, Roback, Tittler, Weitz, Walston & McKee, 1978; Reiss, 1980).

2. Article 15

"To overdo classification is to undo equality."

Article 15(1) Part III of the Constitution relating to Fundemantal Rights states that: "The State shall not discriminate against any citizen on grounds only of religion, race, caste, *sex*, place of birth or any of them." (emphasis supplied)

International human rights covenants have been interpreted to prohibit discrimination based on sexual orientation.[42]

In view of this international development, the term 'sex' referred to in Article 15 may be interpreted to include sexual orientation in the present context. There is enough scope to debate that Section 377 actually violates Article 15 of the Constitution.

3. Article 19

"Denial of expression is denial of life."

Article 19(1)(a) states that: "All citizens shall have the right to freedom of speech and expression."

The right to freedom of speech and expression is recognised in Article 19(1)(a) of the Constitution of India. This basic right has also been recognised by international covenants.[43] Restrictions on the freedom of expression usually take the form of obscenity, censorship and public interest laws.

The current definition of obscenity as per Section 292 of the IPC[44] can

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[42] The ICCPR guarantees equality without discrimination on the basis of, *inter alia*, 'other status', which has been interpreted by the United Nations Human Rights Committee in *Toonen* v. *Australia* to include sexual orientation. This decision has been discussed in Part IV D of this article. *See also* "Sexual Orientation And Gender Identity", briefing to the 60th Session of the UN Commission on Human Rights (Human Rights Watch January 2004), *available at* http://www.hrw.org/english/docs/2004/02/02/global7249.htm.

[43] Article 19 of the *Universal Declaration of Human Rights* (UDHR) and Articles 18 and 19 of the ICCPR guarantee the freedom of thought and expression.

[44] Section 292 of the IPC, which criminalises obscenity states: "(1) For the purpose of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any

lead to its misuse against gay and lesbian writings. Any writing[45] or painting on gay issues, including literary works, which aim at uplifting the conditions of the homosexual community as well as HIV prevention educational material can be banned by branding them as obscene. This denies the homosexuals their right to expression and speech.[46]

Notwithstanding criminalisation, homosexuality could easily be regarded as depraved or indecent.

4. Article 21

"Give me liberty or give me death."[47]

Article 21 of the Constitution of India guarantees that, "No person shall be deprived of his life or personal liberty except according to procedure established by law."

The right to life, as enshrined in Article 21, means something more than survival or animal existence.[48] It would include the right to live with human dignity[49] as well as all those aspects in life, which go to make a man's life meaningful, complete and worth living.[50] Despite these precious safeguards guaranteed to every person by the Constitution, homosexuals in India are still unable to enjoy this right to life even 'partially'. Thus, by the criminalising homosexuality, the State is depriving a human being from leading a complete and meaningful life.

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one of its item, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it."

45 *See* Mihir Desai, "Civil Laws Affecting Gay Men And Lesbians" in Bina Fernandez (ed), *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India* (India Centre for Human Rights and Law Mumbai 1999) 66, 67: "In October 1997, the Customs department of Calcutta confiscated a consignment of copies of a magazine, Trikone, on grounds that it attracted the provisions of the *Customs Act, 1962*. (Trikone is a magazine for lesbians, gays and bisexuals from South Asia published in the US and distributed in India through the Counsel Club in Calcutta and the Humsafar Trust in Bombay.) The allegation of the Customs Department was that the magazine was derogatory to the morality and social system of our nation."

46 *See also* the *Dramatic Performances Act, 1876,* which is discussed in Part III B of this article.

47 Patrick Henry (1736–1799).

48 *State of Maharashtra* v. *Chandrabhan* AIR 1983 SC 803.

49 *Olga Tellis* v. *Bombay Municipal Corporation* AIR 1986 SC 180.

50 *Maneka Gandhi* v. *Union of India* AIR 1978 SC 597.

Due to judicial activism, the right to privacy, has been read into the the right to life and personal liberty. In the case of *Kharak Singh* v. *State of UP*, while taking into account the legality of certain police regulations, allowing surveillance and even domiciliary visits, Subba Rao, J. stated that the right to privacy "is an essential ingredient of personal liberty" and that "nothing is more deleterious to man's physical happiness and health than a calculated interference with his privacy".[51] The fundamental right to liberty, under Article 21, prohibits the State from interfering with the private personal activities of the individual.[52] The privacy-dignity claim concerning private consensual sexual relations is entitled to protection as a fundamental right as it falls within both aspects of right to privacy-ordered liberty and individual autonomy.

'Sex' is a very intimate and personal facet of the human personality. By intruding on this aspect of human personality, the State is not only denying people of their right to privacy but is also indirectly violating their right to a complete life. Recent judgments in the United States (US) as well as European courts have held that consensual private homosexual relationship comes within the purview of the right to privacy.[53] Thus, guaranteed under Article 21 of the Constitution.

B. Other Laws

Although Section 377 is the major obstacle in the path of homosexuals, they continue to be discriminated in a wide range of statutes. Labour laws, matrimonial laws, insurance laws, defence laws, housing laws and succession laws refrain from even considering homosexuals, let alone recognising their rights. Listed below are some of the provisions that are discriminatory towards homosexuals.

1. Labour Laws

Various benefits are available under the labour laws to heirs and legal representatives on the death of an employee. Due to these statutes, a relationship, which is not based on blood or marriage, is not recognised

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[51] AIR 1963 SC 1295, para 31. *See* Khanna *supra* n. 5, 44.

[52] *Ibid.*

[53] Recently, the European Court of Human Rights (ECHR) held in *ADT* v. *UK* (Unreported, ECHR 31 July 2000 Appeal no. 35765/97) that the criminalisation of sexual activities between men violated the right to privacy.

for entitlement to these benefits. Under these laws, the provisions under the term 'moral turpitude' are wide enough to include homosexuals. Mere claim of an employee being a homosexual is often enough for dismissal from his job.[54]

Some of the provisions of the relevant labour laws are listed below.[55]

a. *Employees' Provident Fund Act, 1952*

Under this Act and Scheme, an employee is entitled to provident fund upon retirement or resignation or termination.[56]

b. *Payment Of Gratuity Act, 1972*

The situation is similar under the *Payment of Gratuity Act, 1972.* The employee can make nomination and the nominee is to receive the gratuity if the employee dies.[57] This again does not cover homosexual relationships.

c. *Workmen's Compensation Act, 1923*

This Act provides for compensation to be paid by the employer, in case of death of a worker, caused by injury at the work place, to his dependants. The entitlement to compensation is based on dependency. The bias of the law is exposed in its definition of 'dependants'.[58]

2. Defence Laws

The legal status of homosexuality in the Indian Armed Forces follows the model set by Section 377 of the IPC.

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[54] *Ibid.*

[55] Desai *supra* n. 45, 67–70.

[56] As per para 61 of the *Employees Provident Fund Scheme, 1952,* the nomination should be in favour of one or more persons belonging to his 'family' or else it would be held invalid. The definition 'family' as per para 2(g) of the *Employees Provident Fund Scheme, 1952* does not cover homosexual relationships. Thus, a gay or lesbian couple cannot nominate his or her companion for receiving the provident fund.

[57] *See* Section 6 of the *Payment Of Gratuity Act, 1972*, which deals with nomination read with Section 2(h), which defines family.

[58] *See* Section 2(d) of the *Workmen's Compensation Act, 1923.* The authors would like to observe that this highly exhaustive definition covers even illegitimate and adopted relationships, which were regarded to be against personal laws and the culture in the past. A homosexual partner, however, is still not included in this definition as homosexuality is still regarded to be against the culture!

Section 46 in Chapter VI of the *Army Act, 1950* states: "Any person subject to this Act who is guilty of any disgraceful conduct of a *crude, indecent or unnatural kind* shall on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or much less punishments as is this Act mentioned." (emphasis supplied)

A similar provision exists in the *Air Force Act, 1950* and the *Navy Act, 1957*.[59]

3. *The Dramatic Performances Act, 1876*

Under this Act, the State is authorised to ban any play, which it considers to be is scandalous or is likely to corrupt the audience. Thus, a gay or lesbian play may be banned under this provision.

4. *The Juvenile Justice Act, 2000*

Section 2(d) of the *Juvenile Justice Act, 2000* defines a "child in need of care and protection" as, *inter alia*, a child who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child.

The term "unfit or incapacitated" is often used to target homosexuals as they easily fall within the ambit of this vague term. Homosexuals are therefore deprived of their right to take care of and adopt children.

Thus, under Section 377 or even independent of it, it can be asserted that a gay or lesbian parent is unfit as he or she is unnatural and leading an immoral life.

IV. Comparative Legal Position Of The Homosexual Community In The World—Modern Trends

An analysis of the changing legal position around the world regarding homosexuality is provided below.

A. Position In United Kingdom

1. Earliest View

Christianity was the most dominant religion in the UK and it exercised a tremendous influence on the socio-legal conditions then. The Book of

[59] Sherry *supra* n. 6.

Leviticus in the Bible states: "If a man also lie with mankind as he laith with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them."[60] The destruction of the cities of 'Sodom' and 'Gomorrahea' is seen as the source of criminalisation of sodomy in most common law countries influenced by the English rulers.

2. Medieval View

The traces of criminalisation of homosexuality can be seen as early as 1290.[61] The *English Buggery Act, 1533* prescribed death by hanging for sodomy and, in several instances, executions were carried out. The *Offences Against the Person Act, 1861* abolished the death penalty for buggery, replacing it with sentences of between 10 years and life imprisonment.[62]

3. Modern View

The liberalisation of the law on the position of homosexuality in the UK commenced under the guidance of Sir John Wolfenden, when the *Sexual Offences Act, 1967* was passed. It states: "A homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age 21 years", except with a person suffering from severe handicaps, on a UK merchant ship and if any of the Armed Forces Acts forbid it. Punishments for this offence range from life imprisonment for

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[60] *See* Leviticus 20:13 (King James version). *See also* Leviticus 18:22.

[61] *See* "Timeline Of English Sodomy Law", *at* http://clem.mscd.edu/~diguardi/england.html. A chronological list of laws which criminalised homosexuality in UK is provided below:
1290: The Fleta document was the first mention of criminal punishment for sodomy in English common law. It specified that anyone found guilty of homosexual behaviour was to be buried alive. No evidence exists that the document was adopted as law.
1300: The Britton treatise was adopted. The punishment for homosexual behaviour was to be burned alive and it equated sodomy with heresy. It was rarely enforced.
1376: Parliament petitioned King Edward III to banish foreign artisans and traders, accusing them of attempting to destroy the realm by practicing sodomy. The petition was unsuccessful.
1533: Parliament passed the Buggery Act, which defined sodomy as a felony punishable by hanging. It was briefly repealed under Edward VI, but re-enacted in 1548.
1553: The Buggery Act was repealed.
1563: The Buggery Act was re-enacted by Queen Elizabeth I. It would remain in effect over two centuries, but until the late 1700s few men were executed.

[62] Khanna *supra* n. 5, 39. In 1898, the law on soliciting for 'immoral' purposes was tightened and made to apply to male homosexuals. Interestingly, lesbian activities were not acknowledged to exist and were therefore not proscribed.

buggery on a boy under 16 or a woman, to two years for gross indecency.[63] The amendments made by the *Sexual Offences Act, 2003*, which are due to come into force in May 2004, repeal the offences of gross indecency and buggery and also does away with notification requirements for the offences of gross indecency and buggery.[64]

B. Position In United States

Most States in the US had their own laws punishing sodomy; those that did not, sought refuge in the common law principles of the old English law. At least half the States still retain sodomy statutes defining it variously. The age of consent also varies.

The liberalising of the conditions of homosexuals in the US is reflected from two landmark judgments. While the former criminalised homosexuality, the latter overturned this decision and decriminalised homosexuality. Presented below is a critical analysis of these two cases.

1. *Bowers* v. *Hardwick*[65]

a. *Facts*

Michael Hardwick, who was a bartender in a gay bar in Atlanta, Georgia, was targeted by a police officer for harassment. In 1982, a houseguest unknowingly let the officer enter into Hardwick's home. The officer went to the bedroom, where Hardwick was engaged in oral sex with his partner. The men were arrested on the charge of sodomy. Charges were later dropped, but Hardwick brought the case forward with the purpose of having the sodomy law declared unconstitutional.

b. *Judgment*

The 5:4 decision found that nothing in the Constitution "would extend a fundamental right to homosexuals to engage in acts of consensual sodomy".[66] The Judges observed that:

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[63] Khanna *supra* n. 5, 39.

[64] Section 140 read with Schedule 7 (Repeals and Revocations) and Section 93 (Abolished homosexual offences) read with Schedule 4 (Procedure for ending notification requirements for abolished homosexual offences). *Available at* http://www.legislation.hmso.gov.uk/acts/acts2003/20030042.htm.

[65] 478 U.S. 186 (1986).

[66] 478 U.S. 186, 192 (1986).

> "The Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. None of the fundamental rights announced in this Court's prior cases involving family relationships, marriage, or procreation bear any resemblance to the right asserted in this case. And any claim that those cases stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."[67]

To the argument that homosexual activity should be protected when it occurs in the privacy of a home, White, J., said, "[O]therwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home."[68]

Thus, homosexuality was regarded on the same footing as committing a felony!

c. *Critical Analysis*

The judgment contained several flaws, which can be catogorised into—historical, factual and legal.

- Historical flaw: The judgment contained errors in observations on the history of the laws in existence at the time of the adoption of the 14th Amendment in 1868.
- Factual flaw: White, J., made an incorrect factual observation when he stated that sodomy was a crime in all 13 colonies at the time of the adoption of the Bill of Rights.
- Legal flaw: The judgment held that sodomy laws, which existed in 1868, criminalised oral sex. The sodomy laws, which were in existence in 1868, did not (with two possible exceptions—Connecticut and Tennessee) recognise oral sex as a crime. Oral sex is what Hardwick performed to trigger his arrest. This shows an incorrect application of the law.

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[67] 478 U.S. 186, 186 (1986).
[68] 478 U.S. 186, 195 (1986).

White, J. also incorrectly listed the laws for Arkansas, Florida, Kansas, Maine, Rhode Island and Vermont and omitted sodomy laws in existence for the District of Columbia, Idaho, North Dakota and South Dakota (then known together as the Dakota Territory) and Wyoming, as well as a common-law reception statute in New Mexico.[69]

This judgment reflects the myopic and homophobic outlook of the American Judiciary. This case was overturned in just 17 years by *Lawrence and Garner* v. *State of Texas* (discussed below).

2. *Lawrence And Garner* v. *Texas*[70]

In a landmark decision, the US Supreme Court struck down laws against homosexual practices. On 26 June 2003, it unequivocally reversed an earlier decision by declaring that a Texan law forbidding homosexual sex was unconstitutional, as homosexuals had a right to live without any criminally punitive impediments against their behaviour.

a. *Facts*

Two gay men (the petitioners John Lawrence and Tyron Garner) contended that the State of Texas deprived them of their of rights to privacy and equal protection under the law when they were arrested in 1998 for having (consensual) sex in a Houston home.

A neighbour had reported a 'weapons disturbance' at the home of John Lawrence. When the police arrived they only found two adult men engaging in a private consensual sexual act. John Lawrence and Tyron Garner were held overnight in jail and later fined USD 200 each for violating the State's Homosexual Conduct law. Interestingly, the neighbour was later convicted for filing a false police report!

b. *Judgment*[71]

Kennedy, J., held that:

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[69] "Criminal Sodomy Statutes In Effect In 1868", *at* http://www.sodomylaws.org/history/history02.htm.

[70] 539 U.S. 558 (2003) : 156 L. Ed. 2d 508 (2003).

[71] Kennedy, J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined. O'Connor, J., filed an opinion concurring in the judgment. Scalia, J., filed a dissenting opinion, in which Rehnquist, C. J., and Thomas, J., joined. Thomas, J., filed a dissenting opinion.

> "The fact that the governing majority in a state has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack ... Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers* v. *Hardwick should be and now is overruled.*"[72] (emphasis supplied)

In other words, individual and minority rights must be respected, even when a majority believes otherwise—the alternative is racial and communal discrimination established by majority plebiscite.

The Court also took the historical approach, especially regarding contemporary history, to address the ascription of immorality to homosexuals.

> "In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[73]

The Court noted that the views of historians, psychologists, state political processes and indeed the public, as regards homosexual conduct have significantly changed over the past 50 years.

In the concluding lines of Kennedy's, J., decision:

> "Had those who drew and ratified the Due Process Clause of the Fifth Amendment or the Fourteenth Amendment, known the components of liberty in its manifold possibilities, they might have been more specific. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact *serve only to oppress.* As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[74] (emphasis supplied)

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[72] 156 L. Ed. 2d 508, 525 (2003).
[73] 156 L. Ed. 2d 508, 521 (2003).
[74] 156 L. Ed. 2d 508, 526 (2003).

c. *Analysis: Advancing The Light*

As noted by Huck Gutman:

> "Four aspects of this judicial decision are of surpassing interest—the decision itself and its upholding of private homosexual conduct, the concept of personhood underlying the decision, the emergence of a new respect for international precedent, and the embrace of a new historicism as grounds for the judicial system's approach to cultural mores."[75]

The US Supreme Court has thus affirmed that homosexual persons have the right to shape their own selves and their destiny.

The recent judgment of the Massachusetts Supreme Court, on 5 February 2004, allowing the right of marriage to gays, is suggestive of the growing trend towards acceptance of homosexuality. The State's highest court issued an opinion clarifying a landmark November ruling, which held that denying marriage licences to same-sex couples violated the State's constitution.[76]

C. Position In Europe

The position of the homosexual community in Europe is analysed with particular reference to the landmark judgment of *Dudgeon* v. *United Kingdom*, a case decided by the ECHR. The significance of this case is that for the first time International Law was sought to analyse the position of homosexuals.

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[75] *See* Huck Gutman, "Supreme Court Issues Watershed Decision On Gay Rights", *The Statesman* (Calcutta), 9 July 2003, *available at* http://www.commondreams.org/views03/0709-10.htm.

