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FROM THE PRINCIPAL'S DESK

As the Government Law College comes out with the 4th edition of its annual *Law Review*, I cannot help but take a step back and admire with pride the efforts of the students who have contributed to this year's *Law Review*. Last year's *Law Review* received a tremendous response from several corners. It was sent to over 80 Universities and Colleges, both in India and overseas, all the Hon'ble Judges of the Supreme Court of India and the Bombay High Court as well as a number of distinguished lawyers and advocates across India.

For the first time since its inception, *The Law Review* has accepted an article from the academic fraternity. Professor Phil Thomas from the Cardiff University, Wales has co-authored the article on Identity Cards with Professor Sunita Masani from the Government Law College. It is worth noting that Professor Thomas is not only a leading academician but has also been the editor of the Journal of Law and Society of the Cardiff University for 30 years.

As a part of its endeavour to be a proactive publication forum, the Law Review Committee conducted an orientation program for the students of the college to enable them to develop their legal research and writing skills. The Law Review Committee has also developed and adopted its own set of specifications for format and citations which are loosely based on international standards.

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. Keeping in mind the tenor of some of the articles this year, the Editorial Board was expanded to include not only legal luminaries but also experts from the Armed Forces. I thank the Editor-in-Chief, Mr Justice YV Chandrachud, former Chief Justice of India, as well as the members of the Editorial Board, whose invaluable inputs have made a qualitative contribution to *The Law Review*. I also thank the contributors for their generous support in making this publication possible.

This is the 150th year of the Government Law College. As we look ahead, I am sure that as in the past, *The Law Review* will continue to be the fostering ground for our student-authors. It is heartening to see that with every passing year they excel the high standards previously set by this publication. I am certain that these scholarly writings will go a long way in the development of the law, as also in sustaining and initiating legal debate and reform in the years to come.



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

FOREWORD

In my foreword to the last year's journal, I had said that I was deeply impressed by the high quality of articles written by our students. I am happy to be able to say the same about the articles in this issue. The remarkable thing about these articles is the sense of originality and the desire for creativity which is displayed therein. It will be difficult to make a comparative assessment of the articles on their merits. Each article has a merit of its own. I therefore recommended that the articles should be published in alphabetical order, according to the surnames of the writers.

I will now state briefly what each writer has said in the article.

1. The Idea-Expression Fallacy: Effacing the Traditional and Doctrinaire Limits

Abhinav Chandrachud

'An idea must be considered in a relative context. Ideas derive their existence from individual perception. A painting has a different sense to the painter and the appreciative public. In copyright law therefore, two perspectives of the idea ought to be taken into consideration. The first is the idea that the author possesses. The question that must be asked is: What is it that the author wishes to convey? The second perspective is the idea of the spectator or viewer, who is equally important in copyright law. The question that arises is: What is the impression created on the minds of the viewers? Both must be considered while determining the question of infringement.'

2. Disciplinary Provisions Under the Navy Act, 1957

Jasdeep Randhawa

'The large number of legal cases being contested by the Defence Ministry and the Armed Forces Headquarters run into more than 100,000, showing that the justice delivery system of the Armed Forces has been moving at a very slow pace, and has not been able to satisfy the aspirations of the men in uniform. The Supreme Court, in the Bedi case commented that, "Reluctance of the apex court more concerned with the civil law to interfere with the internal affairs of the armed forces is likely to create a

distorted picture in the minds of the military personnel that the persons subject to the armed forces are not citizens of India”.’

3. Nanotechnology: Protecting the Next Big ‘Small’ Thing
Shrinivas Sankaran

‘The dilemma of copyrighting a molecular or atomic structure arises particularly in the manufacture of proteins which assemble into working molecular machines to build the ribosomes or aid in the manufacture of new and improved drugs. “Ribosomes, programmable machines for manufacturing proteins are nature’s closest approach to a molecular assembler. ... Since biomolecules already form such complex devices, its easy to see that advanced protein engineering could be used to build first-generation nanomachines.” Genetic engineering, as we know it, will undergo fundamental changes and will be empowered by Nanotechnology, as the fields of Biotechnology and Nanotechnology converge. “In fact, it will eclipse genetic engineering because it involves all matter—both living and non-living”.’

4. Legal Paternalism: The Indian Context
Natasha Treasurywala

‘Many people believe that the State should not violate the right to choose whether or not to use narcotic drugs, even if such drugs have harmful effects on the user. Addiction to certain drugs can have a major impact on an individual’s health causing depression, anxiety, insomnia and severe neurological problems. As per a survey held in 2002 in the US, in spite of the country spending millions of dollars educating its citizens on the dangers of narcotic drugs, an estimated 19.5 million Americans, or 8.3 percent of the population aged 12 or older were illicit drug users. This is a perfect example of education not being an absolute solution to potentially harmful activities.’

5. Identity Cards-In Whose Interest?

Prof. Phil Thomas and Prof. Sunita Masani

‘Thus, we can see that Identity Cards, or Entitlement Cards, as they are euphemistically named, constitute part of a response

pattern which, in turn, reduces civil rights in the name of the fight against the common international enemy: the terrorist. Given the national “emergency” supposedly faced then, protection against terrorism is a powerful argument, but not sufficiently powerful to convince the President of the US to promote the introduction of Identity Cards. Indeed, if the UK Government felt so strongly about the Card’s fighting efficiency, it would have been introduced immediately on a compulsory basis rather than seeking to introduce it by attrition over a period of years. On 3 July 2002, David Blunkett stated in the House of Commons, “I accept that it is important that we do not pretend that the Entitlement Card (now called the Identity Card) would be an overwhelming factor in combating international terrorism”.’

6. CASE REVIEW: The Saw Pipes Judgment
Nadia Gracias and Siddhima Kotak

‘In the authors’ opinion, with overcrowded courts, public interest favours efficient, inexpensive and speedy dispute resolution. This is more so in the commercial context where dispute resolution could well depend on custom and practice rather than on esoteric legal analysis. Even though public policy certainly cannot be said to be in conflict with public interest, paradoxically, in this case, it is public policy itself that has been used to undermine arbitrations in India.

It must not be forgotten that arbitrations allow parties to determine by way of a private bargain, how their chosen tribunal will resolve their dispute and what their respective obligations will be in relation to the conduct of reference. From this perspective it can be safely said that the *Saw Pipes* case has in one sweeping blow, upset the proverbial apple cart. “Finality” being the most attractive and unique feature of arbitration internationally has fallen by the wayside. Arbitration as it now stands in India is just another step in the appeal process that most can well do without.’

7. **LEGISLATION REVIEW: The Armed Forces (Special Powers) Act, 1958: Disarming the Law?**

Vishal Kanade

'A demand that has been consistently made by several bodies is that the Act be completely repealed. This might not be possible in the immediate future as there is a very active insurgency in the north-east region and the Armed Forces are facing what is described as a low intensity conflict.

The fact that militants and terrorists move across international borders further deteriorates the ground situation. There are also allegations that intelligence agencies of hostile countries are involved in encouraging terrorist activities in the north-east. In the *Naga People's Movement of Human Rights case*, the Supreme Court held that the provisions of CrPC with regards to use of Armed Forces in civilian areas such as section 131 were inadequate in the north-east.'



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

THE IDEA-EXPRESSION FALLACY: EFFACING THE TRADITIONAL AND DOCTRINAIRE LIMITS[†]

Abhinav Chandrachud*

'Heard melodies are sweet, but those unheard
Are sweeter; therefore, ye soft pipes, play on;'

John Keats, *Ode on a Grecian Urn*

I. INTRODUCTION

For a significant period of time the pinions of copyright law have been frayed, fettered and frustrated by the proposition that a copyright does not subsist in an idea by itself, but in the form or expression of the idea.¹ What is protected by copyright law is not original thought or information, but the expression of thought or information in some concrete form.² This principle was adopted by the Supreme Court of India in a series of normative precepts which have been unconditionally followed ever since.³ However, as the noted jurist Hugh Laddie cautions, like all

[†] This article reflects the position of law as on 26 July 2005.

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¹ See *Baker v. Selden* 101 US 99 (1880); *Mazer v. Stein* 347 US 201 (1954); *Reyher v. Children's Television Workshop* 533 F 2d 87, 90 (2nd Cir 1976); *Sandra Mayer v. Josiah Wedgewood & Sons Ltd* 225 USPQ 776 (SDNY 1985); *M Kramer Manufacturing Co, Inc v. Hugh Andrews, et al* 783 F 2d 421 (4th Cir 1986); *Mathew Bender & Co, Inc v. Kluwer Law Book Publishers, Inc* 672 F Supp 107 (SDNY 1987); *Eldred v. Ashcroft* 537 US 186 (2003); *Wilson v. Lukepy* (1875) 1 VLR 127; *Walter v. Steinkopf*, (1892) 3 Ch 489; *Holinrake v. Truswell* (1894) 3 Ch 420; *McCrum v. Eisner* (1918) 87 LJ Ch 99; *Wilmer v. Hutchinson & Co, Ltd* (1936-45) Mac CC 13 *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* (1964) 1 WLR 273.

² See Copinger *et al*, *Copinger and Skone James on Copyright* (13th edn Sweet and Maxwell London 1991) 165.

³ *RG Anand v. M/s Delux Films* (1978) 4 SCC 118, 140 (finding that 'There can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.') (the *RG Anand Case*).

pithy catchphrases, the proposition that there is no copyright in an idea is likely to lead to confusion.⁴

An idea would remain intangible, abstract, vague and undefined if not expressed in some material form or the other. Therefore, for an idea to be ensconced in the protection of copyright, it must first be expressed.⁵ The only possible way that an author or artist can *convey* his idea is in the expression of the idea. However, *protection* under copyright law is not restricted to the mere form or expression of the idea. If this were true, then any plagiarist could alter the words of a novel, make some small embellishment while employing the self-same ideas and call the novel his own. The author's work is protected regardless of the material form in which it is expressed, as long as it is expressed.⁶

When a novel written by an author is expressed in the form of a play, there is a quantum difference in the two works. When a novel written in English is translated into French, the expressive language of the author, the very instrument that he employs to communicate with his audiences, is replaced by another. If copyright protection were restricted to the tangible and formal attributes of a novel, protection would be extended so long as the infringing work remained within the confines of the written word, expressed on perceivable pages, written in similar languages. However, copyright protection embraces expression in *any material form*, irrespective of the mode of expression.

Over a period of time, an undue emphasis has been placed on the *form* and the *expression* of an author's idea, whereas what ought also to be taken into consideration is the *idea* which is being expressed. This article seeks to knock on the doors of substantive thought by delineating some of the anachronistic misconceptions of the idea in copyright law. In Part II, the elusive and relative definitions of an idea have been attempted along with a brief interpretation and analysis of subsistence and infringement. Part III examines the expediency of broadening the horizons of copyright protection, while examining the familiar dichotomy with the

⁴ Laddie *et al*, *The Modern Law of Copyright and Designs* (2nd edn Butterworths [London 2000]) vol 1, 97.

⁵ Copinger *supra* n. 2.

⁶ Section 14 read with section 51 of *The Copyright Act, 1957*, provides that reproduction in 'any material form' constitutes infringement of copyright.

aid of computer programs. Finally, Part IV puts to rest the fear of an idea monopoly.

II. THE MISCONCEIVED TRINITY: FORMULATING THE BOUNDARIES OF WHAT? HOW? AND WHEN?

A. *What is an Idea?*

Lord Hailsham of St Marylebone had, in the case of *LB (Plastics) Ltd v. Swish Products*, emphatically stated, 'Of course, it is trite law that there is no copyright in ideas ... But as the late Professor Joad used to observe, it all depends on what you mean by "ideas".'⁷

1. The Elusive Definition

The question of whether protection can be given by way of copyright to an idea is better answered by first determining the elusive boundaries of the idea. The questions that naturally arise are: What is an idea? What is the difference between an idea and an expression?⁸

An idea has been defined as 'an object of the mind existing in apprehension, thought or conception.'⁹ There are primarily two kinds of ideas: those that are expressed and those that are not expressed. The unexpressed idea finds refuge in the law of confidence,¹⁰ whereas copyright

⁷ (1979) RPC 551, 629.

⁸ Professor WR Cornish emphasises the need to give 'meaning and a sense of proportion to the often amorphous distinction between "expression" and "idea".' See Cornish and Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (5th edn Sweet and Maxwell London 2003) 9. Similarly, Hand, J finds that the distinction between the idea and the expression, especially in computer programs, will be 'inevitable and *ad hoc*', *Peter Pan Fabrics Inc v. Martin Weiner Corporation* 274 F 2d 487 (2nd Cir 1960). See also Knowles and Palmieri, 'Dissecting Kroft: An Expression of New Ideas in Copyright?' (1980) 8 *San Fernando Valley Law Review* 109.

⁹ P Ramanatha Aiyar, *The Law Lexicon* (2nd edn Wadhwa and Company Nagpur 1997) 863.

¹⁰ See *Anil Gupta v. Kunal Dasgupta* (2002) (25) PTC 1, 15 (Del); David Bainbridge, *Intellectual Property* (5th edn Pearson Education Delhi 2002) 273; SK Verma, 'Legal Protection of Trade Secrets and Confidential Information' (2002) 44 *Journal of the Indian Law Institute* 336 (no.3; July–September). See also *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948) 65 RPC 203; *Talbott v. General Television Corporation* (1981) RPC 1; *Fraser v. Thames Television* (1983) All ER 101 and *Franchi v. Franchi* (1967) RPC 149.

protection is of relevance when the idea is translated into material expression.¹¹

The decision of the New Zealand High Court in the case of *Plix Products Ltd v. Frank M Winstone*¹² underlines the proposition that there are essentially two kinds of ideas involved in the act of giving expression: general ideas and subsidiary ideas. The general idea involves the basic concept or the broad theme proposed to be employed by the author. Subsidiary ideas are those used in the exercise of giving concrete expression to a general idea.

2. The Relative Definition

An idea must be considered in a relative context. Ideas derive their existence from individual perception. A painting has a different sense to the painter and the appreciative public. In copyright law therefore, two perspectives of the idea ought to be taken into consideration. The first is the idea that the author possesses. The question that must be asked is: What is it that the author wishes to convey? The second perspective is the idea of the spectator or viewer, who is equally important in copyright law. The question that arises is: What is the impression created on the minds of the viewers? Both must be considered while determining the question of infringement.

An expression, on the other hand, represents the ideas that the author encounters. The written word is an utterance of our thoughts and feelings.¹³ It is the material form which defines the author's idea. It is material proof that the author's idea is, in fact, his own. However, it cannot be confused with the idea itself.¹⁴

¹¹ *Anil Gupta v. Kunal Dasgupta* (2002) (25) PTC 1, 15 (Del). See also *Zee Telefilms v. Sundial Communications* 2003 (3) Mh LJ 695.

¹² (1986) FSR 63, 93.

¹³ See Aiyar *supra* n. 9, 686.

¹⁴ It is a matter of fact and degree where the fine line between the two has been crossed. See *Galago Publishers (Pty) Ltd v. Erasmus* (1989) (1) SA 276, 284 (South Africa). See also *Nichols v. Universal Pictures*, 45 F 2d 119 (2nd Cir 1930) and *Ibcos Computers v. Barclays* (1994) FSR 275. The distinction between an idea and an expression has been dealt with later on in this article, see *infra* III, Moving Beyond the Obvious: Technology and the Law.

B. Subsistence of Copyright

Section 13 of the *Copyright Act, 1957* (the Act), deals with the works in which a copyright subsists. A simple reading of the provision reveals that an idea, by itself, does not satisfy the requirement for subsistence of copyright. Generally speaking, in order to qualify for protection under copyright law, an author's literary, dramatic, musical or artistic idea must be: a *work* which is *original*.

Since the definition of the word 'work' as provided for under the Act commits the fallacy of a circular definition,¹⁵ the question that must be asked is: what is a 'work' for the purposes of the Act? The answer can be found in the decision of the House of Lords in the case of *GA Cramp & Sons v. Frank Smythson*. The matter involved the question of whether a series of eight tables present in the 'Liteblue Diary' developed by the Respondents could be regarded as the subject matter of copyright. The diaries provided information which was clerical in nature, ie it required hard work, but no imagination. Viscount Simon LC stated, 'The sun does in fact rise, and the moon set, at times which have been calculated, and the utmost that a table can do on such a subject is state the result accurately. There is so far *no room for taste or judgement*.' (emphasis supplied)¹⁶

This decision prompts the inference that hard work and labour *simpliciter* will not qualify a work for subsistence of copyright. Reference can be made to the 'sweat of the brow' doctrine, by which copyright shall not subsist in a work merely because it involves the expenditure of the sweat of the brow (ie hard work).¹⁷ Notwithstanding the doctrine, however, the fact that a certain amount of labour is required for subsistence points out

¹⁵ Section 2(y) of the Act defines a 'work' *inter alia* as 'a literary, dramatic, musical or artistic *work*' (emphasis supplied), thus placing a circular reliance on the word 'work'. Simply put, a 'work' cannot be defined as a 'work'.

¹⁶ (1944) AC 329, 336.

¹⁷ See *Feist Publications Inc v. Rural Telephone Services Co Inc* (1991) 111 S Ct 1282 (laying to rest the 'sweat of the brow' doctrine when 'white pages' were held not to be entitled to protection under copyright law because they involved a certain amount of effort only and there was no skill or judgement). See also *International News Service v. Associated Press* 248 US 215 (1918) and *Miller v. Universal City Studios Inc* 650 F 2d 1372 (5th Cir 1981).

that 'a work' comes into being when labour is expended on its creation.¹⁸ Reference can be made to the decision of the Court of Appeals in the case of *William Hill (Football) Ltd v. Ladbroke (Football) Ltd* dealing with the question of subsistence of copyright in a compilation of football coupons, where Lord Denning stated:

'This argument [no copyright in an idea] contains a fallacy. True it is that there is no copyright in an idea but that is only true so long as the idea remains in the mind and is not put down on paper. But once it is written down, the writing is the subject of the copyright. No one is entitled to copy it on the plea that it was only an idea.'¹⁹

It is apparent that a work is considered 'original' when skill and judgement are utilised in its creation.²⁰ As mentioned above, an idea is translated into a work for the purposes of the Act, when a certain amount of labour is expended in giving it material expression. Thus, an idea can be protected under copyright law if a certain amount of skill, judgement and labour are expended in its development. The following argument proposes to satisfy the question of how an idea merits protection under the law of copyright.

When an author embarks upon his literary, dramatic, musical or artistic journey, he first conceives a basic or general idea. Such an idea can never

¹⁸ Cf. *University of London Press Ltd v. University Press Tutorial Ltd* (1916) 2 Ch 601, 608; *Macmillan & Co Ltd v. Cooper* (1923) 40 TLR 186, 190; *British Broadcasting Co v. Wireless League Gazette Publishing Co* (1926) Ch. 433, 440; *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* (1964) 1 WLR 273, 277 and *LB Plastics Ltd v. Swish Products Ltd* (1977) FSR 87. See also Abu Jaliwala, 'Hyperlinks: A Study of the Legal Controversies' (2004) 3 *Law Rev GLC* 1.

¹⁹ (1980) RPC 539, 546; see also Laddie *et al supra* n. 4, 222.

²⁰ *University of London Press Ltd v. University Press Tutorial Ltd* (1916) 2 Ch 601, 608; *Macmillan & Co Ltd v. Cooper* (1923) 40 TLR 186, 190; *British Broadcasting Co v. Wireless League Gazette Publishing Co* (1926) Ch. 433, 440; *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* (1964) 1 WLR 273, 277 and *LB Plastics Ltd v. Swish Products Ltd* (1977) FSR 87. However, the precise amount of skill, labour and judgement required cannot be prescribed, but is a matter to be determined by fact. See *Macmillan & Co Ltd v. Cooper*, (1923) 40 TLR 186; *Harman Pictures, NV v. Osborne and Others* (1967) 1 WLR 723.

be the subject of copyright protection.²¹ Thereafter, he begins to exercise his mind and draws upon his reserves of skill, judgement, knowledge and talent to formulate subsidiary ideas for the expression of his general concept. These subsidiary ideas are 'original' inasmuch as they involve skill and judgement. This process, coupled with the act of putting the subsidiary ideas down into material expression, involves labour. The end result is material proof of the skill, judgement and labour expended on the idea. The more detailed, ornate and elaborate the idea, the greater is the skill, judgement and labour involved.²² Once the general concept with the aid of the subsidiary ideas is given material expression, the subsidiary ideas which involved skill, labour and judgement are worthy of protection under copyright law.

A screenwriter may develop a general idea for a show broadly involving friends. The idea is broad and the concept is common. However, he then begins to exercise his mind and he finds that the show shall have six friends and three primary sets including two apartments and a coffee shop. He intricately weaves the characters' lives in an appealing manner, utilising his skill and judgement in developing plots that captivate world audiences. He calls the show 'Friends'. The idea of telling a tale of six friends is not copyrightable, but the manner in which it is done certainly is.

In furtherance of this argument, it must be stated that in the case of *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* it was contended by the Appellants that the Respondents' compilation merely required 'putting in print what were called "ideas" involving, therefore, nothing in the way of original literary work in any sense ...'.²³ However, Lord Evershed held:

²¹ *Green v. Broadcasting Corporation of New Zealand* (1989) RPC 469 (holding that 'the abstraction implicit in a general idea or concept may be delineated by or attended with detail or pattern or incidents sufficiently substantial to attract copyright in the whole.'). See also *Natal Picture Framing Co Ltd v. Levin* (1920) WLD 35 (S Afr); *Valcarenghi v. The Gramophone Co Ltd* (1928-1935) Mac CC 301 (denying infringement of the libretto of an operatic work by short synopsis of the story of the opera since they described the general outline of the piece); *Herbert Rosenthal Jewelry Corp v. Kalpakian* 446 F 2d 738 (9th Cir 1971) and *Plix Products Ltd v. Frank M Winstone (Merchants)* (1986) FSR 63.

²² *Austin v. Columbia Gramophone* (1917-1923) Mac CC 398 and *Vane v. Famous Player Film Co Ltd* (1923-1928) Mac CC 196.

²³ (1964) 1 WLR 273, 281.

‘There can, in my judgement, be no doubt upon the evidence in the present case that, when all the hard work has been done in deciding upon the wagers to be offered, there still remains the further distinct task, requiring considerable skill, labour and judgement (though of a different kind) in *the way in which the chosen wagers are expressed* and presented to the eye of the customer.’ (emphasis supplied)²⁴

Emphasis was thus placed upon the way in which the work was expressed and the selection and arrangement, as opposed to the expression itself, which constitutes nothing but the subsidiary ideas of the author.

In *White-Smith Music Co v. Apollo Co*, while dealing with the question of copyright infringement in a musical piece, Oliver Wendell Holmes, J stated:

‘The ground of this extraordinary right [copyright] is that the person to whom it is given has invented some new collocation of visible or audible points – of lines, colors, sounds, or words ... [T]hat collocation would be protected *according to what was its essence*. One would expect the protection to be co-extensive not only with the invention, which, though free to all only one had the ability to achieve, but with the possibility of reproducing *the result which gives to the invention its meaning and worth*.’ (emphasis supplied)²⁵

Similar emphasis was placed on the essence of the work in *LB (Plastics) Ltd v. Swish Products* where, while dealing with the question of infringement of copyright in an artistic work of production drawings in the Plaintiffs’ ‘knock-down’ drawer system, the House of Lords found that intangible and yet crucial elements of the work had been copied by the Respondent. It was held:

‘What the respondents in fact copied from the appellants was no mere general idea. It was, to quote the respondents’ own language to “*follow the pattern*” or principle “*in part or in whole*” with “*minor changes*” to the design, with the same choice of

²⁴ (1964) 1 WLR 273, 281.

²⁵ 209 US 1, 18 (1908). See also Max Lemur, *The Mind and Faith of Justice Holmes* (Higginbothams Madras 1974), 215.

principle members interfitting in the same way to the same critical dimensions’ (emphasis supplied)²⁶

Thus, it is submitted that the manner, arrangements,²⁷ patterns, details, schemes, incidents and other such delineations of the general concept all form a part of the subsidiary ideas which are employed by the author of the work in giving it material expression. These embellishing details constitute *en bloc* the ‘essential features’ of the work. What is protected by copyright law is the ‘essence’ of the work stripped of all its superfluous expressive elements, as opposed to the mere form or expression of the work.²⁸ Dwelling on the form would be a conceptual fallacy, as anyone who asks for an idea, is bound to get an expression.²⁹

C. *Infringement of Copyright*

Copyright infringement takes place under section 51 of the Act when any person, *inter alia*, does anything, the exclusive right of which is conferred upon the owner of the copyright. Thus, in order to fathom the acts prohibited by copyright law, it would be essential to dwell upon the provisions of section 14 of the Act, which deal with the meaning of copyright. When these two sections are read together, it is clear that infringement takes place when a person performs any of the acts enumerated under section 14 of the Act with respect to: the *whole* work or a *substantial part* of the work.

²⁶ See (1979) RPC 551, 629; cf. *Bleiman v. News Media (Auckland)* (1994) 2 NZLR 673. See also *Moffat & Paige Ltd v. Gill* (1902) 86 LT 465 and *Rees v. Melville* (1914) Mac CC 168.

²⁷ *Jarrold v. Houlston* (1857) 3 K & J 708; (1978) 4 SCC 118, 139 and *Atari Inc v. North American Philips Consumer Electronics Corp* 672 F 2d 607 (7th Cir 1982) (stating that colours, sequences, arrangements and sounds provided something ‘new or additional over the idea’). See also *Goodson-Todman Enterprises, Ltd v. Kellogg Co* 513 F 2d 913 (9th Cir 1975).

²⁸ See *King Features Syndicate v. Kleeman* (1941) 58 RPC 207, 210 and *Gleeson v. Denne*, (1975) RPC 471, 486.

²⁹ GWG Karnell, ‘The Idea Expression Dichotomy – A Conceptual Fallacy’ (1989) *Copyright World* 7, 16. See also F Willem Grosheid, ‘When Ideas Take the Stage’ (1994) *European Intellectual Property Review* 16(6), 219; Brendan Brown, ‘The Ideal Expression Dichotomy and the Games that People Play’ (1995) *European Intellectual Property Review* 17(5), 259.

1. Substantiality of the Idea

If the whole work has been reproduced by the Defendant, there can rarely be any doubt of infringement. The problem arises when the courts ask the question of whether reproduction has been substantial or not.³⁰

Emphasis in this respect must be placed on the renowned aphorism that the test of substantial reproduction is one of quality and not of quantity.³¹ What matters is not the amount or quantum of matter taken, but the quality and respective pertinence of that which is taken.³² For example, in *Narayan Rao v. V Prasad*,³³ a speech of two and a half minutes was found to be a substantial part of a film which was three hours long. Thus, with this principle in mind, a two-fold test was developed in the case of *Spectravest Inc v. Aperknit Ltd*³⁴ to determine whether the reproduction in a suit for infringement was substantial or not. First, the substantial parts of the Plaintiff's work must be identified and second, it must be determined if those parts have been reproduced in the Defendant's work.

Thus, it is submitted that if the subsidiary ideas employed by the author qualitatively form a substantial part of the author's work, they are entitled to protection from infringement under section 51 of the Act.³⁵ This can be further substantiated by the principle that in a suit for infringement of copyright, emphasis should not be placed on the dissimilarities between the two works, but rather, on the broad similarities

³⁰ Cornish *supra* n. 8, 422; P Narayanan, *Copyright and Industrial Designs* (3rd edn Eastern Law House Kolkata 2002) 169.

³¹ *See Ladbrooke (Football) Ltd v. William Hill (Football) Ltd* (1964) 1 WLR 273, 276; *Industrial Furnaces Ltd v. Reeves* (1970) RPC 605, 623; *Antocks Lairn Ltd v. I Bloohn Ltd* (1971) FSR 490; *George Hensher Ltd v. Restawile (Upholstery) Lancs Ltd* (1975) RPC 31; *Catnic Components Ltd v. Hill and Smith Ltd* (1982) RPC 183; *PCR v. Dow Jones Telerate* (1998) EMLR (Entertainment & Media Law Reports) 407 and *Ludlow Music v. Robbie Williams* (2001) FSR 271.

³² *Leslie v. J Young & Sons* (1894) AC 335 (finding four pages of a book containing forty pages to be substantial).

³³ (1979) 2 APLJ 231.

³⁴ (1988) FSR 161.

³⁵ *See Designers Guild Ltd v. Russell Williams (Textiles) Ltd* (2001) FSR 113, 121.

and the overall impression that the work has on the minds of the viewers.³⁶ Also noteworthy is the principle that a copy is that which comes so close to the original, as to give every person seeing it the idea created by the original.³⁷ Such an impression is created not by the intricacies of expression and form, but by the ideas that form the backbone and essence of the expression.

2. Insignificance of the Form/Medium of Expression

Section 14 of the Act entitles the author of a literary work to reproduce his work in 'any material form' including its storage in any medium by electronic means.³⁸ The author of an artistic work has a right to reproduce the work in any material form regardless of any dimensional shift, ie, from a two-dimensional work to a three-dimensional work, etc.³⁹ Further, the exclusive right of the author to make any adaptation⁴⁰ and translation⁴¹ of the work is made explicit in the Act.⁴² These provisions clearly indicate the insignificance of the medium of expression or the form of a work in copyright law. Thus, the very meaning of copyright given under the Act highlights the importance of the idea in copyright law.

In this respect, the copyright in a work could be infringed when it was translated from one language into another.⁴³ Infringement could also take

³⁶ See *Mohendra Chundra v. Emperor* AIR 1928 Cal 359; *C Cunniah v. Balraj* AIR 1961 Madras 111; *Harman Pictures, NV v. Osborne*, (1967) 1 WLR 723; *Novelty Textile Mills, Inc v. Joan Fabrics Corpn* 558 F 2d 1090 (2nd Cir 1977); *Spectravest Inc v. Aperknit Ltd* (1988) FSR 161 and *Wildlife Express Corpn v. Carol Wright Sales* 18 F 3d 502 (7 Cir 1994).

³⁷ *West v. Francis* (1822) 5 B & Ald 737, 743; *King Features Syndicate v. O & M Kleeman Ltd.* (1941) AC 417; *Merchant Adventurers Ltd v. M. Grew & Co Ltd* (1971) FSR 233, 237. Alternatively, a copy is that which comes so near to the original as to suggest that original in the minds of every person seeing it. See *Hanfstaengl v. Smith* (1905) 1 Ch 519, 524; *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* (1964) 1 WLR 273 and *Lerose v. Hawiek Jersey* (1974) RPC 42, 49.

³⁸ *The Copyright Act, 1957*, section 14(a)(i).

³⁹ *The Copyright Act, 1957*, section 14 (c)(i).

⁴⁰ The word 'adaptation' is defined in section 2(a) of the Act.

⁴¹ *The Copyright Act, 1957*, section 14 (a)(v) (only applicable to literary works).

⁴² *The Copyright Act, 1957*, section 14 (a)(vi) and 14 (b)(v).

⁴³ *Burnett v. Chetwood* (1817) 2 Mer 441 and *Cate v. Devon and Exeter Constitutional Newspaper Co* (1889) Ch D 500.

place when a work was translated into a computer language.⁴⁴ Similarly, conversion of a work into Morse Code, Braille or a telegraph code without authorisation would constitute infringement.⁴⁵ It is submitted that when a particular work is translated from one language into another, the subsidiary ideas prevalent in the original work are carried over into the translation. In all these cases there is an infringement of copyright, in spite of the fact that the form or expression of the work is different.

Similarly, when the plot of a novel is turned into a play without the utilisation of the actual language used in the novel, the copyright in the novel could still be infringed.⁴⁶ Purely for the sake of illustration, it may perhaps be found that one of Shakespeare's plays is infringed by virtue of its enactment by mimes. In such cases, regardless of whether the expression was similar or not, infringement could take place if the combination of events in the original work was reproduced in the adapted work.⁴⁷ Further, a pictorial representation of the plot of a book (in the form of a cartoon strip, etc) would constitute infringement in spite of the fact that no words were used in the expression. On similar lines, the dimensional shift of an artistic work, or the reproduction of an article represented in a drawing or graphic work would constitute infringement.⁴⁸

⁴⁴ See Copinger *supra* n. 2, 216.

⁴⁵ See *Ager v. Peninsular and Oriental Steam Navigation Co* (1884) 26 Ch D 637; *Ager v. Collinridge* (1886) 2 TLR 291; *Anderson & Co Ltd v. Lieber Code Co* (1917) 2 KB 469 and *Apple Computer Inc v. Mackintosh Computers Ltd* (1988) 44 DLR (4th) 74. See also *Express Newspapers plc v. Liverpool Daily Post and Echo plc* (1985) FSR 306.

⁴⁶ *Corelli v. Gray* (1913) 30 TLR 116.

⁴⁷ See *Kelly v. Cinema Houses Ltd* (1928–35) Mac CC 362; *Dagnall v. British and Dominion Film Corporation Ltd* (1928–35) Mac CC 39; *MacGregor v. Powell* (1936–1945) Mac CC 233; *De Mandnit v. Gaumont British Picture Corporation Ltd* (1936–1945) Mac CC 292; *Holland v. Vivian Van Damm Productions Ltd* (1936–1945) Mac CC 69; *Harman Pictures, NV v. Osborne* (1967) 1 WLR 723; *Fernald v. Jay Lewis Productions Ltd* (1975) FSR 499 and *Zeccola v. University City Studios Inc* (1982) 46 ALR 189.

⁴⁸ *Dorling v. Honnor Marine Ltd* (1965) Ch 1; *LB (Plastics) Ltd v. Swish Products Ltd* (1977) FSR 87. See also *Hanfstaengl v. Empire Palace* (1894) 2 Ch 1 (CA); *Hanfstaengl v. Baines* (1895) AC 20 (HL); *Bradbury v. Day* (1916) 32 TLR 349; *Burke and Margot Burke Ltd v. Spicers Dress Designs* (1936) Ch 400; *King Features v. Kleeman* (1941) 2 All ER 403 (HL); *Wham-o-mfg v. Lincoln* (1985) RPC 125; Cf. *Horgan v. Macmillan* 789 F 2d 157 (2nd Cir 1986) (finding a book of photographs to have infringed ballet choreograph) and *Steward v. Abend* 495 US 207 (1990) (finding that a motion picture could infringe a copyright in a book due to its 'unique setting, characters, plot, and sequence of events').

Finally, the reproduction of arrangements and transcriptions of existing musical works would constitute an infringement of the copyright in the original.⁴⁹

Thus, in a dimensional shift or a change in the general medium of expression in the manners which have been indicated above, what remains the same, and what entitles the author to protection, is the idea that has been employed in the work, rather than the material form or expression.⁵⁰

3. The Intrinsic and Extrinsic Tests

The crucial role of ideas in determining the question of infringement of copyright was pointed out by the Ninth Circuit of the United States Court of Appeals in the case of *Sid & Marty Kroft Television Products v. McDonald's Corporation*,⁵¹ where the 'extrinsic' and 'intrinsic' tests in copyright law were introduced. While the intrinsic test focused on a subjective analysis of whether the 'ordinary, reasonable audience' would find the works substantially similar in the 'total concept and feel of the works',⁵² the extrinsic test was dubbed as a 'test for the similarity of ideas.' The extrinsic test encompasses elements such as plots, themes, dialogues and settings, as also the pace and sequence of the work.⁵³ Simply put, the courts must determine if there is a similarity of expression after determining if the general idea of the two works is substantially similar, while giving

⁴⁹ See *Wood v. Boosey* (1868) LR 3 QB 223.

⁵⁰ See also *Apple Computers Inc and anr v. Computer Edge Pvt Ltd and Suss* (1984) FSR 481 (protecting computer programs that were stored on ROM chips, RAM, or magnetic disks).

⁵¹ 562 F 2d 1157 (9th Cir 1977) (*Kroft Television Products Case*). See also *Arnstein v. Porter* 154 F 2d 464 (2nd Cir 1946).

⁵² Similar to the test developed in *West v. Francis* (1822) 5 B & Ald 737.