[76] *See* "US Court Clears Way For Gay Marriages", *The Times of India* (Mumbai), 6 February 2004. The original decision had given the State Legislature 180 days to change the State's marriage law, but legislators returned to Court to ask if civil unions would satisfy their ruling. In a 4:3 decision, the Justices said that a civil union law "maintains an unconstitutional, inferior and discriminatory status for same-sex couple". The Legislature was to meet on 11 February 2004 to vote on the matter.

1. *Dudgeon* v. *United Kingdom*[77]

a. *Facts*

Jeffrey Dudgeon, a 35-year-old shipping clerk and was a gay activist in Belfast, Northern Ireland and the Secretary of Northern Ireland Gay Rights Association. He, along with some others, had been conducting a campaign aimed at bringing the law in Northern Ireland in line with that in England and Wales.

On 21 January 1976, the Royal Ulster Constabulary (RUC) Drug Squad raided the homes of gay men mainly those who were involved in the law reform movement under the *Misuse of Drugs Act, 1971*. The RUC arrested Jeffrey Dudgeon. During the search of his home, the police found, in addition to cannabis (marijuana), personal correspondence and diaries in which he described homosexual acts. These were seized and Dudgeon was taken to the police station, where he was interrogated for four-and-a-half hours about his sexual behaviour. He was asked to sign a statement about his 'homosexual activities' and the police investigation file was forwarded to the Director of Prosecution with the intent of charging Dudgeon with the offence of 'gross indecency between males'.[78]

Dudgeon lodged an application with the European Commission of Human Rights on 22 May 1976. He claimed, *inter alia*, that the existence, in the criminal law in force in Northern Ireland of various offences capable of relating to male homosexual conduct and the police investigation in January 1976 constituted an unjustified interference with his right to respect for his private life, in breach of Article 8 of the *European Convention on Human Rights, 1950*.

b. *Judgment*

The ECHR unanimously concluded that: "[T]he legislation complained of interferes with the applicant's right to respect for his private life guaranteed by Article 8 para 1, in so far as it prohibits homosexual acts

[77] Application 7525/76, 1981, Series A No. 45. The full text of the decision is *available at* http://hudoc.echr.coe.int/Hudoc1doc/HEJUD/sift/58.txt.

[78] Michael T. McLoughlin, "Crystal Or Glass?: A Review Of Dudgeon v. United Kingdom On The Fifteenth Anniversary Of The Decision", (December 1996) Murdoch University Electronic Journal of Law, Volume 3 No. 4, *available at* http://www.murdoch.edu.au/elaw/issues/v3n4/mclough.html.

committed in private between consenting males."[79]

The ECHR accepted that in a democratic society although some degree of regulation of male homosexual conduct is necessary, the present legislation was totally unjustified and its very existence caused physical suffering and mental distress to homosexual men. As a result of the ruling, in October 1982, Northern Ireland issued an order-in-council bringing the law on equal footing with that in England and Wales.

It is pertinent to reproduce here McLoughlin's analysis of the importance of this judgment:

> "[T]he greater importance of *Dudgeon* v. *United Kingdom* comes when it is it is paired with the decisions in *Norris* v. *Ireland*[80] and *Modinos* v. *Cyprus*.[81] ... In 1987, the Court confirmed by its decision in *Norris* v. *Ireland* that the same law it ruled a violation of Article 8 as a British law, was just as much a violation of Article 8 as an Irish law. In *Modinos* v. *Cyprus*, the Court further confirmed that it intended its decision in Dudgeon to be pan-European and that any law criminalising homosexual behaviour between consenting adults would be considered a violation of Article 8."[82]

D. Position In Australia

Australia's position regarding the homosexual community is reflected from the judgment of *Nicholas Toonen* v. *Australia*,[83] decided by the United Nations Human Rights Committee (UNHRC).

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[79] *Supra* n. 77, para 40.

[80] *Norris* v. *Ireland* (26 October 1988, Series A No. 142). David Norris challenged the same law as Jeffrey Dudgeon, which was passed in the 19th century before the partition of Ireland. The text of the decision is *available at* http://hudoc.echr.coe.int/Hudoc1doc/HEJUD/sift/132.txt.

[81] *Modinos* v. *Cyprus* [1993] IIHRL 39 (22 April 1993). Modinos, a practicing homosexual and the President of a homosexual liberation movement, complained about a continuing interference with his private life in violation of Article 8. The ECHR here reaffirmed its view that homosexual acts are within the protection afforded by Article 8. The text of the decision is *available at* http://hudoc.echr.coe.int/Hudoc1doc/HEJUD/sift/419.txt.

[82] *Supra* n. 78, para 4.

[83] Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994). The text of the decision is *available at* http://www1.umn.edu/humanrts/undocs/html/vws488.htm.

1. Background

The case was the first of its kind in which the United Nations (UN) addressed the discrimination of gay sexuality. As on 1 May 1997, Tasmania was the only Australian State and one of the few places in the Western world, that still criminalised all forms of private consensual sex between adult males.

2. Issue

The *Tasmanian Criminal Code Act, 1924* (as amended in 1987) was the law used to prohibit gay male sexuality. It provided in Section 122 that: "Any person who—(a) has sexual intercourse with any person against the order of nature; (b) consents to a male person having sexual intercourse with him or her against the order of nature, is guilty of a crime." The charge for breaching this was 'unnatural sexual intercourse'.

Section 123 was more explicit in discriminating against gay men. It provided that: "Any male person who, whether in public or private, commits any indecent assault upon, or other act of gross indecency with, another male person, or procures another male person to commit any act of gross indecency with himself or any other male person, is guilty of a crime." The charge for this was 'indecent practice between male persons'.

The maximum penalty for violating Section 122 or Section 123 was 21 years imprisonment. It is notable that these discriminated against gay men only, with no reference to lesbian sex. Lesbian sex was never proscribed by the law in Australia.

On 25 December 1991, Australia acceded to the First Optional Protocol of the ICCPR. This meant that an individual Australian could take a case to the UNHRC (the body that oversees the enforcement of ICCPR) if he felt that Australia was violating any of the rights enshrined in the ICCPR. However, all domestic remedies for the alleged violation have to have been exhausted.

The Tasmanian Gay and Lesbian Rights Group (TGLRG) took its case to the UNHRC.[84]

[84] The TGLRG website claims that this was the first case to emerge from Australia and the first sexuality discrimination case investigated by the UNHRC.

In his submissions to Geneva, Toonen cited numerous ways in which his life has been affected by the law.[85] These included—being under the constant threat of having his privacy being invaded by police investigating his sexual activity, being threatened with arrest by the Tasmanian police, being vilified by public figures in Tasmania and having no choice but to knowingly break those conditions of his lease which prohibit the use of his flat 'for illegal purposes'.

3. Outcome

In May 1997, after a nine-year campaign, which saw the involvement of the UN, Amnesty International, the Federal Government and the High Court, supporters of the gay law reform finally achieved their goal of equality before the law. Though, the case was long drawn and complex, it dealt with the basic right to equality sought by gay men in Tasmania and, for Australia, it fuelled a movement to end all forms of discrimination due to sexual orientation.

E. Position In Other Countries

The position of homosexuals in other countries is encouraging, but there is still more to be achieved. Fourteen countries have explicit provisions prohibiting discrimination on the grounds of sexual orientation in their national legislation. Various countries across the world have enacted anti-discriminatory or equal opportunity laws and policies to protect the rights homosexuals. In 1994, South Africa became the first country to constitutionally safeguard the rights of gays and lesbians. Other nations like Canada, France and Spain too have similar laws.[86]

V. Position In India

"As long as society is anti-gay, then it will seem like being gay is anti-social."[87]

Society and law go hand-in-hand, each exercising a tremendous influence on the other. There has been no judicial activism regarding the improvement of the conditions of homosexuals in India.

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[85] TGLRG's submission (technically called a communication) argued that the laws in Tasmania that criminalise all forms of consenting sex between adult males in private violate three articles of the ICCPR—Article 17, the right to privacy; Article 26, the right to equality before the law; and Article 2.1, the right not to be discriminated against.

[86] *See* Annexure 1 for a discussion of the laws of some of these countries.

[87] Joseph Francis.

The position of the homosexual community in India, thus, can be viewed from the treatment meted out to them by both the society and the police.

A. Social Position

"The closet is the worst place to die."

The Indian society abhors homosexuals. Many people deny the existence of sexual minorities[88] in India, dismissing same-sex behaviour as a western, upper-class phenomenon. It is labelled as a disease to be cured, an abnormality to be set right or a crime to be punished. While there are no organised hate groups in India as in the West, the persecution of sexuality minorities in India is more insidious. Often, sexual minorities themselves do not want to admit the fact of persecution because it intensifies their fear, guilt and shame. Social stigma casts a pall of invisibility over the life of sexuality minorities, which makes them frequent targets of harassment, violence, extortion and often, sexual abuse from relations, acquaintances, hustlers, *goons* and the police. All this denial and rejection by society under various pretexts, backed by an enforced invisibility, exposes sexual minorities to constant abuse and discrimination.[89]

B. Police Oppression

Police oppression is the major concern of the gay, bisexual and transgender community. The oppression takes several forms. Reproduced below is

[88] The authors would like to state here that since the society disregards homosexuality, homosexuals are often forced to enter into wedlock. This is really unfortunate for the spouse because the homosexual spouse very often merely looks upon her/him as a forced companion. This forced companionship ruins the social fabric leaving neither party in the relationship satisfied and may even result in a divorce.

[89] Social discrimination against sexual minorities manifests itself in the production of the ideology of heterosexism which establishes the male-female sexual relationship as the only valid or possible lifestyle and renders invalid the lives and culture of those who do not fit in. The ideology of heterosexism pervades all dominant societal institutions such as the family, the medical establishment, popular culture, public spaces, workspaces and household spaces. Also, it is a myth to regard homosexuals as people who do not contribute to society or are in competent to work. The fact is that, historically, gay, lesbian and bisexual people have made innumerable contributions to society—Plato, Leonardo da Vinci, Julius Caesar, Gertrude Stein, Michelangelo, Peter Tchaikovsky, Alexander the Great, T. E. Lawrence, Truman Capote, Bessie Smith, Alice B. Toklas and James Baldwin, to name of a few. Being homosexual has no connection with professional competence. *Available at* http://milepost1.com/~gaydad/FAQ/Myths.Facts.html. *See also*, "The Gay Factor", *Bombay Times* (a supplement of *The Times of India*), 20 February 2004, 12.

text from the fact-finding report put forth by People's Union for Civil Liberties, Bangalore.

"2.2.1 Extortion

This is one of the most common forms of oppression. The police often stop gay/bisexual men in the cruising areas, threaten them and extort money from them. It is difficult to estimate the number of cases of extortion suffered by the community, as there are obviously no police records. Since First Information Reports (FIRs) are almost never recorded, it appears to be one of the easiest ways for the police to make easy money as the gay/bisexual men are so scared of being 'outed' to wider society that they will part with whatever they have with them.

"2.2.2 Illegal Detention

Another technique used by the police is illegal detention. The police in this case take people in for questioning and detain them in the lock up for periods of time, varying from overnight to a few days. They do not file an FIR and maintain no documentary evidence of the person's detention. Due to the lack of such evidence, these cases do not come to the attention of the public.

"2.2.3 Abuse

Police abuse is another form of oppression. The police often abuse the men using filthy language, beat them up and even subject them to sexual abuse. When this happens there is no recourse for the largely underground population of gays/bisexuals as any reporting would mean that the anonymity is shattered.

"2.2.4 Outing

The police have also on occasions outed gay or bisexual men to their families. In recent instances the police, on becoming aware of the sexual behaviour of gay/bisexual persons, revealed the same to their families. In an environment wherein not only is homosexuality/bisexuality as an orientation a matter of deep public

ridicule, but also a matter of private shame, outing by the police is a definite form of oppression."[90]

VI. HIV/AIDS And Homosexuality In India

In India, the discussion pertaining HIV/AIDS and homosexuality is deeply influenced by sexual morality rather than scientific facts. The homosexual community is often perceived to be synonymous with HIV/AIDS[91] and is considered as one of the foremost causes for the spread of HIV. The modes of the spread of HIV are definite and 'homosexuality' does not configure as any one of them. Such unscientific scare-mongering should be squarely rejected.

The principal mode of transmission of HIV is unsafe sex, which applies uniformly to homosexuals as well as heterosexuals. Therefore, discriminating against homosexuals by projecting them as 'carriers of AIDS' is unjustified.

If the State were of the view that homosexual intercourse results in transmission of HIV, then the criminalisation and the ban of homosexuality would have been justified. Then following the same illogical and unscientific reasoning and applying it to heterosexuality, if heterosexual intercourse in future would cause some other fatal disease, would that justify criminalising and banning heterosexuality through a law?

Neither does the growing rate of HIV/AIDS in our country have a connection with homosexuality and banning and stigmatising homosexuality will not provide a solution to the HIV/AIDS epidemic.

VII. Arguments Put Forth By The State: An Analysis

In order to give a pragmatic approach to the issue of 'Decriminalising Homosexuality in India', it is essential to analyse the arguments put forth

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[90] *Supra* n. 20, 13.

[91] In one of the Indian Council of Medical Research (ICMR) and Ministry of Health-sponsored inter-university debate on AIDS, held in Delhi (September 1989), several students referred to 'homosexual tendencies' as one of the predominant causes (of AIDS). Interestingly, the figures published by ICMR reveal that only six male homosexuals were documented to be HIV-positive out of a total of 4,082 seropositive individuals. *See* Report of the Association of Indian University (New Delhi March 1990). *See also* Gracious Thomas, *AIDS In India—Myth and Reality* (Rawat Publications Jaipur) 145–146.

by the Government of India against decriminalisation. A proposal of probable recommendations is provided, which would fill in the void created by the repeal of Section 377.

A. The State's Defence

The general stance of the Government is tilted in favour of not repealing Section 377 of the IPC. The contentions put forth by the State are discussed below.

1. Delinquent Behaviour

Replying to the petition filed by NAZ Foundation challenging the constitutional validity of Section 377 of the IPC, the Government said, "[The repeal of Section 377] can well open the floodgates of *delinquent behaviour* and be construed as providing unbridled license for the same. The purpose of Section 377 is to provide a healthy environment in the society by criminalising unnatural sexual activities."[92] (emphasis supplied)

By equating consensual sex between adults with 'delinquent behaviour', the Government reinforces the biblical scriptures disapproving sex for pleasure and not procreation. This position is untenable, since the Government itself no longer supports the assumption of sex-for-procreation, given that it invests large amounts annually in promoting measures of birth control and contraception for population control.[93] This shows the hypocrisy prevailing in the State's attitude towards sex.

2. Societal Consensus

Citing the Law Commission's 42nd Report, the Government said: "Indian society by and large disapproves of homosexuality and the disapproval is strong enough to justify it being treated as a *criminal offence* even where adults indulge in it in private."[94] (emphasis supplied)

It is important to note that the perception of the Indian society about homosexuals is often misguided and based on conventional ideas. The media has contributed to the reinforcement of these myths. These

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92 *See* "Allowing Homosexuality Will Lead To Delinquent Behaviour: Indian Government", 8 September 2003 (Press Trust of India), *at* http://ushome.rediff.com/news/2003/sep/08sex.htm. *See also* Murthy *supra* n. 10.

93 Murthy *supra* n. 10.

94 *Supra* n. 92.

unscientific misconceptions are a major stumbling block in the acceptance of homosexuals by the society.

3. Child Abuse

The question of child abuse, which is often quoted as a justification for retaining Section 377, is a complex one. There are no Indian laws that specifically criminalise child sex abuse. A total of 30 cases, prosecuted under Section 377,[95] (more than 60 per cent)[96] deal with child sex abuse. Section 377 has been somewhat successful in penalising child sexual abuse and filling up the lacunae of the rape law, which is woefully lacking in both the scope of definition and implementation. But this does not negate the clear threat the law presents to the sexual minorities of India, manifesting itself in harassment, extortion and blackmail by the police, with no legal protection.[97]

Child sex abuse should therefore be included as 'an independent category' of sexual offence. There is a dire need to evolve more effective legal formulations as well as procedures to ensure that sexually abused children are offered the protection of the law and perpetrators are brought to book swiftly.

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[95] Gupta *supra* n. 18, 9. It was found that in an independent case study restricted to 46 cases for which Indian High Courts have delivered judgments, 30 cases dealt with child abuse. Around 21 more cases that were appealed in the High Courts are yet to be traced. However, there are probably several judgments of lower Courts, which have not gone in appeal to the High Courts and are therefore unreported.

[96] Gupta *supra* n. 18, 11. Out of these, 20 cases involve male-male child sex abuse and 10 male-female child sex abuses. All of these 30 cases were non-consensual. The question of consent does not arise in cases where sex with minors is involved. Once again, it is interesting to note that this trend of Section 377 being used for prosecuting offences of male-female child sex abuse is very new as all of these 10 cases were appealed in the 1990s.

[97] *See* The Law Commission Of India 172nd Report on Review Of Rape Laws, March 2000, *available at* http://www.lawcommissionofindia.nic.in/rapelaws.htm. After detailed discussions, the Law Commission has recommended changes for widening the scope of the offence in Section 375 of the IPC (Rape) to make it gender neutral. It also recommended the insertion of a new section 376F dealing with unlawful sexual contact and deletion of Section 377. Para 3.6 of the Report regarding the deletion of Section 377 states, "In the light of the change effected by us in Section 375, we are of the opinion that Section 377 deserves to be deleted. After the changes effected by us in the preceding provisions (Sections 375 to 376E), the only content left in section 377 is having voluntary carnal intercourse with any animal. We may leave such persons to their just deserts."

VIII. Suggested Measures

The State has raised valid concerns regarding the repeal of Section 377. Although the repeal of Section 377 would emancipate the homosexual community, nonetheless it would also permit other evils like child abuse, which would have no other legal provision, and therefore open floodgates towards sexual delinquent behaviour. To cement the gaps, which would be created by the repeal of Section 377 as well as to better the conditions of the homosexual community in India, the following measures are suggested:

- Introduction of law reforms that criminalise child abuse and provide an effective mechanism to deal with this offence effectively.
- Introduce a law reform and a redressal mechanism to end the harassment as well as the discrimination meted out to the homosexuals and bring in accountability.
- Grant protection as well as assistance to NGOs working for the betterment of sexual minorities.
- Recognition of the rights of sexual minorities in the context of marriage,[98] inheritance, property, adoption and partnership. In keeping with this suggestion about the rights of persons in a homo-relational partnership, the following suggestions are proposed:

  (i) Each partner has an equal right to matrimonial home.[99] Both partners have an equal share and jointly own all property that is subsequently acquired.

  (ii) Both partners are guardians of the children jointly adopted and are responsible for their welfare.

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[98] The first legally married gay couple in the world under the Danish Partnership Act was Axel and Eigil Axgil, who married together with 10 other couples in Copenhagen, 1 October 1989. At the time of the marriage, the Axgils had been together for nearly 40 years, 32 of which were lived under a common name. Axel and Eigil had in 1957 combined their first names into the family name Axgil when they were in prison for gay rights activism! *Available at* users.cybercity.dk/~dko12530/.

[99] This change proposed would be a radical change, as women presently do not have an equal share.

- In the case of dispute or breakdown of the partnership, either partner can ask for a divorce claiming irretrievable breakdown of the marriage. The property acquired during the relationship would be divided equally.

IX. Conclusion

This article raises certain significant issues regarding homosexual community, which have had severe negative impact on homosexuals in our society. It scrutinises the contradictions existing between the constitutional guarantees and the present position of the homosexuals in India.

The issue of decriminalisation of homosexuality in India has been avoided for a long time as a result of which the homosexual community has suffered grave injustice. However, this does not mean that legal reform is an end in itself. Great emphasis has to be placed on social understanding of same sex behaviour, reducing hatred and harassment. It is only when the social position of homosexuals in India is emancipated that they will be truly liberated.

ANNEXURE 1

COUNTRY	YEAR & LEGISLATIONS	FEATURES
Canada	1996: Amendment of Canadian Human Rights Act which includes sexual orientation as a protected category	Bans discrimination in federally regulated—housing, employment, public services as well as professional activities.
Denmark	1987: Amendment of Penal Code and Anti-discrimination Act	Prohibition of discrimination in the work place.
France	1985: Amendment of Penal Code 1986 and 1990: Amendment of Code of Labour Law	Prohibition of discrimination based on sexual orientation at the workplace, in the civil services and the armed forces.
Israel	1992: Anti-discrimination Law 1994: Supreme Court judgment in favour of equal employment benefits for same sex partners.	Prohibition of discrimination at workplace.
Netherlands	1991: Amendment of Penal Code	Prohibition of discrimination in a workplace, education and with respect to goods and services.
New Zealand	1994: Amendment to the Human Rights Act which includes sexual orientation as a protected category	Prohibition of discrimination in employment, access to public place, housing and accommodation, provision of goods and services and education.
Norway	1981: Amendment of Penal Code	Prohibition of discrimination with respect to goods and services. No discrimination in access to public gatherings. Prohibition of hate speech directed as sexual minorities. Private labour market not covered under these protections.
South Africa	1996: Section 9 of the new Constitution's Bill of Rights includes sexual orientation as a protected category	Prohibits discrimination by the government and by private sector.
Spain	1995: New Penal Code	Bans discrimination in housing, employment, public services and professional activities. The law also criminalises hatred and violence directed at homosexual persons and organisation.

Source ""... OR OTHER STATUS" — The International Legal Scenario" in Bina Fernandez (ed) *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India,* (India Centre for Human Rights and Law 1999) 58, 61–62.

HOW LEGAL IS ILLEGAL: PARADOXES IN THE INDIAN DRUG LAWS†

Sushrut Desai and Vyom Shah*Φ

"As to diseases, make a habit of two things—to help, or at least to do no harm."

Hippocrates,[1] 5th century B. C.

I. INTRODUCTION

India is one of the largest pharmaceutical markets in the world having a domestic turnover of more than Rupees 200 billion and exports of over Rupees 100 billion.[2] It has been growing at over 10 per cent since the last decade and the World Health Organization (WHO) ranks it the third largest in the world.[3] The industry includes multinational pharmaceutical companies such as Glaxo-SmithKline-Beecham, Pfizer, Bayer and Roche as well as Indian companies such as Dr. Reddy's, Nicholas Piramal, Cipla and Ranbaxy, which also specialise in the production of generic drugs. India, being a rapidly developing country, is very attractive to international players in the pharmaceutical sector given the low costs of production, cheap labour and a large market for their products. Thus, this situation is mutually beneficial. While the pharmaceutical companies make profits, India reaps the twin benefits of increased foreign investment, thus boosting the economy and an overall improvement in the quality and availability of medicines and medical facilities. However, a generous regulatory structure also creeps in the proliferation of harmful and toxic drugs into the market.

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† This article reflects the position of law as on 31 March 2004.

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1 Physician regarded as the Father of Medicine.

2 R. Ramachandran, "Dealing With Fake Drugs", *Frontline*, vol. 20, Issue 18, 30 August–12 September 2003), *available at* www.frontlineonnet.com/fl2018/stories/20030912008112200.htm.

3 *Ibid.*

When a pharmaceutical company manufactures a new drug molecule, it is a culmination of millions, often billions, of dollars of research.[4] Theoretically, extensive testing of the drug is to be carried out before it is marketed, to ensure its effectiveness and safety for all such subjects or patients as may consume it under any circumstances. Hence, a drug manufactured, to say, combat stress or depression will have to be tested separately for young men and women, older men and women, pregnant women, adolescents, diabetics, people suffering from heart diseases, liver or kidney problems and the list is endless. This is where a majority of the research funds are utilised. Theoretically!

Practically, pharmaceutical companies are reluctant to either test extensively or to apply the test results to prevent consumption by those who may be harmed by the drug as it would adversely affect their profits. Furthermore, there is little impetus for such testing, as the research has to be funded by the companies themselves. As a result, the growth and development of pharmaceutical companies stagnate on one hand and substandard, unsafe and toxic medicines are available in the market on the other hand thereby posing a major health risk to the entire population.

In addition to the lack of research into drug toxicity and safety, the laxity and the outdatedness of Indian laws allows drugs, which have been proven to be toxic and fatal in other countries, to be sold in India. It is interesting to note that most of the so-called 'advanced' countries of the world where these toxic drugs originated have banned their use themselves.[5]

Part II of this article examines how the Indian legal system interprets certain medical terminology.

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4 *See* Chapter 1, "Pharmaceutical Profile 2003", 2, *at* http://www.phrma.org/publications/publications/profile02/2003%20CHAPTER%201.pdf. The average cost to develop a new drug has increased from USD 138 million in 1975 to USD 802 million in 2000.

5 *See* "Issues: Why Drugs Are Misused", *at* http://healthlibrary.com/reading/banyan1/4sec2.html: "According to the voluntary code of International Federation of Pharmaceutical Manufacturers' Association (IFPMA): 'Information on pharmaceutical products should be accurate, fair and objective and presented in such a way as to conform not only to legal requirements, but also to ethical standards and to standards of good taste.' The constituents of IFPMA in India and under-developed countries consider that 'ethical standard' or 'standard of good taste' in these countries differ drastically from those of developed countries. Therefore, they maintain double standards".

Parts III to V deal with the menace of toxic drugs vis-à-vis the existing legislations and regulations, the *Drugs and Cosmetics Act, 1940* (DCA) and the *Drugs and Cosmetics Rules, 1945* (DCR). They present a comparison of the regulations in India and abroad and suggest a few changes that could be incorporated into the Indian regulatory framework.

Part VI deals with the laws governing medicinal use of marijuana. The Indian drug laws are too vague in this aspect and leave a wide scope for interpretation and misinterpretation. Lack of clarity in the provisions regarding the medicinal consumption of marijuana presents a dilemma to the patient as well as the prescribing medical practitioner, which then leads to hesitation in availing of or prescribing this drug.

Part VII deals with the laws governing *Ayurveda.* No article on Indian drugs and laws governing them can be complete without an analysis of this indigenous system of medicine. Here we examine the various paradoxes in the attitude of the Government in dealing with *Ayurveda* and suggest measures to remove the same to ensure smooth regulation.

This article seeks to highlight those areas of the concerned legislations, which could be misused and are therefore in urgent need of amendments. It recommends the implementation of certain procedures and imposition of certain restrictions to make the Indian pharmaceutical scenario, a healthier and more secure one.

II. Definitions

This article deals with a subject that is highly technical in nature. Knowledge of the definitions and of specific usage of certain medical terms as provided for in the Indian legal system is therefore necessary. It will help us to gauge the level of thoroughness, flexibility and modernity of the Indian drug laws and facilitate an accurate critical examination of the same.

A. Drug

Section 3(b) of the DCA defines a drug to "include:

(i) all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals, including preparations applied on human body for the purpose of repelling insects like mosquitoes;

(ii) such substances (other than food) intend to affect the structure or any function of the human body or intended to be used for the destruction of vermin or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette;

(iii) all substances intended for use as components of a drug including empty gelatine capsules; and

(iv) such devices intended for internal or external use in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette, after consultation with the Board."

B. Misbranded Drugs

Section 17 of the DCA provides that "a drug shall be deemed to be misbranded if —

(a) If it is so coloured, coated, powdered or polished that damage is concealed or if it is made to appear of better or greater therapeutic value than it really is; or

(b) If it is not labelled in the prescribed manner; or

(c) If its label or container or anything accompanying the drugs bears any statement, design or device which makes any false claim for the drug or which is false or misleading in any particular."

C. Adulterated Drugs

Section 17A of the DCA provides that "a drug shall be deemed to be adulterated if —

(a) If it consists in whole or in part, of any filthy, putrid or decomposed substance; or

(b) If it has been prepared, packed or stored under insanitary conditions whereby it may have been contaminated with filth or whereby it may have been rendered injurious to health; or

(c) If its container is composed, in whole or in part, of any poisonous, deleterious substance which may render the contents injurious to health; or

(d) If it bears or contains, for purposes of colouring only, a colour other than which is prescribed; or

(e) If it contains any harmful or toxic substance which may render it injurious to health; or

(f) If any substance has been mixed therewith so as to reduce its quality or strength."

D. Spurious Drugs

Section 17B of the DCA provides that "a drug shall be deemed to be spurious if —

(a) If it is manufactured under a name that belongs to another drug; or

(b) If it is an imitation of or is a substitute for another drug or resembles another drug in a manner likely to deceive or bears upon it or upon its label or container the name of another drug unless it is plainly and conspicuously marked so as to reveal its true character and its lack of identity with such other drug; or

(c) If the label or container bears the name of an individual or company purporting to be the manufacturer of the drug, which individual or company exist; or

(d) If it has been substituted wholly or in part by another drug or substance; or

(e) If it purports to be the product of a manufacturer of whom it is not truly a product."

E. Cannabis

The *Narcotic Drugs and Psychotropic Substances Act, 1985* defines 'cannabis' as:

"(a) *Charas*, that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;

(b) *Ganja*, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; and

(c) Any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom."[6]

F. Ayurvedic Drugs

An *Ayurvedic* drug is defined in the DCA as including:

> "all medicines intended for internal or external use for or in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, and manufactured exclusively in accordance with the formulae described in the authoritative books of Ayurvedic system of medicine, specified in the First Schedule."[7]

III. Overview Of The Indian Pharmacolegal Situation

The 1990s were a period of great prosperity for the Indian pharmaceutical industry. Indian as well as foreign players introduced revolutionary new drugs into the market. The pharmaceutical sector played a role in the resurrection of the Indian economy by boosting employment as well as revenue.

Strangely, the Indian Government chose to play a minimal role in this new boom. Regulation, it was seemingly held, of this boon to the Indian economy would lead to irreparable damage to its growth and therefore, to the economy as a whole. This attitude is exemplified in the workings of the Union Health Ministry, the Drugs Controller General of India (DCGI) and the modification, amendment and implementation of the DCA. Lack of regulation, infrastructure for regulators and inefficiency of the drug laws and regulatory authorities have led to known toxic, substandard and dangerous drugs being marketed with impunity. India is now paying the price of the 'cut-now-measure-later' attitude.[8]

Here is a look at the Indian pharmacolegal situation with respect to the Indian Legislature and the Executive.

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6 Section 2(iii) of the *Narcotic Drugs and Psychotropic Substances Act, 1985.*

7 Section 3(a) of the DCA.

8 Sanjay Kumar, "Drug Linked To Child Deaths Still Available In India", BMJ 2003; 326:70 (11 January 2003), *available at* www.bmj.bmjjournals.com/cgi/content/full 326/7380/70.

A. *The Legislature*

1. Legislative History

The *Drugs Bill*, a bill to regulate the import of drugs into British India, was introduced in the Legislative Assembly in 1937. The Select Committee appointed by the Legislative Assembly was of the opinion that a more comprehensive measure providing for the uniform control of the manufacture and distribution of drugs as well as of import was desirable.[9]

While discussing the Bill, Lieutenant-Colonel Sir Henry Gidness, a nominated non-official in the Legislative Assembly, noted:

> "We have now before us a bill which is one of the most important that has been ever placed before this House, for it deals with the health of India and not its wealth. If history were ever to record on this bill, it will emphasise that this bill which has as its main purport the purity of drugs, is of great importance to the health of India and that the development, progress and contentment of India depends more on its health that on its wealth."[10]

The Bill was passed on 5 April 1940 and the Act came into force on 10 April 1940.

2. The Situation Today

The DCA governs the import, manufacture, distribution and sale of every drug in India including those of the *Ayurvedic, Tibb* and *Unani* systems of medicine. It sets down specific standards of purity, strength, etc. that each drug must comply with. It is under the auspices of this Act that a drug can be deemed spurious, adulterated or misbranded and therefore, illegal within the territory of India.

The DCR were framed under the DCA. Schedule Y of the DCR (inserted as late as 1988) sets down the guidelines for the clinical trials for import and manufacture of a new drug. It stipulates the conduct of the following trials–Animal Pharmacology, Human or Clinical Pharmacology (Phase I trials), Exploratory trials (Phase II trials) and Confirmatory trials (Phase III trials). Animal toxicology studies are carried out to determine the

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[9] Part V of The Gazette of India, 3 February 1940, 30.

[10] Legislative Assembly Debates, March–April 1940, vol. III, 2169.

strength of action, nature of action, appropriate dosage as well as any other information in relation to its toxicity as may surface. The specifications in Appendix III of the DCR comprehensively list out the animal toxicity tests that are required to be carried out. This data has to be submitted along with the application for marketing a new drug as per Appendix I of the DCR. Appendix III, however, provides that animal toxicity data available from other countries are acceptable and the tests need not be repeated in India. Given that all testing is ultimately to be conducted by the pharmaceutical companies themselves, one may question the rationale whereby such freedom is given to the companies. There is always a probability that financial considerations could cloud the fair conduct, reporting and compliance of clinical trials by pharmaceutical companies. However, consulting data from other countries might not necessarily prove to be misleading. In fact, such analysis would be crucial, especially for Appendix III, which deals with animal toxicity. But should we depend on them alone? Why has the Government given up its right to demand that these trials be conducted in India when such waiver could result in an unnecessary exposure to possible harm?

Schedule Y requires Phase I to Phase III trials to be conducted to determine maximum tolerated dose in humans, possible therapeutic effects, effective dose range and further evaluation of safety and pharmacokinetics. Phase I trials require just two adult males as test subjects on each dose whereas Phase II trials normally study only 10–12 patients across three to four centres.[11] Phase III trials then determine the efficacy and safety of the drug in a large number of patients based on the maximum dosage information received from the Phase I and Phase II trials. If the drug is a new substance discovered in India, data is to be obtained on 500 patients over 10–15 centres; in addition 1000–2000 patients are observed for adverse drug reactions (ADRs)[12] during clinical use of the drug. However,

[11] Nimesulide can be held as a good example in this regard. The most common adverse drug reaction reported for the drug is severe liver damage in children often resulting in death. However, the drug would receive a clean chit in both the Phase I and Phase II trials unless the 10–12 people tested in Phase II were to consist of a certain number of children.

[12] An ADR is an unwanted or harmful side effect experienced following the administration of a drug or combination of drugs and is suspected to be related to the drug. The WHO defines an ADR as "a response to a drug that is noxious and unintended and occurs at doses normally used in man for the prophylaxis, diagnosis or therapy of disease or for modification of physiological function."

the DCR also states that if the drug has already been approved of or marketed in other countries, the data required in Phase III trials is only on a minimum of 100 patients in three to four centres.[13] Here its approval in 'other countries' exempts it from any testing beyond the 100 patients thereby facilitating the flooding of toxic drugs in the Indian markets. Unless imported drugs are treated at par with Indian drugs and equally rigorous testing procedures are required of them, no multinational pharmaceutical company will give up the chance of dumping toxic drugs in India.

This presents us with the problem of known toxic drugs that have already been cleared by the Central Drugs Standards Control Organisation (CDSCO) as meeting requisite standards, being sold all over India. Section 18(i) of the DCA, which prohibits manufacture and sale of drugs that are not of standard quality or are misbranded, adulterated or spurious can be invoked.[14] However, the definitions of adulterated, spurious and misbranded drugs are framed such that their applicability is more suited to the adulterated, spurious or misbranded nature of a given sample or batch of a drug as opposed to an inherent chemical property of the drug itself. The definitions employ phrases such as "consists ... of any filthy, putrid or decomposed substance", "contains any harmful or toxic substance which may render it injurious to health" and "bears any statement ... which makes any false claim for the drug or which is false or misleading in any particular" for classifying drugs as adulterated or misbranded. We see, however, that it is only the sample or batch of a given drug that could

[13] Schedule Y, Rule 7, of the DCR.

[14] Section 18 of the DCA, (Prohibition of manufacture and sale of certain drugs and cosmetics) provides in relevant part as follows: "From such date as may be fixed by the State Government by notification in the Official Gazette in this behalf, no person shall himself or by any other person on his behalf—

(a) manufacture for sale or for distribution, or sell, or stock or exhibit or offer for sale, or distribute

(i) any drug which is not of a standard quality, or is misbranded, adulterated or spurious; ...

(vi) any drug or cosmetic in contravention of any of the provisions of this Chapter or any rule made thereunder;

(b) sell or stock or exhibit or offer for sale, or distribute any drug or cosmetic which has been imported or manufactured in contravention of any of the provisions of this Act or any rule made thereunder;

(c) manufacture for sale or for distribution, or sell, or stock or exhibit or offer for sale, or distribute any drug or cosmetic, except under, and in accordance with the conditions of, a licence issued for such purpose under this Chapter."

contain such filthy, putrid or decomposed substances and not the drug itself, which is already a licensed product.