⁵³ *Kouf v. Walt Disney Pictures and Television* 16 F 3d 1042 (9th Cir 1944); *Jason v. Fonda* 526 F Supp 774 (CD Cal 1981); *Litchfield v. Spielberg* 736 F 2d 1352 (9th Cir 1984); *Berkic v. Orichon* 761 F 2d 1289 (9th Cir 1985); *Olson v. National Broadcasting Co* 855 F 2d 1446 (9th Cir 1988); *United Telephone Company of Missouri v. Johnson Publishing Co, Inc* 855 F 2d 604 (8th Cir 1988); *Narell v. Freeman* 872 F 2d 907 (9th Cir 1989); *Shaw v. Lindheim* 919 F 2d 1353 (9th Cir 1990) and *Cavalier v. Random House* 297 F 3d 815 (9th Cir 2002).

due notice to the 'concept and feel' of the two works.⁵⁴ The prevalence of these tests reiterates the pertinence of the idea in copyright law, emphasising that ideas ought, in the least, to be considered if not protected.

4. The Average Consumer Test

The average consumer test pre-supposes that the consumer is an ordinary man of average intelligence and imperfect recollection.⁵⁵ No law can have an existence independent of the people to whom it applies and therefore, the law must take into consideration the people who are likely to be deceived.⁵⁶ The concept was first developed in trademark law, but the significance of this test in copyright law was pointed out by the Supreme Court of India in the *RG Anand Case* where it was held that 'the surest and safest test of determining whether or not there has been a violation of copyright is to see if the reader, spectator or viewer, after having read or seen both the works, is of the opinion that the subsequent work appears to be a copy of the original'.⁵⁷ The ordinary man will not get an opportunity of weighing and measuring the two works side by side to see if the

⁵⁴ See *Taylor Corporation v. Four Seasons Greetings* 315 F 3d 1039 (8th Cir 2003). See also Alfred C Yen, 'A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"' (1989) 38 *Emory Law Journal* 393.

⁵⁵ *National Sewing Thread Co Ltd v. James Chadwick and Bros Ltd* AIR 1953 SC 357; *Cadilla Healthcare Ltd v. Cadilla Pharmaceuticals Ltd* (2001) 5 SCC 73 and *Mahendra & Mahendra Paper Mills Ltd v. Mahindra & Mahindra Ltd* (2002) 2 SCC 147. Equally significant are the decisions of the Bombay High Court on the matter. See *Scotch Whisky Association and Another v. Pravara Sahakar Shakar Karhana Ltd* 1992 (2) Bom CR 219; *Lupin Laboratories Ltd v. Jain Products* 1998 (2) LJ 820; *SR Thorat Milk Products Pvt Ltd v. Sahyadri Dairy* 2002 (6) Bom CR 327; *BDH Industries Ltd v. Croydon Chemical Works Pvt Ltd* 2002 (3) All MR 61; *Boots Company plc England v. Registrar of Trademarks* 2002 (2) Mah LJ 834; *Indchemie Health Specialities Pvt Ltd v. Naxpar Labs Pvt Ltd and Another* 2002 (2) Mah LJ 513 and *ITC Limited v. GTC Industries Ltd* 2003 (2) Bom CR 417.

⁵⁶ See *Reckit and Colman v. Borden Inc* (1990) 1 All ER 873.

⁵⁷ (1978) 4 SCC 118, 140. Reference can also be made to the 'ordinary observer test' which was applied by the United States Circuit Courts in cases involving novels, plays and paintings. See Michael Ferdinand Setzer, 'Copyright Infringement Actions: The Proper Role for Audience Reactions in Determining Substantial Similarity' (1981) 54 *Southern California Review of Law* 385.

formalities of expression have been reproduced.⁵⁸ When an ordinary man views a literary or artistic work, an idea or impression is created on his mind. When he comes across a work similar to the previous one, the similarity in the two works is evident because the impression created by the second work is similar to that created by the first. It is therefore submitted that the ordinary man will find a work to be the copy of another if the idea conveyed by the two works is the same.

III. MOVING BEYOND THE OBVIOUS: TECHNOLOGY AND THE LAW

A. *The Utilitarian General Idea*

Copyright law, at its inception, had both a negative and a positive function. Its negative function was to curtail the acts of plagiarists,⁵⁹ while its positive function was to encourage the creativity and drive of authors in the development of works which would be beneficial to society.⁶⁰ Legislators and jurists alike, realised the need to protect the works of authors and artists, to reassure them that their works would not be hacked by plagiarists, but protected by law.⁶¹ This positive function and ideology is embodied in the quintessential statement, '[T]here remains the rough practical test that what is *worth copying* is *prima facie worth protecting*.' (emphasis supplied)⁶²

⁵⁸ *M/s C Cunniah v. Balraj* AIR 1961 Mad 111 and *Hiralal v. M/s Ganesh Trading* AIR 1984 Bom 218; *Spectravest Inc v. Aperknit Ltd* (1988) FSR 161.

⁵⁹ *Re Dickens* (1935) Ch 267; *Fraser v. Thames Television Ltd* (1984) QB 44, 60 and *British Leyland Motor Corporation v. Armstrong Patents Co Ltd* (1986) RPC 279, 302. See also Cornish *supra* n. 8, 6; Copinger *supra* n. 2, 1.

⁶⁰ Narayanan *supra* n. 30, 3; Bainbridge *supra* n. 10, 10. Bainbridge views these functions in the form of correlative rights and duties, where the owner of the copyright has the right of reproduction, etc, while all others have a duty not to infringe that right. Similarly, in *Computer Associates International Inc v. Altai* 982 F 2d 693 (2nd Cir 1992), Circuit Judge Walker was of the opinion that copyright law seeks to establish a delicate equilibrium between protection to authors (which was a secondary function) and benefit to society.

⁶¹ See Frank H Easterbrook, 'Intellectual Property Is Still Property' (1990) 13 *Harvard Journal of Law & Public Policy* 108.

⁶² Peterson, J in *University of London Press Ltd v. University Tutorial Press Ltd*, (1916) 2 Ch 601, 610.

The question that then arises is: What is worth copying? What works are worth copying to the extent that society has to provide the authors of such works with a positive reassurance that their works will not be copied, that their commercial viability will not be tapped?

The answer must necessarily be: anything that has unprecedented commercial value or potential.⁶³ Copyright law must protect utility. No law is useful unless it protects that which is useful. Ideas which are new, useful and non-obvious are protected under the patent laws pertaining to machines, manufactures and processes;⁶⁴ subsidiary ideas which have been expressed are protected under copyright law, while ideas which have not yet been fully conceived are protected under the law of confidence.⁶⁵ There remains however, a small quantum of intangible property which is unprotected by law notwithstanding its wide utility and commercial viability. This unprotected section, referred to in this article as the utilitarian general idea, falls in between the areas protected by contemporary patent and copyright laws. It is therefore submitted that general ideas, when commercially useful, must be protected under copyright law.

This line of thought can be substantiated with reference to simple logic. In *Kenrick v. Lawrence*,⁶⁶ protection was denied to a drawing which showed a hand marking a ballot paper. The reason behind this denial was that the idea behind the work was ordinary and common place, and anyone else who had to demonstrate the act of voting would have to do so by employing the same idea. The concept is known as '*scenes a faire*'. It implies that in certain areas of work, there are certain ideas which must necessarily be used along with the general idea. For example, the use of a detective in a novel involving a murder mystery would not be unique for

⁶³ Cornish *supra* n. 8, 6; Note, 'Copyright – Study of the Term "Writings" in the Copyright Clause of the Constitution' 31 *New York University Law Review* 1263, 1269.

⁶⁴ See *Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)* (adopted 15 April 1994, entered into force 1 Jan 1995), *Marrakesh Agreement Establishing the World Trade Organisation*, Annex 1 C, Legal Instruments – Results of the Uruguay Round 1869 UNTS 299, Article 27; *Patent Cooperation Treaty (PCT)* (adopted on 19 June 1970, entered into force on 24 January 1978) 1160 UNTS 231–482, Article 33; *Draft Substantive Patent Law Treaty* (adopted on 6 February 2004) SCP/10/4, Article 12; *Patents Act, 1970*, section 2(j).

⁶⁵ See generally *supra* n. 10.

⁶⁶ (1890) 25 QBD 99.

the simple reason that it is practically essential to use a detective in any such novel. Thus, protection was denied to ordinary, commonplace ideas which were indispensable to the author.⁶⁷ It can then be inferred, using the test of material obversion,⁶⁸ that if ordinary and commonplace ideas are not protected under copyright law, novel, striking and unique ones ought to be protected.

If an author today conceives an idea or a concept which is novel, unique, non-obvious and striking, one which has tremendous potential for commercial exploitation, is it not incumbent upon the law to provide such an idea with adequate protection?⁶⁹ True it is that the idea must be expressed in order to meet the basic requirement of copyright protection stated above, but the idea gives flavour to the expression. The novelty, uniqueness and non-obviousness of the idea constitute the skill, labour and judgement utilised by the author, while the act of putting it down on paper (or any other medium of material expression) fulfils the requirement of the sweat of the brow.

Professor Nimmer opines, 'If an author writes a book about a process for refining rubber, copyright protects how the author described the process, but not the physical process itself.'⁷⁰ First and foremost, if the *act of describing* the process is in itself unique and unprecedented, if the idea of describing such a process has unprecedented commercial potential, it is submitted that the act of describing the process is copyrightable, whether

⁶⁷ The test was also applied in the case of *Baker v. Selden* 101 US 99 (1880), where copyright protection was denied to methods and diagrams which were considered 'necessary incidents' by the public. Reference can be made to the 'Merger Theory' where the expression is excluded from copyright protection if it is 'merged' inseparably from the idea. See *Autoskill Inc v. National Educational Support Systems* 994 F 2d 1461 (10th Cir 1993); *CCC Information Services, Inc v. Maclean Hunter Market Reports* 44 F 3d 61 (2nd Cir 1994); *Southco Inc v. Kanebridge Corporation* 324 F 3d 190 (3rd Cir 2003); Raymond T Nimmer and Patricia Ann Krauthaus, 'Software Copyright: Sliding Scales and Abstracted Expression' (1995) 32 *Houston Law Review* 317; Aaron M Braoddu, 'Eliminating the Confusion: A Restatement of the Test For Copyright Infringement' (1995) 5 *De-Paul-LCA Journal of Art & Entertainment Law* 43.

⁶⁸ See KT Basantani, *Elementary Logic* (3rd edn Sheth Publishers Mumbai 2003) 108.

⁶⁹ See Nimmer and Krauthaus *supra* n. 67 (stating that once released to the public, ideas and inventions are subject to wholesale appropriation by third parties who did not contribute to their development).

⁷⁰ *Ibid.*

or not the process itself is protected. Secondly, if the *process by itself is novel, unique and non-obvious* and, for whatever reason, does not fall within the ambit of patent protection, it is submitted that the moment the process is translated into any form of material expression (provided it satisfies the requirements of subsistence stated above), it becomes a work in which a copyright subsists. Therefore, to 'reproduce the work in any material form'⁷¹ would include the act of carrying out the process. Thus, protection should be granted at two levels in the utilitarian general idea: the act of describing the idea and its reproduction in any material form. Thirdly, if the *description itself*, or in other words the subsidiary idea or what jurists today would call the 'expression', satisfies the tests of subsistence, it too would be granted copyright protection.

Similarly, it has been stated in the past that 'a computer program controlling the bottling of a soft drink may embody a unique and secret process for the manufacture of the drink'.⁷² Copyright, it has been expounded, would not prevent someone from reading the program, extracting the secret process, and writing an entirely different program that makes use of the secret.⁷³ However, it is submitted that this argument is illogical and fallacious for the simple reason that the very objective of the copyright in the program would be frustrated if anybody is given the right to freely utilise that which makes the program itself useful.

This concept would be of material significance, *inter alia*, in the newly developing law of genetic engineering where the idea of combining a particular gene with another to create a new set of proteins should be amenable to copyright protection. If an individual obtains a copyright for a particular genetic sequence or combination in the form of a literary work, the object of the copyright itself would be frustrated if anybody could reproduce the genetic sequence by actually combining the genes given in the work without actually reproducing the sequence on paper.

⁷¹ *The Copyright Act, 1957*, section 14(a)(1).

⁷² Note, 'Copyright Protection of Computer Program Object Code' (1983) 96 *Harvard Law Review* 1723, 1737.

⁷³ *Ibid.*

The scope of 'reproduction in any material form' should be widened so as to make the ambit of copyright protection more meaningful.⁷⁴ Protection must thus be given to *how the author describes* the work and, if the general idea underlying the expression is unique, *the act of describing* the work as well as the performance or *reproduction of the process described* by the work. The ideas of reality television, email, broadband internet, mobile phones with multimedia services, when conceived, had tremendous commercial viability and were ideas worth protecting.

B. *Computer Programs: 'Plus ça change, plus c'est la même chose'*⁷⁵

The extension of the scope of copyright law to embrace computer programs and databases marked a great deviation from the aphorism pronounced by Davey, LJ in *Hollinrake v. Truswell*,⁷⁶ where it was held that a literary work is one intended to 'afford either information and instruction, or pleasure in the form of literary enjoyment'. Computer programs have been defined and afforded protection, *inter alia*, in the United Kingdom,⁷⁷ the United States,⁷⁸ Germany,⁷⁹ Australia,⁸⁰ New Zealand⁸¹ and Canada.⁸² In India, sections 2(ffb) and (ffc) of the Act define a 'computer' and a 'computer program' respectively. Section 2(o) extends

⁷⁴ James G Silva, 'Copyright Protection of Biotechnology Works: Into the Dustbin of History?' (2000) *BC Intell Prop & Tech* F 012801, available at http://www.bc.edu/bc_org/avp/law/st_org/iptf/articles/content/2000012801.html (last visited 10 January 2005).

⁷⁵ A French proverb meaning 'the more it changes, the more it remains the same'. As explained hereafter, the ordinary principles of copyright were held applicable to the new and emerging technology.

⁷⁶ (1894) 3 Ch 420, 428; See also *Exxon Corporation v. Exxon Insurance Consultants International Ltd* (1981) 3 All ER 241.

⁷⁷ *Copyright, Designs and Patents Act, 1988* (UK) c 48, section 3(1)(b).

⁷⁸ *Copyright Act*, 17 USC §§ 101, 102 (1976).

⁷⁹ *Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz)* v. 9.9.1965 (BGBl. I S. 1273) § 69(a)—(g).

⁸⁰ *Copyright Act, 1968* (Cth), section 10(1)(ba).

⁸¹ *Copyright Act, 1994*. (Cth), section 2(1).

⁸² *Copyright Act RSC 1985*, c C-42, section 2.

the ambit of literary works to include computer programs. It is thus a well-settled principle of law that computer programs are copyrightable.⁸³

Copyright law, however, did not confer upon computer programs a separate existence. Instead, legislators chose to take the new wine and pour it out into the old doctrinal bottles.⁸⁴ Computer programs were considered analogous to literary works, and were afforded protection thereof. Owing to their unique nature, however, the idea-expression dichotomy in computer programs is likely to lead to further misconception. Computer programs differ inherently from literary works for the simple reason that the essence of a computer program is not what is written, but the outcome or function of that which is written.⁸⁵ The average consumer or ordinary user, moreover, finds the computer language to be unintelligible and the only manner in which he finds a program to be similar to another is in the function performed by the program. A program's commercial viability is judged by what it does, not by what is written.⁸⁶

The distinction between the idea and the expression surfaced once more in cases of infringement of computer programs. In order to understand the law relating to computer programs, it would be pertinent to first understand the working of a program.⁸⁷

⁸³ See generally *William Elecs Inc v. Artic International Inc* 685 F 2d 870 (3rd Cir 1982); *Apple Computer Inc v. Franklin Computer Corp* 714 F 2d 1240 (3rd Cir 1983); *SAS Institute Inc v. S & H Computer System Inc* 605 F Supp 816 (MD Tenn 1985); *Digital Communications Associates v. Softclone Distribution Corporation* 659 F Supp 449 (ND Ga 1987) and *Gates Rubber Company v. Bando Chemical Industries Ltd* 9 F 3d 823 (10th Cir 1993).

⁸⁴ Arthur R Miller, 'Copyright Protection for Computer Programs, Databases, and Computer Generated Works: Is Anything New Since CONTU?' (1993) 106 *Harvard Law Review* 978, 979.

⁸⁵ See *Cantor Fitzgerald International v. Tradition (UK)* (2000) RPC 95, 130 (stating that 'there is a real risk of making an error if one adapts well-known principles which have been developed in the context of literary works addressed to humans and applies them uncritically to (a) literary work whose only purpose is to make a machine operate in such and such a manner.'(sic)).

⁸⁶ See *supra* II. C. 3, The Intrinsic and Extrinsic Tests; II. C. 4, The Average Consumer Test.

⁸⁷ See generally Matt Weisfeld, *The Object Oriented Thought Process* (1st edn Macmillan

Simply put, a computer program is a set of instructions to a computer. The Act defines it as a 'set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, causing a computer to perform a particular task or achieve a particular result'.⁸⁸ This program is written in a computer language, using character sets, syntax structure, keywords, operators and statements. These languages are primarily of two kinds:

- (i) machine language or low language; and
- (ii) high level language.

The machine language is the lowest form of a computer language, consisting of binary codes, or a series of 1s and 0s called 'bits', which are the only symbols recognised by a digital computer. This language is better known as the 'object code'. Most programs today, however, are written in the high level languages or in the 'source code'. There are two levels of higher level languages that exist as of today. The first is an 'assembly language' which consists of alpha-numeric instructions.⁸⁹ The next level consists of programs such as FORTRAN, COBOL, BASIC, PASCAL and C++, which are the most popularly used high level languages. All languages written in the 'source code' however, have to be translated or 'compiled' into the 'object code' for the computer to be able to decipher the program.⁹⁰

The creation of a program takes place in several steps moving from the general to the specific.⁹¹ The first step involves identifying the problem that the computer programmer is trying to solve, which requires an understanding of the program's ultimate function or purpose. This first

Computer Publishing United States 2000); John Graham and Roger Loader, *A Programmer's Introduction to Computer Systems* (Macgraw Hill Book Company London 1989); Randy Chow and Theodore Johnson, *Distributed Operating Systems & Algorithms* (Addison Wesley Longman Inc. United States 1997); Ian Sinclair, *Computer Science: A Concise Introduction* (1st edn Heinemann Professional Publishing Ltd. Oxford 1990); B West, *Basic Computing Principles* (3rd edn NCC Blackwell Ltd. Oxford 1994).

⁸⁸ *The Copyright Act, 1957*, section 2(ffc).

⁸⁹ *See supra* n. 72.

⁹⁰ *See* Yatindra Singh, J, 'Open Source Software and Intellectual Property Rights' (2004) 4 SCC (Jour) 28.

⁹¹ Yohe, 'An Overview of Programming Tactics' (1974) 6 *Computing Surveys* 221.

step can be equated with the general idea, or the idea that the author of a work possesses before he begins to conceive the subsidiary ideas.⁹² At this point of time, ‘the programmer breaks down or ‘decomposes’ the program’s ultimate function into ‘simpler constituent functions’ or ‘substacks’, which are also known as “subroutines” or “modules”’.⁹³ The fundamental processes utilised by a program in order to find a solution to each of the subroutines or modules are called algorithms.⁹⁴ Flow charts are generally used to outline the process or broad plan. These are then translated into the program.⁹⁵ Thus, a great amount of skill, labour and judgement is expended in the creation of a computer program.

Initially, copyright protection was granted only to the source code.⁹⁶ However, the progression of time led to a gradual change of trends as object codes began to be perceived as adaptations of source codes.⁹⁷ Thus, in *Apple Computers v. Mackintosh Computers Ltd*,⁹⁸ the Federal Court of Canada, while considering the question of whether an object code can be protected, came to the conclusion that the conversion of a work into a code constitutes translation and an object code is therefore subject to copyright protection. Similarly, the Third Circuit of the United States Court of Appeals held, in the case of *Apple Computer Inc v. Franklin*

⁹² See *supra* III. B, Subsistence of Copyright.

⁹³ *Computer Associates v. Altai* 982 F 2d 693 (2nd Cir 1992). See also Peter G Spivack, ‘Does Form Follow Function? The Idea/Expression Dichotomy In Copyright Protection of Computer Software’ 35 *University of California, Los Angeles, Law Review* 723 (1988).

⁹⁴ BN Kirpal, J, ‘Protection of Computer Programs in India’, (1988) 2 *SCC (Jour)* 1; Keplinger, ‘Computer Software—Its Nature and Protection’ 30 *Emory Law Journal* 483 (1984). See also the definitions of algorithms, available at <http://www.google.co.in/search?hl=en&lr=&oi=defmore&q=define:Algorithms> (last visited 18 February 2005); — ‘What is an Algorithm?’, at <http://www.cs.bris.ac.uk/Teaching/Resources/COMS11200/pages/tour12/sld005.htm> (last visited 18 February 2005).

⁹⁵ See also *Whelan Associates Inc v. Jaslow Dental Laboratory Inc* 797 F 2d 1222 (3rd Cir 1986) (analysing the processes involved in the creation of a computer program).

⁹⁶ See *Apple Computer Inc v. Computer Edge Pty Ltd* (1984) FSR 246. But see Bainbridge *supra* n. 10, 192 (finding the dissenting judgment of Shepard J. to be the ‘most elegant and well argued’).

⁹⁷ See *Sega Enterprises Ltd v. Richards* (1983) FSR 73. See also *Gates v. Swift* (1982) RPC 339 and *Thrustcode Ltd v. WW Computing Ltd*, (1983) FSR 502.

⁹⁸ 1986 (10) CPR (Third) 1.

Computer Corporation,⁹⁹ that both the object code and the source code were amenable to copyright protection. It is reiterated therefore, that a translation is a conversion of the idea conveyed by one work into another work. Thus, when the source code is converted into the object code, such that the computer can perform the desired function, the computer determines and performs the idea or the instruction that is conveyed in the source code. The language used in both codes is different. However, the idea in both remains the same.¹⁰⁰

The imbroglio that computer programs find themselves in with respect to copyright law can be analysed as follows. Like any other literary work, a computer program is susceptible to disguised plagiarism, as it can perform the same function as another with minor variations in the format or expression of the program. Due to their highly technical and intricate nature, programs are easy to disguise and their format inexpensive to alter.¹⁰¹ The series of logical operations (in the form of algorithms), which a programmer uses to solve the problem before him, gives the program its real and greatest value. Therefore, it would be inexpedient to provide computer programs with protection merely in their form or expression as it would fail to protect the essence of the program. Thus, the algorithms of a program,¹⁰² being nothing more than the equivalent of the subsidiary ideas of the author, require protection from infringement, along with the form in which they are expressed.

1. The Amorphous Idea-Expression Distinction: *Whelan Associates, Inc v. Jaslow Dental Laboratory, Inc*¹⁰³

In 1986, the Third Circuit of the United States Court of Appeals was faced

⁹⁹ 464 US 1033. See also *Stern Electronics Inc v. Kaufman* 669 F 2d 852 (2nd Cir 1982) and *William Electronics Inc v. Artic International Inc* 685 F 2d 870 (3rd Cir 1982).

¹⁰⁰ See also *supra* II . C, Infringement of Copyright.

¹⁰¹ Note, 'Computer Programs and Proposed Revisions of the Patent and Copyright Laws' (1967) 81 *Harvard Law Review* 1541, 1550 (indicating the weakness of copyright as a 'prophylactic device' against plagiarism and thereby its inappropriateness for computer programs).

¹⁰² See generally *supra* n. 94.

¹⁰³ 797 F 2d 1222 (3rd Cir 1986) (*Whelan Associates Case*).

with the question of whether the structure (or sequence and organisation) of a computer program was protectable by means of a copyright, or whether copyright law extended only as far as the literal computer code. In doing so, the Court developed a test for distinguishing the idea from the expression in computer programs. The program in question, known as the 'Dentalab' Program, was created for the operation of a dental laboratory. The Defendant had not copied the literal code or the program's expression. However, the logical sequence behind it, or its structure, had been reproduced. The question was whether such an act amounted to infringement.

Reliance was placed on the decision of *Baker v. Selden*,¹⁰⁴ on the basis of which the Circuit Court thus held:

'[T]he line between idea and expression may be drawn with the end sought to be achieved by the work in question. In other words, the purpose or function of a utilitarian work would be the work's idea, and everything that is not necessary to that purpose or function would be a part of the expression of the idea. ... [I]t is clear that the purpose of the utilitarian Dentalab program was to aid in the business operations of a dental laboratory. It is equally clear that the structure of the program was not essential to that task: *there are other programs on the market, competitors of Dentalab and Dentcom, that perform the same functions but have different structures and designs.*' (emphasis supplied)¹⁰⁵

Thus, the basis of differentiation between the idea and the expression lay in the function that the program performed or the end sought to be achieved by the program. Everything essential to the function was considered to be a part of the idea, whereas all non-essential features of the program, a part of the expression. These non-essential features are the equivalent of the subsidiary ideas; the essential features, a part of the general idea. Further, since the idea behind the program was mundane

¹⁰⁴ 101 US 99 (1880). The Plaintiff, Selden, had obtained a copyright on a book which described a simplified method of accounting. In that case however, simple blank forms with headings were denied copyright protection as they were considered to be 'necessary incidents' to the work.

¹⁰⁵ 797 F 2d 1222, 1236 (3rd Cir 1986).

(as there were other programs on the market that performed the same function), the structure of the program would only be protected if it was not essential to its expression, or if there was no merger between the idea and the expression.¹⁰⁶ It can therefore be inferred using the tests mentioned above,¹⁰⁷ that since an ordinary, mundane or common place function is not protectable, a novel, unique and unprecedented one, possessing unprecedented commercial potential is.

The Circuit Court thus applied the doctrines of *merger* and *scenes a faire* in determining the question of infringement. It stated that if the function to be performed by the computer could only be expressed in the particular structure which was used by the Dentalab program (if there was a merger between the idea and the expression), or the structure of the program was essential to performance of the function (*scenes a faire*), it could not be protected by copyright law.

To put it simply, when a programmer identifies the problem that he is trying to solve, he conceives a general plan for the program. This general plan, being the ultimate function of the program, is a general idea. The function can only be protected if it is unique, novel and commercially advantageous. Thereafter, the programmer begins to devise a sequence of algorithms to instruct the computer such that it performs the desired task. These algorithmic equations constitute the subsidiary ideas and are protected by copyright. Any minor variations thereof, or translations into different languages, would thus still amount to infringement.

2. The Doctrinal Triumvirate: *Computer Associates International Inc v. Altai, Inc*¹⁰⁸

The principle applied in the *Whelan Associates case*, with a few exceptions,¹⁰⁹ did not receive a favourable response.¹¹⁰ The concept of differentiation

¹⁰⁶ See *supra* n. 67 [discussing Merger Theory].

¹⁰⁷ See the discussion in *supra* III. A, The Utilitarian General Idea.

¹⁰⁸ 982 F 2d 693 (2nd Cir 1992) (the *Altai Case*).

¹⁰⁹ *Bull HN Info Sys Inc v. American Express Bank Ltd* 1990 Copyright Law Dec (CCH) P 26, 555; 1987 WL 6419 (SDNY 1987); *Dynamic Solutions Inc v. Planning and Control Inc* 1987 Copyright Law Dec (CCH) P 26,062 : 1987 WL 6419 (SDNY 1987) and *Broaderbund Software Inc v. Unison World Inc* 648 F Supp 1127 (ND Cal 1986).

¹¹⁰ *Synercom Technology Inc v. University Computing Co* 462 F Supp 1003 (ND Tex 1978); *Plains Cotton Co-operative v. Goodpasture Computer Services Inc* 807 F 2d

between the idea and the expression as used in the *Whelan Associates* case was severely criticised by the Second Circuit of the United States Court of Appeals in the *Altai* case. The Court considered the question of whether the Defendant's OSCAR 3.4 computer program infringed the Plaintiff's copyright in its CA-SCHEDULER program, which was a job-scheduling program designed for IBM mainframe computers. It was alleged that one of the components of the CA-SCHEDULER program, the ADAPTER, was incorporated in the Defendant's program. It was held that a computer program did not have a single function, but was a result of the harmonious conjunction of interacting 'subroutines' or sub-functions. Each such subroutine had its own idea behind it.

Thus the Circuit Court advocated a three-step procedure to determine infringement for computer programs.¹¹¹ The first step, known as abstraction, involved a stratification of the program into various levels of abstraction to determine the ideas at each level. The process is similar to that of reverse engineering and begins with the code and ends with an articulation of the program's ultimate function. Simply put, the first stage requires the idea to be separated from the expression. The second stage, filtration, involved a segregation of what the court considered protectable material from that which was not protectable. In other words, it required courts to determine whether any part of the expression, or the subsidiary ideas, would be precluded from protection. Finally, in the third stage, known as comparison, the court assumed a holistic approach, and compared the two works to determine if the protectable material from the first work had been copied in the second work.¹¹²

This test is the most expedient in determining the question of infringement of copyright in ideas. In the first stage of abstraction, the court must determine whether or not the idea itself, or the general idea, is so novel and unique, as to warrant copyright protection. The general idea must be identified as separate and distinct from the subsidiary ideas. Thus, in

1256 (5th Cir 1987) and *Lotus Development Corporation v. Paperback Software International* 740 F Supp 37 (D Mass 1990) (holding that disentangling the idea from the expression was not 'black and white' but a matter of fact and degree).

¹¹¹ 982 F 2d 693, 709 (2nd Cir 1992).

¹¹² See Promod Nair, 'Copyright Protection for Computer Software' (2004) 7 SCC (Jour) 31.

*Autoskill Inc v. National Educational Support Systems*¹¹³ the Tenth Circuit of the United States Court of Appeals deciphered that at the ‘highest level of abstraction’, the program involved was unique, inasmuch as it was a ‘reading program designed to diagnose, re-mediate and teach reading skills through the use of the computer.’ After having thus identified the primary function of the computer or what, in other words, will be perceived as its general idea, the Court must determine if the function is by itself protectable, and whether the subsidiary ideas utilised in the program satisfy the tests of subsistence. Thereafter, a simple comparison of the two works will yield results in the question of infringement of copyright.

IV. THE PUTATIVE IDEA MONOPOLY: STANDING ON YE SHOULDERS OF GIANTS

‘The law is unknown to him that knoweth not the reason thereof, and the known certainty of the law is the safety of all.’

Sir Edward Coke¹¹⁴

There is a mottled fear burgeoning in the consciousness of jurists and authors that these minatory insinuations of copyright law will inevitably yield to idea monopolies and restrict the development of society altogether. Sir Isaac Newton had once stated, ‘If I have seen further, it is by standing on ye shoulders of giants’.¹¹⁵ The ineffable ideal of intellectual property is, after all, the progress of society. It is often argued that a monopoly in a concept or an idea would be detrimental to the very rationale of an intellectual property system.¹¹⁶ However, a compendious understanding of the philosophy of the law and the very nature of copyright law itself reveals that these fears ought to be allayed with cold drops of reason.

¹¹³ 994 F 2d 1476 (10th Cir 1993).

¹¹⁴ Sir Edward Coke (1552–1634), an English jurist, who had a brilliant career occupying posts such as the Speaker of the House of Commons, Solicitor General, Chief Justice of the common pleas, etc; See Norman F Cantor, *Imagining the Law* (Indo-American Co-operative Publishing New Delhi 2000).

¹¹⁵ Letter written by Sir Isaac Newton to Robert Hooke on 5 February 1676.

¹¹⁶ See Cornish *supra* n. 8, 37; Ashika Visram, ‘The Dawn of “Copytrust”’ (2003) 2 *Law Rev. GLC* 266.

A. *The Philosophy of the Law*

The law is not created by mechanical beings detached from society by iron curtains. Every law is founded on reason, which alone facilitates the law to meet the vicissitudes and vagaries of life. Reason gives to the law its legitimacy, bringing forth the obligation of obedience.¹¹⁷

We owe our existence and development today to great scholars, thinkers and writers who helped shape the collective thought of society. Thinkers such as Voltaire, Rousseau, Dicey, Bentham and Mill spurred the evolution of society through their inventive thought.¹¹⁸ The notion of society itself was an idea. The inevitable question then is: Should not the law provide an incentive to encourage path-breaking thought?

Political philosophy dictates that an important aspect of the law is the provision of incentive to citizens so as to maximise the welfare of the people. The utilitarian doctrine in particular emphasises that the law protects what is useful, and therefore any incentive to produce that which is useful is in furtherance of the philosophy of the law. It is therefore submitted that protection of general ideas serves as an incentive to intellectuals to come up with novel and unique works which will ensure the greatest happiness of the greatest number. It must also be noted that one of the fundamental duties enumerated under the Constitution of

¹¹⁷ See generally RWM Dias, *Jurisprudence* (5th edn Butterworth London 1985); Ian Ward, *An Introduction to Critical Legal Theory* (Cavendish Publishing Ltd. London 1998); LB Curzon, *Jurisprudence* (2nd edn Cavendish Publishing Ltd. London 1995); Brian Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell London 1996).

¹¹⁸ See generally FA Hayek, *The Constitution of Liberty* (Mackays of Chatham PLC Kent London 1960) 159. The author makes an interesting observation while altering the renowned maxim '*salus populi est suprema lex*' to read '*salus populi supreme lex esto*' stating that the welfare of the law ought to be—not is—the highest law; implying that improper means cannot be used for justifying the ends of law. See also Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* (Revised Edition Universal Book Traders Delhi 1996) 89; Iain Hampsher Monk, *A History of Modern Political Thought* (Blackwell Publishers Oxford 1992) 148, 157; Michael H Lessnoff, *Political Philosophers of the Twentieth Century* (Blackwell Publishers Oxford 1999); AV Dicey, *Law and Public Opinion in England* (2nd edn Universal Book Traders Delhi 1996) 137; HLA Hart, *The Concept of Law* (2nd edn Oxford University Press New York 1994) and Roscoe Pound, *An Introduction to the Philosophy of Law*, (Universal Book Traders Delhi 1995).

India calls upon citizens to 'strive towards excellence in all spheres of collective activity so that the nation constantly rises to higher levels of endeavour and achievement.'¹¹⁹ The state must thus provide some incentive so as to enable citizens to fulfil their constitutionally recognised fundamental duty.

B. *The 'Fair Use' Doctrine*

If the objective of copyright law, like any other, is the maximisation of the welfare of the people, the law must ensure that people have access to the new and innovative works of their time. There is, however, a difference between allowing access to works and allowing for their commercial exploitation. The welfare of society is brought about when the people are allowed access to works. However, while allowing others to commercially exploit the ideas of authors may bring about commercial benefit, it does not additionally facilitate progress. The progress of society is therefore brought about through the 'fair use' doctrine.¹²⁰ A certain number of dealings, largely of academic interest, are considered to constitute a 'fair use' of the works in question, and consequently, no copyright infringement can be alleged when a work is used in the specified manner. The doctrine ensures that society benefits from the works which are given copyright protection, by providing them with access to the works. At the same time, the authors of the work are not dissuaded in their endeavours, as any commercial exploitation of their work does not constitute a 'fair use' and stands legally reprehensible.

Thus, section 52 of the Act enumerates a host of dealings in the work in question which constitute a 'fair use' or a 'fair dealing' of the work and it thereby enables citizens to imbibe the uniqueness of the works while allowing them to 'develop a scientific temper, humanism and the spirit of enquiry and reform'.¹²¹

¹¹⁹ Constitution of India, Article 51-A(j).

¹²⁰ Copinger *supra* n. 2, 247; Bainbridge *supra* n. 10, 166.

¹²¹ Constitution of India, Article 51-A(h).