Section 17A(e) states that a drug is adulterated if it contains harmful or toxic substances. However, it does not prepare for the eventuality that the harmful or toxic substance is the drug itself. It is not any adulteration either during or after manufacture that renders the drug injurious. It is the drug itself, in its purest form that is injurious. It would be a debatable point in law if a drug could be deemed adulterated due to the presence of certain unchangeable chemical properties within itself.

The provisions in the DCA, which may be used to combat such drugs are Section 10A[15] and Section 26A[16] which empowers the Central Government to ban drugs in public interest. The adequacy of these provisions have to be examined in light of the grave proportions that the toxic drug menace has assumed. Section 18 clearly prohibits the manufacture, distribution and sale of any drug that falls within the clearly defined limits of misbranded, adulterated, spurious or substandard drugs. Section 26, on the other hand, grants discretion to the Government to decide whether or not certain drugs affect 'public interest' by harming public health. The danger of such discretion is best exemplified by the 'Nimesulide case'. The Union Health Minister, Sushma Swaraj, told the Parliament in February 2003 that no serious ADR was noted in children in the country who had used the drug. Ruling out a ban on the drug, she had said a

[15] Section 10A of the DCA, (Power of Central Government to prohibit import of drugs and cosmetics in public interest): "Without prejudice to any other provision contained in this Chapter, if the Central Government is satisfied that the use of any drug or cosmetic is likely to involve any risk to human beings or animals or that any drug does not have the therapeutic value claimed for it or contains ingredients and in such quantity for which there is no therapeutic justification and that in the public interest it is necessary or expedient so to do then, that Government may, by notification in the Official Gazette, prohibit the import of such drug or cosmetic."

[16] Section 26A of the DCA, (Powers of Central Government to prohibit manufacture, etc., of drug and cosmetic in public interest): "Without prejudice to any other provision contained in this Chapter, if the Central Government is satisfied, that the use of any drug or cosmetic is likely to involve any risk to human beings or animals or that any drug does not have the therapeutic value claimed or purported to be claimed for it or contains ingredients and in such quantity for which there is no therapeutic justification and that in the public interest it is necessary or expedient so to do, then, that Government may, by notification in the Official Gazette, prohibit the manufacture, sale or distribution of such drug or cosmetic."

"majority of experts confirmed the reliability of Nimesulide".[17] It must be noted that 150 countries of the world have found the drug to be too toxic to be administered to children.[18]

Even if such an endeavour was successful and the manufacture and sale of such drugs were prohibited, the obvious fallacy in such a procedure is that an action can be taken only after the toxic drug has already entered the market and has adversely affected consumers. The legality of a drug is affirmed when it is deemed to have met the standards of quality laid down in the DCA. Further testing procedures do not follow this nor are any follow-up developments being carried on. One would thus have to wait until the drug is on the market and its toxic effects manifest themselves, before demanding further testing, regulation, etc. Provisions regarding post marketing surveillance study have been introduced in Schedule Y of DCR only in December 2001.

The prevalent situation makes it very simple for pharmaceutical companies to get their drugs, which have been banned abroad, onto Indian shelves. In view of the fact that the DCA is the single most important legislation passed in relation to the pharmaceutical industry and taking into account the desired all-encompassing regulatory function that it seeks to achieve, due notice needs to be taken of such loopholes.

B. The Executive

It is not inadequate legislations alone that have led to the woes of the Indian patient population.

Political, economic or other reasons best known to the powers that be within the Indian Executive have curtailed any proactive steps from being taken to ensure strict implementation of laws governing this sector. Ultimately, it is the people of India who suffer through such callous inactivity of the Executive. The recent controversy surrounding the use of nimesulide in children and its unapproved combinations with other medicines for use in adults has exposed the poor implementation of the laws.

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[17] "Govt. Asks Nimesulide Makers To Withdraw Paediatric Drops", *Express Pharma Pulse*, 16 May 2003, *available at* http://www.expresspharmapulse.com/story.php?&idno=84.

[18] Dr. Chandra Gulhati, "Nimesulide", *at* http://www.essentialdrugs.org/indiadrug/archive/200303/msg00003.php.

Given that the Executive itself derives its powers from the legislations themselves, the picture looks even bleaker. The DCA, a legislation riddled with loopholes, further undermines the capability of the Executive to wield it as an effective weapon in the regulation of the Indian pharmaceutical industry. It is the inefficiency with which the Executive functions coupled with its callous attitude that has led to the problem today.

1. Ground Realities: Reviewing The Performance Of The Watchdogs Of The Industry

The DCA envisages a dual system with the CDSCO at the Central level and the Food and Drugs Administration (FDA) at the State level.

a. *The Central Drug Regulatory Agency*

The CDSCO, headed by the DCGI, is charged with functions such as approval of new drugs introduced in the country, granting permission to conduct clinical trials, registration and quality control of imported drugs and laying down standards for drugs and updating the Indian Pharmacopoeia.[19]

While the DCGI is the highest authority for drug regulation in India, the utter confusion and mismanagement in the ranks of the CDCSO has called his real authority in the organisation into question. After the media outcry over nimesulide, the DCGI, Dr. Ashwini Kumar, said that the Government was appointing a committee to look into the issue of ADRs to the drug.[20] However, in an interview with the British Medical Journal (BMJ), the Deputy DCGI, Ram Teke, said that the drug would continue to be available and that there was no move to reconsider its use or approval.[21] A divided front, publicly presented by the highest authorities, in contemplating a ban on one of the most controversial drugs in recent times is not a very encouraging picture.

Even if India did ban the numerous toxic drugs in its markets, the record for implementing such ban is extremely poor. An example of this is the case of anti-allergy drugs, astemizole and terfenadine. Though a decision to ban them was announced in June 2002, the notification was issued

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[19] For more details, *see* http://cdsco.nic.in.

[20] Kumar *supra* n. 8.

[21] *Ibid.*

only in October 2002 and the notification provided that the ban would come into effect only in August 2003.[22] Commenting on such delays, Dr. Chandra Gulhati[23] said, "If a drug is bad and harms people's health, you ban it with immediate effect. Such decisions are taken only to help the manufacturers." He lists commercial interests of the pharmaceutical lobby, corruption and a total lack of accountability and transparency as the key ailments affecting the drug regulatory mechanism in India.[24]

The present division of power between the Central and State Drug Regulatory agencies and the absence of co-ordination between them has severe repercussions. Drug authorities in the States and Union Territories in India function almost independently now as far as enforcement of various drug regulations are concerned. Although they are expected to follow and implement all the central drug laws, many key regulations are not being enforced just because there is no co-ordination and regular communication between the state drug authorities and the central drug authority. One of the worst outcomes of this poor co-ordination between various State authorities and the DCGI is the proliferation of irrational drug combinations in the market.[25] The Government of India itself admitted in a court hearing on nimesulide, that drug formulations unapproved by India's central drug regulatory agency and not evaluated for effectiveness are prescribed and sold all over the country.[26] The DCGI stated that this problem arose with the issuing of marketing licences by state drug regulatory officials, despite the absence of marketing approvals from CDSCO.

b. *State Drug Regulatory Agencies*

The functions of the State FDA's include licensing of drug manufacturing establishments and sales premises, monitoring the quality of drugs sold in the state, suspension and cancellation of licenses, etc.[27]

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[22] *Ibid.*

[23] Dr. Chandra Mohan Gulhati is a former WHO expert on drugs and editor of *Monthly Index of Medical Specialities*.

[24] *Supra* n. 8.

[25] P. A. Francis, "Networking Drug Administration", 30 October 2002, *at* http://www.pharmabiz.com/article/detnews.asp?articleid=12637&sectionid=47.

[26] Ganapati Mudur, "India Admits To Unapproved Drug Formulations In Market", BMJ 2003; 326:1286, 14 June 2003, *available at* http://bmj.bmjjournals.com/cgi/content/full/326/7402/1286-f.

[27] *Supra* n. 19.

The Report of the Expert Committee on a Comprehensive Examination of Drug Regulatory Issues, including the Problem of Spurious Drugs (Mashelkar Committee Report)[28] has noted that while appropriate regulatory and legislative systems exist, there is considerable non-uniformity of interpretation of the provisions of the laws and enforcement standards followed by state drug control authorities. Further, the infrastructure facilities and the number and quality of drug inspectors, testing facilities and support systems vary from state to state.[29] There are cases wherein states like Maharashtra, Gujarat and Karnataka had disallowed manufacturing licences for certain irrational combinations but subsequently, licences were issued for the same combination by other states.[30] There are over a dozen irrational combinations running into several hundreds of brands currently available in the market. Some of these are ciprofloxacin with tinidazole, norfloxacin with tinidazole, amlodipine with ramipril, cisapride with omeprazole, nimesulide with tizanidine and nimesulide with paracetamol.[31]

The following observations in the Mashelkar Committee Report highlight the differences in the commitment of the States in providing an efficient drug regulatory system:

- While in some States the organisation is headed by a technical person, others have administrators, police or medical persons as heads.[32]
- Only a few States have well-equipped testing laboratories, while most have no laboratory or have a small one with scant testing facilities. Only 15 of the 26 States surveyed have functioning testing laboratories of which only seven were reasonably well equipped and staffed.[33]

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[28] The Mashelkar Committee is an expert committee set up in January 2003 under the chairmanship of Dr. R. A. Mashelkar, Director General of the Council for Scientific and Industrial Research, to examine all aspects of the drug regulatory infrastructure. The Committee submitted its Report in November 2003.

[29] Mashelkar Committee Report, 27, para 4.2.4.

[30] Francis *supra* n. 25.

[31] *See* P. A. Francis, "Centralised Drug Licensing", 22 August 2001, *at* http://www.pharmabiz.com/article/detnews.asp?articleid=12366&sectionid=47.

[32] *Supra* n. 29.

[33] *Ibid.*

- The number of inspectors is also not sufficient to meet the workload and to monitor the quality of drugs. A government task force set up in 1982 had recommended one inspector for every 25 manufacturing units and one for every 100 sales premises. This recommendation has largely remained on paper.[34]
- Only 10 States have so far set up intelligence-cum-legal cells.[35]

The Mashelkar Committee Report pointed out the importance of uniformity amongst States with regard to enforcement, infrastructure and procedure. Disparities in the same could lead to many inter-state complications and open up the possibilities of continuous proliferation and movement of substandard drugs. As a result, a drug manufactured in a State with a weak regulatory mechanism is sold in another State freely as well as exported out of the country.[36]

2. *Central Drug Administration: Solution To All Our Troubles?*

As noted above, the most striking feature of Indian drug regulatory system is the absence of a single central agency to monitor and regulate this sector. The issue of the establishment of an autonomous National Drug Authority (NDA) has surfaced numerous times in the past. The Hathi Committee, which submitted its Report to the Central Government in 1974, highlighted the havoc played by multinational corporations in the Indian scene and pleaded for nationalising the drug industry in the best interests of the people.[37] It also stated that, "With a view to tackling the problem of large scale production and distribution of drugs, the committee recommends the creation of a Statutory Body which may be called the National Drug Authority of India."[38] The *Drug Policy of 1986* called for the setting up of a National Drug and Pharmaceutical Authority (NDPA) at the central level.[39] However, there was no follow up action.[40] The need for an NDA was

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[34] Mashelkar Committee Report, para 6.3.2.

[35] *Ibid.*

[36] Ramachandran *supra* n. 2.

[37] *Vincent Panikurlangara* v. *Union of India and others* (1987) 2 SCC 165.

[38] Hathi Committee Report, Chapter IV.

[39] "Measures For Rationalisation, Quality Control and Growth of Drugs and Pharmaceutical Industry in India", Part III, para 3.1.

[40] P. T. Jyothi Datta, "Fresh Look At Plan For Drug Authority", *The Hindu Business Line*, 28 April 2003, *available at* www.thehindubusinessline.com/6line/2003/04/29/stories.htm.

evidenced by the J. J. Hospital incident in 1986.[41] The Lentin Commission set up by the Government of Maharashtra to inquire into the incident recommended changes to the drug regulatory system. The result was an amendment to the DCR in December 1992 to provide for a dual licensing mechanism, with a Central License Approving Authority (CLAA) and the States being the license issuing authorities.[42] The concept of NDA was again included in the *Drug Policy of 1994.*

However, in 1999, the Pharmaceutical Research and Development Committee (PRDC), a committee headed by Dr. R. A. Mashelkar, recommended a comprehensive strengthening of the CDSCO to enable it to carry out multifarious activities that the NDA was expected to perform.[43] The PRDC recommended a strict monitoring of ADR's done through a special unit manned by experts and made available to the CDSCO. The committee also suggested that post-marketing surveillance[44] should lie in the hands of the regulatory authorities and not with the pharmaceutical companies.[45] The *National Pharmaceutical Policy, 2002* states that the Ministry of Health and Family Welfare would set up a "world-class CDSCO by modernising, restructuring and reforming the existing system"[46] rather than creating an NDA.

In response to the growing concern over dangerous drugs, the Central Government constituted, on 27 January 2003, the Mashelkar Committee, to comprehensively examine all drug regulatory issues. The Committee felt the need for a central authority as the pharmacolegal structure had too many bosses.[47]

- The DCGI, the present regulatory authority, is under the Ministry of Health and Family Welfare;

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41 *See* "Resume On The Lentin Commission Report", *at* http://www.healthlibrary.com/reading/banyan1/4appen8.html. 14 patients at the J. J. Hospital, Mumbai, died of acute renal failure after being administered adulterated glycerol which contained 18.5 per cent diethylene glycol meant for industrial use (even one per cent diethylene glycol can cause damage).

42 Mashelkar Committee Report, para 6.1.3.

43 Mashelkar Committee Report, para 4.4.

44 The role of post-marketing surveillance is to monitor the quality, efficacy and safety of registered products that are in the market. Products that are found to be unsafe or of substandard quality are removed from use by the regulatory authority.

45 Pharmaceutical Research and Development Committee Report, Part 10, para 19.

46 "Quality Aspects", *National Pharmaceutical Policy, 2002*, Part VII, para (iv).

47 Datta *supra* n. 40.

- The National Pharmaceutical Pricing Authority (NPPA), the body that monitors drug pricing, is under the Ministry of Chemicals and Fertilizers; and
- The Pharmaceutical Research and Development Fund is under the Ministry of Science and Technology.

While an NDA would be a central regulatory authority, completely autonomous in its functioning, is the NDA really required? The Mashelkar Committee chose to answer this question cautiously.

The Mashelkar Committee sent out a questionnaire to all the States seeking their views on the matter. 15 States responded saying that if the CDCSO could perform the statutory functions efficiently, there was no need for an NDA.

Based on these considerations, the Committee concluded that, while the existing infrastructure at the Centre and in the States is not adequate to perform the assigned functions efficiently, creating an additional authority will not solve the problem. It has, therefore, recommended a strong, well-equipped and professionally managed CDCSO, which could be accorded the status of Central Drug Administration (CDA), as the most appropriate solution.[48]

IV. Toxic Drugs

The *Monthly Index of Medical Specialities*[49] lists 15 drugs available in India, which are banned globally or whose use is severely restricted or not approved owing to serious side effects.[50]

Discussed below are four drugs available in India, the proven toxic effects, the responses of drug regulatory authorities of other countries and the status of approval in India. The discussion highlights specific problem areas in the drug regulatory mechanism and deals with them in a drug-specific manner.

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[48] Mashelkar Committee Report, para 5.7.3.

[49] A monthly drug information bulletin in India.

[50] These include analgin, cerivastatin, droperidol, furazolidone, lynestrenol, nitrofurazone, nimesulide, phenylpropanolamine, phenformin, phenolphthalein, phenlybutazone, piperazine and quiniodochlor.

A. *Nimesulide*

Nimesulide[51] has been developed and licensed out by Helsinn Healthcare S. A., Switzerland.[52] It is used in the treatment of a wide range of inflammatory and painful conditions. However, in recent times, this drug has been subject to continuous criticism on account of its increasing rate of serious ADRs. An analysis of serious hepatotoxic side effects registered with the WHO indicates that nimesulide has the highest rate of side effects amongst non-steroidal anti-inflammatory drugs (NSAIDs).[53] As noted in the report 'Fatal Hepatitis And Renal Failure During Treatment With Nimesulide',[54] use of nimesulide has not been approved in the United States (US), Canada or Australia and has been banned in several European countries like Finland, Spain and Turkey.[55] Today, nimesulide is licensed for use in just under 40 countries which also means that it is not permitted for use in just over 150 countries. Some countries in South East Asia such as Thailand, Malaysia and Singapore, permit the use of nimesulide only in adults for specified conditions. It is particularly forbidden for children below 12 years of age in the US and parts of Europe except Italy. In Italy, it is not permitted for children below six years of age.[56] It is astonishing to note from one study that there are 12 paediatric preparations of nimesulide available in India.[57] Such reports only affirm the pervasive use of the drug in the paediatric patient population in India. India is the only country where nimesulide drops are being marketed for use in neonates and infants.[58]

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51 Nimesulide is a non-steroidal anti-inflammatory drug (NSAID) with analgesic and antipyretic properties.

52 "Nimesulide Information", *at* http://www.nimesulide.net/nimesulide.html.

53 *See* "Nimesulide Has Highest Rate Of Hepatotoxic Side-Effects Amongst NSAID's: Swiss Researchers", *Pharmabiz.com*, 6 November 2001, *at* http://www.pharmabiz.com/article/detnews.asp?articleid=1285&sectionid=4.

54 Schattner A., Sololovskaya N. and Cohen J., "Fatal Hepatitis And Renal Failure During Treatment With Nimesulide", J. Internal Med. 2000; 247: 153–155.

55 Dr. Chandra Gulhati, *at* http://www.essentialdrugs.org/indiadrug/archive/200303/msg00003.php.

56 Kalyan Ray, "Nimesulide Sold Without Safety Evaluation: Govt", *Deccan Herald*, 10 June 2003, *available at* http://www.deccanherald.com/deccanherald/jun10/n1.asp.

57 S. Malhotra and P. Pandhi, "Analgesics For Pediatric Use", Indian Journal of Pediatrics 2000, 67: 589–590.

58 "Approve In Haste, Repent At Leisure", *Express Pharma Pulse*, 22 January 2004, *available at* http://www.expresspharmapulse.com/20040122/editorial01.shtml.

B. Acetaminophen

Acetaminophen (Paracetamol) has been claimed to be one of the safest analgesics in use for home medication or otherwise for over 30 years and is accepted as a very effective treatment for the relief of pain and fever in adults and children. However, recent ADR reports have cast aspersions on the safety of the drug. Acetaminophen related poisoning results in a condition known as 'hepatoxicity'.[59] In 2002, the BMJ recorded 26,000 hospitalisations and 450 deaths occurring in the US due to acetaminophen overdoses.[60] The National Hospital Discharge Survey (NHDS) in the US indicates that there are an average of 26,256 hospitalisations per year related to paracetamol overdoses.[61] By any measure, this is a major health problem. US realised the toxicity of paracetamol in cases of overdosage. In 1977, the US Food and Drug Administration's (US FDA's) Advisory Review Panel recommended the following warnings for acetaminophen-containing products: "Do not exceed recommended dosage because severe liver damage may occur". However, there was little perceptible decrease in acetaminophen poisoning. Accordingly, a statement on Safety Issues Related to Acetaminophen was submitted before the Nonprescription Drugs Advisory Committee of US on 19 September 2002. A six-point plan to address the acetaminophen overdose problem in all its manifestations was drafted. The six-points were—increasing consumer access to risk information, reduction of maximum daily doses, reduction of per-tablet doses, standardisation of liquid formulations, removal of irrational combinations and more research.

In India too, paracetamol is widely used as an analgesic and is available throughout the country without a prescription. This results in unrestricted consumption of paracetamol by ignorant citizens thereby endangering their lives. Pharmacists themselves adopt the role of medical practitioners and advise consumers to purchase paracetamol. The lack of awareness of the toxic effects caused by over dosage makes it a logical conclusion that

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[59] 'Hepatoxicity' is the technical term for liver damage caused by medications and other chemicals.

[60] Ray Moynihan, "FDA Fails To Reduce Accessibility Of Paracetamol Despite 450 Deaths A Year", BMJ 2002; 325:678 (28 September 2002), *available at* http:/ bmj.bmjjournals.com/cgi/content/full/325/7366/678.

[61] Public Citizen's Health Research Group Statement on Safety Issues related to Acetaminophen.

the problem in India is, if anything, more chronic than that in the US where such surveillance agencies have been effectively functioning for the purpose of bringing such information to the people.

One must bear in mind that anything injurious to health or life, which when administered is, by definition, poisonous.[62] Also it is evident that nothing is a poison, unless regard be had to its administration. For example, strychnine is a deadly poison or a valuable medicine according to how and how much is taken.[63] The availability of strychnine is severely restricted in recognition of its lethal properties whereas, ironically, another potentially lethal drug in the form of paracetamol has been legally approved in all circumstances and quantities.

C. Azidothymidine

The problem of Acquired Immune-Deficiency Syndrome (AIDS) is a problem of great magnitude not only in India but also throughout the whole world. In 2002, the HIV epidemic was estimated to affect a range of 3.82 to 4.58 million people in India alone.[64] Azidothymidine (AZT) is currently used extensively in the treatment of AIDS. It is interesting to note that AZT was found on the reject shelves in North Carolina (US) of the Burroughs Wellcome Company, a subsidiary of the British firm, Wellcome plc. It had been looked at in the 1950s as a potential cancer treatment but abandoned in 1964 as being too poisonous.[65] Certain medical practitioners have started questioning the safety of the drug. Dr. Claus Kohnlein, an independent researcher from Germany, described AZT as a "highly toxic and worthless drug that continues to be promoted in spite of being responsible for tens of thousands of deaths".[66] Dr. Shashank Joshi, an infectious disease specialist based in Mumbai says, "AZT may cause a depletion of red or white blood cells, especially when taken in the later

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62 *R* v. *Cramp* 49 LJMC 45 : 5 QBD 307, *per* Coleridge, C. J.

63 *Ibid.*

64 "HIV Estimates In India (Based On HIV Sentinel Surveillance)", National AIDS Control Organisation, India, *available at* http://www.naco.nic.in/indianscene/esthiv.htm.

65 Stephen Davis, "AIDSgate", *available at* http://aliveandwell-eugene.dreamhost.com/azttext.htm.

66 Ranjit Dev Raj, "Health-India: Experts Warn Against Using AZT On Pregnant Women", Inter Press Service, February 2000, *at* http://www.aegis.com/news/ips/2000/ip000202.html.

stages of the disease."[67] A study conducted in India showed that use of AZT in pregnant women resulted in a shocking number of therapeutic and spontaneous abortions and a number of grotesque birth defects.[68]

D. Phenlypropanolamine

Phenylpropanolamine (PPA) is used as a nasal decongestant or as an appetite suppressant.[69] PPA is a vasoconstrictor and works by constricting blood vessels in the human body. For some people, this may result in a rupture of the vessel and uncontrolled bleeding.[70] PPA-containing products may include several side effects such as severe headaches, increased blood pressure and tightness in the chest. An overdose of the drug could bring about fast pounding or irregular heartbeat, severe nausea and vomiting, convulsions (seizures), fast and irregular pulse, hallucinations and muscle trembling.[71] The US FDA has banned PPA with effect from November 2002 and has requested that all drug companies discontinue marketing products containing PPA. In addition, the US FDA has issued a public health advisory concerning PPA. This drug is an ingredient that was used in many over-the-counter (OTC) drugs and prescription cough and cold medications as a decongestant and in OTC weight loss products.[72] A similar ban has been issued in Canada, Germany[73] and Malaysia.[74] However, this drug is available in India without the need of prescriptions thereby allowing unlimited and unchecked consumption of the drug.

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67 Anne-christine d'Adesky, "WHO Pares Down HIV Treatment Guidelines For Poor Countries", *American Foundation for AIDS Research*, July 2002, *at* http://www.aegis.com/pubs/amfar/2002/AM020701.html.

68 Kumar *et al* in *Journal of Acquired Deficiency Syndromes*, 7:1034–9,1994.

69 A. Prasad, K. K. Bhoi, K. Bala, K. S. Anand, H. K. Pal, "Phenylpropanolamine—Induced Intraventricular Hemorrhage.", (2003) *Neurol India* [serial online] 2003 [cited 2004 Jun 13]; 51:117–118, *at* http://www.neurologyindia.com/article.asp?issn=0028 3886;year=2003;volume=51;issue=1;spage=117;epage=118;aulast=Prasad.

70 "Phenylpropanolamine (PPA) Health Risks", *at* http://www.mesothelioma.com/ppa_health.htm.

71 Prasad *et al supra* n. 69.

72 "Phenylpropanolamine (PPA) Information Page", US Center for Drug Evaluation and Research, *at* http://www.fda.gov/cder/drug/infopage/ppa/default.htm.

73 WHO Pharmaceuticals Newsletter, No. 4, 2000, *at* http://www.who.int/medicines/library/pnewslet/npn0400.html.

74 "Phenylpropanolamine", January 2001, *at* http://www.bpfk.gov.my/pdfworddownload/publication/PMU-Jan 2001.pdf.

V. Insight: A Possible Remedy

In cases of drugs like PPA, given the grave consequences caused by the use of such drugs, the only solution is an outright ban on manufacture and sale of such drugs. However, for drugs like nimesulide and acetaminophen, the law could provide a middle path by which the use of such drugs can be regulated as opposed to banning it entirely. A few remedial measures suggested below could be incorporated in the law thereby increasing its effectiveness to regulate such drugs.

A. Regulation Of Availability Of Drugs

Nimesulide has been subject to much attention over the last few years and in light of severe ADRs to this drug, many medical practitioners have called for a complete ban on its use. This fact becomes more pertinent given the presence of alternative drugs, which can treat the same conditions. There can be no dispute that other NSAIDs like acetaminophen or ibuprofen are better choices as analgesics or antipyretics, especially for children.[75]

However, are these grounds sufficient to call for an outright ban on the use of this drug? One has to weigh the risks versus the benefits of the use of a drug. It has to be noted that nimesulide causes ADRs only in children and in adults only when used in wrongful combinations with other drugs. While the drug itself is not harmful what causes harm is its use in an improper manner. Thus, while no one challenges the potency and the effectiveness of nimesulide, fears regarding its use amongst children would be allayed easily by regulating the availability of this drug in the market as opposed to banning it entirely. As regards the use of the drug in wrongful combination, the law must take a firm stand and prevent any such combination without rigorous testing and monitoring. This means that even if a drug is approved, a check must still be maintained on the combination of that drug with other drugs. This is important because if an ADR is caused, by a medicine, which is the combination of several drugs, it is difficult to identify the real culprit.[76]

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[75] *See* Dr. Kunal Saha, "Re: Abuse Of Nimesulide In India", 4 February 2003, *at* http://bmj.bmjjournals.com/cgi/eletters/326/7380/70#29387. (A letter to the Editor, BMJ, in response to Sanjay Kumar, "Drug Linked To Child Deaths Still Available In India", BMJ 2003; 326 : 70 (11 January 2003), *available at* www.bmj.bmjjournals.com/cgi/content/full/326/7380/70).

[76] *Ibid.*

B. Regulation Of The Sale Of Over The Counter Drugs

Sometimes, the question is not whether or not a drug should be used but how and how much of it should be used. In the case of paracetamol, it has been recorded that the drug, when consumed within the recommended dosage would have no adverse effects and is, in fact, one of the safest analgesics and antipyretics available on the market. However, it has also been noted that the unregulated availability of such OTC drugs have caused problems of over dosage among people who use these drugs excessively in an attempt to suppress these symptoms while ignoring the disease which causes them. This abuse of drugs should be stopped and the power of self-medication for a drug, which has such severe repercussions for the user, should be withdrawn from the people.

The law must endeavour to empower the medical practitioner rather than the patient by severely restricting the sale of such drugs over the counter without the need of a prescription. This is important in light of the fact that the dosage of most drugs needs to be regulated. Also, a medical practitioner is the only competent authority to determine when, where and how much of a drug is to be used. Ideally, the law must provide that a medical practitioner be required at each and every stage of medication, whether it is for the treatment of symptoms or for the disease itself. However, such a solution might not be practical. A more practical way out would be to incorporate such drugs whose administration needs to be strictly monitored, in Schedule H of the DCR. Schedule H prohibits the sale of drugs included under it except on the prescription of a registered medical practitioner. All these drugs must carry a label stating "WARNING: Schedule H Drug. To be sold on prescription of a registered medical practitioner only". As a result, Schedule H effectively controls and regulates the sale of such drugs. A requirement for a prescription ensures the involvement of medical practitioners in the medication process thereby limiting any adverse effects especially those arising from over dosage, wrongful administration, etc.

The Mashelkar Committee Report has recommended[77] further strengthening of this provision by recommending that Schedule H be

[77] *See* P. A. Francis, "The Prescription List", *Pharmabiz.com*, 21 April 2004, *at* http://www.pharmabiz.com/article detnews.asp? articleid=21450 & sectionid=47. At the time of this article going to press, the office of the DCGI decided to add 219 more drugs to the

reviewed on an ongoing basis to add or delete products from the Schedule depending upon their usage and safety profile. A mechanism should be set up to review the list on a periodical basis thereby bringing in sufficient flexibility in the system.[78]

C. *Improvement Of ADR Monitoring And Post-Marketing Surveillance Facilities*

Furthermore, the law should not restrict itself to merely the manufacture and sale of drugs but should also take constructive steps to establish a regime of checks in order to gauge the safety and efficacy of a drug in the market. The absence of an effective ADR monitoring mechanism in India is one of the main causes for the availability and sale of toxic drugs. Even after obtaining marketing approval, a drug's safety and efficacy must be continuously monitored to avoid such unwanted reactions. An ADR monitoring mechanism should ideally involve the drug regulatory agencies, pharmaceutical companies, medical practitioners and patients. This may be achieved through the setting up of an apparatus to conduct post-marketing surveillance. It may be noted that in light of the recommendations of the PRDC, the DCR was amended to prescribe post-marketing surveillance as a mandatory condition for drugs approved in India.[79] However, the lax attitude in relation to ADR monitoring in India casts doubts on the effective execution and strict enforcement of such surveillance by drug regulatory officials. In 1998, India joined the WHO-sponsored ADR Monitoring based at Uppsala, Sweden. Though three centres for ADR Monitoring were set up,[80] they are hardly functional.[81] The main factors of the inefficient nature of these centres is the lack of

Schedule H of the DCA thereby increasing the total number of drugs under Schedule H to 453. The DCGI has decided that henceforth all prescription drugs will be brought under Schedule H as soon as they are approved for marketing within the country. With the safety and efficacy of several drugs currently begin marketed in India under doubt, it is essential for the government to bring about other such positive changes.

78 Mashelkar Committee Report, para 7.3.2b.

79 Mashelkar Committee Report, para 4.5.1.

80 A National Pharmacovigilance Centre was set up in New Delhi and two WHO special centres were set up at KEM Hospital, Mumbai and JLN Hospital, Aligarh.

81 Dr. Arun Kumar Biswas, "India Should Implement Strict Laws For Reporting ADRs", BMJ 2003 (14 January 2003), *at* http://bmj.bmjjournals.com/cgi/eletters/326/7380/70#28728. (A letter to the Editor, BMJ, in response to Sanjay Kumar, "Drug Linked To Child Deaths Still Available In India", BMJ 2003, 326:70 (11 January 2003), *available at* www.bmj.bmjjournals.com/cgi/content/full/326/7380/70).

systematic training in pharmacovigilance amongst medical practitioners and a lax regulatory system that has inadequately trained staff that is incapable of handling serious drug safety issues.[82]

Ideally, the CDSCO should play an active role in creating awareness and educating medical practitioners on ADRs. It is pertinent to note that the medical practitioner is often the first recipient of information from patients about an ADR to a particular drug or a combination of drugs. Therefore, it should be made mandatory for medical practitioners to report such ADRs to the Medical Council of India (MCI) and/or the State Medical Councils (SMCs) with which they are registered. Such authorities should in turn disseminate such information to all medical practitioners registered with them and recommend that medical practitioners refrain from prescribing inherently harmful drugs or harmful combinations of drugs. Failure to disclose such information should result in severe penalties being imposed on the defaulting medical practitioners. The MCI and/or the SMCs should also submit such data to the CDSCO, which could then investigate the drug and take appropriate action.

D. Continuing Medical Education

Given the changing face of medicine, Continuing Medical Education (CME) is imperative so that medical practitioners may stay abreast of the latest developments in their specific area of expertise. CME aims to provide programmes of high educational quality to allow physicians to improve their knowledge base and skills thus allowing them to maintain or upgrade their level of medical competence and enhance their skills and knowledge. CME can be carried out by conferences, seminars, answering examinations and also conferring with fellow medical practitioners.

Presently, 36 of the 50 states in the US have a mandatory CME requirement to register the licence to practise.[83] Medical practitioners are questioned about the advances in medicine and the effect of CME on their practice to check if they did complete the required exercises.

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[82] *Ibid.*

[83] "CME Is Here To Stay—An Interview With Dr. Dennis K. Wentz", *at* www.sma.org.sg/sma_news/3211/interview.pdf. Dennis Wentz is the Director of the Division of Continuing Physician Professional Development (CPPD), formerly the Division of Continuing Medical Education (CME) of the American Medical Association (AMA).

However, in India, CME is still optional[84] and it is only the conscientious medical practitioners who opt for it. No information is otherwise provided to medical practitioners. Since there is no compulsion, the medical practitioners themselves might not pay heed to conferences or seminars. Often, a drug might be cleared by the concerned authorities but might then be proven to be toxic. However, the medical practitioner might just be ignorant of this development and would thus continue to prescribe that drug to his patients. For example, in connection with AZT, Dr. Shashank Joshi says, "They (common medical practitioners) don't know what to combine with what. I can show you prescriptions where it's AZT plus d4T." (As the WHO guidelines point out, AZT and d4T are antagonistic with each other and should never be taken concurrently.) Endangering the lives of the patients due to the ignorance of the medical practitioner is a grave issue that needs to be handled immediately. It is essential for medical practitioners to educate themselves about the drugs they prescribe. State-controlled CME would ensure that the medical practitioners are given sufficient financial help and proper exposure to independent studies, surveys and research data. The Indian Medical Association also agrees that medical practitioners desperately need CME to keep them up to date with the latest drugs, equipment and medical practices but legislation to make this a requirement has made little progress. The MCI is campaigning for CME to be made compulsory for the country's 615, 000 registered medical practitioners and has proposed a draft amendment to the *Indian Medical Council Act, 1956* that would standardise medical practice across the country while making sure it is up to date with the latest developments.[85] Two years ago, the Delhi Medical Council, made it mandatory for members to complete 100 hours of CME every five years before they can re-register as medical practitioners.[86] However, in the absence of any such initiatives by the Central Government, CME remains optional.

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[84] Regulation 1.2.3 of the *Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002* does prescribe at least 30 hours of CME per physician every five years.

[85] "Continuing Medical Education In India Delays In Legislation Slow The Progress Of Continuing Medical Education In India", Volume 82, No. 2, February 2004, *at* http://www.who.int/bulletin/volumes/82/2/CME0204/en/.

[86] *Ibid.*

E. Empowering The Patients

When comparing the situation in India vis-à-vis the world, it would be fallacious to overlook the role played by Consumer and Patients Rights Groups and Courts.[87] The US could be considered a model example. Though the licensing mechanism is somewhat similar in both India and the US, i.e. all testing procedures being conducted by the pharmaceutical companies themselves, the presence of active citizens groups makes all the difference. This puts a greater onus upon these companies to produce safer drugs and thus to conduct extensive toxicological research before releasing the drugs into the market. If a drug with severe side effects were released onto the market, at the first instance of such ADR being reported, the US FDA would call for an immediate revision on the licence and demand further testing. This was seen in the case of nimesulide in the US where after much testing, a decision to ban it was announced a few years after it had hit the markets. It is not uncommon to see either individuals or citizens rights groups filing a civil suit for gross-negligence and endangering the life of the public. Also had the US FDA not taken the decision to ban such drugs, civil action would have been instituted against them as well. The presence of strong and active citizens' rights groups coupled with quick and efficient civil court system ensures that pharmaceutical companies and government bodies function in such a way so as to serve the public the best.