C. *Subconscious Copying: 'Une Hirondelle ne fait pas le Printemps'*¹²²

In *Francis Day v. Bron*,¹²³ the Court of Appeal of England was dealing with the simple question of whether there had been any infringement by the Defendant in the Plaintiff's musical work, 'In a Little Spanish Town'. Complexities arose, however, when the Defendant denied having even heard the Plaintiff's work. After a considerable amount of deliberation, the court came to the conclusion that reproduction would be said to have taken place if there was a 'sufficient degree of objective similarity' between the two works, as also some 'causal connexion' between the same. The court thus developed the concept of 'subconscious copying' where it held that an intention to copy was immaterial, as long as there was a sufficient degree of similarity between the two works.¹²⁴

This pronouncement effectively implies that if an individual, without having ever seen an author's literary work, produces a literary work which resembles, to a sufficient degree, the previous author's work, he can be sued for infringement of copyright without having ever copied. It is therefore submitted that protection of ideas under copyright law would not, by itself, result in monopolies in ideas, since the concept of subconscious copying effectively grants the author of a work with a monopoly in his work.

V. CONCLUSION

This analysis reveals that reticence and ambiguity have characterised copyright law. When copyright law was in its incipient stages, protection was granted exclusively to the words that were used in the expression of

¹²² A French proverb which means, 'the spring is not brought about by a bird', implying that there may be reasons other than the most apparent ones for any act. In logic, the fallacy in reasoning is commonly referred to as that of 'post hoc ergo propter hoc'. As explained further, a monopoly is virtually brought about through the concept of 'subconscious copying'.

¹²³ (1963) 2 All ER 16.

¹²⁴ See *Mirage Studios v. Counter Feat Clothing Company Ltd* (1991) FSR 145; *Chappell and Company Ltd v. Redwood Music Ltd v. Francis, Day & Hunter* (1981) RPC 337 and *John Richardson Computers Ltd v. Flanders and Another* (1993) FSR 497; but see Stephen Breyer, 'The Uneasy Case For Copyright: A Study Of Copyright In Books, Photocopies And Computer Programs', (1970) 84 *Harvard Law Review* 281.

a literary work. Any trivial alterations made to a work constituted a legitimate exercise by the plagiarist. However, the progression of time witnessed a gradual evolution in the philosophy and drive of copyright law. Notwithstanding the recognition that the essence of a work lay not in its material formalities, but in its substantial spirit, copyright protection was continually conferred upon the expression. The adoption of this progressionist attitude resulted in a hypocrisy of sorts. On the one hand, protection was extended to the essence of a creation, whereas on the other, it was denied to that which formed its very essence, the idea.

The objective of this article has been to broaden the horizons of substantive thought. Policy makers would be well advised to seek an answer to these questions: What does the author wish to convey? What is the average consumer's or affected section's perception? How does the author go about communicating his idea? Is the act of communicating his idea novel in itself? Each of these is an idea in itself, and is likely to be a valuable guide while determining the question of infringement of copyright.

It must be noted that to some extent it is true that an expression is meritorious of protection, for the author's ideas can only be fathomed through his expression. However, the idea-expression dichotomy creates confusion when the idea behind the work is absolutely ignored, and protection is granted exclusively to its expression. An expression, it must be remembered, is nothing without its idea, its essence. The *raison d'être* of the law is to protect the idea. An expression is a tangible, measurable and perceivable manifestation of the idea.

At the same time, an earnest appeal has been made to extend the ambit of copyright protection to include novel and unique ideas, unprotected by patent laws, for the collective welfare and development of society. However, one cannot discount the fact that the distinction between a novel idea and an ordinary one is difficult to draw. The extension of copyright protection would thus necessarily involve a coterminous extension of the powers and functions of the copyright board, which would have to be entrusted with the function of making such a distinction in the same capacity as the patent board.

To conclude, it would be expedient to dwell upon an observation made by the Circuit Judge, James M Carter, in the *Kroft Television Products case* where it was stated that the idea behind Michaelangelo's David was 'no

more than a statue of a nude male'.¹²⁵ With all due respect, the artist's work has been misunderstood. Michaelangelo's David is a statue that sums up the quintessence of his creative genius, his artistic inspiration. Every twist of a muscle, every twitch of a wrist and every crease of a smile depicts laborious forethought. If Michaelangelo did not see beforehand the image of his David, nor the magnificent frescoes on the ceiling of the Sistine Chapel, it would have been impossible for him to create these works of art. Creative genius, creative forethought, creative inspiration came first. What came next was the sweat of the brow, mere expression. To reduce his ideas into expression would be to reduce a genius into a labourer. The quintessential law is but a step away. All that is required is solidarity in the letter and spirit of the law.

¹²⁵ 562 F 2d 1157, 1168 (9th Cir 1977).

DISCIPLINARY PROVISIONS UNDER THE NAVY ACT, 1957[†]

*Jasdeep Randhawa**

‘Our God and soldiers we alike adore,
when at the brink of ruin, not before,
after deliverance both alike required,
our God forgotten, and our soldiers slighted.’¹

I. INTRODUCTION

Today, with democracy making huge strides in our country, and with other democratic countries like the United States (US) and the United Kingdom (UK) having carried out large-scale revisions of their respective military codes to bring them in line with the changing conditions and concepts of penology and administration of justice, the *Navy Act, 1957* (the Act) is lagging behind. The Act is based upon the pre-independence *Indian Navy (Discipline) Act, 1934*, which was in turn modelled on the *United Kingdom Naval Discipline Act, 1866*. Today, judicial activism in this field is strongly advocating change in the system. The scope of this article is limited to analysing those provisions of the Act that require certain amendments, keeping in view the changes in its counterpart services both in India and abroad. A balance is sought to be achieved between military discipline and the legal rights of military personnel.

The second part of this article deals with the inapplicability of the *Code of Criminal Procedure, 1973* (CrPC) to the Act. However, the necessity of incorporation of a provision similar to section 428 of the CrPC cannot be over-emphasised. Further, the conflict of jurisdiction between the civil courts and court-martials to try a civil offence committed by naval personnel under section 475 of the CrPC has to be analysed in the light of balancing two conflicting interests, vis-à-vis maintaining military discipline and providing civil safeguards to a soldier.

[†] This article reflects the position of law as on 23 May 2005.

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¹ Francis Quarles, ‘Of Common Devotion’ in Alexander B Grosart (ed), *The Complete Works in Prose and Verse of Francis Quarles* (AMS Press, New York, 1967) vol 2, 205.

This is followed by an attempt to study the unique procedure of the court-martial in the third part of the article. The aim therein is to examine the extent to which the court-martial system affords protection to the rights of the accused by drawing attention to those features in which the system contrasts most strongly with the criminal justice system.

Part four examines the extent of judicial review of a court-martial within the Navy and the proceedings in civil courts. Part five analyses provisions for appeal from a court-martial proceeding.

II. NON-APPLICABILITY OF THE CODE OF CRIMINAL PROCEDURE, 1973

Section 5 of the CrPC excludes its applicability to proceedings under any special or local law or any special jurisdiction, or form, or procedure prescribed by any other law, which would also include the Act.²

A. Need for Set-off Provisions

On the recommendation of the Joint Parliamentary Committee, section 428 of the CrPC was introduced in 1978. It provides as follows:

‘Where an accused person has, on conviction, been sentenced to imprisonment for a term, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him.’

In *Ajmeer Singh v. Union of India*,³ the Supreme Court held that section 428 of the CrPC was inapplicable to the Armed Forces as their respective statutes ie the *Army Act, 1950*, the *Air Force Act, 1950* and the *Navy Act, 1957* each constitute a self-contained code, specifying offences and prescribing a procedure for detention, custody and trial of the offenders by court-

² Section 41 of the *Indian Penal Code, 1860* (IPC) defines ‘special law’ as ‘a law applicable to a particular subject.’ They are laws that recognise fresh offences not covered by the IPC.

³ AIR 1987 SC 1646.

martial. The *Army (Amendment) Act, 1992* inserted section 169A⁴ in the *Army Act, 1950* which is *pari materia* with that of section 428. The Navy, however, did not enjoy any such reform. The Act explicitly excludes the set-off provision.⁵ Although section 85 of the Act provides for constitutional safeguards regarding arrest and detention, a person accused can be detained unnecessarily and not tried for a long time due to service exigencies. Therefore, it is imperative that set-off provisions also be included in the Act.

B. *Jurisdiction Under the Act*

The Act provides for the exercise of jurisdiction by the civil (non-military) and military courts as follows:

1. Jurisdiction of the Indian Navy

Chapter 8 (Articles of War) of the Act comprising sections 34 to 76 provide for offences that can be tried exclusively by the Navy. Civil courts have no jurisdiction.

2. Exclusive Jurisdiction of the Civil Courts

Section 78(2) of the Act provides for exclusive jurisdiction of the ordinary criminal courts for the following offences when committed by navy personnel against a civilian, namely:

- (i) murder,
- (ii) culpable homicide not amounting to murder, and
- (iii) rape.

⁴ Section 169A of the *Army Act, 1950* states, 'When a person or officer subject to this Act is sentenced by a court-martial to a term of imprisonment, not being an imprisonment in default of payment of fine, the period spent by him in civil or military custody during investigation, inquiry or trial of the same case, and before the date of order of such sentence, shall be set off against the term of imprisonment imposed upon him, and the liability of such person or officer to undergo imprisonment of such order of sentence shall be restricted to the remainder, if any, of the terms of imprisonment imposed upon him.'

⁵ Section 151(1) of the Act provides that, '[E]very term of imprisonment or detention awarded in pursuance of the Act shall be reckoned as commencing on the day on which the sentence was awarded.'

However, section 78(2) provides for an exception wherein the court-martial has exclusive jurisdiction to try the naval personnel if the above-mentioned offences are committed under the following three conditions:

- (i) during active service,
- (ii) at any place outside India, and
- (iii) at any place specified by the Central Government by notification in this behalf.

The reasons for the above jurisdiction may be safely inferred from the nature of the service requirements of naval personnel. These exceptions have been made due to service exigencies eg a speedier trial may be provided to the offender so that he is available to perform his duties as soon as his case is tried. Also, it must be remembered that under these conditions, ordinary criminal jurisdiction may not be applicable.

3. Dual Jurisdiction of the Criminal Courts and Court-Martials

The other types of offences are civil offences as defined under section 3(3)⁶ of the Act, to be read with section 78(1).⁷ It is an enabling provision that makes the naval personnel subject to all penal laws of the country. These provisions give concurrent jurisdiction to the criminal courts and court-martials for the trial of naval personnel. However, sub-section (1) of section 475 of the CrPC empowers the Central Government to make rules in order to avoid conflict of dual jurisdiction. Accordingly, rules have been framed by the Central Government under the *Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1978* (the Rules).

When a naval personnel commits any civil offence and the criminal court takes cognisance of the same, the question of concurrent jurisdiction arises. Rules 3 and 4 provide that it will be for the Commanding Officer (CO) of the accused to decide this question when the magistrate who has taken cognisance of the offence informs him about the civil offence committed

⁶ Section 3(3) of the Act defines a 'civil offence' as 'an offence under the jurisdiction of the ordinary civil courts.'

⁷ Section 78(1) of the Act provides that, 'Subject to the provisions of sub-section (2), every person subject to naval law who is charged with a naval offence or a civil offence may be tried and punished under this Act regardless of where the alleged offence was committed.'

by a person of his unit. It is incumbent upon the magistrate to inform the CO, and if the latter decides to take over the case of the accused, the accused would be tried by court-martial as per the chargesheet framed by the magistrate. From the above rules, it is clear that the initial jurisdiction to deal with the military delinquent vests solely with the CO and the magistrate has to hand over the accused to his CO to be tried under the provisions of the military law.⁸

In the case of *Ram Swarup v. Union Of India*⁹ it was contended that section 125 of the *Army Act, 1950* (*pari materia* with section 78(1) of the Act), read with section 475(1) of the CrPC and the rules framed thereunder, is violative of Article 14 of the Constitution of India as it gives unfettered discretion to the CO to decide whether the accused shall be tried by the civil court or by court-martial.

However, the Supreme Court ruled that the above provisions are not unconstitutional as the military authorities are guided by certain well-defined principles for taking over such offenders for trial under the military law such as exigencies of service, conduct of speedier trial, nature of the particular offence and the person against whom the offence is committed. The Rules further provide that if no effectual proceedings are taken by the military authorities within a reasonable time, then the magistrate can report the circumstances to the State Government to take appropriate steps after consultation with the Central Government, to ensure that the accused is dealt with in accordance with law.

However, certain disadvantages may be caused to the alleged offender of a civil offence due to the discretion vested with the CO for taking over the accused for trial under the aforementioned provisions. Firstly, the procedural safeguards that are available in a civil trial like provisions of appeal, etc would be denied to the accused if he is tried under the stringent provisions of the Act. Furthermore, the accused may harbour a feeling that he may not get a fair trial due to his previous conduct in the unit. For example, if the accused has a previous record of disorderly behaviour

⁸ See *Delhi Special Police Establishment v. Lt Col SK Loraiya* AIR 1972 SC 2548 (laying down the law conclusively that non-compliance with the mandatory procedure vitiated the trial and that the magistrate had to inform the military authorities before taking any action).

⁹ AIR 1965 SC 247.

and he has been charged by a magistrate for voluntarily causing hurt under section 323 of the *Indian Penal Code, 1860* (IPC) to a civilian, under such circumstances if the CO decides to take over the accused for trial, the accused may be dealt a more severe punishment in accordance with section 77(2) of the Act. Although the IPC prescribes a maximum imprisonment of one year, under section 77(2) the naval authorities can punish him with imprisonment of up to three years by court-martial.

In *Lt Col RS Bhagat v. Union of India*,¹⁰ the Delhi High Court cautioned the military authorities to judicially exercise the discretion conferred on them under these provisions of concurrent jurisdiction. In this case, the accused was charged with theft and convicted by court-martial. It was held that the discretion of the Army authorities to take over the case was not exercised judicially.

The Manual of Military Law¹¹ enunciates some of the guidelines on which discretion as regards jurisdiction under section 125 of the *Army Act, 1950* should be exercised, namely:

- (i) The discretion for a trial by court-martial by the military authority must be guided by considerations of active service, place of commission of the offence, expedient infliction of punishment, cases of discipline and repetitive offences in the unit.
- (ii) The heinousness of the crime should be considered.
- (iii) Offences involving technical questions of law should be tried by the civil courts.¹²

Thus, the above guidelines can be considered by the CO in the Indian Navy while taking over such cases for trial under the provisions of the naval law, and the decision is to be taken after due deliberation, on a case-to-case basis.

¹⁰ 1981 (1) SLR 71 (*RS Bhagat Case*).

¹¹ The *Manual of Military Law* is an official publication of the Ministry of Defence, Government of India, New Delhi and stipulates rules and procedure for the investigation, prosecution, and punishment of military offences and crimes in the armed forces.

¹² *Manual of Military Law* (Ministry of Defence, Government of India New Delhi 1983) vol 1, 87.

III. COURT-MARTIAL

There are various fora¹³ available to the naval authorities to deal with cases of indiscipline under the provisions of naval law. However, this article restricts itself to a discussion on the procedure for trial by court-martial in the Indian Navy.

A. *The Jury and Command Influence*

1. Constitution of the Jury

The court-martial consists of a jury¹⁴ called 'the members of the court-martial' and the Trial Judge Advocate (TJA) who is not a member of the court-martial but is an officer qualified in law, who advises the jury during the course of the trial on the relevant provisions of the law.¹⁵ It is the duty of the court-martial to decide which view of the facts is true and then arrive at a finding, which under such view, ought to be arrived at.¹⁶

Section 97 of the Act provides for the constitution of the court-martial. Sub-section (6) of section 97 provides for the strength of the jury, which should be not less than five and not more than nine officers. A majority of the members, including the President, are officers of the executive branch.¹⁷ The members have to be drawn from at least two different

¹³ Chapter XII of the Act stipulates the authorities having power to award punishments and provides for the different fora to punish offenders. Under section 93(1), a person can be tried by a court-martial for the commission of a naval offence; section 93(2) provides for summary trials of sailors by their CO; section 94 confers power on the Central Government, Chief of Naval Staff and other officers to impose forfeiture of seniority; sections 95 and 96 provide for the constitution and procedure of disciplinary courts during war or active service.

¹⁴ In common parlance, a jury may be defined as a body of citizens sworn to give a true verdict according to the evidence presented in a court of law. India had a jury-based system until 1959 when, after the case of *Kawas Nanavati v. State of Maharashtra* 162 (1) Cri LJ 521 where the jury of the Sessions Court was thought to be unduly influenced by the press, jury trials in India were abolished. Currently, the jury system exists only in the Armed Forces.

¹⁵ *Navy Act, 1957*, section 114.

¹⁶ *Navy Act, 1957*, section 115.

¹⁷ *Navy Act, 1957*, section 97(10)(b).

ships.¹⁸ Further, the officer who orders the court-martial, the CO of the accused and the investigating officer are disqualified from being members of the court-martial.¹⁹ The convening authority or any officer empowered by him appoints the President of a court-martial who is either senior to or of the same rank as that of the accused.²⁰ The members of the court-martial are to be appointed by the President by summoning all officers next in seniority to him at the place where the court-martial is to be held, and to sit thereon until five members are chosen.²¹

The aforementioned provisions have been laid down to minimise the 'command influence'²² of the convening authority. One of the criticisms of the court-martial system is the pressure that the convening authority may bring upon members of the jury whose careers are dependent on him. To prevent the same, the President of the court-martial and not the convening authority appoints the members of the jury.

This is unlike the procedure under the *Army Act, 1950*, wherein the convening authority appoints both the President and the members of the court-martial. The exact number of officers detailed to serve as members of the court-martial are also clearly mentioned in the convening order.

However, sub-section (19) of section 97 is being circumvented by the Navy through sub-section (20) of section 97 read with Regulation 174 of the *Regulations for the Navy, Part 2 [Statutory], 1965* (the Regulations) wherein the convening authority gives the list of officers to the President who can sit as members to try the accused. All other officers who are eligible to sit as members of the court-martial for the trial may be shown as exempted on grounds of sickness or urgent public duty by the convening authority. Therefore, the convening authority could influence the appointments of all members of the court-martial to try the accused, albeit indirectly.

¹⁸ *Navy Act, 1957*, section 97(11).

¹⁹ *Navy Act, 1957*, section 97(9).

²⁰ *Navy Act, 1957*, section 97(12).

²¹ *Navy Act, 1957*, section 97(19).

²² Rear Admiral OP Sharma states that while the phrase 'command influence' is vague, to an accused who is prosecuted, it means that he may not get a fair trial due to the 'command influence' exercised by the convening authority through the officers appointed by him for the trial. See OP Sharma, *Military Law in India* (2nd edn NM Tripathi Pvt Ltd. New Delhi 1989) 193.

The TJA is appointed by the convening authority as per Regulation 161 and is on the staff of the convening authority. Being on the staff, the convening authority writes an Annual Confidential Report (ACR) each year. As the promotion, appointments and postings are based on the ACR, under the circumstances, the TJA may be seen to be under the command influence of the convening authority.

In the case of *Lt Col PPS Bedi v. Union of India and Others*²³ the Supreme Court made a reference to the command influence prevailing in the Armed Forces by citing *Black, J in Reid v. Covert*²⁴ as follows:

‘Court-martials are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of “command influence”. In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command. Frequently, the members of the court-martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings – in short, for their future progress in the service. Conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, the members of a court-martial in the nature of things do not and cannot have the independence of jurors drawn from the general public or of civilian judges.’²⁵

Thus, it becomes necessary to follow the provisions of the Act both in letter and spirit so that the accused is not defenceless against command influence.

B. *Reasoned Order: Principles of Natural Justice*

As seen above, the court-martial consists of a jury and the TJA. The duty of the jury is to ascertain the facts of the case and to arrive at a

²³ AIR 1982 SC 1413 (*Bedi case*).

²⁴ 354 US 1 (1957), available at <http://www.constitution.org/ussc/354-001a.htm> (last visited 18 May 2005).

²⁵ AIR 1982 SC 1413, para 45.

finding. As the jury consists of officers drawn from the various branches of the Indian Navy and a majority being from the executive branch, they are not well versed with legal provisions. During the trial, the TJA, who is a legal officer, assists them. His functions are enunciated in section 114 of the Act. He decides all questions of law, including those pertaining to admissibility of evidence. Thus, a court-martial is a non-judicial or administrative tribunal²⁶ consisting of officers performing judicial functions.

The finding of the jury is always through a non-speaking order, stating 'guilty or not guilty' on each charge,²⁷ except in navigational cases²⁸ under Regulation 185A of the Regulations, where they are required to give a reasoned order.

The question as to whether there is a general principle of law or a rule of natural justice that a statutory tribunal should always, and in every case, give reasons in support of its decisions first appeared for consideration before the Supreme Court in the case of *Som Dutt Datta v. Union of India*.²⁹ Here, the Supreme Court did not accept the contention that apart from any requirement imposed by the statute or statutory rule, either expressly or by necessary implication, that there is no general principle or any rule of natural justice that a statutory tribunal should always, and in every case, give reasons in support of its decision.

In *S N Mukherjee v. Union of India*,³⁰ the Supreme Court was faced with a reconsideration of the decision in the *Som Dutt* case in the light of recent judgments.³¹

²⁶ In *Ridge v. Baldwin* [1964] AC 130, referring to the power vested in the administrative tribunals, Lord Reid held that a power which affects rights or interests is what makes it 'judicial', and so subject to the procedures required by natural justice.

²⁷ *Navy Act, 1957*, section 118.

²⁸ The offences, as defined under sections 55 and 55A of the Act, of losing ship or aircraft and dangerous unauthorised flying, respectively.

²⁹ AIR 1969 SC 414, para 10 (*Som Dutt case*).

³⁰ AIR 1990 SC 1984, para 47 (*Mukherjee case*).

³¹ *Bhagat Raja v. Union of India* AIR 1967 SC 1606; *Mahabir Prasad Santosh Kumar v. State of UP* AIR 1970 SC 1302; *Woolcombers of India Ltd. v. Woolcombers Workers*

The Supreme Court had to decide two issues—firstly, whether there was any general principle of law that required an administrative authority to record the reasons for its decision; and secondly, whether the said principle applies to a court-martial.

After tracing decisions of courts in the US,³² England,³³ Australia,³⁴ Canada³⁵ and India, the Supreme Court laid down that the concept of natural justice extended to giving reasoned orders by administrative tribunals for several reasons. The authority would have to give reasons in support of its decision, and the same would operate as an effective restraint on abuse of power. Unlike a Judge, he cannot be objective, uninfluenced by considerations of policy or expediency. Thus, the extraneous considerations and arbitrariness in the decision could be ruled out through a reasoned order.

Furthermore, with a reasoned order, the Supreme Court would be enabled under Article 32 and the High Courts under Article 226 of the Constitution of India, to effectively exercise the power of judicial review. In addition, reasoned orders introduce clarity in the decisions.

Although the Court considered itself bound by the decision in the *Som Dutt case*, it made some important recommendations that are worth mentioning. It held that the reasons required to be given in a court-martial were not required to be as elaborate as in the decision of a court of law. This is apt to the constitution of a court-martial, where the jury have no knowledge of law and therefore cannot be expected to give a detailed reasoned order. However, the TJA guides the court on questions of law during the trial. Further, before the jury retires to give a verdict under section 116 of the Act, the TJA summarises the evidence and lays down the law under section 113 by which the jury is to be guided while determining the guilt of the accused. Thus, the jury can give a brief reasoned order through the guidance of the TJA without being influenced by the TJA during their findings.

Union AIR 1973 SC 2758 and Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India AIR 1976 SC 1785.

³² *Securities and Exchange Commission v. Chenery Corporation* 318 US 80 (1943).

³³ *Regina v. Gaming Board for Great Britain* (1970) 2 QB 417.

³⁴ *Osmond v. Public Service Board of New South Wales* (1985) 3 NSWLR 447.

³⁵ *Pure Spring Co. Ltd v. Minister of National Revenue* (1947) 1 DLR 501.

This is unlike the procedure followed by the Army, wherein the Judge Advocate is also a part of the court-martial proceedings when the findings are being deliberated. This procedure has been much criticised. In the case of *Union of India v. Charanjit Singh Gill*,³⁶ the Supreme Court, referring to the *Mukherjee case*, held that with the role assigned to the TJA, he could easily sway the minds of the jury as they were not law-knowing persons, thus he must maintain an impartial position. In the same case, the Court also took note of the fact that despite the changes recommended in the law of the Armed Forces in the *Bedi case*, only Rule 62 of the Army Rules (providing for giving brief reasons in support of the finding) had been amended. However, the Court observed that it may often fall upon the Judge Advocate to record or cause to be recorded the brief reasons, which again left scope for arbitrariness.

Canada,³⁷ UK³⁸ and Australia³⁹ have enacted legislation for the decisions of the tribunals to be reasoned. In India, the matter was considered by the Law Commission in its 14th Report relating to reform in Judicial Administration, wherein the Law Commission made, *inter alia*, the recommendation that, 'In case of administrative decisions, provisions should be made that they should be accompanied by reasons. The reasons will make it possible to test the validity of these decisions by the machinery of appropriate writs.'

In the *Mukherjee case*, the Court held that an exception to the giving of reasons could be made in cases of public interest wherein the administrative authority could withhold the reasons. Thus, if a norm is to be established, then the Act must be amended to provide for brief reasoned orders. If during the determination of the guilt, the jury requires the ascertainment of a point of law, the President can reassemble the court-martial again for the TJA's advice. In this manner, undue influence of the TJA can be avoided, and a reasoned order can also be delivered.

IV. JUDICIAL REVIEW

Judicial review of court-martial proceedings is governed by sections 160

³⁶ AIR 2000 SC 3425.

³⁷ *Statutory Powers and Procedure Act* RSO 1980.

³⁸ *Tribunal and Enquiries Act, 1971* (UK).

³⁹ *Administrative Decisions (Judicial Review) Act, 1977* (Cth), section 13.

and 161 of the Act.⁴⁰ Further modifications of findings and sentences, pardons and commutation, remission and suspension of sentences is governed by sections 162 to 164 of the Act. In *Union of India v. Himmat Singh Chahar*,⁴¹ the Supreme Court held that a reading of these sections clearly provided that there was no scope for judicial review by civil courts as the entire procedure is provided in the Act itself.

The Constitution of India under Article 136(2) expressly excludes the power of the Supreme Court to grant leave to appeal from any judgment, decree, determination, sentence or order, in any cause or matter, made by a tribunal constituted by or under any law relating to Armed Forces.

Further Article 227(4) of the Constitution of India provides that, 'Nothing in this Article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.'

Dr BR Ambedkar, explaining the scope of these articles, observed as follows in the Constituent Assembly:

'I should, however, like to say this that Clause (2) does not altogether take away the powers of the Supreme Court or the High Courts. The law does not leave a member of the Armed Forces entirely to the mercy of the tribunal constituted under the particular law. For, notwithstanding clause (2) of Article 112, it would be still open to the Supreme Court or the High Courts to exercise jurisdiction, if the court-martial has exceeded the jurisdiction given to it or the power conferred upon it by law relating to the Armed Forces. It will be open to the Supreme Court as well as the High Courts to examine the question whether the exercise of jurisdiction is within the ambit of the law, which creates or constitutes this Court or tribunal. Secondly, if the court-martial were to give a finding without any evidence, then again, it will be open to the Supreme Court as well as the High courts

⁴⁰ The Judge Advocate General of the Navy reviews the court-martial proceedings by hearing the accused in person or through his counsel and forwards his report with a recommendation to the Chief of Naval Staff whereas under section 164(2) of the *Army Act, 1950* the person aggrieved may present a petition to the Chief of Army Staff, the Central government or any person prescribed in this behalf.

⁴¹ AIR 1999 SC 1980 (*Chahar case*).

to entertain an appeal to find whether there is evidence. ... Similarly, if I may say so, it would be open for a member of the Armed Forces to appeal to the Court for the purpose of issuing Prerogative Writs in order to examine whether the proceedings of the court-martial against him are carried on under any law made by the Parliament or whether they were arbitrary in character. This Article is a necessary Article. It really does not do anything more but gives a statutory recognition to a rule that is prevalent and which, is recognised by all superior Courts.⁴²

The Supreme Court has laid down the following circumstances in which Judicial Review can be exercised:

1. In the *Mukherjee case*, the Court held that judicial review may be provided if:
 - (i) the said proceedings have resulted in denial of Fundamental Rights; or
 - (ii) the said proceedings suffer from a jurisdictional error; or
 - (iii) there is an error of law apparent on the face of the record.
2. In *Union of India v. Maj A Hussain*,⁴³ the Hon'ble Supreme Court laid down that if the composition and the proceedings of the court-martial were not in accordance with the procedure prescribed in the Act, the High Court or the Supreme Court could interfere.
3. In the *Chahar case*, the Supreme Court held that violation of principles of natural justice that vitiated the entire proceedings called for judicial review.

However, the following are the circumstances in which no judicial review will lie:

1. In *BC Chaturvedi v. Union of India*,⁴⁴ the Supreme Court held that the Court could not review the decision or order of

⁴² Dr BR Ambedkar, Constituent Assembly Debates, vol 10, 376–380 (6–17 October 1949).

⁴³ AIR 1998 SC 577.

⁴⁴ (1995) 6 SCC 749.

punishment by the disciplinary authority. Further, the Court could not act as an appellate body to reappreciate the evidence and to arrive at its own findings based on such evidence.⁴⁵

2. In the *Chahar* case, the Court held that judicial review was not an appeal from a decision but from the manner in which the decision was made. Thus, it was not the duty of the Court to ensure that the conclusion which the authority reaches is necessarily correct in the eyes of the law.

V. REQUIREMENTS FOR APPELLATE PROVISIONS

It is thus clear that there is very limited scope of interference by the courts through the process of judicial review. The civil courts can look neither into the facts or evidence of a case, nor into the adequacy of the punishment, but only into the procedural aspects of the court-martial proceedings. Nevertheless, there have been an increasing number of military personnel seeking relief from civil courts. The number of military cases pending in the civil courts in 1992 was 1723; this number increased to 6024 in the year 2000.⁴⁶

Commenting on the various lacunae existing in the military law in India, the Hon'ble Supreme Court observed as follows in the *Bedi* case:

'Absence of even one appeal with power to review evidence, legal formulation, conclusion and adequacy or otherwise of punishment is a glaring lacuna in a country where a counter part civilian convict can prefer appeal after appeal to hierarchy of courts. The core question is whether at least there should be one appeal to a body composed of non-military personnel and who enjoy the right of judicial review both on law and facts as also determine the adequacy of punishment being commensurate with the gravity of the offence charged. Judicial approach by people well-versed in objective analysis of evidence trained by experience to look at facts and law objectively, fair play and justice cannot always be subversive of discipline. Unjust decision would

⁴⁵ See also *UOI and Ors. v. Shivendra Bikaram Singh* AIR 2003 SC 2481.

⁴⁶ Editorial, 'How Fair is the Army Judicial System?', *The Tribune* (Chandigarh India 23 October 2001); Rajat Pandit, 'Legal Battles Sap Forces Energy', *The Times of India* (Mumbai India 18 May 2005).

be subversive of discipline. And nothing revolutionary is being suggested.’

The Supreme Court also observed that the UK had enacted the *Court-martial (Appeals) Act, 1951* and it had been extensively amended by the *Court-martial (Appeals) Act, 1968*, wherein the members of the Appellate Court consisted of ordinary Judges of the Court of Appeal who would inspire confidence, being free from any military bias. Further, as observed by the Supreme Court, the Court of Appeal had ‘full power of Judicial Review unhampered by any procedural clap trap.’

The Hon’ble Supreme Court also made a reference to the *Uniform Code of Military Justice Act, 1950* (UCMJ) of the United States and observed that:

‘[B]etween 1950 and 1968 when the *Administration of Justice Act, 1968*, was introduced, many advances were made in the administration of justice by civil courts but they were not reflected in military court proceedings. To correct these deficiencies the congress enacted *Military Justice Act, 1968*. ...’⁴⁷

In 1948, Congress had placed the Departments of the Army, Navy, and Air Force under the newly created Department of Defence. The first Secretary of Defence, James Forrestal, created a committee under the chairmanship of Professor Edmund Morgan to study the potential for unifying and revising the services’ disparate military justice systems under a single code. The committee recommended a unified system applicable to the Army, Navy, Air Force, Marine Corps and Coast Guard. Numerous other changes were proposed by the committee, including the creation of an independent civilian appellate court. The committee’s recommendations, as revised by the United States Congress, became the UCMJ. Article 67 of the UCMJ established the Court of Military Appeals as a three-judge civilian court. The Report of the House Armed Services Committee accompanying the legislation emphasised that the new Court would be ‘completely removed from all military influence of persuasion.’ In 1968, Congress redesignated the Court as the United States Court of Military Appeal and in 1983, authorised direct appeal to the Supreme Court of cases decided by

⁴⁷ AIR 1982 SC 1413, para 46.

the United States Court of Military Appeals, except for cases involving denial of a petition for discretionary review. As seen above, the US has enacted a Uniform Code of Military Justice governing all the three forces by a common Statute. Similarly, the Armed Forces of the UK are also governed by the consolidated *Armed Forces Act, 1966*.⁴⁸

The Supreme Court in the *Bedi* case advocated the setting up of an Independent Appellate Tribunal for the Armed Forces consisting of non-military personnel free from command influence and who could look into all aspects of the case, both procedural and legal. As a consequence of the above, the three service headquarters were asked to examine the case for providing a right of appeal by constitution of a court-martial appeal court. However, little has been done in this regard so far.⁴⁹

Currently in India, as we have seen, each of the Armed Forces is governed by its own distinct legislation. Although the basic structure of all the three Acts is identical, there are glaring differences in certain provisions, like the different types of court-martials, procedure for pre-trial investigation, judicial review of court-martials, appointment of jury, reasoned orders, confirmation of the court-martial orders and the extent of restriction on the fundamental rights. Article 14 of the Constitution of India, while providing for equality before law and equal protection of the law, permits reasonable classification for the purposes of legislation of the members of a well-defined class.⁵⁰ The members of the Armed Forces are a distinct

⁴⁸ Available at <http://www.hms0.gov.uk/acts/acts1996/1996046-a.htm#1> (last visited 21 May 2005).

⁴⁹ The 15th Law Commission of India, headed by BP Jeevan Reddy, J prepared the 169th Report in which it recommended the creation of an Armed Forces Appellate Tribunal to entertain appeals against the sentence or finding or order of the court-martial under three acts governing the Armed Forces. The Appellate Tribunal will consist of a retired judge of the Supreme Court or retired Chief Justice of the High Court who shall preside over the tribunal as President, a retired officer of the Army of the rank of Major General or above or retired officer of the Air Force of the rank of Air Vice Marshall or a retired officer of the Navy of the rank of Real Admiral and retired Advocate General of the Army or Airforce or Navy. The recommendations of the Law Commission seek to meet the deficiencies pointed out by the Supreme Court of India in its decisions on the subject by suggesting measures for expeditious disposal of appeals against the orders of court-martials. However, the Government has been silent on giving effect to these proposals. Available at <http://pib.nic.in/archive/Ireleng/10999/r280999.html> (last visited 17 May 2005).

⁵⁰ *State of Bombay v. Balsara* 1951 SCR 682, 708–709.

class in themselves, and may be reasonably classified under legislation as a class different from their civilian counterparts. However, as seen above, the three forces are being further classified as distinct classes by the application of different Acts to them. But Article 14 prohibits class legislation, ie differential treatment of members belonging to the same class.⁵¹ Thus, as recommended in the *Bedi case*, the three Acts must be consolidated to form a Uniform Military Code wherein the peculiarities of each service can still be retained. The law as to court-martials, fundamental rights, appeals etc should be the same for all the members of the Armed Forces.

VI. CONCLUSION

The Act has been found to be antiquated and out of step with the liberal spirit of the Constitution of India. There has been a sea change in the administration of military justice in the rest of the world, but India continues to live in the 19th century.

The main faults that have been found in the Act and which require immediate rectification can be summarised as follows:

- (i) Court-martials do not even write brief reasoned orders for each charge.
- (ii) The convening authority is exercising considerable amount of command influence over the members of the court-martial and the TJA.
- (iii) Absence of the provision of being heard at the pre-trial investigation stage.
- (iv) Absence of even one appeal with power to review evidence, legal formulation, conclusion and adequacy or otherwise of punishment given by the court-martial.
- (v) The need for making the rights and duties of the members of the Armed Forces ascertainable by reference to a single statute.

The large number of legal cases being contested by the Defence Ministry and the Armed Forces Headquarters run into more than 100,000, showing

⁵¹ *Chiranjit Lal Chaudhari v. Union Of India* AIR 1951 SC 41, para 83.

that the justice delivery system of the Armed Forces has been moving at a very slow pace, and has not been able to satisfy the aspirations of the men in uniform. The Supreme Court, in the *Bedi case*, commented that:

‘[R]eluctance of the apex court more concerned with civil law to interfere with the internal affairs of the Armed Forces is likely to create a distorted picture in the minds of the military personnel that the persons subject to the Armed Forces are not citizens of India.’⁵²

It is not correct to say that since the number of persons affected by military law is small, or the members of the Armed Forces have voluntarily submitted themselves to the existing system with all its defects, no reform of the law is necessary. There is a need to strike a fair balance between the pressures of a democratic society and the requirements of military discipline. The intention must be to remove the glaring deficiencies in the safeguards accorded to the accused and in the attitude of those administering the military justice delivery system. What the Supreme Court wants the government to bring about is a quantum transformation. It is not going to be an easy task, considering the radical change in mindset that it requires, but there is no denying that modifications are to be called for urgently.

In *Union Of India v. Charanjit Singh Gill*,⁵³ the Supreme Court once again reminded the Central Government and the Parliament of their constitutional obligations to incorporate the changes as recommended by the Supreme Court in its decision in the *Bedi case* by observing that:

‘[T]he law relating to Armed Forces remains static which requires to be changed keeping in view the observations made by this court in *Bedi’s case*, the constitutional mandate and the changes effected by other democratic countries. The time has come to allay the apprehension of all concerned that the system of trial by court-martial was not the arch type of summary and arbitrary proceedings.’⁵⁴

⁵² AIR 1982 SC 1413, para 45.

⁵³ *Supra* n. 36, 3432.

⁵⁴ *Supra* n. 36, para 9.

NANOTECHNOLOGY: PROTECTING THE NEXT BIG 'SMALL' THING[†]

*Shrinivas Sankaran**

'The best way to predict the future is to invent it.'

Alan Kay¹

I. INTRODUCTION

The globalisation of Intellectual Property Rights (IPR) has ushered in a degree of uniformity amongst the laws in different countries. However, laws do not and *cannot* always foresee every kind of situation. With the advent of Nanotechnology as a radical new science, this shortcoming is all the more amplified. The efficacy of the existing forms of protection for this new science and its related inventions is slated to open up a whole new chapter in the Intellectual Property Law jurisprudence. This article seeks to highlight how Nanotechnology can fit best within the jigsaw puzzle of the existing laws. Therefore, it is essential that a brief introduction to Nanotechnology be included before proceeding to the legal aspects.

II. BEGINNERS GUIDE TO NANOTECHNOLOGY

The key technologies since the industrial revolution and beyond have always been about downsizing ie reducing size, materials and costs while increasing power and output. It has always been a top-down process, taking different materials and joining them or cutting them down to size and specifications. 'Blocks or chunks of raw material are cast, sawed, or machined into precisely formed products by removing unwanted matter'

[†] This article reflects the position of law as on 20 August 2005.

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and '[t]he results of such processes may be rather small (integrated circuits with structures measured in microns) or very large (ocean liners or jumbo jets)'.² However, we have never possessed the expertise to operate at the molecular scale.

Enter Nanotechnology – a term coined by Richard P Feynman,³ the Nobel laureate and physicist in his famous lecture entitled 'There Is Plenty Of Room At The Bottom'.⁴ He envisaged the creation of material at a microscale by the manipulation of atoms that formed it. The ability to manipulate atom by atom would be possible if we have the capacity to see what we are doing at the atomic level, the development of which is inevitable.⁵ Although the idea put forward was ahead of its time, it was not very difficult to imagine something as simple and fundamental as the manipulation of atoms, since nature has been working this way for millions of years.⁶

A. What Is Nanotechnology?

'Nano' in Greek means *dwarf*. The Oxford dictionary defines it as the 'form denoting a factor of 10^{-9} '.⁷ What does it mean, in a way that we can comprehend? A nanometre is one-billionth of a metre. To put that in

² Frederick A Fiedler and Glenn H Reynolds, 'Article: Legal Problems Of Nanotechnology: An Overview' (1994) 3 *Southern California Interdisciplinary Law Journal* 594, available at <http://discuss foresight.org/~peterson/FiedlerReynolds.html> (last visited 20 August 2005).

³ 'Feynman discussed a wide range of novel ideas, included among them was the ability to rearrange atoms for information storage, duplicating how biological systems write and execute information stored at the molecular level, and the creation of tiny, self-replicating "hands" that were capable of simultaneously manufacturing very small devices.' See Francisco Castro, 'Legal And Regulatory Concerns Facing Nanotechnology' 4 *Chicago-Kent Journal of Intellectual Property* 140, available at [http:// http://jip.kentlaw.edu/art/volume%204/4%20Chi-Kent%20J%20Intell%20Prop%20140.doc](http://http://jip.kentlaw.edu/art/volume%204/4%20Chi-Kent%20J%20Intell%20Prop%20140.doc) (last visited 20 August 2005).

⁴ The lecture delivered at the California Institute of Technology in 1959 is regarded as a 'first' on Nanotechnology as a serious science. The transcript is available at www.zyvex.com/nanotech/feynman.html (last visited 20 August 2005).

⁵ Fiedler and Reynolds *supra* n. 2.

⁶ *Ibid.*

⁷ F.G. Fowler and H.W. Fowler, *The Pocket Oxford Dictionary of Current English* (8th edn Oxford University Press Delhi 1996) 591.

perspective, a human hair is roughly 100,000 nanometres (nm) in diameter.⁸ A human blood cell is 1,000 nm in diameter and a red blood cell is about 5,000 nm in diameter, about one-twentieth the width of a human hair.⁹ A virus is in the order of 100 nm.¹⁰ A DNA molecule is about 2.5 nm wide. DNA is an assemblage of hydrogen, nitrogen, oxygen and carbon atoms.¹¹ The diameter of single atoms ranges from about 0.1 to 0.5 nm.¹² As Fiedler and Reynolds state:

‘Nanotechnology—or, more specifically, that subset of nanotechnology known as “molecular manufacturing”—involves manipulating matter on an atom-by-atom or molecule-by-molecule basis to attain desired configurations. This description, though simple, is wholly accurate. Its simplicity, however, conceals a great deal of complexity in both the application and implications of nanotechnology.’¹³

The reason for the above paradox is that we have never explored the possibility of imitating nature as far as building matter is concerned.¹⁴ Feynman believed that a reversal of technique holds tremendous promise.

B. *Protectable Intellectual Property in Nanotechnology*

1. Manufacturing Methods

The manufacturing methods that work by the positioning of atoms, either physically or chemically, will be the primary focus of Nanotechnology patents. Nanotechnology involves manipulation at the atomic level to

⁸ Jerry Tullis, ‘Current Intellectual Property Issues in Nanotechnology’ (2004) *UCLA Journal of Law & Technology Notes* 12, available at http://www.lawtechjournal.com/notes/2004/12_040809_tullis.php (last visited 20 August 2005).

⁹ *Ibid.*

¹⁰ Tullis *supra* n. 8.

¹¹ —, ‘From Genomes to Atoms: the Big Down’, p 14, at <http://www.etcgroup.org/documents/TheBigDown.pdf> (last visited 20 August 2005).

¹² *Ibid.*

¹³ Fiedler and Reynolds *supra* n. 2, 595.

¹⁴ Nature always starts building from the smallest unit. Complex structures are built from the bottom-up process by cell replication and fusion by billions of such units working in parallel.

construct materials. The question of manipulating atoms one by one posed a problem for all Nanotechnology enthusiasts. Further, the laws of physics are totally different at the nano level because quantum laws of physics change the behaviour of electrons. The dilemma can be explained by an analogy. Bulldozers, owing to their sheer size, cannot be used to create fine equipment on the lines of a wristwatch. At the most, factories that make wristwatches can be constructed by using bulldozers. In other words, finer and more sophisticated (not necessarily smaller) equipment is needed to get down to the minute level. Nanotechnology suggests that a bottom-up approach is needed to accomplish engineering goals at the molecular scale.¹⁵

Humans, animals and plants contain one molecular structure put together at a time. Yet they grow and reproduce quickly by building in parallel with many billions of molecular machines working at once. Using Nanotechnology, production would be carried out by a large number of tiny devices, operating in parallel, in a manner similar to the molecular system already found in living organisms.¹⁶ Assemblers¹⁷ have been proposed as general purpose manufacturing devices, which are able to build a wide range of useful products as well as copies of themselves. Eric K Drexler¹⁸ believes that these assemblers will perform the work of molecular manufacture. Assembly, in a broader sense, is the process of constructing devices and machines. In the case of positional assembly, the engineer has a degree of control over where an individual atom or molecule is placed. However, in the case of self-assembly, the process is

¹⁵ Eric K Drexler and Chris Peterson, 'Unbounding the Future – The Nanotechnology Revolution', available at http://www.foresight.org/UTF/Unbound_LBW/chapt_4.html (last visited 20 August 2005).

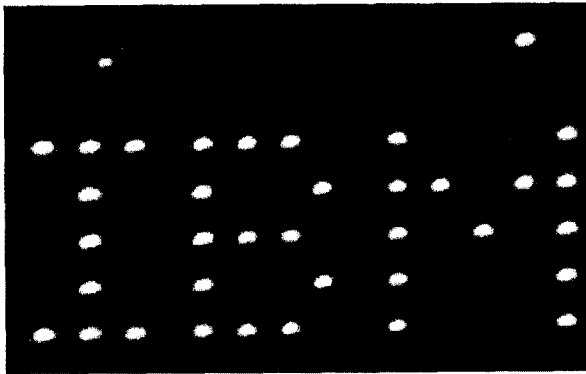
¹⁶ Fiedler and Reynolds *supra* n. 2, 599.

¹⁷ 'A chemical device that given certain atomic or molecular inputs (starting materials) can output a specific molecular structure or aggregation', at <http://www.nanoword.net/library/def> (last visited 20 August 2005).

¹⁸ Eric K Drexler is the author of 'Engines of Creation', the first book on Nanotechnology. He is an author, theoretical researcher, and policy advocate who focused on emerging technologies and their consequences for the future. In the book, he outlined the prospects for advanced molecular manufacturing technology – its capabilities, their medical, environmental, and economic implications, dangers and security risks, and potential policy responses. 'Engines of Creation' introduced the term 'Nanotechnology' to describe the Feynman vision and the technologies it will enable.

carried out largely by nature, once it is initiated, although the placement of individual atoms may be just as critical. These tiny devices would be capable of manipulating individual molecules very rapidly and precisely.¹⁹ To reap the benefits of such enormous parallelism, researchers are already achieving breakthroughs in the domain of protein engineering to manufacture molecules.

Our long-standing interest in developing innovative tools for material characterisation²⁰ at the nanoscale stems from the need to be able to look at what we have created, which is something that our conventional tools lacked. The dream of manipulating atoms became a reality in the early 80's after the invention of the Scanning-Tunnelling Microscope (STM) by IBM. The STM allows a sharp, electrically conducted needle-like tip onto an electrically conducting surface, almost touching it and thereby enabling the positioning of atoms. In 1990, IBM managed to assemble 35 xenon atoms in the logo of IBM, thus demonstrating to the world that a significant breakthrough had been achieved.



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- ¹⁹ "These assemblers will work fast. A fast enzyme, such as carbonic anhydrase, can process almost a million molecules per second, even without conveyors and power-driven mechanisms to slap a new molecule into place as soon as an old one is released ... an assembler arm will be about fifty million times shorter than a human arm, and so as it turns out it will be able to move back and forth about fifty million times more rapidly. For an assembler arm to move a mere million times per second would be like a human arm moving about once per minute: sluggish. So it seems a very reasonable goal". See Fielder and Reynolds, *supra* n. 2, footnote 24.
- ²⁰ The characterising of the material/end product through scientific techniques is known as 'material characterisation'.
- ²¹ See <http://www.nanomedicine.com/NMI/figures/2.25.jpg>. See also IBM Research Division, at <http://www.almaden.ibm.com/vis/stm/atoms.html> (last visited 20 August 2005).

Another focus would be on the technique of assembly, which involves the design of molecules that aggregate into the desired structures. What kind of protection could be afforded for the breakthrough procedures in the creation of anything so spectacularly small? If a traditional object is created using Nanotechnology, then how would one protect it and how would the manufacturers steer clear of infringement?

2. The Molecular Configuration or Structure

The molecular arrangement and configuration most stable and suited to achieving the product or effect desired, would also deserve protection. In the words of Eric Drexler:

'Proteins can self assemble into working molecular machines, objects that *do* something, such as cutting and splicing other molecules or making muscles contract. They also join with other molecules to form huge assemblies like the ribosome. Ribosomes,²² programmable machines for manufacturing proteins, are nature's closest approach to a molecular assembler. Since, bio-molecules already form such complex devices; it is easy to see that advanced protein engineering could be used to build first-generation nanomachines.' (emphasis supplied)²³

Similarly, Thomas Schalkhammer observes that:

'With respect to biotechnology, artificial nanostructured material is either a template for assembling biological materials, or the other way around. ... The use of nucleic acids as a matrix and means of self-assembly of nanoparticles into programmable arrangements provides the basis for manufacturing nanobiodevices. The ability to setup three-dimensional structures enables DNA Nanotechnology to construct nanoscale assemblies far exceeding those created with lithographic techniques and is

²² 'A minute round particle composed of RNA (Ribo Nucleic Acid) and protein that is found in the cytoplasm of living cells and serves as the site of assembly for polypeptides encoded by messenger RNA', at <http://www.answers.com/topic/ribosome> (last visited 20 August 2005).

²³ Drexler and Peterson *supra* n. 15.

able to provide building blocks for applications in nanoelectronics, nanorobotics and other nanomaterials'.²⁴

Would copyright be the obvious choice for the above or can the molecular structure be patented as in the case of pharmaceutical drugs, thereby rendering even original works leading to the same structure as an infringement?

C. *What Has Been Achieved So Far?*

- In June 2002, IBM nanotechnologists demonstrated a data storage density of one trillion bits per square inch, equal to a 100 gigabyte hard drive or 20 times the data of the magnetic storage used in today's computers.²⁵
- NEC Japan has spearheaded a breakthrough by using Carbon Nanotubes²⁶ (CNT) in batteries, which boost its lifespan by 20 per cent without creating any pollution or hazardous wastes.²⁷ Carbon Nanotubes are used in developing chips that run at 20 Ghz while consuming the same power as an Intel Corporation Pentium 4 processor²⁸ and can theoretically run three times faster than a conventional transistor of the same size and power consumption.²⁹

²⁴ Thomas Schalkhammer, 'Bionanodevices' in Hari Singh Nalwa (ed), *Encyclopedia of Nanoscience and Nanotechnology* (1st edn American Scientific Publishers United States 2004) vol 8, 332-333.

²⁵ IBM News Release, "'Millipede' Project Demonstrates Trillion Bit Data Storage Density" (11 June 2002), at <http://www.ibm.com/news/us/2002/06/11.html> (last visited 20 August 2005).

²⁶ Carbon nanotubes are cylinders made from rings of carbon atoms and are durable structures that allow electrons to move more quickly through the channel than current materials.

²⁷ —, 'NEC Pioneers Breakthrough in Nanotechnology', available at <http://www.nec.com/global/features/index7/index.html> (last visited 20 August 2005).

²⁸ Paul Kallender, 'NEC positions carbon nanotubes for prime time', at http://www.infoworld.com/article/04/09/02/HNnanotubes_1.html (last visited 20 August 2005).

²⁹ 'Intel Prepares For Next 20 Years Of Chip Making' (25 October 2004), available at <http://www.computerworld.com/hardwaretopics/hardware/story0,10801,96917,00.html> (last visited 20 August 2005).

- While Nanomix Inc³⁰ engineers nanotube based sensors which detect dangerous gas leaks, Kraft foods has set up a Nanotechnology food laboratory, where products like beverages with nano-capsules containing selectable flavours are being developed.³¹

III. WHAT KIND OF PROTECTION IS FEASIBLE FOR NANOTECHNOLOGY?

IPR relating to Nanotechnology primarily deals with *Patents* and *Copyrights*. Let us examine the best kind of protection that can be afforded to Nanotechnology within the present framework of Intellectual Property Laws.

A. *Patents*

A patent is a monopoly right granted to a person for a limited period, on the invention of a new, useful and non-obvious machine, manufacture or process.³² In the case of a process patent, the patentee has the exclusive legal right to prevent others from using or exercising the process or method in the country which grants the patent. The grant of a patent for a new product *per se* gives the patentee the exclusive legal right to prevent others from commercially utilising the product without his permission. Therefore, the moment any person prepares the said product without the patentee's permission, he will be infringing the rights of the patent holder. This is irrespective of the fact that an entirely different and new process has been employed. It is highly improbable that nanodevices will infringe the existing process patents.

According to section 2(1)(j) of the *Patents Act, 1970*, an 'invention' is defined

³⁰ Nanomix Inc is a company which develops Nanotechnology based sensors and hydrogen storage systems. Nanomix has also been developing high-density hydrogen storage systems that use nano materials for the emerging fuel cell industry. Their hydrogen storage system equals the energy density of gasoline. Engineering prototypes have been evaluated to demonstrate the technology's feasibility for use in fuel cell-powered vehicles. The website of the company is <http://www.nano.com> (last visited on 20 August 2005).

³¹ Charles Choi, 'Liquid Coated Fluids for Smart Drugs', available at <http://www.upi.com/view.cfm?StoryID=28022002-112756-2791r> (last visited 20 August 2005).

³² P Narayanan, *Intellectual Property Law* (3rd edn Eastern Law House 2002) 11. Section 2(m) of the *Patents Act, 1970* defines patent as a patent granted under the Act.

as 'a new product or a process involving an inventive step and capable of industrial application.'

Section 2(1)(j)(a) defines 'inventive step' as 'a feature of an invention that involves a technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art.'

All over the world, there are three primary requirements for a patentable invention. These are novelty,³³ inventive step (or non-obviousness)³⁴ and utility.³⁵ While it is generally easy to determine if an invention has an inventive step, the non-obviousness requirement may not be evident at first sight. For example, the use of dual spark plugs in the combustion chamber of an engine to burn fuel more efficiently is something that is non-obvious to a person skilled in that field or industry.

The United States Patents and Trademark Office has granted patents to some Nanotechnology based devices. Below are a few examples of the same:

- US Patent 4,343,993 issued to IBM for STM.
- US Patent 6,846,565 issued for light-emitting nanoparticles and method of making the same.
- US Patent 6,756,039 issued for self-assembling proteins.³⁶

³³ See Dr BL Wadehra, *Law Relating To Patents, Copyrights, Trademarks, Designs And Geographical Indications* (2nd edn Universal Law Publishing Co Pvt Ltd Delhi 2003) 7 (stating that 'the element of novelty in an invention is dependent upon the state of existing knowledge and similar inventions already known in the particular field. There would be no novelty if there has been a prior publication and use of an identical invention').

³⁴ See Ian Muir *et al*, *European Patent Law* (1st edn Oxford University Press Oxford 1999) 152 (stating that 'the invention must be non-obvious to a person skilled in the art to which the invention relates. The purpose of the requirement is to encourage continual development of technology from being impeded by monopoly rights. The assessment of the inventive step is made in relation to the level of skill and ability of the skilled person; that which does not exceed his ability or skill is not inventive').

³⁵ See Narayanan *supra* n. 32, 7 (stating that 'the invention must also be useful. An invention, which is new and non-obvious but cannot be put to any beneficial use to mankind, cannot be patented').

³⁶ The complete details of the patents issued are *available at* <http://www.uspto.gov> (last visited 20 August 2005).

Nanotechnology-based products may *prima facie* appear to fulfil the fundamental requirements of patent law.³⁷ However, there are several interesting and unique questions which arise for consideration, such as:

- Is merely making the same object smaller a patentable invention?³⁸
- Will the fundamentally different laws of physics at the nano-scale obstruct the patentability of the object, by overriding the non-obviousness hurdle?³⁹
- How can an atomic or molecular structure be patented?⁴⁰
- Will existing patents with broad claims that lack references to scale, on traditional products, extract royalties from their nanoscale counterparts?⁴¹

The patents applied for Nanotechnology are most likely to fail due to the lack of 'inventive step' or against the availability of prior art⁴² necessitating the search for prior art databases in the patent office. This is because it may at the first instance appear that the Nanotechnology based traditional products like a microprocessor or a cellular phone are merely a smaller version of the same product. The illustration of the bulletproof vest in the paragraphs below explains the same. In the case of *Graham v. John Deere Company*,⁴³ the United States Supreme Court has laid down a three-point checklist to ascertain the existence of an inventive step or non-obviousness:

- Determining what is contained in the prior art;

³⁷ Barry Newberger, 'Intellectual Property and Nanotechnology' (2003) 11 *Tex Intellectual Prop Law Journal* 649, 654.

³⁸ Michael P Williams, 'Questions About Patents and Nanotechnology' (2003) 230 *New York Law Journal* 7.

³⁹ *Ibid.*

⁴⁰ Williams *supra* n. 38.

⁴¹ Wei Zhou, 'Ethics of Nanobiotechnology at the Frontline' (2003) 19 *Santa Clara Computer & High Tech Law Journal* 481, 487.

⁴² The state or the database of patents prior to the invention or improvement for which the patent is sought.

⁴³ 383 US 1 (1966).

To determine the above, one has to conduct a search of patents granted by the patent offices in the country and all the published documents.

- Comparing the differences between the prior art and the present invention;

The invention is compared with the published documents relating to prior arts and is checked for similarity. It is checked whether the invention has already been anticipated earlier.

- Determining the level of ordinary skill in the pertinent art;

The inventive step must not be obvious to a person skilled in the art. It must be more than just ordinary skill possessed by a person skilled in the art.

The requirement of prior art is due to the fact that a mere miniaturisation of something, which already exists, would be a bar to patent. Also, the basic idea of a patent discourages the patenting of inherent properties of matter.⁴⁴ A way of countering the above is by emphasising the distinction between traditional miniaturisation and Nanotechnology itself. This brings up the all-important question of law, when a traditional product is created using Nanotechnology from the bottom-up rather than the traditional method of top-down. For example, if one invents a bullet proof vest for a child that is merely a smaller version of an adult vest, that invention would meet the utility requirement, it may meet the novelty requirement, but it would fail to meet the obviousness requirement. Taking an existing technology and merely making it smaller without having to overcome any technical hurdles or obtaining any unexpected results will not, in most cases, result in a patentable invention. However, if the vest is created using Nanotechnology as an enabling process that makes the same vest lighter and stronger, then it would be patentable since it meets the non-obviousness requirement.⁴⁵ In the words of Vicky Norton:

‘Careful patent drafting can secure coverage of related inventions even when based on inherent properties of materials, by focusing on the previously unattained nanoparticle’s size and scale and/

⁴⁴ *Infra* n. 66.

⁴⁵ Newberger *supra* n. 37.

or molecular organisation. In addition, process patents can be secured by focusing on the novel methods used to measure or alter the quantum properties of nanomaterials at such a level. ... If not artfully drafted, or if left to languish while discoveries continue, a company's patents may lack sufficient disclosure to block similar inventions, or fail to cover the technology ultimately commercialised. This permits competitors to reverse engineer products, save the costs of research and development, and outwit the patentee.⁴⁶

1. The Pitfall of Patent Infringement

The problems of protection do not end at obtaining the patent. The patent is a negative right of the patentee to prevent another from using his invention without permission. The patentee on the one hand must be able to prevent others from exploiting his invention and on the other must also be able to steer clear of infringing the patents of other holders. The term 'infringement' has not been defined under the *Patents Act, 1970* as such. An infringement occurs when the rights granted to the patentee under the patent, viz to make, distribute or sell the invention in India are violated.

In case of product patents, the rights of the patentee are infringed by anyone who makes or distributes that invention without the patentee's consent. Process patents are infringed when such a process is employed by anyone other than the patentee to make any product. To judge whether the act of a person infringes any patent, one has to see the scope of the monopoly conferred by the patents, which can be interpreted from the specification and the claims contained in the application of the patentee. Thus, any action not falling within the ambit of the claim would not amount to infringement.⁴⁷

⁴⁶ Vicki Norton, 'What Nanotechnology Means for IP' (June 2003), at <http://www.legalmediagroup.com/mip/includes/print.asp?SID=1961> (last visited 20 August 2005).

⁴⁷ Dr BL Wadehra, '*Law Relating to Patents Trademarks Copyright Designs and Geographical Indications*' (3rd Revised Edition Universal Law Publishing Co Ltd Delhi 2004).

a. *The Doctrine of Equivalents*

One of the hurdles to look out for is that the accused device may substantially perform the same functions, in substantially the same way and with substantially the same purpose as the original patented device, *although it escapes literal infringement*, which raises a presumption of infringement.

The Doctrine of Equivalents provides that a patent may be infringed even if the literal claims of the patent are not infringed. In the case of *Graver Tank and Manufacturing Co Inc v. Linde Air Products Co*,⁴⁸ it was held that a device will infringe the claims of a patent under the Doctrine of Equivalents if it 'performs substantially the same function in substantially the same way to obtain the same result' as the claimed invention. The Doctrine of Equivalents serves to expand the patent protection beyond the literal language of the claims.

b. *The Reverse Doctrine of Equivalents*

However, courts in the United States have also held that this doctrine can be used both as a shield and as a sword. In the *Graver Tank case*, the United States Supreme Court held that:

'The wholesome realism of this doctrine is not always applied in favour of a patentee but is sometimes used against him. Thus, where a device is so far changed in principle from a patented article that it performs the same or a similar function in a substantially different way, but nevertheless falls within the literal works of the claim, the Doctrine of Equivalents may be used to restrict the claim and defeat the patentee's action for infringement'.⁴⁹

This is popularly known as 'The Reverse Doctrine of Equivalents', for which there are two tests laid down by the United States courts in the case of *Texas Instruments, Inc. v. US International Trade Commission*.⁵⁰ Firstly, the accused device must have literally infringed the patentee's

⁴⁸ 339 US 605 (1950), 608 (*Graver Tank case*).

⁴⁹ 339 US 605 (1950), 609.

⁵⁰ 846 F 2d 1369 (Fed Cir 1988).

patent claims and secondly, in order to avoid infringement, the accused device must be 'sufficiently different' from the patentee's device.

In effect, when an accused device is so different from the claimed invention, a ruling of non-infringement may be justified even though the accused device falls squarely within the claims of the original invention. For example, if Company X manufactures a conventional microprocessor using silicon wafers, and obtains a patent for it, and if Company Y manufactures a microprocessor using carbon nanotubes acting as transistors, then although the latter performs the same function in substantially the same way, it is also so different *in principle*, that an infringement may be excused by applying the Reverse Doctrine of Equivalents, ie the Doctrine of Equivalents used against the patentee.

This kind of scenario is expected because of the ability of nanodevices to perform what conventional devices perform, however, on a much smaller scale. Favouring Nanotechnology-based inventors is desirable because it encourages the progress of science and hastens the commercialisation of Nanotechnology research, especially in a situation where the harm to traditional manufacturers is minimal because of additional technical considerations of working at the nanoscale and the unlikelihood of competition between Nano-manufacturers and traditional manufacturers. The reason for this clash may be attributed to the fact that traditional manufacturers may have never intended to limit the scope of their patent claims by specifying the scale at which the invention or the device is intended to operate, obviously as a result of the non-anticipation of Nanotechnology itself, leave alone its benefits.

Therefore by applying the Reverse Doctrine of Equivalents, a Nanotechnology patent, which might infringe a traditional device's patent, may be held to be non-infringing on the grounds of sufficient differences between the two due to the unique behaviour of atoms at the nano level and the incidental similarity to the 'prior art'.

However, infringement claims based on the fact that nano devices perform the same functions as traditional devices may also be on shaky grounds because:

- The manufacturers of traditional products are not likely to be

in the best position to take advantage of the Nanotechnology based applications of their products. The adaptation of traditional products to the nanoscale is likely to involve huge costs in obtaining the relevant expertise and upgrading machinery. Efficient Nanotechnology companies, already outfitted with the necessary technical expertise, are the logical developers of this new technology.⁵¹

- It is also not clear how Nanotechnology based applications of traditional products would eat into the commercial viability of the traditional products. As long as the common man is in need of products that can be easily manipulated, the demand for traditional products can never go down *primarily* due to a flood of smaller products occupying a niche of the market.⁵² For example, consider a conventional mobile phone with present day integrated circuits. Repairs to such a phone can be made by anyone who is trained with conventional tools. On the other hand consider a mobile phone, which uses a critical component created by using Nanotechnology and special materials, and whose repairs cannot be performed using conventional tools and knowledge. Until the new technology leads to mass production and widespread use, thereby making it cheaper, the former will not lose its utility.
- 'It is also not clear why traditional manufacturers should be granted a monopoly over their Nanotechnology based counterparts. Granting such a monopoly hinders an underlying function of the patent system, which is the promotion of scientific progress by providing inventors with an incentive to invent. In this case, traditional manufacturers never contemplated Nanotechnology based applications and all they needed was an incentive to invent the traditional products that they invented whether or not Nanotechnology was a reality. Thus, as motivations stand today, awarding a

⁵¹ Andrew Wasson, 'Protecting the Next Small Thing: Nanotechnology and the Reverse Doctrine of Equivalents' (2004) *Duke Law & Technology Review* 0010, available at <http://www.law.duke.edu/journals/dltr/articles/2004dltr0010.html> (last visited 20 August 2005).

⁵² *Ibid.*

monopoly on a traditional manufacturer would confer a windfall on the traditional manufacturer.⁵³

B. Copyrights

A difficulty arises when the property in question is the atomic or the molecular structure or configuration rather than the product itself. A patent may be granted for the process by which one arrives at the molecular combination and the product arising from it. However, the previously unattainable molecular structure may itself deserve protection.

Copyright subsists in literary, artistic, musical works, sound recordings and cinematograph films. The atomic or molecular structures could be sought to be protected as Original Literary works. In the case of *Ladbroke Ltd v. William Hill Ltd*,⁵⁴ it was held that the words 'literary work' would cover that which is expressed in print or writing irrespective of the question whether the quality or style is high. Thus football coupons, university exam papers, writings in Morse Code and Braille have all been held to be literary works. The essential characteristic is that of *originality*. An examination into the question whether atomic or molecular structures of products could be covered under the term Original Literary Work thus becomes imperative.

The dilemma of copyrighting a molecular or atomic structure arises particularly in the manufacture of proteins which assemble into working molecular machines to build the ribosomes or aid in the manufacture of new and improved drugs. 'Ribosomes, programmable machines for manufacturing proteins are nature's closest approach to a molecular assembler. ... Since biomolecules already form such complex devices, it's easy to see that advanced protein engineering could be used to build first-generation nanomachines.'⁵⁵ Genetic engineering, as we know it, will undergo fundamental changes and will be empowered by Nanotechnology, as the fields of Biotechnology and Nanotechnology converge. 'In fact, it will eclipse genetic engineering because it involves all matter – both living and non-living.'⁵⁶

⁵³ Wasson *supra* n. 51.

⁵⁴ (1964) 1 All ER 465, 475.

⁵⁵ Drexler and Peterson *supra* n. 15.

⁵⁶ *Supra* n. 11, p 10.

In the case of *Diamond v. Chakraborty*, the United States Supreme Court held that 'everything under the sun made by man is patentable'.⁵⁷ However, using the same argument, the computer industry, in parallel, had a problem with patenting programs. Issues of utility and obviousness hindered the biotechnology field throughout the 1980s and 1990s in obtaining patents.⁵⁸ When computer programs were afforded copyright protection around the world, such protection was sought for molecular configurations or even DNA molecules.

The feasibility of affording copyright protection in respect of molecular structures can be assessed by the following:

- Copyright exists for works that are original, and fixed works of authorship. For a work to be fixed it must be embedded in a copy under the author's authority for more than a transitory period. When a scientist arrives at a particular molecular structure or configuration by manipulating atoms, he creates a work of authorship. It is copyrightable because the configuration is fixed in the molecular structure itself which is achieved and presented on paper or a three dimensional model. The copyright will not subsist if the configuration freely exists in nature. However, if a particular configuration is attained by the process of manipulating atoms to combine in the particular configuration, then a copyright may subsist. For instance, the subsistence of copyrights in gene sequences has been a subject of great discussion recently. It has been proposed by scholars that the expression of new gene sequences would qualify as works of authorship. 'The rationale is that a new DNA sequence, designed by a scientist, qualifies as a work of original authorship because the specific order or sequence of the base pairs in DNA is conventionally written out and is fixed in a tangible medium of expression (the DNA itself). In simpler terms, the copyrighted expression is the actual DNA sequence, regardless of whether the sequence is

⁵⁷ 447 US 303, 309 (1980).

⁵⁸ Doreen M Hogle, 'Copyright For Innovative Biotechnological Research: An Attractive Alternative To Patent Or Trade Secret Protection' (1990) 5 *High Tech. Law Journal* 75, available at <http://www.law.berkeley.edu/journals/btlj/articles/vol5/Hogle/html/reader.html> (last visited 20 August 2005).

fixed on paper or in a DNA strand.⁵⁹

- Originality is a pre requisite for copyright protection. The *University of London Press, Ltd v. University Tutorial Press, Ltd*⁶⁰ case laid down that the standard of originality is minimal and it is a mere prohibition of actual copying. Therefore, any additional effort expended in improving a copyrighted expression gains a separate copyright. This opens the floodgates to independent research leading to the same result, which could result in extensive cross-licensing⁶¹ deals.
- Facts, ideas, and discoveries are not protected by copyright. Although facts may be 'discovered' by someone, they do not originate with that person. The molecular structure may fall within the classification of a 'fact of nature' but analysing other stable structures and achieving them, thereby forming a new structure that is more stable, is a different ball game. The molecular or atomic structures are not mere discoveries but are protectable expressions of the structure or configuration achieved. Since the structure itself becomes the expression by merging into an inseparable entity, such an expression must be accorded protection.

C. What about Trade Secrets?

Patents have to necessarily disclose full details of the product or the process in order to obtain it, there is always a danger of it being infringed by someone who could exploit the knowledge, now in the public domain, speed up the research and development of a product and use the 'Reverse Doctrine of Equivalents' to steer clear of infringement of the patent. Next, since it can take years for a novel material to come to the market, patent protection for it may expire before that happens. In such cases, trade secrets emerge as a possible alternative.

⁵⁹ James G Silva, 'Copyright Protection Of Biotechnology Works: Into The Dustbin Of History?' (2000) *Boston College Intellectual Property & Technology* F. 012801, available at http://www.bc.edu/bc_org/avp/law/st_org/iptf/articles/content/2000012801.html (last visited 20 August 2005).

⁶⁰ (1916) 2 Ch. 601.

⁶¹ Cross-licensing is the mutual sharing of intellectual property between companies without the exchange of a license fee.

Since there is no question of any disclosure as in the case of patents, there is no need for formalities such as registration or application for protection. The advantage of trade secret protection is that it can be maintained indefinitely, and is never published to competitors. The most famous example of a trade secret is the formula for Coca-Cola, which was successfully maintained as a trade secret for close to a century.