Compare this situation to India where patients rights groups are virtually unheard of. Even if a citizen were to file a suit against pharmaceutical companies, it is almost certain that the case would remain pending in the Courts for years and at the end of it all, the damages awarded, if at all, would be petty. It is a well-known fact that the Indian citizen prefers to not move the Courts for an action in tort. Little wonder then that the pharmaceutical companies, whose formulations are banned abroad, seek the Indian markets as a haven.

However, can the law do anything about this? As noted by Kennedy, "Currently, information on contraindications, side effects, interactions, and dose is provided on patient information-inserts within the drug packets

[87] They are a group of concerned citizens who seek to protect the rights of patients in relation to medical malpractice, negligence and substandard and unsafe drugs, etc.

required by the licensing authorities. This is usually produced in minute typeface, legalistic in wording, and is defensive in tone. Unsurprisingly, patients and medical practitioners often find such information discouraging and unhelpful in determining the balance between risk and benefit."[88] For such reasons, an establishment of a specialised and rigorous "information source" independent of both the health service and pharmaceutical industry is required. It should monitor, assess and interpret the research evidence in each clinical area and become an authoritative, but not exclusive, information provider for medical practitioners and the public.[89] The law should impose a heavy pecuniary liability on pharmaceutical companies in cases where they suppress available toxicity data or submit incorrect data to obtain marketing approval or during investigations of a drug's safety. Further, taking cognisance of the gravity of the issue, courts too should subject pharmaceutical companies to heavy damages for any harm caused to patients due to the intake of toxic drugs marketed by them despite knowledge of its toxicity.

VI. The Flip Side: Medicinal Marijuana

Ironically, while on the one hand lax drug regulations and enforcement to enable toxic drugs to be sold in the market, on the other hand, certain drug laws prevent patients from accessing drugs which could be beneficial to them. The rights and medical needs of patients have been sacrificed to the government's war on drugs. In a desperate effort to curtail drug use, the government has deprived individuals of the medicinal properties of marijuana, a drug that comes from the Indian hemp plant (*cannabis sativa*). Marijuana was liberally used in ancient Indian and Chinese medicines.[90] Patients suffering from AIDS Wasting Syndrome,[91] multiple sclerosis,[92]

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[88] James G. Kennedy, "'Doc, Tell Me What I Need To Know'—A Doctor's Perspective", BMJ 2003; 327: 862–863 (11 October 2003), *available at* http://bmj.bmjjournals.com/cgi/content/full/327/7419/862.

[89] *Ibid.*

[90] Blue Miner Young, "The History Of Medicinal Cannabis", *at* http://www.whitman.edu/biology/Stuproj/YoungB/history.html.

[91] Dr. Lester Grinspoon, "New England Journal Of Medicine: Medical Marijuana Letter", 7 September 1995, *at* http://www.maps.org/mmj/nejm.html.

[92] "Marijuana Treats Multiple Sclerosis Symptoms, British Journal Nature Reports This Week", 29 February 2000, *at* http://www.mpp.org/releases/nr022900.html.

nausea associated with cancer chemotherapy, asthma,[93] glaucoma,[94] migraine,[95] schizophrenia[96] and other serious conditions often find that marijuana is the most, sometimes only effective treatment. Yet those who do use marijuana for medicinal purposes could be subject to arrest, seizure of assets and other criminal sanctions.

A. In Our Own Backyard

The *Narcotic Drugs and Psychotropic Substances Act, 1985* (NDPS Act) was passed with a view to consolidate and amend the law to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. Unfortunately, the laws do not adequately regulate the use of marijuana for medical purposes. While Section 8 of the NDPS Act does permit the use of cannabis for medicinal purposes, there are no further provisions regulating the use of this drug. It seems to be a half-hearted attempt on behalf of the government. The ambiguity of this Act lies in the fact that it does not clearly define the circumstances where this drug should be used. As a result, registered medical practitioners hesitate in prescribing such drugs since it could possibly result in their prosecution. Patients themselves would also hesitate in consuming such drugs for fear of contravening the NDPS Act. Punishments for contravention of this provision are very severe[97] and keeping in view the absence of clarity in the present provisions, patients can wind up in prison cells for the fault of wanting to ease their pain.

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[93] Duncan Welch, "Marijuana In Asthma Study", 23 November 2000, *at* http://www.mapinc.org/drugnews/voo.n1746.a04.html/.

[94] "Marijuana Helps Glaucoma", *at* http://www.geocities.com/medicalmarijuana2003/fact15.htm.

[95] "Journal Article Says Marijuana Is Effective For Treating Migraine; Federal Government Impedes Author's Research Efforts", 29 June 1998, *at* http://www.mpp.org/releases/nr062998.html.

[96] Dr. Lester Grinspoon with James Bakalar in his book *Marijuana The Forbidden Medicine.*

[97] Section 20 of the NDPS Act (Punishment for contravention in relation to cannabis plant and cannabis): "Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder,

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-state, exports inter-state or uses cannabis, shall be punishable,—

(i) where such contravention relates to *ganja* or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees;

Section 10 of the NDPS Act empowers the State Governments to permit and regulate possession and inter-state movement of opium, poppy straw, the manufacture of medicinal opium and the cultivation of cannabis excluding *hashish.* Inadequate regulations by the States have not made it easier for patients to access marijuana for medicinal purposes. For example, the *Maharashtra Narcotics Drug and Psychotropic Substances Rules, 1985* (MNDPS Rules) only allow consumption of '*ganja*'. Rules 40(1),[98] 41(1),[99] 42(1)[100] and 60[101] state that the use of *ganja* as a medicine would be legal when it is used as an ingredient in a medicine. As a result, cannabis and even *ganja*, on its own, cannot be legally administered. With such legislations, a provision permitting marijuana to be smoked cannot even be dreamt of. However, smoking is the most effective means of using marijuana medically. It takes longer for the body to access the chemicals in marijuana when it is ingested through medicines. This is particularly unfortunate for those who need immediate therapeutic relief, such as cancer patients who experience nausea and vomiting from chemotherapy or epileptics having seizures.[102] The Australian National Task Force on

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(ii) where such contravention relates to cannabis other than *ganja*, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees.

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

98 Rule 40(1) of the MNDPS Rules: "Any registered medical practitioner desiring to possess *ganja* for use as an ingredient in any medicine and to sell medicines containing *ganja* on prescription shall make an application to the Collector or authorised officer in that behalf."

99 Rule 41(1) of the MNDPS Rules: "Any person on behalf of an institution or any manufacturer of medicines desiring to possess *ganja* for use as an ingredient in the preparation of any medicine and to sell medicines containing *ganja* shall make an application to the Collector or authorised officer for a licence in that behalf."

100 Rule 42(1) of the MNDPS Rules: "Any person desiring to possess and sell medicines containing *ganja* shall make an application to the Collector or authorised officer for a licence in that behalf."

101 Rule 60 of the MNDPS Rules: "Notwithstanding anything contained in these rules, it shall be lawful for any person to buy, possess, transport, consume or use any medicine containing *ganja* in such quantity as may at one time be dispensed or sold to him in accordance with the prescription of a registered medical practitioner."

102 "Do You Have To Smoke Marijuana For Medicinal Benefit?", Alliance for Cannabis Therapeutics, *at* http://marijuana-as-medicine.org/Alliance/faq.htm#legal.

Cannabis[103] and the Institute of Medicine Report (US)[104] have both acknowledged the therapeutic effects of smoked marijuana. Doubts also arise regarding the legality of the cultivation of the drug. Section 14 of the NDPS Act provides that the government might allow cultivation of any cannabis plant for industrial purposes for obtaining fibre or seed or for horticultural purposes only. Cultivation for medicinal purposes is again not clearly provided for. There is a mere mention of cultivation being allowed for medicinal purposes in Section 8 of the NDPS Act. The State laws passed pursuant to the NDPS Act too do not clarify the issue. The MNDPS Rules do not make provisions for the cultivation of marijuana, but only provides for the use of *ganja. Ganja* can be obtained only from depots established under Rule 48[105] of the MNDPS Rules. Provisions regarding such depots leave much to the imagination.

The medicinal qualities of opium have been recognised by Indian laws and a number of laws have been enacted to permit its medicinal use.[106] Why this double-handed treatment? The medicinal qualities of marijuana have been recognised throughout the world.[107] Regulation for availability of marijuana and stringent restrictions on the instances when marijuana can be used for medicinal purposes has been introduced in various countries. Yet, India refuses to introduce adequate provisions regarding the use of marijuana for medicinal purposes. The Government should study the framework of laws passed by other countries and an effort should be made to adapt and implement the same in the interest of the patients

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[103] The Australian National Task Force on Cannabis was formed under the auspices of the Commonwealth/State Ministerial Council on Drug Strategy to prepare a paper surmising current knowledge of cannabis use which was then used by the Ministerial Council on Drug Strategy to assist it in developing a national statement on cannabis. The paper is *available at* http://www.health.gov.au/pubs/drug/cannabis/can_ch1.htm.

[104] *See* "Drug Czar Proven Wrong: Marijuana's Medical Benefits Supported by Scientific Evidence", 17 March 1999, *available at* http://www.mpp.org/releases/nr031799.html. The Institute of Medicine (IOM) is a private, non-profit organisation that was commissioned in 1997 by the White House Office of National Drug Control Policy to perform a "comprehensive review" of marijuana's medical benefits and health effects. The IOM report presents ample scientific evidence confirming that marijuana has therapeutic value for patients with certain conditions.

[105] Rule 48 of the MNDPS Rules: "Depots for the sale of *ganja* shall be established at such places as the State Government may from time to time direct."

[106] The *Opium Act, 1878* and the *Dangerous Drugs Act, 1930.*

[107] For details refer to Part VI B of this article.

in India. Enacting such inefficient laws undermines the otherwise sufficient laws enacted by the Government.

B. Changing Views Around The World

A topic of heated debate for a long time now, several nations have taken positive steps to legalise the use of marijuana for medicinal purposes. Some of the laws of Canada and US dealing with a detailed regulation of the availability of marijuana for medicinal purposes are discussed below.

1. Canada

The Marihuana Medical Access Regulations[108] and the consequential amendment to the *Narcotic Control Regulations*[109] came into force on 30 July 2001. The Regulations clearly define the circumstances and the manner in which access to marijuana for medical purposes will be permitted. Here is an overview of the Regulations and a look at how they work.

a. *Who Is Eligible To Use Medical Marijuana?*

The Regulations spell out three categories of people who can apply to possess marijuana for medical purposes.

- Category 1: Applicants who have terminal illnesses with a prognosis of a life span of less than 12 months. A medical practitioner must provide a medical declaration that states, among other things, that all conventional treatments have been tried or considered.
- Category 2: This category is for applicants who suffer from specific symptoms associated with certain serious medical conditions.

  Applicants must provide a declaration from a medical specialist confirming, among other things, that conventional treatments for symptoms have been tried or considered and were found to be medically inappropriate.

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[108] Registration: SOR 2001–227, P. C. : 1146, Passage: 14 June 2001, at http://www.hc-sc.gc.ca/hecs-sesc/controlled_substances/pdf/regulations/marihuana_06-13-01.pdf.

[109] C.R.C., c. 1041. The text of the Narcotics Control Regulations is *available at* http://laws.justice.gc.ca/en/c-38.8/c.r.c.-c.1041/76786.html.

- Category 3: This category is for applicants who have symptoms associated with a serious medical condition, other than those described in Categories 1 and 2, where, among other things, conventional treatments have failed to relieve symptoms of the medical condition or its treatment. Declarations from two medical specialists must accompany the application.

b. *The Application Process*

All patients desiring to possess marijuana must obtain a form from Health Canada's[110] Office of Cannabis Medical Access. In the event of wanting to grow one's own marijuana, the concerned patient must also obtain a licence permitting him to do the same. For applicants in Category 2, a signed declaration from one medical specialist is required. For applicants in Category 3, signed declarations from two medical specialists are required. The physician must recommend a specific dosage for the patient. If the information is insufficient, the application will be refused.

c. *Information For Physicians*

Health Canada issues a guide for physicians to provide an overview of the Regulations and help them understand their role in the use of marijuana for medical purposes. Thus, there would be little chances of misuse of marijuana.

2. United States

At least seven states in the US have legalised marijuana for medicinal purposes and many more are following suit.[111] Based on research and strong anecdotal evidence, the Drug Enforcement Administration's (DEA's) top administrative law judge, Judge Francis Young, ruled in 1988 that the DEA's ban on medicinal marijuana was "arbitrary and capricious" and described marijuana as "the safest therapeutically active substance known to man".[112] He recommended that the *Controlled Substances Act, 1970* be amended and marijuana be reclassified as a Schedule II drug so as to facilitate prescription availability.

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[110] Health Canada is the federal department responsible for helping the people of Canada maintain and improve their health. The official website is www.hc-sc.gc.ca.

[111] Alaska, Nevada, Oregon, Washington, Colorado, California and Arizona have already legalised the drug and are currently employing its medicinal properties.

[112] "DEA Judge Francis Young's Ruling That Marijuana Must Be Reclassified", 6 September 1988, *at* http://www.medmjscience.org/Pages/reports.html.

An insight into the California and Arizona State laws is given below.

a. *California*

The medicinal marijuana initiative was also known as *Proposition 215.* The Section concerned is cited as the *Compassionate Use Act of 1996. Proposition 215* ensures that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine or any other illness for which marijuana provides relief.[113] It also ensures that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction[114] and encourages the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.[115]

b. *Arizona*

Medicinal marijuana was legalised in the State of Arizona by *Proposition 200* in 1996. The concerned Act was known as the *Drug Medicalization, Prevention And Control Act of 1996. Proposition 200* allows medical doctors to prescribe a controlled substance such as marijuana to treat a disease or to relieve the pain and suffering of a seriously or terminally ill patient.[116] The medical practitioner must obtain a written opinion from a second doctor that prescribing the controlled substance is appropriate.[117] The written consent of the patient is also to be obtained.[118] A patient who receives, possesses or uses a controlled substance as prescribed by a doctor would not be subject to criminal penalties. This Act was followed by *Proposition 203, the Drug Medicalization, Prevention and Control Act of 2002. Proposition 203* was designed to re-enforce the previous initiatives, as well

[113] Section 1(A) of the *Compassionate Use Act, 1996.*
[114] Section 1(B) of the *Compassionate Use Act, 1996.*
[115] Section 1(C) of the *Compassionate Use Act, 1996.*
[116] Section 7(1) of the *Drug Medicalization, Prevention and Control Act, 1996.*
[117] *Ibid.*
[118] *Ibid.*

as, over-rule changes to the previous propositions by the legislature.[119] *Proposition 203*, expanding on the previous propositions, legalises marijuana for medical purposes. Under this proposition, the Arizona Department of Public Safety would be required to establish a system to maintain and distribute marijuana and the Department of Health Services would be required to establish a patient registry for patients eligible to receive marijuana for medical purposes. The proposition also allows citizens to petition the Department of Health to add to the list of "debilitating" diseases for which use of marijuana would be permitted.

Hence, it is clear that administration of this drug in these countries is very strictly enforced and consumption of the drugs generally or for recreational purposes is illegal and punishable by law thereby striking a right balance between use and misuse of the drug.

VII. Reinventing Ayurveda

Ayurveda means the "science of life".[120] This system of medicine originated in India more than 10,000 years ago and is believed to be the oldest healing science in existence.[121] However, India has not given due importance to *Ayurveda* and this has been reflected in the archaic laws, the step-brotherly treatment of this system of medicine and the reluctance, till recently, of the State to invest in research and development in this field.[122] The situation that has emerged from this is that the *Ayurvedic* formulations are necessarily identical to those used thousands of years ago in terms of purity, identity and strength. What these laws fail to take into account is that in the absence of any attempt to modernise or update this sector, it is very conceivable that these drugs may not have as great potency today, on stronger, more resistant strains of microbes (bacteria, viruses, etc.) than it had then. It would then seem that these drugs are 'made to have greater therapeutic

[119] "Arizona: *The Drug Medicalization, Prevention And Control Act of 2002*", *at* http://www.usdoj.gov/dea/ongoing/arizonainitiative.html.

[120] "What Is Ayurveda", *at* http://www.ayur.com/about.html.

[121] *Ibid.*

[122] Until as recently as 1999–2000 the budgetary allocation for Indigenous Systems of Medicine and Homeopathy was only Rupees 590 million. The scene has improved today as the 2003–04 budget allocated a sum of Rupees 1964.7 million to this sector. But it may already be too late to undo the damage caused by 52 years of apathy.

value than they really have'[123] and therefore could be deemed misbranded. Thus, the Government's insistence on the drugs being manufactured in accordance with formulations that are thousands of years old could very well result in their being deemed as misbranded and therefore illegal.

Another important aspect of which special notice must be taken is that the science of *Ayurveda* predates the Indian drug laws by several millennia. Yet the harmony that is sought is that the system be practised in its pure form 'exclusively in accordance' with the original texts, while adhering to the provisions of the DCA, the *Poisons Act, 1919*, etc. The dichotomy between what the government preaches and practises is therefore clear. Today, the Government subjects this sector to a strange paradox. On one hand, it is subject to over-regulation and over-legislation with respect to control over the classification, treatment and practice of *Ayurveda.* On the other hand, however, there is the problem of under-regulation and under-legislation with a view to protection and development of this system of medicine. Neither is this view radical or extremist, nor is it new. The problems that could arise if the exercise of excessive control was attempted over this sector were recognised by the Chopra Committee[124] in its report to the Legislative Assembly in 1940. After examining a multitude of witnesses including witnesses from the *Ayurvedic* professions concerning the feasibility of each of the provisions of the *Drugs Bill* in relation to *Ayurveda*, the Committee noted:

> "Many of the witnesses gave evidence showing the utter impossibility of such a control. Some of the indigenous practitioners objected to it on merely sentimental grounds saying that there is something higher and more vital in their systems which is inscrutable and impenetrable by modern science and which modern chemists cannot analyse and determine. We know what hold conservatism has and how slow we move when the question

[123] *See* "Ayurveda And The Indian Biotechnology Revolution" (Section 33E of the DCA), *available at* http://www.majmudarindia.com/frames/articles/Intelectual_Properties/ayurveda.htm. The article argues that as the DCA imposes strict standards, not every drug can qualify as an *Ayurvedic* drug. In certain circumstances, an *Ayurvedic* drug can be deemed to be misbranded under the Act if the drug is so coloured, coated, powdered or polished so as to cause damage to the drug, the damage being concealed; or if the drug is made to appear of better or greater therapeutic value than it really is.