In India there is no legislation protecting data secrecy but the law is well crystallised in the form of law of confidence. In the case of *Coco v. AN Clark Engineering*, it was held that in an action for breach of confidence, 'it is firstly required to be proved that that the information was confidential. Secondly, that the circumstances imposed an obligation of confidentiality. Thirdly, there was unauthorised use of the information.'⁶²

However, the downside of electing trade secret protection is that the protection is lost once the information is made public, and protection cannot be sustained for products that are easily reverse engineered. Trade secret protection may be most appropriate in certain methods of manufacture where details cannot be gleaned from reverse engineering of the final product. However, with the advancement of technology, methods of reverse engineering may also improve, thereby exposing even a complex Nanotechnology based product or a creation.⁶³ Another limitation to the 'trade secret' form of protection is that potential investors also value a company based on its patent portfolio and having none is bound to lead to scepticism about the returns on investment, if the trade secret is leaked out. A trade secret also implies that to win cases against those accused of stealing a trade secret, a company has to demonstrate that it took efforts to maintain secrecy which may 'include high security, nondisclosure agreements for employees and third parties, access logs and other monitoring schemes – and clearly marked confidential information'.⁶⁴

Due to the inherent risks involved in maintaining trade secrets and the lack of remedy for the theft of such a secret, trade secrets as a means of

⁶² (1969) RPC 41, 47.

⁶³ Newberger *supra* n. 37.

⁶⁴ Charles Choi, 'Nano World: The Rise Of Nanotechnology Secrets', *The Washington Times* (Washington United States 26 November 2004), available at <http://washingtontimes.com/upi-breaking/20041125-093928-6066r.htm> (last visited 20 August 2005).

protection are unfavourable, although they are of indefinite duration. However, trade secrets as a form of protection in the field of Nanotechnology are set to increase as more and more companies are shying away from the idea of public disclosure.⁶⁵

D. Any Other Form of Protection?

The Semiconductor Integrated Circuits Layout Design Act, 2000 was enacted to provide for the protection of semiconductor integrated circuits layout-designs. Section 2(r) defines 'semiconductor integrated circuit' as a product having transistors and other circuitry elements, which are inseparably formed on a semiconductor material or an insulating material or inside the semiconductor material and designed to perform an electronic circuitry function. Protection for Nanotechnology based electronic products could be sought under this enactment. The term 'circuitry elements' is wide enough to accommodate processors and other semiconductor based appliances that use nanoscale materials like CNT even though the act may have never contemplated such a possibility. However, the protection granted is for a period of ten years and those looking for a longer period of protection may be better off with choosing patents.

IV. PATENTS VERSUS COPYRIGHT

The form of protection chosen to protect a particular work could be the most important aspect, sometimes even overshadowing the work itself. The matter boils down to what is the better, if not the best form of protection for the science of Nanotechnology and its applications.

- All innovations, if they were used as an intermediate step or as a process leading to a useful product (machine, manufacture or composition of matter) would receive adequate patent protection. The patenting of a mere property of a substance or of a physical phenomenon is prohibited because it is believed that that they are in essence the basic tools of scientific and technological research, free to all men⁶⁶ and reserved

⁶⁵ *Ibid.*

⁶⁶ *Parker v. Flook* 437 US 584, 589 (1978).

exclusively to none.⁶⁷ Perhaps, one of the reasons for enacting the above bar was the irrelevance of Nanotechnology as a promising science at that time, emphasising the common good. Nanotechnology altogether changes the paradigm of conventional patent law since it is transdisciplinary and borrows from physics, engineering, molecular biology and chemistry.⁶⁸ The intention of the legislature was to prevent the patenting of the configuration of natural substances as they are found in their *free state*. With Nanotechnology it becomes possible to manipulate and effect changes in the free state of atoms and arrange them in the configurations we want as long as they are stable in such a new configuration. Therefore, such molecular configurations would not be a mere manifestation of nature nor a mere property of matter, and would at the same time satisfy the requirements of novelty, utility and inventive step (non-obviousness). A copyright vests in the original expression of the author's work. However, if another person arrives at the same configuration independently using his own research and analysis, then the configuration arrived at by the second person would not be an infringement of the first copyright.⁶⁹ This would render the protection afforded to the first author futile as any person could arrive at the same findings. This would especially be of grave consequences to pharmaceutical companies that rely on chemical compositions and molecular configurations to make new drugs. For example, if Company 'A' manufactures Aspirin and does not hold a patent for it but has only a copyright for the molecular structure, then Company 'B' can arrive at the same molecular structure by independent research and manufacture the same drug under a different brand name and market the same. However, if it were patented, then the person would be guilty of patent infringement, thereby providing better protection. Also it is unlikely that one would end up with an identical configuration by parallel engineering in the case of

⁶⁷ 447 US 303, 309 (1980); *See* 437 US 584, 589 (1978).

⁶⁸ *Supra* n. 11, p 10.

⁶⁹ Wadehra *supra* n. 33, 285.

Nanotechnology. Therefore it would also be difficult for the second person to convince the judge that the configuration is not simply a copy of the first.

- The basic idea of intellectual property is to confer recognition and legal protection to the product of the intellect of a person. Through the system of IPR, it is possible not only to ensure that an innovation or creation is attributed to the individual, thus resulting in recognition, but also to secure the 'ownership' of it and benefit commercially as a result. This system is designed to benefit both the creator and society as a whole, and it strikes a delicate balance to ensure that the needs of both are satisfied. IPR usually allow the creator to commercially exploit his work exclusively for a limited period of time. In return for granting such rights, society benefits in a number of ways. A copyright usually subsists for a period of 60 years from the date of the author's death whereas the term of a patent is 20 years.⁷⁰ Intellectual Property laws must seek to balance the consideration of interests of the inventor of the work with the needs of society. If copyright protection is accepted, the protection of 60 years from the author's death is too long a period of time for a molecular or atomic configuration. For optimum commercial exploitation and also to serve the benefit of society, 20 years of protection afforded by a patent is quite sufficient. However, a limited duration of copyright would also be welcome and it is not without precedent. For example, *The Semiconductor Integrated Layout Design Act, 2000* grants protection to semiconductor designs for a limited period of ten years.
- Also a patent requires a compulsory disclosure, which allows for the further development of the invention by other competitors and increases the level of competition in the market for newer and more profitable inventions.

⁷⁰ Article 33, *Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)* (adopted 15 April 1994, entered into force 1 Jan 1995), Marrakesh Agreement Establishing the World Trade Organisation, Annex 1 C, Legal Instruments – Results of the Uruguay Round 1869 UNTS 299.

V. CONCLUSION

Nanotechnology, touted as 'the next best thing', is gearing up for a spate of protection related issues and in the near future, it may also warrant the broadening of intellectual property laws to accommodate its unique problems and needs. It may not penetrate our lives in the immediate future, but will do so sooner or later. However, as far as the current laws are concerned, patents seem to be the best bet, though fraught with idiosyncrasies peculiar to that form of protection. But the fact remains that the existing Intellectual Property laws are undoubtedly for the product of the human intellect and not the lack of it.

LEGAL PATERNALISM: THE INDIAN CONTEXT†

Natasha Treasurywala*

I. INTRODUCTION

The word 'paternalism' originates from the Latin word *pater*, meaning to act like a father, or to treat another person like a child. Legal paternalism subscribes to the view that it is permissible for the State to legislate against certain actions to prevent individuals from inflicting physical or severe emotional harm on themselves.¹ Laws against suicide and voluntary euthanasia, restrictions on the use of heroin, cocaine, marijuana and other harmful drugs, seatbelt and helmet regulations, gambling and prostitution laws are just some of the instances of paternalistic laws.

While paternalistic laws such as the ones mentioned above are fairly common in most legal systems, they involve a conflict between two significant issues an individual's fundamental freedom of choice and the importance of protecting the well-being of others. When people freely choose to act in ways that seem contrary to their own well-being, the question of whether the law is justified in interfering with their affairs arises.² For example, if a person refuses to wear a seatbelt while driving, should the law impose a penalty on him since his actions harm no one but himself? Anti-Paternalists believe that such laws by their very nature interfere with the autonomy of an individual and infringe upon a person's rights. However, the paternalistic school of thought justifies such laws as a necessary mechanism for making sure that people do not harm themselves by their self-deprecating actions.

The implications of paternalistic laws pertaining to freedom to choose

† This article reflects the position of law as on 20 June 2005.

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¹ Kenneth Einar Himma, 'Philosophy of Law', *The Internet Encyclopedia of Philosophy*, available at <http://www.utm.edu/research/iep/l/law-phil.htm#II.1.2%20%20Legal%20Paternalism> (last visited 10 June 2005).

² See Claire Andres and Manuel Velasquez, 'For Your Own Good' (Fall 1991) 4 (2) Santa Clara University Article, available at <http://www.scu.edu/ethics/publications/ie/v4n2/owngood.html> (last visited 10 June 2005).

are of global concern, although such a debate would be meaningless if people always acted in their best interests. Is there, then, an alternative to paternalistic legislation? Many a times, education is cited as a possible solution. According to supporters of the education theory, if people are made aware of the consequences of their self-harming actions, they may not be so reckless. Unfortunately, education, though seemingly a panacea, is by no means a complete solution to render paternalistic laws unnecessary. For instance, despite educating the public of the potential dangers of not wearing a seatbelt, certain people continue to flout such essential safety regulations. Also, educating the people is an enormous task especially in India, where only 61 per cent of the 1.1 billion strong population is literate.³ Therefore, education is not our answer and we have no choice but to look to the law for a solution.

In a Utopian society, there would be little (if any) need for paternalistic laws or any laws for that matter. In an educated society, perhaps the requirement of paternalistic legislation would be diminished, on the strength of the basic knowledge of the populace. But in India, where the spread of knowledge and information is insufficient, the need for paternalistic laws remains, and is perhaps relatively greater.

In this article, we first categorise paternalistic laws in India into three groups; Basic, Contradictory and Pseudo. The article then contends that while Basic Paternalistic Laws should be kept in place, Contradictory and Pseudo laws should be modified. Further, we look at various options to align Basic Paternalistic Laws with the notion of the autonomy of an individual on the basis of some theories of paternalism so as to arrive at laws that protect an individual from himself, but do not infringe upon his personal liberty.

³ World Development Indicators Database, August 2004, *available at* http://www.worldbank.org/cgi-bin/sendoff.cgi?page=%2Fdata%2Fcountrydata%2Faag%2Find_aag.pdf (last visited 31 July 2005).

II. PATERNALISM – AN OVERVIEW

A. *Different Perspectives*

The 19th century British philosopher, John Stuart Mill, in his essay *On Liberty*,⁴ rejected paternalism stating that, ‘The only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others. His own good ... is not a sufficient warrant.’ Mill made two exceptions to his principle; children and people living in ‘backward states of society’. Mill’s principle has popularly come to be known as the ‘Harm Principle’ which is the doctrine at the core of legal paternalism.

British philosopher HLA Hart, opposed John Stuart Mill’s argument stating that Mill’s viewpoint stems from an excessively narrow conception of what a typical member of the public is like, ‘Mill endows him with too much of the psychology of a middle-aged man whose desires are relatively fixed, nor liable to be artificially stimulated by external influences; who knows what he wants and what gives him satisfaction or happiness; and who pursues these things when he can.’⁵ In other words, Hart was in favour of paternalistic laws because according to him, individuals were likely to make decisions that were not always in their best interests simply because they were possibly influenced to think in a certain way.

Philosopher Gerald Dworkin describes paternalistic interference as an ‘interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced.’⁶ Dworkin argues that Mill’s view excludes ‘paternalistic legislation to which fully rational individuals would agree. ... Dworkin concludes, that the attainment of basic *goods* can legitimately be promoted in certain circumstances by using the State’s coercive force.’⁷ Dworkin tries to find a middle ground to strike a balance between Hart’s and Mill’s theories but his theory has an inherent fault of its own—his

⁴ John Stuart Mill, ‘On Liberty’ (Penguin Classics New York 2005).

⁵ HLA Hart, *Law, Liberty And Morality* (Oxford University Press Oxford 1962).

⁶ Gerald Dworkin, ‘Paternalism’, *The Monist*, vol 56 64–84 (1972).

⁷ See Kenneth Einar Himma, ‘Philosophy of Law’ (2005) *The Internet Encyclopedia of Philosophy*, at <http://www.iep.utm.edu/l/law-phil.htm> (last visited 10 June 2005).

dependence upon the rationality of a person to decide what is or is not in his best interests.

B. *Rationality of Choices*

The opinion that an individual's choice should be respected as long as such a choice brings no harm to others is based largely on the theory that human beings can make reasonable decisions with regard to their own actions without any third party interference. But what about those decisions that are made irrationally? For example, there is still no reasonable explanation as to why even after being made fully aware of the harmful effects of smoking, cigarette sales continue to boom.

While paternalists argue that human beings do not always make rational decisions that are in their best interests, anti-paternalists argue that people must be allowed to make their own choices about how to lead their lives, even if those choices are considered reckless, stupid or otherwise *bad* choices by others.

C. *Types of Paternalism*

There are many types of paternalism but one may broadly classify paternalism into strong and weak. Strong paternalism maintains that laws should be made to prevent a person from harming himself even when his decisions are fully voluntary or totally unimpaired. Weak paternalism is the doctrine that others are justified in interfering to prevent a person from harming himself only when there is a defect in the decision to engage in self-harming activity.⁸ If a person chooses to indulge in gambling, it follows from strong paternalism that he should be stopped even if he does so voluntarily; but following from weak paternalism, he should not be prevented if his decision is voluntary.

III. PATERNALISM IN THE INDIAN CONTEXT

India has its fair share of paternalistic laws such as drug laws, prostitution laws, organ donation laws and abortion laws. This article categorises such

⁸ See Gerald Dworkin, 'Paternalism' in Edward N. Zalta (ed), *Stanford Encyclopedia of Philosophy* (Winter 2002), available at <http://plato.stanford.edu/entries/paternalism> (last visited 13 June 2005).

laws into three categories: Basic, Contradictory and Pseudo Paternalistic Laws.

A. Basic Paternalistic Laws

Basic Paternalistic Laws are those laws that are enacted to protect people from harming themselves even if they do so voluntarily. The simplest example is the law that makes it mandatory to use seatbelts. Even if a person makes a wilful decision not to wear his seatbelt, the law will still penalise him. While such laws infringe on personal autonomy, they remain necessary to protect those people who put their own well-being at risk even though they know that the consequences may be dire. This concept is in keeping with Gerald Dworkin's view that paternalistic legislation is necessary, even if it interferes with the autonomy of an individual since it is for his own welfare or happiness.⁹

1. Helmet Laws

Under section 129 of the *Motor Vehicles Act, 1988*, every person riding a motorcycle of any class or description should wear protective headgear conforming to the requirements of the Bureau of Indian Standards.¹⁰ In the State of Maharashtra, this law has never been fully enforced. However, in 2003, the Bombay High Court passed an order arising from a writ petition making it compulsory for motorcycle riders to wear a helmet and

⁹ See Dworkin *supra* n. 6.

¹⁰ Section 129 of the *Motor Vehicles Act, 1988* provides that: 'Every person driving or riding (otherwise than in a side car, on a motor cycle of any class or description) shall, while in a public place, wear protective headgear conforming to the standards of Bureau of Indian Standards:

Provided that the provisions of this sections shall not apply to a person who is a Sikh, if he is, while driving or riding on the motor cycle, in a public place, wearing a turban: Provided further that the State Government may, by such rules, provide for such exceptions as it may think fit.

Explanation – "Protective headgear" means a helmet which, —

(a) by virtue of its shape, material and construction, could reasonably be expected to afford to the person driving or riding on a motor cycle a degree or protection from injury in the event of an accident; and

(b) is securely fastened to the head of the wearer by means of straps or other fastenings provided on the headgear.'

instructed the State of Maharashtra to implement the order.¹¹

It was submitted in the writ petition that helmets should not be made compulsory on the basis of John Stuart Mill's¹² argument that power should be exercised against a person's will only to prevent harm to others.¹³ The Respondent also relied on a warning by the Central Government through the media stating, '*marji hai aapki, aakhir sar hai aapka*' (it is your choice, after all it is your head). It was accompanied by a small script displaying two coconuts, one of which was covered with a helmet while the other was left uncovered. The uncovered coconut was shown to be broken by a hammer.¹⁴

The Respondent contended that the use of a helmet should be optional and the decision to wear a helmet should be left to the individual concerned. Whilst rejecting this contention the Bombay High Court referred to the judgment delivered by Verma, J in *Gian Kaur (Smt) v. State of Punjab*¹⁵ wherein it was stated:

'To give meaning and content to the word "life" in Article 21, it has been construed as life with human dignity. Any aspect of life which makes it dignified may be read into it but not that which extinguishes it and is, therefore, inconsistent with the continued existence of life resulting in effacing the right itself.'¹⁶

Neither the Supreme Court of India nor the Bombay High Court considered cases in which the motorcycle rider was not capable of making

11 *Ravi Shekhar Bhardwaj and Ors. v. Director General of Police, State of Maharashtra and Ors.* 2004(2) MhLJ 213.

12 Mill *supra* n. 4.

13 2004(2) MhLJ 213, para 47: 'The intervenors have also urged, referring to celebrated personality and great author John Stewart Mill, champion of personal liberty that "the only purpose for which the power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others." According to the intervenors, the author identified things which are to be excluded from the ambit of criminal law by saying that "his own good, either moral or not is a sufficient warrant and he cannot rightfully be compelled to do or forbear from doing, because it will be better from him to do so or will make him happier, because in the opinion of others to do so would be wise or right.'

14 2004(2) MhLJ 213, para 48.

15 (1996) 2 SCC 648.

16 2004(2) MhLJ 213, para 51 (quoting Verma, J in (1996) 2 SCC 648).

a rational decision, based not only on mental incapacity but also on a lack of knowledge as to the fatal outcome of not wearing a helmet. The fact remains that helmet laws are necessary to ensure the safety of motorcycle riders.

This is made clear in countries where helmet laws are strictly enforced, like Taiwan, where motorcycles are the most common means of transport. A study to evaluate the effect of the helmet law in Taiwan compared the head injury situations one year before and after the implementation of the helmet law and found that motorcycle-related head injuries decreased by 33 per cent (5260 to 3535), head injury hospitalisations reduced by 33 per cent and fatalities by 56 per cent.¹⁷

2. Drug Laws

The *Narcotic Drugs and Psychotropic Substances Act, 1985*, regulates the possession, transportation, import, export, purchase or use of substances including marijuana (cannabis/hemp), poppy straw, prepared opium and cocoa leaf which are defined as 'narcotic drugs' under the Act.¹⁸

Many people believe that the State should not violate the right to choose whether or not to use narcotic drugs, even if such drugs have harmful effects on the user.¹⁹ Addiction to certain drugs can have a major impact on an individual's health causing depression, anxiety, insomnia and severe neurological problems. As per a survey conducted in 2002 in the US, in spite of the country spending millions of dollars educating its citizens on the dangers of narcotic drugs, an estimated 19.5 million Americans, or 8.3 per cent of the population aged 12 or older were illicit drug users.²⁰ This is a perfect example of education not being an absolute solution to potentially harmful activities. If a developed country like the US is not

¹⁷ Prof K Ganapathy, 'To Wear or Not to Wear', at http://www.lpaindia.org/to_wear_not_to_wear.htm (last visited 14 June 2005).

¹⁸ *Narcotic Drugs and Psychotropic Substances Act, 1985*, section 2(xiv).

¹⁹ Here it should be noted that an argument could easily be made that drugs also induce users to perhaps act violently and at times cause harm to others. However, for the purpose of this article, drug laws are considered only from a paternalistic viewpoint, specifically that they are enacted to prevent harm to the user himself.

²⁰ See 2003 US National Survey on Drug Use and Health, at <http://www.hopenetworks.org/addiction/FactSheets/Highlights.pdf> (last visited 14 June 2005).

able to dissuade its citizens through education, India, with its colossal population, has no choice but to have stringent drug laws. Not to mention that disseminating information to so many people is not possible given the fact that many are not able to read a poster or warning as part of a drug abuse prevention campaign due to low levels of literacy.

3. Abortion Laws

The practice of abortion is a widely debated and rather controversial issue around the world. In India, it is governed by the *Medical Termination of Pregnancy Act, 1971* (MTPA) which allows for abortions in cases where the pregnancy does not exceed 12 weeks, and in cases that exceed 12 weeks but not more than 20 weeks if there is a risk to the mother's life or if there is a substantial risk that the unborn child is likely to suffer from severe deformities or abnormalities as to be seriously handicapped.²¹ The MTPA also states that if grave injury is caused to the mental or physical health of a pregnant woman then an abortion may be performed.²²

When abortion laws are referred to as 'paternalistic', we refer to the law that allows for abortion to take place that and not those that do not allow for it. It is easy to jump to the conclusion that abortions are paternalistic because they protect the unborn child from harm. This interpretation is flawed because these laws are in fact paternalistic towards the mother. The issue of abortion usually leads to an overabundance of arguments for and against it based on the harm done to an unborn child (or a 'foetus', as pro-choice groups prefer). However, there are no debates over the fact that the well-being of the mother is a concern that remains paramount

²¹ Section 3 of the *Medical Termination of Pregnancy Act, 1971* states that: 'A pregnancy may be terminated by a registered medical practitioner:

- (a) where the length of the pregnancy does not exceed twelve weeks ... or
- (b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of an opinion formed in good faith, that—
 - (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or
 - (ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.'

²² An explanation to section 3 states that 'a grave injury to the mental health of the woman may be caused by rape or by the failure of the use of, any contraceptive device by a married woman or her husband to limit the number of children.'

and is one of the main reasons for allowing abortions under certain circumstances.

Under section 5 of the MTPA a pregnancy may be terminated at any time even after the 20 week period, or in a place other than one in accordance with the MTPA, if it is necessary to save the life of an expectant woman. Abortions after the 20 week period are banned except to save the expectant mother's life, as abortions in the third trimester of pregnancy are extremely dangerous to the mother. The enacting of such a law to allow for abortions is purely paternalistic. It regulates an expectant mother's choice to have an abortion in the interests of her safety and thus, must be retained.

4. Ban on Chewing Tobacco

In August 2002, the Government of Maharashtra issued a notification banning the sale of chewing tobacco (*gutkha*) in the State under section 7(4) of the *Prevention of Food Adulteration Act, 1954*, banning the manufacture and sale of *gutkha* for a period of five years.²³ Exactly two years later in August 2004, the Supreme Court of India ruled that the notification issued by the State of Maharashtra (as well as the one issued in the State of Andhra Pradesh) was unconstitutional. The Supreme Court of India ruling had little to do with whether *gutkha* was dangerous or not. Instead the Supreme Court of India based its decision on a pure technicality, namely that the power to impose a total ban on any food or consumable item rested entirely with the Central Government, and hence the State Government could not impose such a ban through a notification.

Banning the sale of *gutkha* is an example of a Basic Paternalistic Law where the government tries to protect its citizens from what it views as an instance of their lack of good sense. Therefore, even though a person may know the dangers of *gutkha* and continue to use it, the law will prevent him from doing so for his own good. 'A recent World Health Organization study showed that the consumption of oral tobacco has increased all over the country. India accounts for 82.1 per cent of oral tobacco users in

²³ Section 7(4) of the *Prevention of Food Adulteration Act, 1954*, states that, 'No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute any article of food the sale of which is for the time being prohibited by the Food Health Authority in the interest of public health.'

Southeast Asia, followed by Bangladesh, Myanmar, Nepal, Sri Lanka and Thailand.²⁴ ‘Tobacco-related cancers account for almost one-third of all cancers in India—predominantly head and neck, lung and esophageal cancers.’²⁵ ‘The Indian Council of Medical Research has estimated the cost of treating tobacco-related diseases at Rs 25,000 crores. The World Health Organization has estimated that tobacco will be responsible for 13.3 per cent of all deaths in India by the year 2020.’²⁶ Thus, it is imperative that a ban on *gutkha* should be set in place since it is quite obvious that even those who are aware of its destructive effects continue to use it.

B. Contradictory Paternalistic Laws

Contradictory Paternalistic Laws are those that appear to have been passed in the best interests of the public but in fact, end up doing more harm than good. These laws create more problems than providing solutions. If people are prevented from doing something under the law, they seek loopholes or alternate ways of circumventing them. These laws have the exact opposite effect of that which they are meant to have.

1. Prostitution

The *Immoral Traffic (Prevention) Act, 1956* (ITPA) enforces anti-trafficking laws in India. Section 3 of ITPA lays down the punishment for keeping a brothel while section 4 lays down the punishment for living on the earnings of prostitution.²⁷ Section 5 is the key section, making it illegal for a person to procure or attempt to procure a person for prostitution. Therefore, prostitution itself is not mentioned as being illegal anywhere in ITPA.

Laws condemning prostitution are enforced to protect women from subjecting themselves to what the State views as immoral behaviour, to

²⁴ KP Narayana Kumar, ‘Packaged Death’, (6 February 2005) *The Week*, available at http://www.the-week.com/25feb06/currentevents_article9.htm (last visited 14 June 2005).

²⁵ ‘The Cancer Burden in India’, at http://www.cancer.org/docroot/AA/content/AA_2_5_8x_India.asp?sitearea=AA (last visited 14 June 2005).

²⁶ Editorial, ‘Death in a Pouch’, *Indian Express* (Mumbai India 16 October 2000), available at <http://www.indianexpress.com/ie/daily/20001016/ied16027.html> (last visited 13 June 2005).

²⁷ Section 2(f) of the *Immoral Traffic (Prevention) Act, 1956* defines prostitution as ‘the sexual exploitation or abuse of persons for commercial purposes, and the expression “prostitute” shall be construed accordingly.’

protect them from physical abuse and from contracting and transmitting sexually-transmitted diseases. However, banning prostitution only exacerbates the problem, leading people to find ways and means of circumventing the law thereby resulting in underground prostitution existing under the guise of massage parlours, escort services, strip bars and modelling agencies.

The reality is that the legalisation of prostitution would actually be far more effective as a Paternalistic Law, since it would actually protect women from harm, not to mention substantially decrease the spread of sexually-transmitted diseases. In the Netherlands, where prostitution has been legalised, prostitutes must be at least 18 years old while for non-commercial sex the age of consent is 16 years. Clients must be at least 16 years old.²⁸ 'Prostitutes are considered *bona fide* entrepreneurs; they pay taxes and are otherwise treated like any other self-employed tradespersons to whom health and social services are readily available'.²⁹ After the legalisation of prostitution, the Netherlands has witnessed 'the least number of murders and rapes. ... It does not suffer from an HIV/AIDS epidemic, like the US and the UK, and has the second lowest suicide rate listed'.³⁰ Therefore, a law regulating prostitution whereby licences are issued, names recorded and mandatory health check-ups required on a regular basis may be a far safer and better alternative to current laws governing prostitution in India.

2. Sale of Human Organs

Organ sales (not to be confused with organ donations) need to be regulated by law, especially in poor countries where people are willing to sell their organs without taking into account the consequent risks. Before 1994, there was no law regulating organ transplants in India. The *Transplantation of Human Organs Act, 1994* (THOA) was adopted by several State Governments in 1995. The THOA allows harvesting of human organs only when the donor is brain-dead but his heart and other organs are still functional and his family voluntarily agrees to donate his organs. However,

²⁸ See 'Prostitution in the Netherlands', available at <http://www.answers.com/topic/prostitution-in-the-netherlands> (last visited 14 June 2005).

²⁹ *Ibid.*

³⁰ Mark Liberator, 'Legalized Prostitution: Regulating the Oldest Profession' (2004), at <http://www.liberator.net/articles/prostitution.html> (last visited 15 June 2005).

a loophole in THOA has rendered it ineffective. Section 9(3) of THOA provides that an unrelated donor, for reasons of 'affection or attachment towards the recipient', may donate his or her kidney provided the donation is approved by the Authorisation Committee. 'Since THOA came into force, this clause has provided a cover for 100s of illegal cash-for-kidney deals. ESRD patients in Karnataka and Tamil Nadu have claimed blatantly false emotional and altruistic attachment to prospective donors and made misrepresentations before the Authorisation Committees to secure approval for what are, in fact, outright commercial transactions.'³¹ As a result, in spite of THOA, India is known as one of the great organ bazaars of the world.³²

Here, like prostitution, if organ sales are legalised and controlled by stringent laws, exploited donors may be protected.³³ Granted that such a law has many serious ethical and moral implications, but there are several other factors to consider. For example, in the early 1990s a young Turkish father wanted to sell his kidney to pay for the treatment of his sick daughter. This case grabbed the attention of the Western media.³⁴ Does anyone have the right to deprive the man of his autonomy and the opportunity to help his daughter? If there is a law to regulate such a donation and make sure that no harm was caused to the donor, there is no reason why such a law should not be implemented.

C. *Pseudo Paternalistic Laws*

Pseudo Paternalistic Laws are laws that, as the name suggests, only appear paternalistic but instead of preventing self-inflicted harm purport to prevent harm to the general public. Pseudo Paternalistic Laws pass under the guise of the *we know what is best for you* attitude of the State, affecting people's rights and imposing restrictions on them. Pseudo Paternalistic

³¹ ———, 'Kidneys Still For Sale' (13 December–26 December 1997) vol 14 no 25 *Frontline*, available at <http://www.frontlineonnet.com/fl1425/14250640.htm> (last visited 15 June 2005).

³² See 'India Kidney Trade', at <http://www.american.edu/TED/kidney.htm> (last visited 15 June 2005).

³³ Radcliffe-Richards J *et al*, for the International Forum for Transplant Ethics, 'The Case for Allowing Kidney Sales', *Lancet* 1998: 351 (1950–1952).

³⁴ Vidya Ram, 'Ethical and Moral Considerations' (30 March–12 April 2002) vol 19 no. 7, *Frontline*, available at <http://www.frontlineonnet.com/fl1907/19070740.htm> (last visited 13 June 2005).

Laws directly infringe on the right of a person to make his own decisions or to have the freedom of choice. This is exactly what the American philosopher Ronald Dworkin spoke of when he wrote that external preferences are not to be a justification for a political decision. Dworkin talks of personal preferences and external preferences.³⁵ He describes a personal preference as a preference for a person's own enjoyment of some goods or opportunities, whereas an external preference is his preference for the assignment of goods or opportunities to others. He distinguishes between the two and argues that all external preferences are not to be counted in the utilitarian justification for a political decision. Dworkin gives an example that if the majority of personal preferences favour a sports stadium rather than an opera house then that counts as an argument for the stadium. But, on the other hand, the fact that the majority regard homosexuality as immoral does not count as an argument for legislating against homosexuality because the preferences here are external ones. He clearly stated that just because the majority has certain views against a particular act, it does not mean that such views should be used as an argument for legislating against the act, mainly because in such a case the preference is external; ie, a preference for the assignment of goods or opportunities to others as opposed to a personal preference for one's own enjoyment.

1. Industrial Policy

Until the early 1990s, a paternalistic regime of control manifested itself in India, regulating and restricting the production of consumer goods.³⁶ A lack of incentives held back investments to develop new products. Multinational companies were kept at bay and imports were throttled by tariffs often exceeding 200 per cent. The result was that Indians could buy any car as long as it was a Fiat³⁷ or an

³⁵ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press Cambridge 1999) 14–15.

³⁶ The *Industries (Development and Regulation) Act, 1951* was the principal legislation providing the legal basis for industrial licensing in India. In the initial stages of the country's development, the growth of industry was regulated through the granting of industrial licences and other industrial approvals.

³⁷ Introduced by Premier Automobiles in 1947, this model is no longer in production.

Ambassador³⁸ and any watch as long as it came from HMT^{39, 40}

The State saw this as a way of protecting the economy from outside influences. However, it backfired. The existing indigenous industries became complacent about their legally protected monopolies and made no efforts to keep abreast with the global market. As a result, for over four decades the greater segment of the Indian consumers had to make do with substandard and outdated products. This protectionist policy of the State also encouraged illegal marketing of imported goods in grey markets.

2. Homosexuality

In none of the Indian statutes is homosexuality described as a crime although under section 377 of the *Indian Penal Code, 1860*, sodomy is a criminal offence. Section 377 describes sodomy as an unnatural offence and states that 'whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life or imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine.' It is under this section that homosexual intercourse is punishable as an offence.

It is rather difficult to imagine how being a homosexual or engaging in homosexual activity harms a person. The standard argument is that it spreads sexually transmitted diseases, particularly HIV/AIDS. This argument has two problems; firstly, that HIV and AIDS did not enter human consciousness till the early 1980s (the Indian Penal Code was enacted in 1860) and secondly, that while unprotected sex between homosexuals does lead to an increased possibility of HIV cases, it does so in case of unprotected sex between heterosexuals as well.⁴¹

38 Manufactured by Hindustan Motors Limited, the Ambassador was based on the British Morris Oxford and has been around since 1948. See <http://www.hmambassador.com/history.asp> (last visited 10 June 2005).

39 Hindustan Machine Tools (HMT), a Government of India undertaking, was incorporated in 1953 and was the first company to start manufacturing watches in India. See http://www.hmti.com/Html/Dsp_SubIndex.asp?sType=aboutus (last visited 10 June 2005).

40 Michael Fernandes *et al*, 'India's Retailing Comes of Age' (2000) *The McKinsey Quarterly Special Edition*, 95–102.

41 Joseph Sherry, 'The Law and Homosexuality in India', at <http://www.hsph.harvard.edu/Organizations/healthnet/SAsia/suchana/0909/rh374.html> (last visited 15 June 2005).

Very often, public morality and Pseudo Paternalistic Laws are intertwined and even more so in the case of laws against homosexuality. If a majority of the citizens of a State have certain beliefs, those beliefs are bound to trickle down into the law of that land. 'It is clear that only that morality which society accepts as its own has a realistic chance of being translated into public policy. This is not to say, however, that society's moral standards are beyond challenge, or that minority views and practices are to be overridden and prohibited by the majority.'⁴² Therefore, enforcing a law against homosexuality is based purely on the State's own prejudices compounded by the values held by a majority in society, imposed upon the public under the pretext of being in their best interests. The more conservative the society, the more likely it is that such laws will continue to be in force.⁴³

IV. PATERNALISM AND PERSONAL AUTONOMY

So far this article has examined various paternalistic laws in India. The fact still remains that paternalistic laws infringe on the autonomy of an individual. Why should the State make laws to infringe on the right of an individual to do as he chooses as long as he harms no one but himself? Is it possible to reconcile autonomy and paternalistic laws? Many theories have been propounded over the years and while it is impossible to go through all of them, perhaps a synthesis of some recent theories may provide a reasonable solution.

A. *Libertarian Paternalism*

Libertarian paternalists believe that laws and regulations made by both private institutions (companies and corporations) and public institutions (the State) greatly influence the decisions people make.⁴⁴ This theory

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.

42 Rev Richard McBrien, 'Law, Morality and Homosexuality' (October 2003) vol 18 no 1, at http://www.nd.edu/~com_sens/issues/v18/1/mcbrien.html (last visited 14 June 2005).

43 Argentina, Belgium, Canada, Denmark and Vermont in the United States are some places in the world that allow for same-sex marriages. For more information on same-sex marriages see 'Gay Marriage around the Globe', available at <http://news.bbc.co.uk/1/hi/world/americas/4081999.stm> (last visited 15 June 2005).

44 See Cass R Sunstein and Richard H Thaler, 'Libertarian Paternalism is not an Oxymoron',

propounds that such laws and regulations should be made for the welfare of the people affected by them but, at the same time, such people should be allowed to 'opt-out' of specified arrangements if they choose to do so.

This theory also depends on a novel field of analysis called Behavioural Economics.⁴⁵ Using data derived from the field of Behavioural Economics, libertarian paternalists believe that most of the time, people do not make decisions in their best interest, no matter how well educated or qualified such individuals may be. Behavioural Economics could open up endless possibilities in the study of how to make paternalistic laws more effective or whether they are effective at all.

B. *Behavioural Economics*

The entire basis of the argument in favour of paternalism is that people do not always act rationally and they must, therefore, be protected against such behaviour. But is it possible to predict how a human being will react to a certain situation? The study of Behavioural Economics seems to lead to that conclusion. Behavioural Economics explores the implications of actual human behaviour on the law.⁴⁶ A large part of Behavioural Economics describes ways in which people do not always act in their best interests. By listing common decision errors that even highly competent, intelligent people make in predictable situations, this research broadens the scope of situations in which paternalistic policies could be usefully developed.

The development of Behavioural Economics can be traced to two parallel, complementary intellectual lines of research. One was experimental work by cognitive psychologists who discovered a wide range of anomalies in decision making.⁴⁷ The second parallel effort was work by economists who felt the rational choice paradigm should be extended to account for

(2003) 44 *University of Chicago Law Review* 1159, 1203, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=405940 (last visited 13 June 2005).

45 See Christine Jolls *et al.*, 'Behavioral Approach to Law and Economics', (1998) 50 *Stanford Law Review* 1471, 1477-1479.

46 *Ibid.*

47 See Colin Camerer *et al.*, 'Regulation for Conservatives: Behavioral Economics and the case for Asymmetric Paternalism' (2003) vol 151 no 3 *University Of Pennsylvania Law Review*, 1211-1254, available at <http://www.cebiz.org/cds/patermatt311.pdf> (last visited 13 June 2005).

normal bounds on rationality.⁴⁸ Behavioural Economics describes three models of human behaviour as listed below.

1. Bounded Rationality

Bounded rationality refers to the obvious fact that human cognitive abilities are not infinite.⁴⁹ Human beings have flawed memories and can easily forget. As a result, people often make decisions based on a rule of thumb. People tend to conclude, for example, that the probability of an event is greater if they have recently witnessed an occurrence of that event than if they have not.⁵⁰

2. Bounded Will Power

In this case, people often take decisions which they know are not in their best interests. For example, in spite of knowing the dangers of smoking, smokers continue to light up.

3. Bounded Self-Interest

In this case, people who are treated fairly by others are more likely to treat those people fairly in return. This theory can be applied in cases where a court delivers a judgment or issues an order for injunction or damages. In such cases, the parties may bargain to a different outcome if such an outcome is preferable and the costs are less. Therefore, as long as one party acts fairly, so will the other; but if one acts spitefully, the other is also likely to do so.

C. *Asymmetric Paternalism*

A regulation is asymmetrically paternalistic if it creates larger benefits for those people who make errors, while imposing little or no harm on those who are fully rational.⁵¹ Asymmetric paternalism focuses on four types of

48 *Ibid.*

49 Herbert A. Simon, 'A Behavioral Model of Rational Choice' (1955) 69 Q.J. Econ. 99.

50 Daniel Kahneman *et al.*, *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge University Press London 1982).

51 Camerer *supra* n. 46.

policies—default rules, reframing of information, cooling-off periods and limiting consumer choice.

1. Default Rules

It has been observed that if a default rule is in place, people are more likely to stick to such a rule than to change it, even if they have a choice to do so. For example, there are two options A and B, A being more valuable than B, but B being the default. In this case, people are more likely to stick to B even though there is no cost to switch over to the more valuable option of A. This could be due to procrastination or sheer laziness. In such cases, the question arises as to what the default should be. If the default in the above example is B, and most people stick to B, then the person offering the option is more likely to continue to offer B as the default since B being less valuable would be more profitable to him. In applying asymmetric paternalism to this example, a default rule should be set to be advantageous to people who are likely to stick to it while causing little or no harm to others. Therefore in the example, A, being more advantageous, should be set as the default.

2. Reframing of Information

Reframing of information can be done by adding certain clauses that do not affect a person capable of making a rational decision but, at the same time, help a person likely to make an irrational decision. For example, an insurance policy may contain a clause that specifically states the amount for which a person is insured. Such a clause does no harm to a person who already knows of the amount, but is helpful to another who may have no idea of the same amount.

3. Cooling-Off Period

It is a well-known fact that when people are angry or enraged they tend to make decisions which they may regret later on. The state of mind while making a decision is extremely important. With this in mind, asymmetric paternalism offers a cooling-off period. A cooling-off period can be imposed in two ways. One is by making a decision effective only after a certain amount of time and the other is by making the decision effective immediately and reversible for a certain period of time.

For example, when buying a car, a person might sign the contract but take possession at a later date. Alternatively, the person can take possession of the car immediately and return it at a later time.

4. Limitations on Consumer Choice

Imposing limitations on choice is by far the most paternalistic of asymmetric paternalistic policies. Such limitations are imposed only when default rules, reframing and cooling-off periods cannot be applied. However, such limitations need not be overly restrictive.

D. Actual Application of the Theories

The theories above can be applied to Indian laws so that even though the law remains paternalistic, it does not completely take away the rights of the person.

For example, under the *Special Marriage Act, 1954* as well as under the *Hindu Marriage Act, 1955*, a petition for divorce cannot be filed until a year has passed since the date of marriage.⁵² This kind of regulation fits perfectly into the mould of Asymmetric Paternalism. While couples who are hasty in their decision to file for divorce have a year to try and sort out their differences, such a law imposes little, if any, harm to those who are rational enough to understand that such time may be necessary to make sure that a divorce is actually what they want.

Another example is that of organ donations. THOA, as discussed, allows harvesting of human organs only when the donor is brain-dead but his heart and other organs are still functional and his family voluntarily agrees to donate the organs. By applying a combination of the two theories explained above, the law could be amended so that the default rule states that organ donations are presumed to be consented to unless otherwise explicitly renounced by the donor.

This method has proved successful in several nations like France, Italy, Singapore and Spain where people are presumed to consent to organ donations unless they explicitly rebut the presumption by writing on their

⁵² See section 29 of the *Special Marriage Act, 1954* and section 14 of the *Hindu Marriage Act, 1955*.

driver's licences.⁵³ In the US, organ donations are not presumed unless there is an explicit notation on their driver's licences. The result is that in countries like Singapore, over 90 per cent of the people consent to organ donations whereas only 28 per cent do so in the US.⁵⁴

V. CONCLUSION

The relevance of paternalistic legislation in India cannot be stressed enough. The low literacy levels and the difficulty of disseminating information to such a large population makes it necessary to keep in place Basic Paternalistic Laws to protect citizens who may not be aware of the negative effects of their own actions. However, while certain paternalistic laws need to be kept in place, others such as Contradictory and Pseudo Paternalistic Laws need to be urgently overhauled. Unlike Basic Paternalistic Laws, Contradictory Paternalistic Laws are not effective in protecting self-inflicted harm and only create the larger problem of subversive groups whose main aim is to defy such laws as in the case of underground abortion clinics and prostitution rings. Then there are Pseudo Paternalistic Laws which are redundant and unnecessary, inflicting upon the public, the prejudices of the State and imposing the values of the bulk of society on all its citizens including the minority.

While Basic Paternalistic Laws are essential to the Indian legal system, the fact remains that such laws are always administered at the expense of personal liberty. By applying the theories of Libertarian Paternalism, Behavioural Economics and Asymmetric Paternalism in the Indian context, perhaps Basic Paternalistic Laws will be more palatable to libertarians, while continuing to protect others from self-harming actions. Ultimately, it is essential to bear in mind that the law is a means to protect and safeguard the rights of the people but not at the expense of their own personal liberty—certainly not in the world's largest democracy.

⁵³ See <http://www.presumedconsent.org/solutions.htm> (last visited 14 June 2005).

⁵⁴ *Supra* n 3.

IDENTITY CARDS – IN WHOSE INTEREST?†

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I. INTRODUCTION

This article examines the concept of 'Identity Cards' as it exists in India and the 'Citizen Card' proposed in the United Kingdom (UK) and evaluates the advantages and disadvantages of the proposed Citizen Card of UK. It concludes by answering the debate on whether India could consider introducing a Citizen Card as contemplated in the UK.

An Identity Card, commonly found in wallets and purses, is used in its plastic form for financial transactions, retail and consumer services and employment identity. The driving licence, birth certificate and passport allow others to identify us. Less obvious but no less important is the use of personalised numbers for identification purposes for health, social security and taxation. Both in the private and public sectors, formal identification of individuals is commonplace. Many organisations dealing with health care, travel and government subsidies need to be sure of your age and identity.

In 2004, the UK introduced the Identity Cards Bill concerning, *inter alia*, the issue of Identity Cards, which are termed 'Citizen Cards'. The Bill proposes the creation of a National Identification Register which will contain a wide range of details on every UK citizen and resident above the age of 16. The Register will hold over 50 categories of information on citizens. Each person will be given a unique registration number which will become the key to allow access by state and private agencies. The system will also support information exchange. There are also 'biometrics' involved which will require individuals to submit to fingerprinting and

† This article reflects the position of law as on 25 July 2005.

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other means of physical identification. These are likely to include electronic face scanning and iris recognition. In addition, there will be an Identity Card with its own chip. Initially, the Card will not be compulsory but the declared intention is that it will become so. The Identity Card would eventually replace the passport and driving licence.

In India, unlike the UK, there is no government initiative as yet to have a compulsory 'Citizen Card' as identification. Some of the common forms of identification prevailing in India are the Passport, Driving Licence, Income Tax Identity (PAN) Card, Voter's Identity Card, Senior Citizen's Card and Ration Card. It is to be appreciated that each of the abovementioned forms of identification are for a specific purpose.

A. *Passport*

Every Indian citizen has the right to a passport, which is an important document serving diverse purposes—for overseas travel, for identification and as a political document. A passport is a photo identity which contains *inter alia* the name, age and address of the holder as well as his marital status and identifying mark.¹

B. *Driving Licence*

The driving licence is a legal requirement for a person operating a motor vehicle in any public place.² A driving licence issued by the competent authority of any State or Union Territory of India is valid throughout India. This is also a photo identification of a person containing a person's name, age and address.³

C. *Income Tax Identity Card*

A Permanent Account Number (PAN) is a ten-digit alphanumeric number, issued by the Commissioner of Income Tax. A corresponding PAN Card is issued in the form of a laminated card which also contains a photograph of the holder. It is mandatory to quote one's PAN on filing one's returns of income and for all correspondence with any Income Tax Authority.

¹ *Passport (Entry into India) Rules, 1950.*

² *Motor Vehicles Act, 1988, section 3.*

³ *Central Motor Vehicles Rules, 1989, form 6.*

Some financial transactions for the purchase of assets (especially the shares of listed companies) where the amount exceeds Rs. 50,000 or are connected with travel to any foreign country, also require the PAN to be quoted. Likewise, the PAN has to be quoted for making a time deposit with a bank for an amount in excess of Rs. 50,000.⁴

D. *Elector's Photo Identity Card*

Elector's Photo Identity Cards (EPIC), also known as Voter's Identity Cards, which, contain the photograph, date of birth and address of the holder, have been issued by the Election Commission of India at a very high cost. The EPIC scheme was formulated in 1993 as one in a series of confidence building measures to ensure improvements in the current Indian electoral system.⁵

E. *Senior Citizen's Card*

Any citizen of India, having reached the age of 65 years, may apply to a State Government for the Senior Citizen's Card to avail of various concessions and benefits with state transport, air travel, hospitals and banks. High Courts give priority hearing to matters where one or more of the parties are senior citizens. The Senior Citizen's Card, like the other abovementioned Identity Cards, is also a photo identification containing the name, date of birth and address of the holder. It also contains a brief medical history of the holder such as his blood group, allergies and details of any ongoing medication.

F. *Ration Card*

Every family residing in India is entitled to a Ration Card under the regulations prevailing from time to time. Special cards of different identifiable colours are issued for those 'below the poverty line'. It entitles the holders of these Ration Cards to obtain essential commodities at specially subsidised rates as also the timely availability of food grains under

⁴ —, Income-Tax Department FAQs, at <http://incometaxindia.gov.in/PAN/Overview.asp> (last visited on 25 August 2005).

⁵ See <http://www.eci.gov.in/ElectoralSystem/#Elector's%20Photo%20Identity%20Cards> (last visited on 25 August 2005).

the Targeted Public Distribution System.⁶

Stringent steps have been proposed to ensure detection of unauthorised Ration Cards through a system of surprise checks and inspections.⁷ Ration Cards also contain information about the age of the holder and his immediate family as on the date of issue, as well as the family's permanent address.

None of these are designed to be instruments or modes of identifying a person. However, they serve the purpose of identification due to the information that each of them contains. None of them are mandatory, and it may be appreciated that an Indian citizen may choose to stay out of the conspectus of the abovementioned aids to identification; not wanting to travel abroad, drive a car in a public place, exercise his franchise, nor even make use of Government subsidies for rations. A citizen may not want to avail of senior citizen benefits, may not be required to file his income tax returns and may not have an official birth certificate. It is thus conceivable and legally possible for such a person to stay out of the umbrella of requiring any form of identification. Such a person would therefore technically be 'non existent' to the Government; a phantom, so to speak.

The question that flows from this is whether such a state of affairs would be conducive to maintaining internal security, where the possibility of an unrecorded person living in India exists? On the other hand, if one were faced with a situation such as the one foreseen in the UK, where citizens may be compulsorily required to have a 'Citizen Card', would such a Card lend itself to misuse and result in a serious encroachment of civil liberties, including the infringement of the right to privacy? If India were to go the way the UK seems to be heading, would it be able to achieve better internal security? Would such a trade off by the citizens of India result in better governance by the State and ultimately result in a safer environment?

A look at the situation in the UK is warranted here. Historically, the Identity Card debate has revolved around the relationship between the individual and the State. During the two World Wars, the formal concerns about

⁶ See http://fcamin.nic.in/ctzn_det.htm (last visited on 25 August 2005).

⁷ *Ibid.*

citizens carrying Identity Cards were associated with state security, recruitment and the rationing of food and clothes. However, the Cards were continued to be employed even in peacetime until 1952. The post-war period saw the regular resurrection of the demand for the re-introduction of Identity Cards. In particular, issues of criminal and anti-social behaviour have been paramount in parliamentary debates concerned with the introduction of these cards. A series of questions arise and remain unanswered about the proposed Identity Card. To cite one, maintaining an accurate and up to date database required for such a programme would be costly and inevitably have traces of human error. Another worry is the misuse of records and information. The questions that may arise are who would monitor the records for accuracy and who would have access to the information? Even those within the system may discover that they are excluded.

Let us examine the position by evaluating the case for and against the Citizen Card, as it stands in the UK.

A. *Arguments in Favour of the ‘Citizen Card’*

1. Convenience

The ‘Citizen Card’ would be a comprehensive document. A search on the central database after examination of the card would yield all the relevant details about the holder. It can make life much easier. Even if you have a passport or driving licence, the ‘Citizen Card’ means you can leave these more valuable documents safely at home.

Many organisations recognise the ‘Citizen Card’ as a valid photo-identity or proof-of-age. The Home Office and the Trading Standards Institute endorse the scheme as a member of the British Retail Consortium’s Proof of Age Standards Scheme Initiative.

2. Prevention of Fraud

From the Government’s perspective, having a Citizen Card would result in reduction of benefit fraud.

3. Prevention of Identity Theft

The Card could be used effectively against the growing problem of identity theft. However, we must not confuse credit card fraud with identity theft. Overseas experiences suggest that a central register is not a solution to such theft. Indeed, it may even promote it. In the United States (US), the Social Security number has become an identity hub and a central reference point to index and link identity. This has made identity theft easier. A similar pattern was evident in Australia after the introduction of a Tax File Number.

B. *Arguments Against the 'Citizen Card'*

1. Expense

In 2002, the Home Office estimated the cost of introducing the Register and the Card at £3.1 billion. In November 2004, it revised it to £5.5 billion and that excludes the very large number of 'reading machines' that will be required to verify the information on the card. It is certain that the final set-up costs will exceed the current estimate. The Identity Cards Bill establishes several new crimes to ensure that people comply with the identity requirements. Fines can run up to £2,500 for each failure to attend an iris scan or fingerprinting appointment. In financial terms, the Identity Card is money wasted given the cost of establishing and maintaining the system.

2. Centralised Database

An Identity Card system does not have to be linked to a Central Government Database. In fact in Germany, this is explicitly forbidden by law. The rationale behind such a move is presumably to avoid being criticised that an Identity Card containing lots of sensitive personal, medical and financial information would be a huge 'all eggs in one basket' risk and actually be a more attractive target for identity thieves. Besides, it would also be enormously inconvenient if the Card gets damaged or lost. David Blunkett, the former Home Secretary who was forced to resign in 2004, talked vaguely about holding only the minimum amount of data on the Identity Card. This would be admirable, except for the talk of connecting it to a Centralised Database, which could effectively store or

act as a gateway to huge data files on an individual, which would not physically fit onto any Identity Card. The Home Office documents totally fail to budget for the installation and then subsequent maintenance and running of the huge infrastructure that would be needed to connect millions of Identity Card readers securely to a central database.

3. Aid to Terrorists

It is suggested that instead of countering terrorism, such a centralised database, if it gets into the wrong hands, could actually aid terrorists. The 21st century is experiencing a new form of terrorism, which is tending to lose its specific and identifiable goals. At the same time, traditional issues of leadership, ideology, state association and weaponry are also changing. For example, and in contrast, the Irish Republican Army (IRA) pattern has a specific, publicly declared and achievable political agenda – it has a clear command structure; it is prepared to enter into political negotiation at various levels; its weapons are of a traditional ‘industrial-war’ type which rely upon the acquisition and use of guns and explosives; coded alert warnings are communicated; and its membership is geographically specific. New forms of terrorism simply do not fit the IRA pattern. For example, Al-Qaida and its supporters have no allegiance to a Nation State; they have a global reach; the membership is international; there is no apparent command structure; their ideology is a construct of Islamic fundamentalism; their weapons are both traditional and innovative as demonstrated by the devastation caused in the US on 11 September 2001, and there is an alleged willingness to use chemical weapons and ‘dirty’ bombs. The new terrorist is characterised as a shady, fanatical, isolated foreigner who may operate in any corner of the world as part of a discreet unit with or without support, formal association or direction from a headquarter or a director of operations – the born-again, international anarchist.

The responses of liberal democratic states to these new challenges have been instant, often ill considered and highly questionable in terms of international law and the democratic principles that underpin these States. The price that has to be paid, politicians claim, is the diminution of civil rights. This reduction in rights is meant to be temporary and the rights are to be reinforced when society returns to normal. However, the definition of normality, being a social construct, has resulted in the

Prevention of Terrorism (Temporary Provisions) Act, 1974 becoming permanent within the terms of the *Terrorism Act, 2000*. Thus, those in the UK now live in a permanent state of 'emergency'. It is within this context of extraordinary events specifically fuelled by the fear of terrorism that the Identity Card issue is raised with unfailing regularity.

It was immediately after the events of 11 September 2001 that Blunkett reopened the question of National Identity Cards in the House of Commons although he stated that 'the debate must not focus on issues of national security alone'. Blunkett, a passionate advocate of compulsory Identity Cards, set out the Government's restrictive policies on nationality, immigration and asylum in February 2002. In that White Paper, notice was given that a consultation paper would be produced on Entitlement Cards (Identity Cards by another name). The consultation period provided by the 'Entitlement Cards and Identity Fraud' Consultation Paper expired in January 2003.

Thus, we can see that Identity Cards, or Entitlement Cards, as they are euphemistically named, constitute part of a response pattern which, in turn, reduces civil rights in the name of the fight against the common international enemy: the terrorist. Given the national 'emergency' supposedly faced then, protection against terrorism is a powerful argument, but not sufficiently powerful to convince the President of the US to promote the introduction of Identity Cards. Indeed, if the UK Government felt so strongly about the Card's fighting efficiency, it would have been introduced immediately on a compulsory basis rather than seeking to introduce it by attrition over a period of years. On 3 July 2002, David Blunkett stated in the House of Commons, 'I accept that it is important that we do not pretend that the Entitlement Card (now called the Identity Card) would be an overwhelming factor in combating international terrorism'. Last year, Privacy International published unique findings on the relationship between Identity Cards and terrorism. It stated there is no evidence to support the claim that Identity Cards combat terrorist threats. This is because terrorists move around using tourist visas, such as employed by the 9/11 terrorists, or are already domiciled and therefore have legitimate Identity Cards, such as those who carried out the Madrid bombings in March 2004. The Report states, 'Almost two-thirds of known terrorists operate under their true identity. The remainder use a variety of techniques to forge or impersonate identities.'

4. Ineffective Technology

Some techno-wizards are sceptical about the effectiveness of current technology to handle this national project. The track record of public services is both poor and costly. Information Technology failures have taken place in a variety of departments which include the Passport Agency, Inland Revenue, Court Service, National Air Traffic Services, Child Support Agency, Ministry of Defence, Prison Service and even the Home Office.

5. Incompatible with European Union Laws

Today all UK legislation must be compatible with the European Convention on Human Rights. The *Human Rights Act, 1998* requires that a statement of compatibility be prepared. The Home Office refused to publish the advice of the Attorney General on the Identity Cards Bill and in January 2005, the Parliament's Joint Committee on Human Rights, which scrutinizes every Bill, stated that there were 'serious questions of Human Rights compatibility' and went on to say that, 'We consider the absence of such explanation (on compatibility) to be deeply unsatisfactory.'

II. CONCLUSION

India is a vast nation of 1.2 billion people, as compared to the UK which has a population of 59.6 million. India is a country with limited financial resources – its per capita income was US\$ 3,100 for the year 2004.⁸ The percentage of people living below the poverty line in that year was 25 percent. Given the cost of establishing and maintaining the system, the Identity Card is wasted money which could be utilised elsewhere. Although terrorism is rampant in India, issuing Citizen Cards would not act as a restraint on such activities. The disadvantages of having a centralised database and the risk of the data getting into the wrong hands is actually a huge deterrent for serious consideration in a country like India. There have been instances where Government websites have been hacked. One of the major shortcomings in the Indian election process was the problem of 'missing names' in the voters' list, which makes a mockery of the

⁸ At <http://www.cia.gov/cia/publications/factbook/rankorder/2004rank.html> (last visited on 25 August 2005).

identification process. Keeping these limitations in mind and weighing them against the so-called benefits which may accrue if India opted for a similar system of having a Citizen Card, it does not appear to be a viable proposition.

It was announced in March 2005 that the Identity Cards Bill, proposed in the UK, was being dropped. The proroguing of Parliament on the call of a general election had a similar effect on all Bills. In May 2005, the country re-elected the Labour Government under the continuing leadership of Tony Blair. The Labour election manifesto included a commitment to reintroduce an Identity Card Bill and this has been done. However, the context in which it is being debated has been radically altered by the suicide bombings in London which occurred on 7 July 2005 and the failed attempts which occurred a week later.

New anti-terrorist legislation is promised by the Government and the principle has all-party political support. The value of closed circuit television surveillance cameras was enhanced through the recognition of the bombers and thus extended public surveillance can be expected as a result. In particular, more cameras will be located in airports and ports. The police are requesting a new generation of roadside cameras capable of scanning number plates on moving vehicles. This development has an estimated cost of £45 million. High level discussions at the European Union are currently taking place in order to extend and standardise the possibility of phone tapping and the accessing of phone records by security forces. The Metropolitan Police Force is seeking new anti-terrorist powers. These include the right to detain a suspect for up to three months without any charge instead of the current 14 days. Senior officers also want powers to attach and close down websites thereby limiting a new criminal offence of using the internet to prepare acts of terrorism and to suppress inappropriate internet usage. They also wish to make it a criminal offence for suspects to refuse to co-operate with the police by denying complete access to computer files through non-disclosure of encryption keys. The police have made a demand that a specialist Border Security Agency be established along the lines of the Homeland Security Office in the US. Plea bargaining in criminal charges concerning terrorists might be revisited. Convicted terrorists might be given lighter sentences in exchange for information supplied. Not only is the law set to be extended and hardened, but police practice has also been subjected to a radical change.

A 'shoot to kill' policy has been implemented which has resulted in the death of an innocent Brazilian migrant worker, unconnected with the suicide bombings, in London in July 2005. The Prime Minister has stated that he is willing to consider 'gaps in the law' that the police and security chiefs identify as a result of the London bombings.

Within this atmosphere of 'emergency', it is particularly difficult to argue the case against the introduction of Identity Cards. Rational debate about the efficiency, financial and social costs and need for such a development is likely to be swept aside by the moral panic which has seized the nation. It is in such times that we should be carefully reflecting on appropriate steps, for legislation passed in haste has, as history shows, often been legislation made in error.

THE SAW PIPES JUDGMENT†

Nadia Gracias* and Siddhima Kotak**

‘Honest men dread Arbitration more than they dread law suits.’¹

I. INTRODUCTION

The *Arbitration and Conciliation Act, 1996* (the 1996 Act) was enacted primarily with the object of providing parties with an alternative system of dispute resolution which was speedy and efficacious. Most ancient world orders such as those of Greece, Rome, China and also that of India, encouraged the settlement of disputes by a tribunal chosen by the parties themselves and whose decision was to be accepted as final and binding between the parties.² Prior to the enactment of the 1996 Act, arbitration was given statutory recognition through the *Arbitration (Protocol and Convention) Act, 1937*, the *Arbitration Act, 1940* (the 1940 Act) and the *Foreign Awards (Recognition and Enforcement) Act, 1961*.

With the evolution of the new world economic order, there was a greater need to ensure that foreign as well as domestic awards and arbitration were governed by a uniform legislation, in accordance with the United Nations Commission on International Trade Law Model on International Commercial Arbitration (the UNCITRAL Model) adopted in 1985. The 1996 Act was passed on 16 August 1996, taking into account the UNCITRAL Model and the rules laid down therein. It was enacted with the objective of eliminating arduous court procedures and proceedings, by giving a reprieve to the parties from long-drawn court battles as well as relieving the courts from undue pressure of work. In fact, the Statement

† This article reflects the position of law as on 14 June, 2005.

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1 *Panchu Gopal Bose v. Board of Trustees for Port of Calcutta* MANU/SC/0385/1994, para 9.

2 PM Bakshi, *Arbitration Law – An Introduction* (2nd edn Eastern Book Company Lucknow 1986) 2.

of Objects and Reasons contained in the Arbitration and Conciliation Bill, 1995 clearly mentioned that the 1996 Act intended 'to minimise the supervisory role of courts in the arbitral process.'

However, the courts today are still unwilling to cut the umbilical cord so far as arbitration is concerned. The Supreme Court in its recent judgment of *Oil and Natural Gas Corporation Ltd (ONGC) v. Saw Pipes Ltd*³ has ruled that an arbitral award can be challenged under section 34 of the 1996 Act on the ground that it violates the public policy of India, *inter alia*, because it is patently illegal. This decision has opened the floodgates to litigation challenging arbitral awards before the Courts under the 1996 Act.

This article aims to examine the broader ramifications of the judgment on the 1996 Act and on the future of arbitration in India.

II. THE SAW PIPES JUDGMENT

A. *Factual Position*

Saw Pipes Ltd (the Respondent) was engaged in the business of supplying equipment for offshore oil exploration and maintenance. ONGC Ltd (the Appellant) had invited tenders for purchasing 26 and 30 inches diameter casing pipes. The Respondent's tender was accepted and an order was given to them for supplying casing pipes on 3 June 1996. The contract stipulated that the delivery of casing pipes was to be effected on 14 November 1996. It was provided in the contract that time was of the essence.

The Respondent then placed an order dated 8 August 1996 with Liva Laminati (an Italian supplier jointly agreed upon by the parties) for the supply of steel plates as raw materials required for manufacturing the pipes, with materials to be shipped by the end of September 1996. However, the Italian supplier was unable to deliver the requisite raw materials on the date agreed upon owing to a general strike of mill workers in Italy and hence sought an extension from the Respondent.

By its letter dated 28 October 1996, the Respondent in turn sought an extension of time on the ground that the Italian supplier was facing

³ (2003) 5 SCC 705 (*Saw Pipes case*).

problems with respect to labour and that consequently the delay was caused due to circumstances beyond the Respondent's control.

The Appellant granted the Respondent an extension until 29 December 1996 (a grace period of 45 days) to deliver the goods. However, in its letter dated 4 December 1996 which granted the Respondent an extension, the Appellant also categorically stated that pursuant to clause 11(a) of the contract, liquidated damages for the delay would be recovered.

In the present case, clause 11 of the contract stated that punctual delivery was of the essence and a failure to make delivery on time would entitle the Appellant to recover damages for such breach. Further, clause 11(a) laid down that such sum would not be by way of a penalty, but would be a genuine pre-estimate of liquidated damages equal to one per cent of the whole unit price per week but not exceeding 10 per cent of the whole unit price failed to be delivered.

Thus, pursuant to the aforementioned, the Appellant withheld a sum of Rs. 1,575,559 (by way of customs duty, sales tax, freight, etc.) and further, a sum of US\$ 304,970.20 as liquidated damages for late delivery. A dispute arose with reference to the deduction, as the Respondent opposed such deduction as wrongful. The matter was then referred to arbitration.

1. Decision of the Arbitral Tribunal

The Respondent contended that strikes, interfering with the supply of raw material, were not within the scope of the definition of *force majeure* as contracted between the parties. However, the Arbitral Tribunal rejected the Respondent's contention and therefore, the deduction of liquidated damages by the Appellant on that account was held not to be wrongful.

Further, it also rejected the Respondent's contention that since there was non-payment of customs duty because of the Appellant's non-submission of the relevant CT-2 forms to them for clearance, the delay in delivery of goods was justified.

Lastly, the Arbitral Tribunal, after considering the decisions of the Supreme Court of India in *Fatehchand v. Balkishan Dass*⁴ and *Maula*

4 AIR 1963 SC 1045 (*Fatehchand case*).

Bux v. Union of India,⁵ held that although section 74 of the *Indian Contract Act, 1872* (the Contract Act) dispensed with the requirement of proof of damage, in cases where the loss was determinable monetarily, the party claiming compensation had to prove the loss suffered by it. Consequently, since the Appellant had been unable to prove the monetary loss suffered by it, to allow it to withhold the liquidated damages was found to be unjustifiable by the Tribunal. Therefore, the Arbitral Tribunal concluded that the Respondent was entitled to recover the said amount with interest at 12 per cent per annum from 1 April 1997 till the date of filing of Statement of Claim and thereafter, at 18 per cent per annum *pendente lite* till the payment was made.

2. Appeal to the Hon'ble Bombay High Court

a. *Order of the Learned Single Judge*

Aggrieved by the arbitral award (dated 2 May 1999), the Appellant filed an Arbitration Petition before the Hon'ble Bombay High Court.⁶ The Learned Single Judge observed that since the courts cannot re-examine the evidence placed before the Arbitral Tribunal, the question of liquidated damages could not be reassessed. The Court also found that it was within the discretion of the arbitrators to levy interest. The Court refused to interfere with the aspect of the disputed claim since it was open to interpretation and several views may be taken. The Judge, by his order dated 24 January 2000, held that there was no scope for interfering with the view taken by the Arbitral Tribunal and the petition was rejected.

b. *Order of the Division Bench*

Discontent with the order of the Learned Single Judge, ONGC Ltd preferred an appeal to a Division Bench of the Hon'ble Bombay High Court.⁷ The Division Bench carefully considered the *ratios* laid down in *Chunilal v. Mehta and Sons*,⁸ *Fatehchand case* and *Maula Bux case*. The Division

⁵ AIR 1970 SC 1955 (*Maula Bux case*).

⁶ Bombay High Court, Arbitration Petition No. 317 of 1999 (Unreported 24 January 2000).

⁷ Bombay High Court, Appeal No. 256 of 2000 (Unreported 21 June 2000).

⁸ AIR 1962 SC 1314 : 1962 Supp (3) SCR 549.

Bench rejected the contention of the Appellants that the Arbitral Tribunal misapplied the aforementioned judgments. The Division Bench also found that there was no infirmity in the order of the Learned Single Judge and hence the appeal was rejected.

B. *Ratio Decidendi of the Hon'ble Supreme Court*

The Appellant filed an appeal to the Supreme Court of India against the order of the Division Bench of the Bombay High Court. The Hon'ble Supreme Court observed that an arbitral award could be set aside *vide* section 34(2)(a)(iv)⁹ of the 1996 Act if sufficient proof was furnished that the award, *inter alia*, was made against the public policy of India. The Supreme Court laid down that the award would be deemed to be against public policy of India, if it is contrary to the fundamental policy of Indian Law, justice or morality or is patently illegal. Patent illegality was interpreted by the Supreme Court to comprise of, *inter alia*, a contravention of the substantive law in force in India or an award made contrary to the terms of the contract.

The Supreme Court also framed the following guidelines for arriving at a 'reasonable compensation' *vide* section 74 of the Contract Act:

- (i) Before deciding whether a claimant is entitled to any compensation the terms of the contract must be considered; where such terms are unambiguous the sum named therein must be awarded unless such sum is found to be by way of a penalty or in any case unreasonable.
- (ii) In all cases of breach, section 74 is to be read with section 73 and therefore it is not essential for a party to prove actual losses before claiming a decree; a court is competent to award 'reasonable compensation' in case of breach irrespective of the existence of any such proof.
- (iii) Sometimes it is impossible for the court to determine the damages with certainty in which case the court can safely award the stipulated sum if it is a genuine pre-estimate of damages by the parties (and not a penalty or unreasonable) as the measure of reasonable compensation.

⁹ *Infra* n. 42

III. CASE ANALYSIS

A. Public Policy

The concept of public policy assumes importance with respect to arbitration as the courts now possess the power to set aside any arbitral award if it is in contravention of the public policy of India. To understand the concept of public policy it is imperative to take into consideration the historical background of public policy.

1. Historical Evolution of Public Policy

The concept of public policy began when the Common Law Courts in England refused to enforce contracts which were *prima facie* illegal. The present law is the evolution of a concept that dates back to Elizabethan times.¹⁰ However, the law in its true sense developed only in the 18th century with commercial contracts becoming the norm of the day.¹¹ Though the judges believed in the sanctity of contracts, they were only willing to enforce contracts that did not violate any social interest or moral mores.¹²

It is against this historical background that the law with regard to public policy developed and the judges used various terms such as '*contras bonos mores*',¹³ ('against the public good') or which had arisen '*ex turpa causa*' ('from an illegal, immoral or ugly act') so as to strike down contracts which were not in consonance with the public policy of the State.¹⁴

The interpretation of the concept of public policy evolved into two well-defined schools of thought – one known as the 'narrow view' and the other being the 'broad view'.

10 Pollock, *Principles of Contract* (13th edn Butterworths England 1999) 291.

11 Cheshire *et al*, *Law of Contract* (13th edn Butterworths England 1996) 370.

12 *Ibid*.

13 Cheshire *et al supra* n. 11, 'Against good morals' as cited by Lord Kenyon in *Girardy v. Richardson* (1793) 1 Esp 13.

14 Cheshire *et al*, *Law of Contract* (11th edn Butterworths England 1986) 341–342.

2. Narrow View of Public Policy (Pigeon Hole Theory)

In essence, the rule that is followed by most courts is that public policy should be confined to the 12 heads¹⁵ and should not be expanded to include any other new head.¹⁶ The theory that the courts must only expound the law and not legislate is more commonly known as the Pigeon Hole Theory. In the case of *Egerton v. Branlow*,¹⁷ Lord Parke expounded the Pigeon Hole Theory as follows:

‘It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is best for public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing Courts ... not to speculate upon what is the best, in his opinion, for the advantage of the community ...’¹⁸

3. Analysis of the Broader View of Public Policy

The views of Sir William Holdsworth are pertinent to note when he stated that:

‘In fact, a body of law like the Common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like

¹⁵ The 12 heads of public policy are as follows: (i) Trading with the king’s enemies (ii) Trafficking in public offices (iii) Interference with the administration of justice (iv) Maintenance and Champerty (v) Marriage Brocage Contracts (vi) Stifling Prosecutions (vii) An agreement which creates an interest against duty (viii) Suicide clause in Insurance policy (ix) Agreements tending to create Monopolies (x) Agreement between pleader and clients (xi) Agreements not to bid against each other (xii) Waiver of illegality. See Anson’s *Law of Contract* (25th edn The English Language Book Society and Oxford University Press London 1979) 348.

¹⁶ See *Gherulal Parakh v. Mahadeodas Maiya*, 1959 Supp (2) SCR 406, 439 : AIR 1959 SC 781, 795. See also *Srinivas Das Lakshmi Narayan v. Ram Rattandas* ILR (1920) 6 Bom. 20; *Bhagwat Ghenuji v. Gangabisan Ram Gopal* ILR 1914 Bom. 71 and *Gopi Tihadi v. Gokhei Panda* ILR 1953 Cut. 558.

¹⁷ 4 HLC 1.