[124] An expert committee set up under the chairmanship of Colonel Chopra to investigate the provisions of the *Drugs Bill* and to make suggestions to improve the same.

> of sentiment is raised. Others reasonably contend that the materials used by the indigenous practitioners are derived from every source in nature, animal, mineral and vegetable, and in many instances only the person who dispenses it knows the nature and quality of the materials used. To control such materials by application of scientific principles would be a formidable task indeed. The composition of the majority of these drugs is not known and therefore standardisation would not be possible in the same sense as with the western medicines. Standardisation presupposes knowledge of the chemistry, the pharmacology and the therapeutics of these drugs, which are unknown in this case. Unless and until these drugs are investigated on scientific lines, control is not feasible. The useful remedies should be separated from the inert and useless by a proper scientific study and the potent drugs should be analysed and standardised before any steps can be taken."[125]

After analysing the report, Sir Girja Shankar Bajpai, an official member of the Legislative Assembly, said that the scrutiny of such evidence and the pronouncement of experienced pharmacologists suggested that it would be a great error on the part of the Government of India to attempt to regulate or control *Ayurvedic* drugs. The Legislative Assembly felt, however, that the provisions relating to *Ayurveda*, now a part of the DCA, had struck the right balance of control and regulation.

But the failure on the part of the Legislature to usher reforms in these laws to adapt them to modern times have not only made them archaic but have also imparted a distinct regressive quality to them. *Ayurveda* has been handed down unchanged and without any scope of further change. The body of knowledge is given and one must work within it. The testing procedures only concern themselves with the identity and strength of these medicines to ensure their compliance with the original formulae. This presumes that the therapeutic effects and their degree are given and are unalterable if the prescribed formulae are adhered to. It further presumes that no aspersions can be cast on the medicinal effects of any of these drugs and no testing need be conducted to verify this. In this respect it would seem that the Government shares in some of the mysticism that surrounds these medicines for the common man.

[125] Legislative Assembly Debates, 4 April 1940, vol. No. 2, 2168.

Another grey area in the provisions of this Act regarding *Ayurveda* is that of the discovery of new herbs. If today a scientist were to discover a herb with miraculous healing effects that no one knew of; it is still unclear whether the herb would be included under the fold of *Ayurveda* on account of it being an *Ayurvedic* herb even though it has not been documented in any books. Or would its exclusion from any of the authoritative books imply its exclusion from *Ayurveda*? Since it has never been used in *Ayurveda*, will it never be used in *Ayurveda*? If this is indeed true, then our laws have reduced *Ayurveda* to a static body of knowledge with no room for improvement or change. Compare this with the case of allopathy. When the revolutionary antibiotic medicine, penicillin was discovered, it was immediately absorbed in the allopathic stream of medicine. Allopathy is a system of medicine that is continuously reinventing itself with modern innovations and use of cutting edge technology for research and development in an effort to produce better, more effective medicines. Little wonder then, that it is the most popular and widely used of all systems of medicine. *Ayurveda* on the other hand, has been relegated to the status of 'alternative medicine'. If the *Ayurvedic* sector is to progress then the largely unorganised nature of *Ayurveda* and our lack of precise knowledge regarding its chemistry and therapeutics needs to be acknowledged and its implications, that of uncertainty of degree of effectiveness and the impossibility of strict regulation and control, needs to be reflected in our laws.

There is also an international aspect to this that cannot be ignored. Over the decades, there have been several instances of drugs sourced and isolated from *Ayurvedic* drugs. However, since this sourcing and isolation of drugs is done through chemical means, the resultant drug extracted from the herb would have all its therapeutic effects, but could not be termed *Ayurveda* under its definition in the DCA. This is because the original formulae do not entail the use of such chemical extracts. Pharmaceutical companies abroad, however, are not restricted by the Indian definition of *Ayurveda*. Any drug containing any *Ayurvedic* extract might reasonably, though maybe not strictly, be called an *Ayurvedic* drug. Hence these '*Ayurvedic*' drugs can be marketed freely in world markets without impunity. To take this a step further, nothing can prevent them from combining *Ayurveda* with allopathy to create a newer, more effective strain of medicines which could be classified as either allopathic or *Ayurvedic*. Is there nothing we can do to prevent our traditional knowledge from being plagiarised by foreign

companies? Sadly, the answer is no. The Indian public will witness the ability of multinational pharmaceutical companies to elevate *Ayurveda* to such standards of effectiveness as were never possible when this traditional knowledge was exclusively in Indian hands. Our own laws and their insistence on *Ayurvedic* medicines being only those 'exclusively manufactured' strictly on the basis of 'formulae described in the authoritative books' are preventing us from reaping the full benefits of our traditional knowledge and the Indian public will have to resign themselves to buying these medicines from abroad only.

This problem needs to be combated head-on. Today traditional knowledge cannot be the subject matter of patent in India.[126] However, our laws need to be more progressive in nature to provide greater scope of growth to this sector. Though there is nothing that we can do to prevent foreign companies from engaging in research in *Ayurveda* to source and isolate drugs from it, we could engage in similar research ourselves. If India were to allow patenting of drugs (sourced from traditional knowledge) by recognised *Ayurvedic* institutes such as The National Institute of Ayurveda at Jaipur and the Central Council of Research in Ayurveda and Siddha, this would go a long way modernising as well as safeguarding our traditional knowledge.

VIII. Conclusion

The rapidly changing scenario in the field of medical science and pharmaceuticals with newer, more effective, medicines being released into markets on an almost daily basis makes this sector one of the most dynamic in the economy. India is, today, a forerunner in this sector with WHO estimating it as the third largest market for pharmaceuticals in the world. The law cannot afford to take a back seat and witness the growth of this sector passively. Although medicines are primarily related to the field of science, law has a pivotal role to play in ensuring the regulation of drugs available in the market. Drug safety should be one of the highest priorities of the Government since it has a direct bearing on the health of the people.

[126] Section 3 of the *Patents Act, 1970*, which lists what are not inventions includes "(p) An invention which, in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components."

On the one hand, there is a steady influx of toxic drugs in the market whereas on the other hand, the citizens are deprived of effective drugs on account of the inadequate drug laws. Lack of sufficient regulations regarding the use of medicinal marijuana is a glaring example of the inadequacy of such legislation. Or as seen in the case of *Ayurveda*, the outdatedness of these laws has stifled the growth and development of this sector.

At any rate, the prevalent drug laws are not attuned to protecting the interests of the Indian public. It is therefore imperative that adequate amendments in the laws be made as soon as possible.

FREE TRADE TODAY

Professor Jagdish N. Bhagwati[1]

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This book has been reviewed by Siddharth S. Mehta.[2]

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[1] About the Author: Professor Jagdish N. Bhagwati is currently University Professor at Columbia University and André Meyer Senior Fellow in International Economics at the Council on Foreign Relations. He was Economic Policy Advisor to the Director General, General Agreement on Tariffs and Trade (1991–1993). Currently, he is Special Advisor to the United Nations on Globalization and External Advisor to the Director General, World Trade Organization (2002–2003).

Bhagwati founded the *Journal of International Economics*, the premier journal in the field today, in 1971 and *Economics & Politics* in 1989. His many books include *Protectionism*, *The World Trading System at Risk* (Princeton), *A Stream of Windows*, and *The Wind of the Hundred Days: How Washington Mismanaged Globalization*. He writes for *The Financial Times*, *The Wall Street Journal* and *The New York Times* and reviews for *The Times Literary Supplement* and *The New Republic*. The recipient of three festschrifts in his honour, he has received several prizes and honorary degrees including the Bernhard Harms Prize, the Freedom Prize and the Seidman Distinguished Award in Political Economy. In addition to helping set the agenda for global trade policy, his writings are acknowledged to have laid out the blueprint for India's current economic reforms. On 26 January 2000, India awarded him with the *Padma Vibhushan*, one of its highest civilian awards. The award was bestowed for the first time to a national of the United States (though one of Indian origin).

Among his former students are some well-known economists, including Paul Krugman of MIT, Jeffrey Frankel of Harvard and Gene Grossman of Princeton.

In November 1994, more than 100 economists, including two Nobel laureates—Paul Samuelson and Robert Solow—attended a two-day conference in Bhagwati's honour titled "The Political Economy of Trade". The title of Samuelson's paper: "What Trade Theory Was Like in the Age of Bhagwati".

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I. INTRODUCTION

Free Trade Today is a spirited and compelling defence of international trade. It has, at its pith, three lectures[3] delivered by Jagdish Bhagwati at the Stockholm School of Economics to explain the benefits of international trade and the misconceived notions behind protectionist thinking and practices. This trio is a sequel to his 1987 lectures, which were published as *Protectionism* (1988). *Free Trade Today* builds on the fundamental proposition enunciated by Bhagwati in *Protectionism* (1988)—that "trade protection hurts the economy of the country that imposes it."

In these three lectures, Bhagwati critically reviews the stance adopted by critics of international trade and then proceeds to dismantle these arguments on the basis of logic, examples and fundamental principles of Economics, Political Science and International Law. Whilst acknowledging that many of these concerns are legitimate and that conclusions drawn from them do initially appear appealing, he notes that they are often contrary to logic and often empirically unsupported. If embodied in practice, these would significantly hinder the trading system by adding unnecessary costs and would not go towards addressing the singular issues for which they were embodied.

Bhagwati notes that the case for free trade was first made by Adam Smith in *The Wealth of Nations*. "It is the maxim of every prudent master of a family, never to make at home what it will cost more to make than to buy", Smith wrote. "The tailor does not make his own shoes but buys them from the shoemaker ... What is prudence in the conduct of every family can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the product of our own industry, employed in a way in which we have some advantage."

Although the conventional arguments for protectionism have been discredited, many are not yet banished entirely. Free trade faces strong new challenges from a variety of groups including labour groups,

[3] Lecture 1: Confronting Conventional Threats to Free Trade: The Postwar Revolution in the Theory of Commercial Policy. Lecture 2: "Fair Trade," Income Distribution, and Social Agendas: Using Trade Theory to Meet New Challenges. Lecture 3: Getting to Free Trade: Alternative Approaches and Their Theoretical Rationale.

environmentalists and human rights activists as well as other lobbies whose agendas are guised in the language of social justice and related rights. These groups, claiming a general interest and denouncing free trade as a special interest of corporations and other capitalist forces, have mobilised substantial opinion amongst the very groups who will arguably benefit the most from free trade.

Bhagwati applies critical insights from revolutionary developments in commercial policy theory to show how the combined pursuit of social and environmental agendas can, in reality, be creatively reconciled with the common pursuit of free trade. It is argued that free trade, by raising the standard of living, can serve these agendas far better than can a descent into trade sanctions and restrictions.

In the book Bhagwati reflects:

> "But let me say also that the case for free trade in the public domain has suffered from neglect because few of us have been prepared to enter the fray in its defense. Faced with the critics of free trade, economists have generally reacted with contempt and indifference, refusing to get into the public arena to engage the critics in battle ... I was in a public debate with Ralph Nader on the campus of Cornell University a couple of years ago. The debate was in the evening, and in the afternoon I gave a technical talk on free trade to the graduate students of economics. I asked, at its end, how many were going to the debate, and not one hand went up. Why, I asked. The typical reaction was: why waste one's time? As a consequence, of the nearly thousand students who jammed the theater where the debate was held, the vast majority were anti-free traders, all rooting for Mr. Nader. I managed pretty well, but I must confess that the episode brought home to me that unless we confront these misguided critics, the public-policy stage will be occupied solely by the critics of free trade, and then politicians cannot be blamed for having to listen and attend to the chorus of free trade's critics."

For those who want to understand the case for trade and why it is sometimes so difficult to make a case on its behalf, this book by Bhagwati, whom many consider to be a future Nobel laureate, serves as the single most reliable companion.

As regards the rationale behind why all nations should open their borders to trade, Bhagwati believes that it is a question of sharing mutually from exchange. As he once mentioned in a televised debate with Walden Bello, Executive Director of Focus on the Global South[4]:

> "If I have surplus toothpaste and you have surplus toothbrushes and if we exchange one of each, teeth are going to get whiter, right, provided we remember to brush our teeth. So fundamentally that's the argument. That is really the underlying logic of any trade transaction and I think there's empirical evidence of a very substantial sort in the post war period, which underlies the wisdom of this, including for developing countries."[5]

But fundamentally wherever you are or wherever you are going to, having an open economy is really going to be good for you whether you are poor or rich.

It may be noteworthy that Bhagwati's views regarding free trade are antithetical to those of his peer, Joseph Stiglitz, a fellow Professor at Columbia University and a Nobel Prize winning economist. Stiglitz believes that the trade liberalisation agenda has been set by the North (i.e. by the rich countries) or more accurately by special interests in the North and that consequently a disproportionate part of the gains has accrued to advanced industrial nations. Further, Stiglitz believes that in some cases the less developed countries have actually been worse off.

As regards protectionist measures, Bhagwati mentions:

> "My old teacher, a great radical, Joan Robinson at Cambridge used to say, if you throw rocks into your harbor, that's no reason for me to throw rocks into my own. Essentially what she was saying was that it's good for me to have no restrictions—or reduced restrictions on trade because trade leads to gains—true. If your door is closed, you know, I would get less by that trade. But it doesn't mean that I should then close my own door because then I get doubly hurt."[6]

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4 Focus on the Global South is a development programme in Bangkok, Thailand.

5 Extracted from the transcript of a television debate filmed for Uncommon Knowledge, on 14 June 2002, titled "'Free Trade—win-win or win-lose?': Bhagwati And Bello Square Off Over Free Trade". The debate was moderated by Peter Robinson.

6 *Ibid.*

II. Lecture 1: Traditional Arguments Against Free Trade

This lecture deals with the history of thinking on free trade and traces the origin of this view to Jacques Derrida and the post-structural deconstructionism movement. This is followed by a discussion of trade thinking in the 1980s and 1990s, which provides readers with a concise backdrop of the recent trends in academic thought in this area. One of the great aspects of this lecture is that it takes us through the sequence of thought as arguments with regard to free trade and protectionism were put forward, successfully attacked and new models were built, attacked and re-built until the present day.

Additionally, this lecture deals with the accusation that free trade "would not maximize the size of the pie we could make from our resources, know-how, and trading possibilities" and concludes by putting these arguments, so prevalent between the 1930s and the 1980s, to rest. When faced with a complex situation, which might indicate to some that free trade is not working, Bhagwati's analysis shines.

For example, he admits that free trade might not be the best policy for a country so small that it may be faced with what economists call a "market distortion". "We also realized, as no one had pointedly done earlier, that if a suitable policy was addressed to offset that distortion, then we could get back to endorsing free trade." Referring to the ancient proverb which advises of the impossibility of killing two birds with a single stone, he observes that two stones—free trade and reasonable policies to compensate for country specific factors—may be in order.

In another example of his ability to get to the heart of the disagreements about free trade, Bhagwati distinguishes that supporting free trade does not necessarily mean that you are for "free short term capital flows, for free direct investment, for free immigration".

Bhagwati's book is aptly suited for Indian economists, bureaucrats and policymakers. Not only does it provide key facts and insights, it also makes the case for greater involvement by free traders in the public arena. Popular scepticism to free trade remains bullish despite indisputable outcomes in favour of free trade. The book identifies two basic causes for such scepticism. Firstly, there is a counterintuitive nature of comparative advantage and secondly there is also the 'infinite weight' accorded to jobs

lost to foreign competition and 'zero weight' accorded to jobs created by trade. Paradoxically, the jobs that may be lost are immediate threats to people who have them and those to be gained in the future are prospects for persons who are yet to become aware of them. Also, the inertia that often characterises the psychology of change makes the difficulties encountered during the change more prominent that the benefits.

Bhagwati introduces us to the concept of 'tyranny of the missing alternative' wherein people seek an alternative to both capitalism and communism. Capitalism, he admits, does have its weaknesses, as one could expect of any complex human undertaking. It is definitely not a utopian system in either practice or theory. Simply put, it is by far the best system for producing goods and services and allocating scarce resources prevalent in the world today.

All government-administered alternatives involving the complexities of providing goods and services or administering major complex programmes ultimately crash upon the same rocks that destroyed socialism. Government management is inherently inept. Because Government lacks many of the essential tools of private management—because it must act without the guidance and discipline of profit-driven, market-directed commerce and suffers from vastly greater political and bureaucratic influences—even the best managers in the world perform poorly in government managerial positions. Trying to induce private businesses to perform welfare tasks by means of regulations and tax incentives can be somewhat more effective. However, it inevitably increases the rewards of cheating, corruption and political influence peddling and ultimately can impose sufficient economic distortions and burdens to retard or even collapse affected portions of the economy.

Another commonly heard argument is the 'infant industry' argument, which rationalises in favour of protecting new industries that are still financially weak. In order to compete in international markets, it is asserted, such industries need time to grow and strengthen—free of import competition. However, this is something tariff protection can provide and a complete rejection of the free trading system is unwarranted.

Bhagwati also examines a number of non-economic objectives and the need to cordon off participation in some areas on account of prevailing national defence purposes. Issues such as restrictive labour mobility and

wage-rate differences, which arguably restrict the ability of producers to adjust to competition sufficiently to avoid economic contraction and unemployment, have been considered.