¹⁸ 4 HLC 1, 123.

ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.’¹⁹

The broader view of public policy is based on the fact that as circumstances change and as the usages of trade and commerce change, the Court must adapt itself by inventing new heads of public policy to prevent a practice from oppressing the public conscience.²⁰ Furthermore, the rules which rest on the foundation of public policy are not fixed according to the customary law, but rather are capable of expansion and modification. Its dictates are governed by the changing circumstances and the changing commercial practices.²¹

4. Concept of Public Policy in India

a. Evolution of Public Policy in India

The concept of public policy in India came into being with the case of *Gherulal Parakh v. Mahadeodas Maiya*²² wherein the Supreme Court has stated as follows:

‘Public policy or the policy of the law is an illusive concept; it has been described as “untrustworthy guide”, “variable quality”, “uncertain one”, “unruly horse” etc; ...the doctrine of public policy is extended not only to harmful cases but also harmful tendencies; ... the principles have been crystallized under different heads and though it is permissible for courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public...’

The Indian courts too adopted the narrow view of public policy as is evident from the *Gherulal case*, but eventually realised that public policy is not an immutable concept. It must evolve to meet contemporary demands. The social milieu within which a contract is to be enforced would be the

¹⁹ *Chitty on Contract* (27th edn. Sweet & Maxwell 1994), 773.

²⁰ See Pollock, *Principles of Contract* (13th edn) 291, Cheshire *et al supra* n. 11 and Avtar Singh, *Law of Contract* (11th edn Eastern Book Company Lucknow 1996) 232.

²¹ *Supra* n. 10.

²² 1959 Supp (2) SCR 406, 439 : AIR 1959 SC 781, 795 (*Gherulal case*).

dominant criteria for deciding the degree and the *factum* of the injury.²³ Furthermore, the Legislature cannot provide for every contingency; when the Legislature cannot keep pace with the changing needs of society, it becomes incumbent upon the courts to fill in the lacunae in the law.²⁴

b. *Concept of Public Policy With Regard to the Renusagar Case and the Saw Pipes Case*

The *Renusagar case*,²⁵ as expounded by the three-judge bench of the Supreme Court, made three pertinent observations as follows:

- (i) The defence of public policy should be construed narrowly;
- (ii) Contravention of law alone will not attract the bar of public policy and something more than contravention of law is required; and
- (iii) Therefore, enforcement of an award would be refused if such enforcement is contrary to (a) fundamental policy of Indian law (b) the interest of India; or (c) justice or morality.

On the other hand, while expounding the concept of public policy *vis-à-vis* domestic arbitration, the Division Bench in the *Saw Pipes case* held as under:

- (i) The phrase public policy used in section 34 of the Act is required to be given a wider meaning;
- (ii) An award which is patently in violation of statutory provisions cannot be said to be in public interest;
- (iii) The *Renusagar case* gave a narrower meaning to the term 'public policy', but in this case (*Saw Pipes case*) an award under the 1996 Act can be set aside if it is patently illegal.²⁶

²³ Pollock and Mulla, *Indian Contract and Specific Relief Acts* (12th edn Butterworths New Delhi 2001) vol 1, 666.

²⁴ *Ibid.*

²⁵ *Renusagar Power Co. Ltd. v. General Electric Co.* AIR 1994 SC 860 (*Renusagar case*).

²⁶ The *Renusagar case* dealt with an international arbitration whereas the *Saw Pipes case* dealt with a domestic arbitration. While both judgments examined 'public policy', the *Saw Pipes case* interpreted a contravention of it to also include 'patent illegality'.

It is evident from the *Renusagar case* that there is a wide distinction between applying the concept of public policy to domestic arbitrations and to international arbitrations, and courts would be generally wary of invoking 'public policy in cases involving a foreign element than when a purely municipal law issue arises.'²⁷ Nonetheless, it is also true that to invoke the concept of public policy in overturning an arbitral award (irrespective of whether it is national or international), 'the enforcement of the award must invoke something more than the violation of the law of India.'²⁸

However, in the absence of a watertight definition of patent illegality and drawing from the broad interpretation of public policy by virtue of the *Saw Pipes case*, what would ensue is that awards suffering from minor legal flaws would be open to challenge and scrutiny and a possible overruling by the courts. Also, one must bear in mind that numerous arbitrations are conducted by arbitrators who are experts in commercial and technical aspects but may not necessarily possess the legal expertise.

One can now notice the fundamental shift in the attitude of the courts towards striking down the arbitral award. In essence, the *Saw Pipes case* has struck at the very roots of the 1996 Act, as most arbitrations will now be subject to a second bout of legal arguments and the efficacy of the private jurisdictional forum will be lost since the courts have now opened up a circuitous route, via public policy, to appeal against the arbitral award. Instead of evolving our laws to keep pace with the times, this judgment has, in fact, caused a legal regression by introducing the same infirmities that were so blatantly eating into the fabric of arbitrations in India under the 1940 Act.

c. *Deciphering the Saw Pipes Case*

To decipher the *Saw Pipes case* in its entirety, it must be understood that arbitrations belong to the realm of private domain, ie exclusively between the parties to the arbitration and no one else. Bearing this in mind, it is imperative that the judiciary maintains a non-interventionist stance towards this entire process.

²⁷ AIR 1994 SC 860.

²⁸ AIR 1994 SC 860.

As Lord Mustill observed,

'The possibility of a mistake for which there is no legal redress is a price which commercial men have, down the years, been prepared to pay in the interest of what they regard as more flexible and practical method of resolving their disputes, a method which also has the particular virtue of finality.'²⁹

Unfortunately, the clock has been turned backwards with the *Saw Pipes case*. A number of defects are inherent in utilising the concept of public policy for overturning an arbitral award. Firstly, public policy being a nebulous concept is left to the judicial temperaments of the judges of every era. This presupposes a subjective element, which carries with it the danger of being misused. A concept as combustible as public policy, with its inherent infirmity of being indefinable, now leaves the field open for new heads of public policy to be created.

Secondly, the ratio as laid down in the *Saw Pipes case* is stringent, wherein an award can be overturned simply because an arbitrator has disregarded a legal or a contractual provision. The parties opting for arbitration must be deemed to have accepted the inherent risk of a decision that may not be questionable on the same grounds as the decision of an inferior court. Why then should they be allowed recourse and reprieve through the indirect route of public policy under the aegis of the court?

Thirdly, the basic tenet of arbitration is that the Court's role is essentially limited to ensuring that the award draws its conclusion from the essential contractual terms. This being the case, an award cannot be overturned simply because the court itself may have arrived at a different conclusion based on the same facts.

In conclusion, arbitration is a viable alternate forum devised by commercial men. The essence of arbitration is not to clothe the proceedings with legalese, or strictly follow legal norms and concepts, but to arrive at a commercially viable settlement via the arbitral award. In fact, most people opt for arbitration because it gives them the freedom to appoint judges of their choice who are well versed with the concept and practical realities of a particular commercial field. Allowing an award to be challenged in a

²⁹ Mustill and Boyd *infra* n. 68, 229.

court of law through the argument of public policy would be tantamount to killing the spirit of the 1996 Act.

B. *Grant of Damages arising from a Breach of Contract*

The Appellant and Respondent had contracted to pay damages in case of a breach. The deduction of a sum by way of liquidated damages by the Appellant is what gave rise to the dispute. Therefore, an examination of the relevant sections of the law relating to damages is essential.

Provisions for awarding compensation to parties in case of a breach of contract laid down in sections 73 and 74³⁰ of the Contract Act espouse accepted principles of the Common Law as to damages with a few variations. Often, at the time of contracting, the parties agree upon a stipulated sum of money to be paid in case of a breach. Such a case would necessarily fall within the ambit of section 74 of the Contract Act.

³⁰ Section 73: When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss of damage sustained by reason of the breach. Compensation for failure to discharge obligation resembling those created by contract:

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation: In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account.

Section 74: Compensation for breach of contract when penalty stipulated for: 'When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation: A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

1. Liquidated Damages and Penalty

Under English Common Law, parties may name a sum to be payable in case of a breach, which if classified by the court as a penalty is irrecoverable but if classified as liquidated damages is recoverable.³¹ However, the Law of Contracts in India does not recognise any qualitative difference in the nature of damages, as section 74 eliminates the somewhat elaborate refinement under Common Law.³² The removal of this distinction avoids a quagmire of complex classifications, thereby binding the court only to award any 'reasonable compensation' that it sees fit, not exceeding the damages stipulated in the contract.

The purpose of provisions stipulating liquidated damages is to promote a degree of certainty in commercial contracts. However, it is to be remembered that penalty or liquidated damages cannot be inferred as such on merely being so described. The main difference between the two is that while liquidated damages are a genuine, covenanted pre-estimate of damage, a penalty is a sum of money so stipulated *in terrorem*³³ ('with the object of coercing the party into performing the contract').³⁴

Thus, a mere description of damages in the contract as either 'liquidated' or 'penalty' is not to be taken at face value. While it might appear contradictory to differentiate between penalty and liquidated damages after having established that the Law of Contracts in India has dispensed with such differences, it is in fact not so. While section 74 of the Contract Act states, quite emphatically, that a party complaining of a breach will be entitled to damages in all cases where a sum is named irrespective of proof of actual damage, the onus of arriving at a 'reasonable' sum rests upon the court.³⁵ It is in order to decide the quantum of damages that the courts must inquire, at least *prima facie*, into whether the stipulated sum is a true estimate of damage, in which case the stipulated ceiling figure is to be awarded. If the stipulated sum is unreasonable then the ceiling figure is to be reduced to a 'reasonable' number.

31 Pollock and Mulla, *Indian Contract and Specific Relief Acts* (12th edn Butterworths New Delhi 2001) vol 2, 1653.

32 *Ibid*, 1647.

33 Pollock and Mulla *supra* n. 31, 1650.

34 Dr N Chandiramani, *The Law of Contract: An Outline* (2nd edn Avinash Mumbai 2001) 166.

35 *Indian Contract Act, 1872*, section 74.

Such an inquiry would be based upon the terms of agreement between the parties, the facts of the case, any other evidence on record and according to well-settled principles of law. The primary question as to whether compensation should be awarded in case of a breach is answered by section 74 of the Contract Act itself, as seen above. Thus, it can be said that the difference between 'reasonable' and 'unreasonable' sum is investigated only to arrive at an appropriate compensation, which is a subsidiary question.

2. Proof of Actual Damage

The phrase 'whether or not actual damage is proved to have been caused thereby' in section 74 of the Contract Act is wide enough to cover all cases of breach where liquidated damages are stipulated and compensation can be awarded, even if no actual damage is proved.³⁶ 'One cannot compensate a person who has not suffered any loss or damage.'³⁷ However, there are certain cases where the actual loss cannot be proved and an accurate assessment of damages is impossible. Section 74 enables such a party to claim compensation in spite of its failure to prove the actual extent of its loss, provided that the fact that some loss or damage has been suffered is established.³⁸

The Supreme Court has rightly classified the present case in this category, where while accurate value of the damage is indeterminable, there can be no doubt as to the fact of some loss.³⁹ It is difficult, in such cases, for the courts to arrive at a 'reasonable compensation' and the stipulated sum acts as a beacon, especially so when it is expressly termed by the parties to be a genuine pre-estimate of liquidated damages at the time of entering into the contract.

C. *Setting Aside Awards*

The subject of setting aside award constitutes what has been referred to

³⁶ MR Mallick, J, *Commentaries on Indian Contract Act* (1st edn Universal Law Publishers Delhi 1999) 806.

³⁷ Pollock and Mulla *supra* n. 31, 1665.

³⁸ *Ibid.*

³⁹ (2003) 5 SCC 705, para 60.

as ‘one of the knottiest and most hated chapter[s] in the Arbitration Law.’⁴⁰

Albeit loathsome, the courts have never shied away from setting aside arbitral awards whenever considered necessary to do so.⁴¹ Currently, the only recourse against an arbitral award is the filing of an application for the setting aside of such an award under section 34 of the 1996 Act. Although the Supreme Court chose the path of ‘public policy’, the case falls squarely within the purview of section 34(2)(a)(iv)⁴² read with section 28. An arbitral award made by disregarding the limits of the jurisdiction of the arbitral tribunal and the bounds of the contract from which it derives its authority can be set aside by the court since, in such circumstances, the Arbitral Tribunal acts *ultra fines compromis* (beyond the limits of the submission to arbitration).⁴³ As stated by Chawla:

‘If any matter is decided *in conscious disregard* or *against the terms of the contract*, it may be said that that is on a matter beyond the scope of the submission. Such a defect in the award will fall within clause (a)(iv) of sub-section (2) of section 34 of the Act.’⁴⁴ (emphasis supplied)

Existing case laws also strongly support this contention.⁴⁵

1. ‘Error Apparent (On The Face Of It)’, ‘Patent Illegality’ and ‘Serious Irregularity’

The dictum of Lord Dunedin states, ‘An error in law on the face of the award means, that you can find in the award or a document actually

⁴⁰ MA Sujan, *Law Relating to Arbitration and Conciliation* (2nd edn Universal Law Publishing Delhi 2001) 379.

⁴¹ *See Burla Ranga Reddi v. Kalapalli Sithaya* 1883, ILR Madras Series (VI) 368.

⁴² Section 34(2): ‘An arbitral award may be set aside by the court only if — (a) the party making the application furnish proof that — (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.’

⁴³ Dr BP Saraf, J, and SM Jhunjhunwala, J, *Law of Arbitration and Conciliation* (2nd edn Snow White Publications Mumbai 2000) 294.

⁴⁴ SK Chawla, *Law of Arbitration and Conciliation* (1st edn Eastern Law House Calcutta 1998).

⁴⁵ *See Grid Corporation of Orissa Ltd. v. Balasore Technical School* AIR 1999 SC 2262; *Continental Construction Co. Ltd. v. State of Madhya Pradesh* AIR 1998 SC 1166 and *Steel Authority of India Ltd. v. J.C. Budharaja* AIR 1999 SC 3275.

incorporated thereto ... some legal proposition which is the basis of the award and which you can then say is erroneous.⁴⁶ Under the 1940 Act, 'error apparent' had become a catch-all phrase for overturning arbitral awards. The *Saw Pipes case* has re-introduced this concept under 'patent illegality' and compared it to the 'serious irregularity' clause in section 68 of the *English Arbitration Act, 1996* (the English Act).⁴⁷ However, the rider on 'serious irregularity' under the English Act is that 'substantial injustice' must be caused to an applicant.

The Departmental Advisory Committee (DAC) Report on the English Arbitration Bill states as follows:

'The test of substantial injustice ... is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. [Section] 68 [of the English Act] is really designed as a long stop, only available in extreme cases when the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.'⁴⁸

Recent English case laws support this conservative interpretation with the courts finding it safer to err on the side of non-intervention.⁴⁹ In this context, it is difficult to comprehend the liberal view adopted by the Supreme Court.

2. The 1996 Act vis-à-vis the 1940 Act

Continual intervention by the courts had crippled the system of arbitration under the 1940 Act.⁵⁰ Terms such as 'misconduct' and 'otherwise invalid',

⁴⁶ *Champsey Bhara & Co. v. Jivraj Ballo Spinning & Wvg. Co. Ltd.* 1923 AC 480, accepted and followed in *Hindustan Construction Co. Ltd. v. State of J&K* (1992) 4 SCC 217.

⁴⁷ Section 68: Challenging the award: serious irregularity – '(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant – (b) the tribunal exceeding its powers' (otherwise than by exceeding its substantive jurisdiction – section 67); Section 69 lays down provisions for an appeal on a point of law.

⁴⁸ Para 280 of the DAC Report cited at Sutton Kendall and Gill, *Russell on Arbitration* (21st edn Sweet & Maxwell London 1997) 422, 8–047.

⁴⁹ *Ranko Group v. Antarctic Maritime SA* [1998] ADRLJ 35; *Egmatra v. Marco Trading Corp* [1998] CLC 1552 and *Contra Gbangbola v. Smith and Sherriiff* [1998] 3 ER 730.

⁵⁰ *Infra* n. 84.

occurring in section 30 of the 1940 Act, were easy bait for discontent litigious parties. Ironically, although never a part of section 30 of the 1940 Act, 'error apparent on the face of it' was by far the most abused phrase.⁵¹ Hence the Legislature, when drafting the 1996 Act, sought to specifically omit these and certain other provisions that were handicapping arbitrations and resulting in the courts being swamped with challenges to the awards.⁵² This intention is clearly conveyed by a comparative reading of section 34 of the 1996 Act and section 30 of the 1940 Act. The sub-sections of the former are strictly limited in their application, in direct contrast to the inclusive sub-sections of the latter, which sought to enable court intervention. Thus, the re-introduction of 'error apparent on the face of it' under the guise of the 'patent illegality' clause by the Supreme Court is bound to be counterproductive.

As a result, the *Saw Pipes case* has been excoriated for hitting the 1996 Act at its very foundation and bringing in the 1940 Act through the backdoor.

IV. SHORTCOMINGS

A. *The Arbitral Award*

In the *Saw Pipes case*, the award made by the Arbitral Tribunal as well as the manner in which such award was arrived at suffered from a few deficiencies. Several principles of law and the evidence on record, which should have been considered, were not considered.

⁵¹ VA Mohta, *The Arbitration and Conciliation Act, 1996* (1st edn All India Reporter Pvt Ltd. 2001) 24.

⁵² *Ibid.* Omitted Provisions – 'Section 30: Grounds for setting aside award. – An award shall not be set aside except on one or more of the following grounds, namely, – (a) that the arbitrator umpire has misconducted himself of the proceedings; (b) that an award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid under section 35; (c) that an award has been improperly procured or is otherwise invalid; These grounds now do not exist. Grounds of challenge are considerably reduced under the new Act.'

1. Time-bound Contracts

The law relating to time-bound contracts is laid down in section 55⁵³ of the Contract Act. Clause 11 of the agreement between the parties was explicit about the time and date of delivery being of essence to the contract, as was clause 12 about imposition of liquidated damages in case of delay. Furthermore, in their letter permitting an extension of the deadline, the Appellant was unequivocal about the fact that liquidated damages would be deducted in accordance with the terms of the contract.

Although *vide* paragraph 1 of section 55, a contract becomes voidable at the option of the aggrieved party in a time-bound contract, paragraph 3 of section 55 envisages a slight modification. Interestingly, the Arbitral Tribunal not only ignored the letter as well as the aforementioned clauses in its award, but also the provisions of paragraph 3 of section 55 of the Contract Act. When the aggrieved party decides to accept performance of the contract after the specified time, a claim for compensation can be made only if notice is given to the opposite party of such claim at the time of acceptance. The fact that such a notice was issued by the Appellant is undisputed. The deductions made by way of compensation from the bills of payment by the Appellant were perfectly legal⁵⁴ and well within the terms of the agreement. It is therefore evident that the Arbitral Tribunal failed to consider not only the terms of the contract and the evidence on record but also the provisions of section 55 of the Contract Act. Oddly, the implications of section 55 on the case were not considered by the Supreme Court either.

Section 28(1)(a)⁵⁵ of the 1996 Act lays down that an award must be made in conformity with the provisions of the substantive law in force.⁵⁶ ‘An

⁵³ Section 55, paragraph 3 – Effect of acceptance of performance at time other than that agreed upon: If, in case of a contract voidable on account of the promisor’s failure to perform his promise at the time agreed, the promisee cannot claim compensation of any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of acceptance, he gives notice to the promisor of his intention to do so.

⁵⁴ *Cf.* MR Mallick, J, *Commentaries on Indian Contract Act* (Universal Law Publishers Delhi 1999) 807.

⁵⁵ Rules applicable to substance of dispute: (1) Where the place of arbitration is situate in India– (a) in an arbitration other than an international commercial arbitration, the tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India.

⁵⁶ *Cf.* Chawla *supra* n. 44, 355.

arbitrator is *not* a conciliator and *cannot ignore the law* or misapply it ... The arbitrator is a tribunal selected by the parties to decide their disputes *according to the law* and so he is *bound to follow and apply the law.*' (emphasis supplied)⁵⁷ Evidently, this section was contravened by the Tribunal in its award and also not considered by the Supreme Court, although an oblique reference to it was made in the latter part of paragraph 19 of the judgment.

2. Contravention of the Terms of the Contract

Clauses 11, 11(a), 11(c) and 12 of the contract were unequivocal about the contract being time bound and the liquidated damages to be paid in case of a breach.⁵⁸ Moreover, clause 34(4) of the contract clarified that no interest was to be levied on 'disputed claims' of payment. The Arbitral Tribunal however, in direct contradiction of the terms of the contract, demanded proof of damages from the Appellant and upon finding their submissions in this area inadequate, not only made an award in favour of the claimant (Saw Pipes Ltd), but also slapped a heavy fine by way of interest (on a disputed claim) to be paid by the Appellant.

The question therefore is whether the Arbitral Tribunal was wrong in demanding proof of damages from the Appellant, or even inquiring into whether the sum that was termed in the contract as 'a genuine pre-estimate of liquidated damages' was a penalty to begin with. More so considering the fact that it was not contended by the Respondent that such sum was by way of penalty.

Section 28(3)⁵⁹ of the 1996 Act explicitly states that the decision of the Arbitral Tribunal shall be, 'in accordance with the terms of the contract'. This sub-section is in consonance with and clarifies the principle already laid down in section 16(3)⁶⁰ of the 1996 Act. An arbitrator is 'a creature of

⁵⁷ *Continental Construction Co. Ltd. v. State of MP* AIR 1988 SC 232.

⁵⁸ *See supra* II. A, Factual Position.

⁵⁹ Section 28(3): 'In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.'

⁶⁰ Section 16(3): 'Competence of the arbitral tribunal to rule on its own jurisdiction (3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.'

the agreement itself' and must always abide by the terms of the contract.⁶¹ 'If he [the arbitrator] has travelled outside the bounds of the contract, he has acted without jurisdiction. ... A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.'⁶²

'More particularly, [the arbitrator] cannot award any amount, which is ruled out or prohibited by the terms of the agreement.'⁶³ Moreover, section 28(3) of the 1996 Act is unequivocally qualified by section 31(7) – 'Unless otherwise agreed by the parties...'.⁶⁴ In a recent case,⁶⁵ the Hon'ble Supreme Court overturned an arbitral award on the grounds that the specific terms of the contract had not been adhered to. The Tribunal had awarded a higher rate of interest on the disputed sum than what the parties had contracted to pay.

B. Faulty Legislation

It is never easy or correct to categorically classify the drafting of any section as faulty at the outset, as these limitations become perceptible only over time after it is tested repeatedly against innumerable cases. Clearly, the Parliament intended to adopt the corresponding provisions of the UNCITRAL Model.⁶⁶ However, the various grounds provided for challenging an award are not comprehensive. In contrast, many lament

61 Chawla *supra* n. 44, 294.

62 *Associated Eng. Co. v. Govt. of AP* AIR 1992 SC 232 accepted in *VG George v. Indian Rare Earths Ltd* 3 (1999) SCC 762.

63 *New Delhi Civil Erectors (P) Ltd. v. ONGC* AIR 1997 SC 980.

64 Section 31(7): 'Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include a sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.'

65 *Gautam Constructions and Fisheries Ltd. v. National Bank for Agricultural & Rural Development* (2000) 6 SCC 522, para 5, 'The grant of interest at 18% p.a. is directly opposed to the specific terms of the contract and it is not permissible for the arbitrator or the court dealing with the validity of the award to award a higher rate than the mutually agreed rate, which is binding on the parties.'

66 The corresponding provision is Article 34 Chapter VII, 'Recourse against award', available at <http://www.uncitral.org/english/texts/arbitration/ml-arb/ml-arb-e.pdf.htm> (last visited on 29 August 2005).

that the law applicable in England provides that the award can be challenged on the ground of serious irregularities mentioned therein and empowers the court to correct an error of law.⁶⁷ However, this needs to be considered in light of the fact that the English Act continues with the system introduced in 1979 having three novel features⁶⁸ aimed solely at curbing challenges to arbitral awards.⁶⁹ With fewer appeals being filed and far fewer successful appeals, the system has served its purpose fairly well.⁷⁰ In any case it cannot be denied that this topic has been a source of great controversy and has both Indian and English jurists alike divided on the issue.⁷¹ The applicability of the provisions of section 16(3) read with 28(3) of the 1996 Act to the present case has already been discussed.

Section 16(6) gives the right to an aggrieved party to make an application to have the award set aside 'in accordance with section 34'. It would, however, be futile to 'search' for the accommodation of section 16(6) anywhere in section 34. This could perhaps explain why the words 'in accordance with' and not 'under the provisions of' have been used. 'In accordance with section 34 only means that the entire procedure laid down in section 34 will apply to such application. "Accordance" means, harmony, agreement, concord or conformity.'⁷² The inference that can be drawn

67 Eminent jurist and Senior Advocate Late Mr Nani Palkhivala while giving his opinion to '*Law of Arbitration and Conciliation*' by Dr BP Saraf, J, and SM Jhunjhunwala, J, noted, '[I] wish that the Indian law had a provision similar to section 68 of the English Arbitration Act, 1996 which gives power to the Court to correct error of law in the award.'

68 Sir Michael Mustill and Steven C Boyd, *Commercial Arbitration* (2nd edn Butterworths London 1989) 27-28. The 3 main features are: (a) Exclusion agreements *viz.* (i) when entered into after the commencement of the arbitration are all valid. (ii) When entered into before the commencement of the arbitration are also valid except for domestic arbitration agreements; (b) There is no automatic right to appeal, instead leave of the court must be obtained at a brief oral hearing. Furthermore, no appeal lies from the decision of the High Court unless the Court of Appeal gives leave and it is certified by the judge that 'the question of law is one of general public importance' or for some other reason ought to be considered; (c) The special case has been replaced with the reasoned award, thereby simplifying the form of the appeal.

69 *Ibid.*, 608, 'One of the most important aims of the 1979 Act was to restrict the opportunity for the losing party to postpone payment by launching a (sic) unmeritorious appeal.'

70 Mustill and Boyd *supra* n. 68.

71 Suján *supra* n. 40, 250-252.

72 *Black's Law Dictionary*, 5th edn (1979) 16, as cited in Chawla *supra* n. 44, 406.

is that although section 16(6) does provide for recourse against an arbitral award, these provisions are 'de hors [outside of] section 34'.⁷³ Naturally, grounds which are not mentioned in section 34 cannot be read into it to provide for section 16(6), hence such an application would have to be made not 'under' but 'in accordance with' section 34, as is required by section 16(6). 'It will nullify the provisions of ... section 16(6) and remedies offered by such provisions, if it were necessary that only the grounds mentioned in section 34(2) can be taken in those proceedings.'⁷⁴

As is apparent, section 34 requires liberal interpretation even to accommodate the provisions of Part I of the 1996 Act itself. In the authors' opinion, although the Supreme Court was forced to tinker with the provisions of section 34, it is unclear why the path of 'public policy' and not section 34(2)(a)(iv) was preferred.

C. *The Arbitration (Amendment) Bill, 2003*

The 2003 Amendment Bill⁷⁵ to the 1996 Act has been tabled in Parliament and is pending enactment. An overview of the 2003 Amendment Bill indicates that the rigorous impact of the *Saw Pipes* case will be to a large extent nullified. Section 28(3) is proposed to be amended to provide for the settlement of disputes under Part I (of the Act dealing with disputes other than international arbitrations) 'in accordance with' substantive Indian law; furthermore, the 2003 Amendment Bill recommends that international arbitrations be governed by the substantive law of the country selected by the parties. Section 34 is proposed to be amended by making 'reasoned awards' compulsory, ie providing for awards to be overturned when no reasons are given. In case of a remittance, a time frame along with guidelines are to be laid down by the court.

The most interesting part relates to the scope of 'public policy' being

⁷³ Cf. Chawla *supra* n. 44, 405–406.

⁷⁴ *Ibid.*

⁷⁵ The draft *Arbitration (Amendment) Bill, 2003* (Bill No. LXXV of 2003), available at http://www.rajyasabha.nic.in/bills-ls-rs/2003/LXXV_2003.pdf (last visited on 29 August 2005).

defined.⁷⁶ The Parliament has rejected the broad meaning of 'public policy' as interpreted in the *Saw Pipes case*. In fact, it has incorporated (*in toto*) the narrow meaning assigned by the Supreme Court in the *Renusagar case*. Although clause (iii) 'justice and morality' (of Explanation 2 proposed to be inserted in section 34 by the Bill) could also be a fertile source of ambiguity, relief can be derived from the fact that the Supreme Court was unable to accommodate the facts of the *Saw Pipes case* within this clause. Provisions have been made in the 2003 Amendment Bill to accommodate applications under section 16(6), as well as for other such sections in Part I within section 34 itself, thereby correcting the faulty drafting of section 34 of the 1996 Act. Section 34A is proposed to be inserted, which shall provide for a domestic award to be challenged if there is an error apparent on the face of it.⁷⁷ In order to prevent abuse of this right, the Bill provides for a separate application to be filed and independently accepted by a court (arbitration division), which is further subject to the stringent conditions laid down in the proviso to the proposed sub-section (2).⁷⁸ This is noteworthy, since a similar provision of obtaining leave exists in the English Act. Although the English have *The Nema Guidelines*⁷⁹ and the *Antaios case*⁸⁰ as formidable authorities

⁷⁶ *Ibid.* Clause 26 states, 'In section 34 of the principal Act the following shall be inserted: *Explanation 2.* — For the purposes of this section, clause (b) of sub-section (2) of section 48 and clause (e) of sub-section (1) of section 57, "public policy of India" or "Contrary to public policy of India" means contrary to (i) fundamental policy of India, or (ii) interests of India, or (iii) justice or morality.'

⁷⁷ Section 34A: (1) In the case of an arbitral award made in an arbitration other than an international arbitration (whether commercial or not), recourse to a court against an arbitral award on the additional ground that there is an error which is apparent on the face of the arbitral award giving rise to a substantial question of law can be had in an application for setting aside an award referred to in sub-section (1) of section 34.

⁷⁸ To be inserted after section 34: '34A(2) Provided that the Court shall not grant leave unless it is prima facie of the opinion that all the following conditions are satisfied, namely — (a) that the determination of the question will substantially affect the rights of one or more parties; (b) that the substantial question of law was one which the arbitral tribunal was asked to decide or has decided on its own; and (c) that the application made for leave identifies the substantial question of law to be decided and states relevant grounds on which leave is sought.'

⁷⁹ As laid down in *Pioneer Shipping Ltd. v. BTP Tioxide Ltd* [1981] All ER 1030.

⁸⁰ *Antaios Compania Naviera SA v. Salen Rederierna AB* [1984] All ER 229.

on challenge to an arbitral award, this is certainly a step in the right direction.⁸¹

V. RAMIFICATIONS OF THE JUDGMENT

An unexplored angle of the *Saw Pipes* case is the role the Appellant, being a Public Sector Undertaking (PSU), had to play in the outcome. It is a widely-held belief, that in contracts to which PSUs and Government undertakings are a party, the term 'public policy' necessarily needs to be given a broad meaning.⁸² In the case of *Raipur Development Authority v. Chokhamal Contractors*, the Supreme Court, dealing with a non-speaking award under the 1940 Act, suggested a more protectionist approach when dealing with state instrumentalities, although the Court did not go so far as to overturn the award:

'But arbitral awards in disputes to which the State and its instrumentalities are parties affect *public interest* and the matter of the manner in which the government and its instrumentalities allow their interest to be affected by such arbitral adjudications involve larger questions of *policy* and *public interest*.' (emphasis supplied)⁸³

It is therefore plausible that it is from this perspective that the Supreme Court was prompted to play a guardian's role allowing the appeal *vide* 'public policy'.

A. On Substantive Law in India

In the authors' opinion, with overcrowded courts, public interest favours efficient, inexpensive and speedy dispute resolution. This is more so in the commercial context, where dispute resolution could well depend on custom and practice rather than on esoteric legal analysis. Even though public policy certainly cannot be said to be in conflict with public interest, paradoxically, in this case, it is public policy itself that has been used to undermine arbitrations in India.

⁸¹ *But see Comparative Analysis of the Arbitration Bill*, at <http://www.bombaychamber.com/Rep-saraf.doc> (last visited on 29 August 2005).

⁸² Geetha Thoopal, *A Few Issues Relating To Arbitration Act, 1996*, at http://www.irastimes.org/A_FEW_ISSUES_RELATING_TO_ARBITRATION_ACT_1996.htm

⁸³ (1989) 2 SCC 721, 752-753 (last visited on 29 August 2005).

It must not be forgotten that arbitrations allow parties to determine by way of a private bargain, how their chosen tribunal will resolve the dispute and what their respective obligations will be in relation to the conduct of reference. From this perspective, it can safely be said that the *Saw Pipes* case has, in one sweeping blow, upset the proverbial apple cart. 'Finality' being the most attractive and unique feature of arbitration internationally⁸⁴ has fallen by the wayside. Arbitration as it now stands in India is just another step in the appeal process that most can well do without.⁸⁵

Moreover, it would be fairly easy to arrive at the conclusion that the wider approach to public policy can be extended to other legislations. A case in point would be the Contract Act, which deals with the concept of public policy under section 23. The enlargement of the concept in one legislation can easily lead to enlargement and striking down of contracts under section 23 of the Contract Act also. The Courts now have the power to sit in judgment over the commercial dealings of private parties through the circuitous route of public policy, thereby unwillingly subjecting them to its jurisdiction.

B. *The International Position*

The 1996 Act was meant to revive the arbitral system in India and bring the law in line with a new era of financial and economic reforms. It was a message to foreign investors that we were establishing a universally accepted dispute resolution method that would save parties from getting entwined in our country's notoriously sluggish court system. It was to be our contribution to the 'universalisation' of arbitral law.⁸⁶

International arbitrations transcend borders and it is essential for them to work seamlessly. Sadly, the *Saw Pipes* case combined with *Bhatia*

⁸⁴ *Tara Products Pvt. Ltd. v. Hutcheson Bros. Pvt. Ltd.*, (1972) 127 CLR 253, 248: 1972 Australia Law Journal Reports 119, '[F]inality of arbitration in the award of the lay arbitrator is more significant than legal propriety in all his processes in reaching that award.', per Barwick CJ (High Court of Australia).

⁸⁵ In *Guru Nanak Foundation v. Rattan Singh and Sons* AIR 1981 SC 2075, wherein the Supreme Court, with reference to the 1940 Act, was constrained to observe: '[T]he way in which the proceedings under the Act are conducted and without exception are challenged in Courts has made lawyers laugh and legal philosophers weep.'

⁸⁶ GK Kwatra, *The Arbitration and Conciliation Law of India* (The Indian Council of Arbitration, New Delhi 1996 edn.), 'Foreword' by (Retd.) Hon'ble Mr RS Pathak, CJ.

*International v. Bulk Trading SA*⁸⁷ is a lethal cocktail.⁸⁸ Although sections 48 and 57 (Part II of the 1996 Act) are very similar to section 34 (Part I of the 1996 Act), earlier they were hedged in by the *Renusagar* case. Interpreted liberally, the courts can now overturn international arbitral awards without a qualm *vide* 'public policy' and wreak potential havoc on the arbitral system internationally.

C. On Arbitrators

Albeit unintentionally, the *Saw Pipes* case has perhaps touched a deeper issue that needs attention. Ideally, Arbitral Tribunals should be free, fair, competent and intelligent tribunals, dispensing just awards.⁸⁹ However, the 'rectitude' of tribunals has often come into question.⁹⁰ 'An arbitrator ... gradually changed colour, being steeped in prevalent climate or (sic) corruption and permitting himself to be influenced by extraneous considerations.'⁹¹ Undoubtedly, efforts must be aimed at establishing a fair system to begin with,⁹² rather than interfering with awards that were meant to be final. But this judgment will certainly mount pressure on the arbitrators to tread carefully when making awards, at least in the near future.

VI. CONCLUSION

The *Saw Pipes* case has opened the Pandora's box insofar as the recourse

⁸⁷ (2002) 2 Comp LJ 361 (SC) (The Supreme Court took the view that Part I of The Act (specifically Section 9) was to apply even to international commercial arbitrations).