Concisely, on a close examination, the theoretical economic advantages of protectionism dissolve. Even where the 'invisible hand' is frail, Bhagwati cogently points out that the 'visible hand is crippled'. One can, after reading this book, clearly decipher that measures designed to reduce the market distortions themselves are far more likely to prove beneficial than are restraints on trade. Losses from foreign retaliations must also be factored in whilst weighing the arguable benefits of restraining trade. Frequently, market distortions are caused by government policies rather than anything inherent in the markets. Education, reductions and simplifications of taxes and regulations, antitrust policies and financial disclosure policies are examples of pro-active government efforts to reduce market imperfections. This is a far more effective approach than creating additional imperfections—protectionist imperfections—in response to market imperfections. There is an obvious array of indirect costs of protectionist policies, which:

- Reduce access to essential components (maintenance of machinery in communist and third world nations often suffer visibly for lack of components);
- Reduce the ability to realise economies of scale;
- Reduce the variety of goods and equipment available;
- Reduce competitive pressures that drive domestic productivity growth (imagine the auto industry of the United States (US) in the 1980s had there not been any Japanese and European competition);
- Reduce access to foreign know-how (The cheapest way to benefit from foreign technological advances is to buy it as part of the new products and services it makes possible.);
- Reduce the marginal efficiency of capital by restricting integration into world markets; and
- Increase the level of 'directly unproductive profit-seeking' made possible by political and bureaucratic interventions in market

> processes (Bureaucratically-hamstrung nations such as India suffer vastly from government interventions and the unproductive efforts—the corruption—they engender).

Lectures 2 and 3 represent the great strength of Bhagwati's book. In particular, his analysis of labour standards and preferential trade agreements are particularly grasping.

III. Lecture 2: Environmental And Social Arguments Against Free Trade

Bhagwati's second lecture advocates delinking the social agendas of labour standards, human rights and environmental protection from trade policy. "By trying to kill these two birds (i.e. social agendas and freer trade) with one stone (i.e. trade treaties and institutions), you are most likely to miss both", he writes.

This lecture addresses a wide variety of social issues frequently brought up by critics of free trade and the problems Bhagwati sees in bundling trade agreements with human rights or environmental concessions. With clear logic he explains that environmental rules can and should be different in each country, even if two countries have an equal commitment to protecting the environment, because of their different national objectives and policies and the varying stages of development. He argues persuasively that controls needed to protect the environment should be separate from trade agreements, in order to achieve the best results for each objective.

Bhagwati does not think the agendas advanced by human rights activists, environmentalists and other critics of globalisation are necessarily invalid. On the contrary, he calls for beefing up the International Labour Organization to enforce labour standards. And he calls for more funding for international aid agencies such as the United Nations Environment Program, the United Nations International Children's Emergency Fund and the United Nations Educational, Scientific and Cultural Organization (UNESCO). He simply believes that these issues should rarely be addressed in trade talks.

Also, new challenges to free trade target the trade practices of foreign nations. These include unfair trade practices, social justice concerns—especially about growing levels of inequality, environmental impacts of

international trade and World Trade Organization (WTO) dispute resolution proceedings—and allegations that international trade undermines real wages in rich countries and further impoverishes the poor in poor countries. All of these assertions are, Bhagwati argues, essentially just makeweights for ideological and/or protectionist interests, aside from being clearly invalid except in a few very narrow circumstances which he continues to address.

The 'fair trade' challenge is driven by several factors. The author identifies:

- Fairness—a 'level playing field'—is the overriding competitive ethic in the US, as opposed to an ethic of egalitarianism in Europe and many other countries. Thus, complaints that foreign competitors operate under different conditions that give them 'unfair' competitive advantage are used to justify remedial action to 'level the playing field'.
- Competition has intensified worldwide due to a 'thinning' of comparative advantage, driving domestic producers to examine all pertinent foreign policies and institutions that might give some advantage to their foreign competitors.
- Sluggish economic conditions in the 1980s and early 1990s fostered a defensive attitude towards Japan, which for sometime was believed likely to displace the US as the dominant commercial nation. This was a strong influence on the attitude of the Clinton administration, which was dominated by "Japanophobes who cried foul at every opportunity".
- Preferential Trade Agreements (PTAs) like the North American Free Trade Agreement (NAFTA) gave opponents a fixed target—the other nation to the agreement—to examine for defects in labour or environmental standards or political flaws.

Lower environmental and labour standards permit foreign producers to lower their costs. This is called "social dumping"—an illegitimate advantage that should be offset by a countervailing tariff. Otherwise, it is argued, there will be a race for the bottom as various nations seek to give domestic producers the cost advantages of low standards. Bhagwati points out weaknesses in several of these objections—such as the complaints based

on lower levels of environmental protection—and notes that there is little evidence to support the existence of any "race to the bottom" in the real world. He observes:

> "A great deal of empirical evidence suggests that multinationals do not choose environmentally unfriendly technologies, for example, or even locations because the environmental regulations are less stringent. Moreover, the race to the bottom occurs far more in another space: in tax concessions offered by governments (including local and state governments in federal countries) to attract multinationals."

Multinationals account for the vast bulk of US foreign direct investment. Moreover, if an effective remedy is really sought rather than just a rationale for protectionism, Bhagwati asserts that it would be far more effective simply to extend US standards to the overseas operations of US multinationals than to load trade treaties with conditions. Ultimately, however, it is indisputable that blocking exports from poor nations does nothing for either their environment or labour standards and reducing their resources make matters much worse. Indeed, there are many examples, especially in agriculture, of trade restraints worsening environmental problems. Altruistic efforts to use trade treaties and the WTO to advance social agendas draw severe criticism from Bhagwati. Trade treaties and the WTO are ineffective tools for social agenda purposes and by attempting to use them to achieve a variety of social objectives in addition to trade liberalisation, you risk failing at both. As he sets out subsequently:

> "[I]f we wish to advance several objectives, we will generally need an equal number of policy instruments. So both social and moral agendas and trade liberalization cannot be efficiently pursued through one instrument, that is, trade treaties and institutions that subject market access to fulfilment of a menu of social agendas such as those sought to be put into a Social Clause at the WTO."

Instead, separate appropriate means should be pursued for each objective, such as "the WTO for trade liberalization, the International Labour Organization for labour standards, the United Nations Environment Program for environmental issues, UNESCO for cultural preservation, and so on." The author convincingly summarises the weaknesses of relying

on the WTO for social agenda purposes and the advantages of addressing those problems through the agencies designed to deal with them and having the appropriate expertise.

The author recites the cautionary tale of trade sanctions against products produced with child labour. These undoubtedly hurt those they were (ostensibly) intended to help by forcing them "into worse occupations, with female children winding up even in prostitution". He notes:

> "To make a dent on the problem, we need to do 'heavy lifting': for example, work with local NGOs, ensure that children go to school when taken off work, and guarantee that the poor parents' incomes do not shrink below the survival line when the children's income disappears. By contrast, the trade sanctions approach ... is likely to be counterproductive (e.g. by pushing children into worse occupations) and therefore, while inspired by good intentions, could well be wicked in effects."

Of course, such social agenda items must be enforced against rich nations as well as poor nations if they are to be considered properly established. Bhagwati notes that US labour laws are far less congenial to the rights of workers to organise and strike than those of many other nations and could be deemed to be in violation of international labour standards dealing with the freedom of association of workers.

For this and several other reasons, rich nations are not interested in strengthening the appropriate international agencies so that they can act impartially within their spheres as the WTO does with respect to trade disputes. Nevertheless, Bhagwati challenges the objection that the social agenda agencies "have no teeth". Citing the Dracula effect—"expose evil to sunlight and it will shrivel up and die", he observes that shame, guilt and the activities of Non-Governmental Organisations (NGOs) all have the ability to create political pressures in favour of reforms.

On the other hand, trade sanctions are resented and frequently harden opposition. Remedial agreements forced by threat of trade sanctions will likely be less than enthusiastically implemented. Moreover, "since the sanctions are used by governments that are themselves morally imperfect, the credibility of their actions in behalf of morality is necessarily suspect and breeds cynicism and evasion."

Of course, these social and trade issues are joined not because dealing with them jointly is effective as a matter of substance but because of the political effectiveness of the traditional log-rolling tactic. By joining a variety of social agenda causes together and adding powerful protectionist interests, causes that will fail on their own have a chance to achieve some gains—even if those gains are of limited utility and cause vast economic harm. These are practical alliances for political purposes, of which the stated social aims are, in reality, widely recognised as subordinate to the restraint of international trade.

Confident of having put the traditional arguments against free trade to rest, he contemplates whether free trade can be credited not only with increasing the size of the pie, but also with creating an expanded middle class, which seeks the end of authoritarianism and promotes democracy. Bhagwati notes that the discussion of social issues opens the door for common arguments against free markets, namely that they are "incompatible with important broader goals such as egalitarian income distribution, environmental protection, labor standards, and human rights".

Whilst confounding stereotypes, Bhagwati can also be said to be an ambitious proponent of social policies. On the issue of labour standards, Bhagwati's approach is incisive as he points out the poor record of the US on labour standards and accuses it of "cynical exploitation of moral issues for *de facto* protectionism". As an alternative to the blunt stick of trade sanctions, Bhagwati suggests a mix of mandatory standards (requiring multinationals headquartered in developed countries to adhere to core labour standards) and voluntary standards (encouraging certification regimes such as the Social Accountability Label).

After addressing both the traditional arguments against free trade in his first lecture and the newer environmental and social objections in his second lecture, Bhagwati concludes: "I would boldly say therefore that we can confidently instruct our policymakers and tell our students, that free trade is a policy that makes eminent sense."

IV. Lecture 3: Getting To Free Trade

In his final lecture, Bhagwati explores four alternative methods to achieve free trade. Some of these routes are different from what might be expected. Unilateral elimination of trade barriers is the approach favoured by trade

economists. Bhagwati opines that reducing trade barriers is desirable regardless of what your trading partner does and hence argues that the normal negotiating approach is counter-productive and does not encourage PTAs, such as NAFTA and Mercosur. They "inevitably politicize trade more than multilateral trade agreements do". He argues in support of multilateralism and advances a critique of recent bilateral and regional free trade agreements (including NAFTA) as preferential arrangements that introduce growing chaos into the world trading system.

These sorts of agreements, he says, create regulatory complexity and confusion in trade policy, especially in the administration of overlapping, contradictory and mind-bogglingly complicated "rules of origin" requirements. Bhagwati calls this the "spaghetti-bowl effect"—firms and governments become tied up in knots of messy, discriminatory red tape, which makes little sense in a world of integrated cross-border production.

Take NAFTA's complex rules of origin, which detail how much 'North American' content automobiles must have to cross borders tariff free. These are designed to keep companies from simply importing goods from outside the free trade zone and selling them within it. Bhagwati also argues that such bilateral trade agreements entice the members of a free trade zone to discriminate against non-members.

Further, they create artificial results. For example, the US trade that NAFTA diverts to Mexico may be trade that the US otherwise would have transacted with Taiwan. Bhagwati argues that conventional unilateralism and multilateral reciprocity are the preferred approaches, while PTAs such as NAFTA and aggressive unilateralism are "a pox on the world trading system". Reserving his wrath for the drafters of "preferential trade agreements" (a term he insists is a more accurate description than "free trade agreements" since the latter term can gull politicians into thinking that they are a means to free trade), Bhagwati notes that PTAs are often trade diverting, not trade creating—and hence projected gains are often illusory. They hamper multilateral trade negotiations by sapping the energy of trade negotiators too. Further, Bhagwati contends that PTAs hurt poor nations as they are the least equipped to conduct bilateral negotiations.

Bhagwati's concern regarding PTAs is more deeply felt than any other issue in the text. He concludes, "While the case for free trade is robust, having surmounted the traditional objections over two centuries, and is

capable of meeting the recent objections from civil society and labor unions as well, the headlong rush into preferential trade has left free trade in a sorry state."

Bhagwati believes that democracy and free trade together can deliver both economic growth and social reform, although he concedes that growth is not inevitable in a democracy. He presents himself as the human face of global *laissez-faire* economics. He insists that open societies can be created without using trade sanctions as a weapon. He places his faith in 'voluntarism', which would rely on the global communications network and NGOs to shame companies and governments into, for example, paying workers a living wage. He argues that the spreading of wealth alongwith these private efforts will eventually create the working conditions and educational advancement that are common in the industrialised nations.

While properly condemning restraints by rich nations on exports from poor nations, Bhagwati fully acknowledges that protectionism, which is generally far greater among the poor nations than among the rich nations, plays a major role in keeping them poor and is just a part of the vast governance problems these nations must begin to resolve to finally begin to achieve some real development. The author properly dismisses the absurd notion that trade impoverishes poor nations, noting that India was kept impoverished for a quarter of a century by its smothering protectionist policies. The subsequent lowering of trade barriers has significantly increased its growth rates.

The Economist reports that during the 1990s, developing nations, which were most open to international trade, experienced an annual gross domestic product growth of five per cent per person. Those most closed, suffered declines. This is not to deny that the removal of trade barriers may cause some difficulties—as any change, no matter how beneficial, inevitably will. This is also not to deny that there will be occasional business recessions as is usual in the capitalist business cycle. However, the frequency and harshness of these downturns will vary between nations in relation to the degree of good governance established to facilitate profit-driven, market-directed commerce.

Importantly, Bhagwati makes an impressive case for 'going it alone' on the road to trade liberalisation and endorses the re-emergence of unilateral liberalisation and reductions in trade barriers at points around the globe as making eminent economic sense. The book lists the United Kingdom in the 19th century and, more recently, Hong Kong, Singapore and Chile as examples of countries that have benefited by unilaterally dropping their trade barriers. "We need to remember," he writes, "that if we refuse to reduce our trade barriers just because others do not reduce theirs, we lose from our trading partners' barriers and then lose again from our own."

At the same time, Bhagwati argues against what he calls "aggressive unilateralism" or the efforts of large economies to bully smaller ones into opening up their markets. He includes in this category actions brought under Section 301 of the *1974 Trade Law*, which allows the US to respond to the 'unfair' trading practices of other nations by raising barriers against their products. Surprisingly, Bhagwati gives little attention to these attempts to force open markets, other than to say, "No one likes a bully". Aggressive unilateralism does create an atmosphere of distrust among nations. Instead of looking for ways to benefit their citizens by reducing trade barriers, nations start to look for bargaining chips to play in international negotiations. Attempts to punish 'unfair' trade rarely have been about opening up markets. Rather, they have been efforts at domestic protection. Domestic firms are almost always on the lookout for ways to exclude foreign goods and services. If they can do so under the banner of freeing trade, so much the better for them. In a lecture format, of course, his time was limited, but it still would have been better if he had gone into a little more depth on this issue. While multilateralism and unilateralism may indeed be preferable to bilateralism in trade policy, regional agreements may not be as destructive as Bhagwati argues.

Addressing issues such as the steel tariffs recently erected by the US to protect its steel manufacturers and other similar actions undertaken by developed countries, which are WTO-inconsistent and are pivotal in the formulation of opinion regarding free trade, Bhagwati consents that:

> "The real problem is when we (i.e. the US) do things like that and we are supposed to be the ones who are most free trade oriented, the big proponents of free trade, ideologically and so on ... when we do this it's very difficult for President Arroyo of the Philippines,

> for the Prime Minister of India, who are all trying to move a little closer to free trade ... And then you say look the big dog on the block is doing something which is hypocritical and that makes our life more difficult in the developing countries."

However, the book indicates that the solution for each of these issues is provided for in the trading mechanism in place and therefore a review of its need is not in order.

V. Conclusion

A comparison between Bhagwati's *Free Trade Today* and Douglas A. Irwin's *Free Trade Under Fire* is irresistible. However, it is important to realise that the former is an effort to turn lectures into a book and may have therefore some limitations, whereas the latter is a book written and published solely in the defence of free trade.

Although the book is written in language, which is relatively easy for a wide cross-section of his readers to understand, some prior relevant background in this area significantly amplifies the nuances which characterise much of Bhagwati's work. Autobiographical anecdotes provide a reader with a brief guide to the author's contributions to available academic works on the theories of trade and trade policy. Also, this book attacks the proliferation of 'free trade areas', which the author believes have the potential of becoming a detrimental diversion from non-discriminatory trade and a "playground (under the guise of liberalizing trade) for mischievous protectionists".

This book from Professor Bhagwati, whom *The Financial Times* calls "the doyen of economists working on international trade", illuminates the trade debate today and points toward freer trade in the future. Bhagwati defends free trade against the 'American virus' of so-called fair trade and the related threat of sanctions against poor countries that fail to meet Western labour and environmental standards. He then offers a road map to a more open global economy. The blueprint for the argument that unilateral free trade at home can encourage freer trade abroad is distinctly perceptible in this book.

A central weakness in this book or, in reality, in the entire proposition of free trade is that Bhagwati assumes (and probably rightly so too) that readers value growing economies and rising standards of living. For those who see

commercialism and affluence as sins, the fact that free trade increases material welfare makes it all the more suspect. No economic argument will reach such critics. However, it certainly does make a powerful case for free trade—a case that apparently must be made again and again.

Professor Jagdish Bhagwati is by far the most powerful, creative, rational and persuasive international trade theorist of this generation. His writing and work have fundamentally changed the way policy makers, conscientious citizens and governments think about free international trade and protection. His refined and witty writing style and his regular appearances worldwide in public debates continue to deliver the *coup de grace* to even the most regressive critics of free trade. In this book, he punctures all the standard false arguments for protection and uses the modern theory of commercial policy to suggest how a balanced approach to trade and social policy might look. *Free Trade Today*, which refutes critics of free trade, is beyond doubt a *tour de force.*

In an interview with *The New York Times* in 1999, Professor Bhagwati had said: "If you want to be in the public domain, you need the courage to be unconventional. Logic is not enough. You need wit, irony, good anecdotes and sarcasm. It always works."[7] And worked it has, Professor Bhagwati! *Free Trade Today* is a prime example of a book in the public arena, which combines these qualities. Through its incisive analysis and persuasive arguments, the book portrays Bhagwati's mastery over this field and leaves the reader simply nodding in agreement with Bhagwati's views on how to go forward in this trading environment.

"I have been alone, but I hang in there," Professor Bhagwati is reported to have once said, adding with his familiar mischievousness, "Usually the world comes around."[8] Today, Professor Bhagwati is no longer alone. He leads the many voices advocating free trade and the world is slowly but surely coming around.

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[7] Chris Hedges, "Jagdish Bhagwati: A Gadfly Who Stings Right And Left With Passion", *The New York Times*, 22 January 1999.

[8] *Ibid.*

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