⁸⁸ However the *Arbitration (Amendment) Bill, 2003*, section 4 specifies that, '[O]nly Sections 8 (power to refer parties to arbitration when there is an arbitration agreement), 9 (interim measures) and 27 (court assistance in taking evidence) apply to Part II and the rest of Part I is to apply to domestic arbitrations only, thereby nullifying the *Bhatia* judgment, if this Bill were to be enacted.'

⁸⁹ Sutton Kendall and Gill, *Russell on Arbitration* (21st edn Sweet & Maxwell London 1997) 191, para 5-050.

⁹⁰ *Supra* n. 83; See *Union of India v. Ajit Mehta and Associates*, AIR 1990 Bom 45; See also *State of Kerala v. Joseph Anchilose* AIR 1990 Ker. 101, '[A]buse of arbitral process is rampant...'

⁹¹ Sujan *supra* n. 40, 10, 11, 435, 436.

⁹² Ensuring that the same law firm is not engaged in the case of a challenge to the award could be an effective statutory requirement. Also, the issue of law firms nominating a particular arbitrator frequently needs due attention.

to a court of law through challenges under section 34 of the 1996 Act is concerned. In fact, so lethal is its venom that it has already claimed two victims in the form of two Delhi High Court judgments – *DSA Engineers (Bom) v. M/s Housing & Urban Development*⁹³ and *Shyam Telecom Ltd. v. ARM Ltd.*⁹⁴

One cannot help but notice the fact that though this judgment takes a pragmatic view of the whole situation and one of its objectives was to ensure that private parties do not suffer at the hands of careless arbitrators, it in fact ends up doing the contrary.

It must not be forgotten that it was the ‘public policy’ consideration which led judicial institutions to grant statutory recognition to private dispute resolution fora. The *Renusagar* case clearly established the fact that for the bar of public policy to be attracted, something more than just a provision of law needed to have been violated. On the other hand, the *Saw Pipes* case states that even if the arbitrator has ignored a contractual provision or a legal provision, the award can be overturned on the basis of non-compliance with the public policy of India. Thus, the balance which had been achieved by the three-judge bench in the *Renusagar* case has been completely eroded by the two judge bench of the *Saw Pipes* case. The enlargement of the concept of public policy, *inter alia*, on the grounds of ‘patent illegality’ refuses to take into account the fact that such a measure would be far detrimental to arbitrations held on the national as well as international level.

Instead of setting aside the awards that were meant to be conclusive, judicial and legislative efforts should be directed towards eradicating flaws in the current legislation, rather than relegating parties to a long period of litigation that was intended to be avoided through the inception of the 1996 Act.

⁹³ Unreported Delhi High Court (21 April 2004).

⁹⁴ Unreported Delhi High Court (17 September 2004).

THE ARMED FORCES (SPECIAL POWERS) ACT, 1958: DISARMING THE LAW?†

*Vishal Kanade**

‘He who fights with monsters should be careful lest he thereby
becomes a monster.’

Friedrich Nietzsche¹

I. INTRODUCTION

Miss Thangjam Manorama Devi, aged 32, was picked up by members of the 17th Assam Rifles in the wee hours of the morning on 11 July 2004.² Few hours later she was found dead near Ngariyan Mapao Maring village.³ There were not only scratch marks all over her body but also bullet wounds on the back.⁴ Her death became a subject of controversy and led to sweeping unrest all over the state as it was allegedly caused by rape and torture committed by the personnel of the 17th Assam Rifles.

After weeks of vehement agitation and turbulence in the State, a group of women protested at the Kangla Gate in Manipur against the *Armed Forces (Special Powers) Act, 1958* (the Act) and the horrendous Manorama Devi incident. Sentries and onlookers were dumbfounded by their expression of protest because all the women who were protesting were naked.⁵ It is, however, pertinent to note that there were also allegations made from certain quarters to the extent that the protest in question was not due to a spontaneous outburst of emotions but a result of carefully planned agitation to malign the image of the Armed Forces in the State.

† This article reflects the position of law as on 5 August 2005.

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1 Friedrich Nietzsche, ‘Beyond Good and Evil’, available at <http://www.landandfarm.com/lf/news/newsletter.asp> (last visited 7 July 2005).

2 Malem Ningthouja, ‘End Military Rule in Manipur’, available at <http://www.revolutionarydemocracy.org/rdv10n2/manipur.htm> (last visited 7 July 2005).

3 *Ibid.*

4 Ningthouja *supra* n. 2.

5 Ambarish K Diwanji, ‘Why is Manipur Burning?’, at <http://www.rediff.com/news/2004/aug/10spec2.htm> (last visited 7 July 2005).

These allegations notwithstanding, the protest did have a profound impact on Manipur as well as the rest of the country.

This coupled with other incidents of turmoil in the north-east, brought the Act into the focus of the mainstream national media. The Act was passed by Parliament in 1958 and the Armed Forces⁶ deployed in the north-east operate under it. The Act was formerly applicable only to the states of Assam and Manipur but with the 1972 amendment, it was extended to the states of Arunachal Pradesh, Meghalaya, Mizoram, Nagaland and Tripura.⁷ Sikkim is the only state in the north-east where the Act is not in force.

This article seeks to scrutinise the provisions of the Act, analysing the relevance of such draconian legislation with the object of examining the question of whether the Act should be amended.

II. EVOLUTION OF THE ACT

A. *The Armed Past*

The precursor to the Act made its presence felt in the pre-independence era when the struggle for independence had moved to a crucial phase. In 1942, the Quit India Movement had gained momentum and mass upheaval broke out in the country.⁸ There was a rebellion within the British Indian Army on a monumental scale wherein nearly 40,000 Indian soldiers merged with the Indian National Army (INA). The INA, along with the Imperial Japanese Army, was at the doorstep of the British Empire in India on its eastern front threatening to invade the prized colony of the British Raj. On 15 August 1942, the then Viceroy, Lord Linlithgow, declared emergency all over British India and promulgated the *Armed Forces (Special Powers) Ordinance, 1942*, vaguely defining special powers of the Armed Forces to arrest and kill civilians on mere suspicion.⁹

On 15 August 1947, India achieved independence and began a journey wherein every citizen was guaranteed equality and social justice amongst

⁶ Section 2(a) of the Act defines 'Armed Forces' as 'the military forces and the air forces operating as land forces, and includes any other Armed Forces of the Union so operating.'

⁷ Preamble to the *Armed Forces (Special Powers) Act, 1958*.

⁸ Preeti Verma(ed), *The Terror Of POTA And Other Security Legislation* (Human Rights Law Network New Delhi 2004) 330.

⁹ *Ibid.*

other basic fundamental rights. However, in 1958, the Act was passed, reincarnating the colonial ordinance, which gave the Armed Forces similar special powers with the following changes:

- The Act was confined only to the north-east unlike the British ordinance, which applied to the entire country.
- The non-commissioned officers were also given the power to take action whereas earlier this power was confined to commissioned officers.¹⁰
- The provision for declaration of emergency was replaced by the term 'disturbed area'.¹¹

The Act was further amended in 1972 introducing the following changes:

- It sought to state clearly that the Governors of the States and Administrators of the Union Territories would have the power to declare an area as 'disturbed'.
- The amendment stated that even the Central Government would have the power of declaring an area as a 'disturbed area'.¹²

B. *Theirs Not to Reason Why*

After India achieved independence in 1947, the process of integration of different princely states and provinces had gathered pace. Integration of states proved to be cumbersome primarily because some princely states wanted to remain independent and others were culturally and historically distinct. A similar problem was emerging in the north-east where, for example, the languages are of the Tibeto-Chinese family rather than the Indo-Aryan or Dravidian family. The predominantly Mongolian features of the people of the north-east was another barrier to cultural assimilation.¹³ Also this region had a rich and varied culture which was

¹⁰ *Armed Forces (Special Powers) Act, 1958*, section 4(a).

¹¹ Diwanji *supra* n. 5.

¹² *Armed Forces (Special Powers) Act, 1958*, section 3.

¹³ South Asian Human Rights Documentation Centre, 'Armed Forces Special Powers Act: A Study In National Security Tyranny', available at http://www.hrdc.net/sahrdc/resources/armed_forces.htm (last visited 7 July 2005).

distinct from the Indian mainland. Therefore, integration with the Indian mainland was not a smooth affair. In 1949 the Government of India invited the King of Manipur for a meeting at Shillong where he allegedly signed the merger agreement under duress.¹⁴

The Nagas came together under the banner of Naga National Council aspiring for an independent Nagaland.¹⁵ A movement for independence among Naga tribes had developed into a rebellion in 1957 necessitating operations by the Indian Army.¹⁶

In the 1958 monsoon session of Parliament, the then Home Minister, Mr GB Pant, while introducing the Armed Forces Special Powers Bill stated, 'in order to enable the Armed Forces to handle the situation effectively wherever such problem arises hereafter, it has been considered necessary to introduce the bill.'¹⁷ He contended that these measures were for the protection of the people in such areas.¹⁸ The Bill was essentially passed to ensure that the rebellion and militancy in the north-east could be effectively crushed.

Apart from this objective there could have been other considerations, which hastened the introduction of the Act.

During the 1950s, the north-east shared its borders with several nations including the potentially hostile erstwhile East Pakistan. The north-east also acted as a buffer zone between India and China, giving India strategic depth in the region. Furthermore the region is of great importance as it provides a gateway through Burma to other South Asian countries and has abundant natural resources.

The north-eastern region is connected to India by a narrow corridor of land between Bhutan and Bangladesh known as the 'Chicken's Neck'. The entire region could be severed from the Indian mainland by capturing this narrow passage. Therefore, physical domination and complete control over the strategic area of north-east was imperative.

¹⁴ *Ibid.*

¹⁵ *Supra* n. 13.

¹⁶ *Indrajit Barua v. State of Assam* AIR 1983 Delhi 513, para 48.

¹⁷ *Supra* n. 13.

¹⁸ *Ibid.*

C. Present Scenario

Today, India as a nation is stronger as compared to four decades ago when the Act came into force. The reasons that necessitated the introduction of such harsh legislation cease to exist today. The country has also seen several draconian legislations being passed like the *Maintenance of Internal Security Act, 1976*, the *Terrorist and Disruptive Activities (Prevention) Act, 1987* and the *Prevention of Terrorism Act, 2002*. What is pertinent to note is that with every successive legislation, attempts have been made to introduce additional safeguards to avoid potential abuse by the Armed Forces personnel. However, no such attempt has been made in case of the Act.¹⁹

III. AND THEN THERE WERE SEVEN: PROVISIONS OF THE ACT

The Act contains only seven sections and its provisions are such that they appear to be violating the basic fundamental rights guaranteed by the Constitution of India (the Constitution). The words *Armed Forces (Special Powers) Act* are synonymous with terror²⁰ in the north-east. The preamble

¹⁹ According to Lt Gen (Retd) Satish Satpute, 'During insurgency the biggest problem faced is the identification of a militant. He is a local. He can be of any age from 16 to 50 years, man or woman, of any occupation or profession, very seldom in an attire different from what the population wears. He thus enjoys anonymity and can claim innocence when apprehended by security forces unless found with a weapon in possession. The initiative almost always rests with the attacker; ie the militant. The army personnel when called upon to operate in such areas have to confront a huge psychological problem of isolation having to be under a constant threat to their life or limb. While in war situations every suspicious target can be fired upon with highly destructive weapons, here an unidentified militant is to be engaged only with small arms firing the least number of bullets.'

In Nagaland the movement is extremely difficult and mostly confined to foot slog across treacherous steep mountain slopes covered with primary jungles, interspersed with gushing springs and rivers. This was one of the main reasons why the benefits of modern development had failed to reach all corners of the state, which gave rise to discontent. It was also this fact which made local law and order machinery totally ineffective in dealing with such violent expression of insurgency with desired alacrity. It may come as a surprise to the reader that a locality visible across the valley may take as much as two/three days to reach, longer during the rainy season. A column has to confine itself to an existing foot track and therefore is detected and ambushed with comparative ease, particularly when the local population is supporting the uprising.'

²⁰ Lt Col (Retd) H Bhuban Singh, 'Armed Forces Special Powers Act (Assam and Manipur) 1958 - An Assessment', available at <http://www.manipuronline.com/Opinions/June2002/>

states that it is an Act to enable certain special powers to be conferred upon the members of Armed Forces in disturbed areas in the seven north-eastern states.

Section 2(a) of the Act defines the term 'Armed Forces'.²¹ The Assam Rifles is a paramilitary force deployed throughout the north-east. The Hon'ble Delhi High Court in the case of *Indrajit Barua v. State of Assam* has described the Assam Rifles as 'a part and parcel of any other Armed Forces of the Union ...'.²² Thus, apart from regular army units, paramilitary forces like the Assam Rifles, Central Reserve Police Force, Border Security Force are also included in the definition of Armed Forces under the Act.

A. Declaration of Disturbed Area

Section 2(b) of the Act defines the term 'disturbed area' as an area, which is for the time being declared by notification under section 3, to be a disturbed area.

Section 3²³ of the Act deals with the power to declare an area as a disturbed area. This section is however loosely drafted. There are certain other Acts which deal with the definition of 'disturbed area' more concretely, like the *Disturbed Areas (Special Courts) Act, 1976*. Section 3 of the aforementioned Act lays down when an area can be declared as a 'disturbed area' and states 'where the State Government is satisfied that there is or there was extensive disturbance of public tranquillity by reason of differences or disputes between members of different communities on religious or racial grounds then an area can be declared as a disturbed area.' By prescribing

afspa03_2.htm (last visited 7 July 2005).

²¹ *Supra* n. 6.

²² AIR 1983 Delhi 513, para 81.

²³ Section 3 of the Act: 'If, in relation to any State or Union territory of which the Act extends, the Governor of that State or the Administrator of that Union territory or the Central Government, in either case, is of the opinion that the whole or any part of such State or Union territory, as the case may be, is in such a disturbed or dangerous condition that the use of Armed Forces in aid of the civil powers is necessary, the Governor of that State or the Administrator of that Union territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union territory to be a disturbed area.'

some parameters within the Act, the declaration would be liable to judicial scrutiny and negate the possibility of blatant abuse of power.

It is pertinent to note that even provisions in the Constitution pertaining to the declaration of emergency are subject to certain considerations. Article 352 of the Constitution states that the President can impose emergency when there is war, external aggression or internal rebellion; whereas Article 356 talks about the imposition of emergency in the State when there is a breakdown of constitutional machinery.

Unlike the constitutional provisions dealing with the declaration of emergency, there is a conspicuous absence of terms like 'internal rebellion' or 'external aggression' within section 3 of the Act. Section 3 only states a dangerous or disturbed condition, which can even cover situations where there is no internal rebellion or external aggression. Loosely worded provisions such as these widen the scope of abuse of power by the authorities. In case of an emergency, a declaration under Article 356 of the Constitution has to be approved by the Parliament, but as mentioned in the Act, the Governors of the States would have the authority to declare an area as a 'disturbed area' without the assent of the State Legislature. After the 1972 amendment, even the Central Government can *suo motu* declare an area as a 'disturbed area.' Thus, it is now evident that the Central Government can overrule the opinion of the State and declare an area to be disturbed. During the 1972 amendment it had been argued that the power need not be extended to the Central Government as the President under the provisions of the Constitution could intervene in a disturbed state.²⁴ Moreover, the declaration of an emergency is reviewed every six months but there is no such provision in the Act. This position was addressed by the Supreme Court of India in the case of *Naga People's Movement of Human Rights v. Union of India* where it was held that the declaration of an area as being disturbed had to be reviewed every six months.²⁵ The Supreme Court further held that it was desirable that the Central Government consults the State Government before making such a declaration. In view of this it is desirable that section 3 be amended in a manner whereby declaration of a disturbed area is regulated.

²⁴ *Supra* n.13.

²⁵ AIR 1998 SC 431, para 37 (*Naga People's Movement of Human Rights case*).

B. *Special Powers of the Armed Forces*

The provisions within section 4²⁶ that deal with the special powers given to Armed Forces are extremely controversial in nature.

Section 4(a)²⁷ gives members of the Armed Forces a lot of discretionary powers. The section also mentions that if members of an assembly as defined in section 4(a) are carrying anything that could be used as a weapon, the Armed Forces personnel can shoot to kill. In the *Naga People's Movement of Human Rights case* it was held that the provisions of this section indicate that the officer shall use the minimal force required.²⁸

Notwithstanding this there have been several cases where such powers have led to disastrous consequences. One such incident occurred on 5 March 1995, when the Rashtriya Rifles mistook the sound of a tyre burst from their own convoy as a bomb attack and started firing indiscriminately in Kohima. Later other paramilitary forces joined them and opened fire, which lasted for an hour and resulted in the death of seven innocent civilians.²⁹ However, it needs to be emphasised that in counter insurgency, Armed Forces are exposed to danger for several reasons. There have been several other incidents involving the alleged disproportionate use of force by the Armed Forces and consequential civil casualties. It is however undoubtedly true that one cannot honestly expect an Armed Forces personnel operating in a disturbed area, infested with militants, to give a warning to a person who is visibly concealing a firearm and that in such a situation there is no way but to neutralise such a threat.³⁰ Therefore to

²⁶ Section 4 of the Act states, 'Any commissioned officer, warrant officer, non commissioned officer or any other person of equivalent rank in the Armed Forces may, in a disturbed area ...'.

²⁷ Section 4(a) of the Act states: '[I]f he is of opinion that it is necessary so to do for the maintenance of Public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances'.

²⁸ AIR 1998 SC 431, para 46.

²⁹ *Supra* n.13.

³⁰ According to Lt Gen (Retd) Satish Satpute, 'The Kohima incident must be seen in the light of a moment's separation between life and death for the soldier who mistook the

justify the invocation of this provision only two conditions need to be satisfied by the officer, firstly that *he deems it necessary* to do so for maintenance of public order. Secondly, that he only *gives such due warning as he may consider necessary*.³¹

Section 4(b)³² states that Armed Forces personnel can obliterate any structure which may be a residential building or a hutment on mere suspicion that an attack is likely to be made from such structure.

Section 4(c)³³ states that the Armed Forces personnel can arrest anyone, without a warrant, who has committed or is suspected of having committed or about to commit, a cognisable offence and use any amount of force necessary to effect the arrest.³⁴

Furthermore section 4(d)³⁵ states that Armed Forces personnel can enter and search without warrant, make arrest, recover any property, arms, ammunition or explosive substances believed to be unlawfully kept in the

sound of a tyre burst as a bomb attack. Unfortunate though it is, the split second decision of reacting to the sound interpreted as fire of the weapon will always be judged as incorrect by those debating it miles away from the scene, months after the incident and in total comfort and safety of a class room. But to the soldier concerned, very seldom would there have been a second chance to live if he was actually being fired at close quarters without any warning or notice. There is a famous true example of an American hero firing at an opposing soldier while searching a house in a combat zone, only to realise that he had in fact fired at his own reflection in a wall sized mirror! The soldier, in that fraction of a second under those conditions, had seen himself as his own enemy!'

³¹ *Supra* n. 13.

³² Section 4(b) of the Act states: '[T]he Armed Forces personnel is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as a training camp for armed volunteers or utilised as a hide-out by armed gangs or absconders wanted for any offence.'

³³ Section 4(c) of the Act states: '[A]rrest, without warrant, any person who has committed a cognisable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognisable offence and may use such force as may be necessary to effect the arrest.'

³⁴ *Supra* n. 13.

³⁵ Section 4(d) of the Act states: '[E]nter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises and may for that purpose use such force as may be necessary.'

premises. However, the Supreme Court has recently, in the *Naga People's Movement of Human Rights case*, laid down that during such search and seizure operations the provisions of the *Code of Criminal Procedure, 1973* (CrPC) have to be followed.³⁶

C. *Handing Over Of Arrested Individuals*

Section 5³⁷ of the Act deals with the provision of arresting and producing the arrested person before the local police. It is evident that there is no time limit specified for the Armed Forces to hand over the detainee to the local police who in turn would produce him before the Magistrate. Article 22(2) of the Constitution and section 57 of CrPC provide that no person being arrested without warrant shall be detained in custody for more than 24 hours unless a special order under section 167 of CrPC is obtained from the Magistrate.

This aspect has also been extensively dealt with by the Supreme Court³⁸ which recently laid down that the detainee should be handed over to the local police with 'least possible delay', though this period has not been defined. The Supreme Court also stated that section 5 has to be exercised in consonance with clauses (1) and (2) of Article 22 of the Constitution. However, unlike Article 22 there is no provision within the Act for the setting up of an Advisory Board that will look into such cases.

The reason for producing the accused before the Magistrate within 24 hours is to decide whether the detention itself is justified or not. The fact that there is no provision that stipulates the time within which a person should be presented before the Magistrate delays the determination of the validity of the detention.

According to Lord Wright, 'the incalculable value of the writ of Habeas Corpus is that it enables the immediate determination of the right of the appellants freedom'.³⁹ The absence of a specific time limit within

³⁶ AIR 1998 SC 431, para 52.

³⁷ Section 5 of the Act states, 'Any person arrested and taken into custody under this Act shall be made over to the officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.'

³⁸ AIR 1998 SC 431.

³⁹ *Greene v. Home Secretary* (1942) AC 284 : (1941) ALL ER 388.

which the detainee has to be handed over to the police accentuates its contentious nature. Such provisions when introduced will provide more safeguards to avoid any scope of abuse of powers.

D. Protection Given to Armed Forces Personnel

Section 6 of the Act provides for special protection given to Armed Forces operating under this Act. The object of such a provision is to protect responsible public servants against the institution of vexatious criminal proceedings.⁴⁰ Such protection is also given to members of the Armed Forces under other statutes like the CrPC.⁴¹ Furthermore, the Supreme Court has held that the order of the Central Government granting or refusing sanction for prosecution is subject to judicial review.⁴² The Supreme Court also held in the *Naga People's Movement of Human Rights case* that such protection is necessary for the Armed Forces operating in such kind of a situation.⁴³

One needs to understand that some kind of legislation is a must for an area which is infested with terrorists and secessionist elements. The law has to arm itself with sufficient measures to tackle such a situation. After having considered all the provisions of the Act and its historical background, the question remains if the Act should be struck down or be allowed to continue with or without suitable amendments.

IV. TESTING THE LAW ON THE TOUCHSTONE OF THE CONSTITUTION

Notwithstanding that the provisions of the Act appear to be draconian, it is peculiar to note that the Act has withstood judicial scrutiny. There are two prominent cases, one decided by the Delhi High Court and another by the Supreme Court of India, both upholding the constitutional validity of the Act.

⁴⁰ Rear Admiral (Retd) OP Sharma, '*Military Law in India*' (2nd edn NM Tripathi Pvt Ltd Bombay 1990) 307.

⁴¹ *Code of Criminal Procedure, 1973*, sections 132(1) and 132(2).

⁴² AIR 1998 SC 431, para 52.

⁴³ AIR 1998 SC 431, para 74.

A. *Indrajit Barua v. State Of Assam*⁴⁴

Indrajit Barua filed a writ petition under Article 226 of the Constitution in the Guwahati High Court. The petition was filed against two notifications issued by the Assam Governor. The concerned notifications were issued by the Assam Governor under section 3 of the Act and section 3 of the *Assam Disturbed Areas Act, 1955*, thereby declaring certain areas as 'disturbed areas'. The petitioner contended that these notifications were *ultra vires* the Constitution and the Act itself was *ultra vires* the Constitution. Thereafter in due course, the State of Assam and Union of India approached the Supreme Court with a transfer petition.⁴⁵ This transfer petition was accepted by the Supreme Court and the proceedings were transferred to the Delhi High Court from the Guwahati High Court. The constitutional validity of both the Acts were challenged on the grounds that the provisions of these Acts violated the fundamental rights guaranteed under Article 14, 19 and 21 of the Constitution.

The Delhi High Court opined that Article 14 is the founding faith of the Constitution and it strikes at arbitrariness and ensures equality of the law and equal protection before the law. The Delhi High Court held that:

'In view of the circumstances which are prevalent in the north-east the impugned enactments have to be tested on the touchstone of Articles 14, 19 and 21 from the point of view what will be best for the interests of the society in general and for ensuring the integrity and security of our nation.'⁴⁶

The Court further held that:

'If a law ensures and protects the greater social interests then such law will be a wholesome and beneficial law although it may infringe the liberty of some individuals, for it will ensure for the greater liberty for the rest of the members of the society.'⁴⁷

It is therefore submitted that relying on the same principle, one must understand that if the statute though meant for ensuring national security

⁴⁴ AIR 1983 Delhi 513.

⁴⁵ AIR 1983 Delhi 513, para 13.

⁴⁶ AIR 1983 Delhi 513, para 61.

⁴⁷ AIR 1983 Delhi 513, para 3.

is in reality proving counter productive, then in greater social interest it would be imperative to amend the provisions of the Act.

B. *Naga People's Movement of Human Rights v. Union Of India*⁴⁸

Delivering the verdict nearly 16 years after the case was filed, the Supreme Court of India upheld the validity of the Act. The validity of any legislation coming under Article 21 must also be tested with reference to Article 14 and Article 19.⁴⁹ This is a well-settled principle of law as enunciated in the case of *Maneka Gandhi v. Union of India*.⁵⁰

The Hon'ble Supreme Court dealt with the contentious provisions within the Act and held that they were not *ultra vires* the Constitution. The Supreme Court categorically held that section 3 of the Act did not confer arbitrary or unguided power upon the Government.⁵¹ The Supreme Court also held that the declaration of a 'disturbed area' did not achieve the same result as that of proclamation of emergency under Article 352 or Article 356 of the Constitution.⁵² The Supreme Court opined that if a situation could be handled with the assistance of the Armed Forces then there was no reason why drastic powers under Article 352 should be invoked⁵³ and therefore section 3 was not *ultra vires* the Constitution. The Supreme Court further held that declaration of an area as a 'disturbed area' under section 3 has to be for a limited duration and there should be periodic review of the declaration before the expiry of six months.⁵⁴

The Supreme Court held that section 4(a) is not arbitrary because the wording of the section indicates that the Armed Forces can use only *minimal force* that is required for effective action and therefore section 4(a) does not suffer from vice of arbitrariness.⁵⁵ However, in the absence

⁴⁸ AIR 1998 SC 431.

⁴⁹ DD Basu, *Shorter Constitution Of India* (12th edn Wadhwa & Company Law Publishers Nagpur 1999) 169.

⁵⁰ AIR 1978 SC 597.

⁵¹ AIR 1998 SC 431, para 36.

⁵² AIR 1998 SC 431, para 35.

⁵³ AIR 1998 SC 431, para 35.

⁵⁴ AIR 1998 SC 431, para 74.

⁵⁵ AIR 1998 SC 431, para 46.

of any strict standards to quantify *minimal force*, the uncertainty still remains. 'The term "minimum force" comes into debate, therefore, when action to control unarmed assembly of civilians including ladies and children, is undertaken.'⁵⁶ The Supreme Court further opined that search and seizure under section 4(d) were to be governed under the provisions of CrPC and that sections 4(b) and 4(c) also were not *ultra vires* the Constitution.⁵⁷

The Supreme Court further laid down that section 5 has to be exercised in consonance with Article 22(1) and 22(2) of the Constitution even though it did not define as to what is the least possible delay within which the detainee has to be handed over to the local police station. Thus, the Supreme Court interpreted that the provisions of the Act contained in themselves adequate safeguards. The Supreme Court in this case while deciding on the constitutional validity of the Act also relied on the list of 'Do's and Don'ts' that were issued by the Army Headquarters as submitted by the Attorney General in this case. The Supreme Court held that these instructions are binding on Armed Forces and serve as sufficient safeguards against abuse and arbitrary use of power.⁵⁸ The Armed Forces however insist that the rules of civility are scrupulously followed and 'Do's and Don'ts' issued by Army Headquarters are adhered to.⁵⁹ Some of the instructions in the 'Do's and Don'ts' are as follows:

- no torture,
- no harassment of civilians,

⁵⁶ According to Lt Gen (Retd) Satish Satpute, 'Army personnel while being employed in Counter Insurgency Operations are emphatically told that the fight is against our own people who are misguided and therefore the tactics and weaponry used in such combat is such that causes least collateral damage; only direct firing small arms are used and indirect firing area weapons (like mortars and artillery) are never utilised. A specific record of ammunition expended is maintained.'

⁵⁷ AIR 1998 SC 431, para 74.

⁵⁸ AIR 1998 SC 431, para 55.

⁵⁹ Lt Gen (Retd) Satish Satpute recounts, 'In remote areas absence of adequate civil authority and/or of lady constables/policewomen often leads to allegations of high handed methods. Propaganda and publicity are also effective means employed by militants to blow such stories to sensationalise issues and bring disrepute to the armed forces. By threat and coercion "victims" and "witnesses" are created to support false claims.'

- avoid indiscriminate firing,
- act only in Disturbed Area as defined under section 3,
- women should be searched in presence of female police personnel,
- aim low and shoot for effect.

Moreover, contravention of these instructions is punishable under sections 41, 42(e), 63 and 64(f) of the *Army Act, 1950*. The Supreme Court held that these instructions along with the safeguards within the Act were sufficient against arbitrary exercise of power. Hence there was no violation of Articles 14, 19 and 21 of the Constitution and the Act was not *ultra vires* the Constitution.

V. RECOMMENDATIONS

A demand that has been consistently made by several bodies is that the Act be completely repealed. This might not be possible in the immediate future as there is a very active insurgency in the north-east region and the Armed Forces are facing what is described as a low intensity conflict.

The fact that militants and terrorists move across international borders further deteriorates the ground situation. There are also allegations that intelligence agencies of hostile countries are involved in encouraging terrorist activities in the north-east. In the *Naga People's Movement of Human Rights case*, the Supreme Court held that the provisions of CrPC with regards to use of Armed Forces in civilian areas such as section 131 were inadequate in the north-east.⁶⁰

There are instances, however, wherein mistaken identity in high voltage combat environment leads to wrongful loss of innocent life (as it happened in the killing of three students in Kashmir recently. The incident happened when the boys happened to be roaming a likely infiltration route at night in Kupwara. The army authorities later regretted this error. In another incident a civilian was killed by the Delhi police in Connaught Place mistaking the occupants of a car for mafia gangsters (thankfully such incidents are very rare). It is impossible to quantify what is minimum force because it depends on the gravity of the situation and can only be debated in retrospect. Unquestionably, principles of good faith and action free of reprisal have to be followed while applying force.'

⁶⁰ AIR 1983 Delhi 513, para 48.

Repealing the Act so that it can be replaced with an even harsher legislation is a futile exercise. Repealing it altogether so that it consequently leads to such drastic deterioration in the ground situation that necessitates the re-promulgation of the Act will also be of no avail. In such low intensity conflicts certain special measures being enforced in the form of legislation are but natural. However the Act in its present form is counter productive and is alienating the common people in the north-east. The remedy is worse than the disease. Therefore in the present scenario, amending the Act is the most viable option.

According to a report by the South Asian Human Rights Documentation Centre,⁶¹ as long as local police are not relied on, they will not be able to assume their proper role in law enforcement. Prolonged presence of the Armed Forces and paramilitary forces is not desirable. In a low intensity conflict situation, Armed Forces have to wage a war against secessionist elements and terrorists on one hand and tackle the law and order situation on the other. Clearly the Armed Forces are not trained to maintain law and order problems in civilian areas. The Supreme Court has opined this view in the *Naga People's Movement of Human Rights case* that the primary task of the Armed Forces of the Union is to defend the country in the event of war or when it is faced with external aggression. The Supreme Court further held that their training and orientation is to defeat the hostile forces, a situation of internal disturbance involving local population requires a different approach.⁶²

Experts believe that it is the local police and not outside forces that can pull the state away from the brink.⁶³ Mr BL Vohra, former Director General of Police, Manipur, has opined that political interference in the administration has increased and the police in the state is beset by the problem of lack of training, poor rotation in postings and lack of resources, besides corruption and indiscipline.⁶⁴ Such problems in the State police have to be urgently looked into and addressed by the Government.

⁶¹ *Supra* n. 13.

⁶² AIR 1998 SC 431, para 39.

⁶³ BL Vohra, 'Beyond Gestures', *The Times of India* (Mumbai India 14 November 2004) 14.

⁶⁴ *Ibid.*

Specialised forces can be raised on a large scale within the State Police in north-eastern states to tackle insurgency. Such police personnel can be provided with adequate military training by the Armed Forces to tackle militants and secessionist elements. Modernisation of the state police force is also important. These specialised police units can be introduced in insurgency and terrorist affected areas, which apart from the necessary military training are also acquainted with civilian law pertaining to law and order and the local conditions. In due course of time, the State Police itself could take over anti-insurgency operations from the Armed Forces.

These steps will also facilitate the withdrawal of the Armed Forces and the paramilitary forces from civilian areas. An important thing to note is that terrorism and militancy in Punjab was finally dealt with decisively by the local police rather than the Armed Forces of the Union.

There are also several ways that the Act can be amended suitably. For example, the *Prevention of Terrorism Act, 2002* (POTA), had in it a provision for the Central and State Review Committee to look into cases where POTA was applied. A similar provision can be made within the Act and a Review Committee can be set up to examine cases of alleged abuse of power by Armed Forces under the Act. Provision can be also made whereby the detainee could make a representation to the Review Committee.

There are several countries in the world where the Armed Forces have been used in civilian areas or in aid of civil authorities. There is a similar situation in Northern Ireland in terms of deployment of troops in civilian areas. The *Northern Ireland (Emergency Provisions) Act, 1996*,⁶⁵ in the United Kingdom (UK) provides for an Independent Assessor of military complaints to investigate allegations of abuse by Armed Forces. There are further conditions attached to the appointment of such an Independent Assessor under the *Northern Ireland (Emergency Provisions) Act, 1996*. One such condition is that a person shall not be eligible for appointment as the Independent Assessor if he is, or at any time during the period of 20 years

⁶⁵ Section 51 of the *Northern Ireland (Emergency Provisions) Act, 1996* provides that 'The Secretary of State may appoint a person to be known as the Independent Assessor of Military Complaints Procedures in Northern Ireland' (In this Act referred to as 'the Independent Assessor'), available at www.northernireland-legislation.hmsso.gov.uk/acts1996 (last visited 20 May 2005).

ending with the date of the appointment has been, a serving member of the British Armed Forces. The Independent Assessor has to keep under review the procedures adopted by the General Officer Commanding Northern Ireland for receiving, investigating and responding to relevant complaints. The Assessor also has to investigate any representations concerning these procedures and may investigate the operation of these procedures in relation to any particular complaint or group of complaints. There is also provision for the senior most officers of the military to furnish relevant documents to the Assessor.

Such provisions within the Act will go a long way in assuring the people that a remedy is available and also deter persons who can be described as rotten apples within the Armed Forces. The Supreme Court in the *Naga People's Movement of Human Rights case* held that there should be a thorough investigation of the alleged instances of abuse of power⁶⁶ and an Assessor could do the job of investigation.

Another special legislation on terrorism in the UK is the *Prevention of Terrorism (Temporary Provisions) Act, 1989* which provides that a person cannot be detained for more than 48 hours after the arrest which may be carried out without warrant⁶⁷ and this period can be extended further.⁶⁸ A similar provision can be incorporated in the Act whereby a definite time limit is specified for the detention of an accused under the Act.

The common feature between both the legislations is that they deal with the use of Armed Forces in civilian areas where the law and order situation has gone out of control and there is secessionist movement. However, the crucial difference between these two Acts is that in the British Act there are sufficient safeguards put into place whereas in the Indian Act the presence of such safeguards is conspicuously absent, thus widening the scope for abuse of power.

⁶⁶ AIR 1998 SC 413, para 61.

⁶⁷ *Prevention of Terrorism (Temporary Provisions) Act, 1989*, section 14 (4), available at <http://www.hmsso.gov.uk/acts/acts1989/ukpga> (last visited 20 May 2005).

⁶⁸ *Prevention of Terrorism (Temporary Provisions) Act, 1989*, section 14 (5) available at <http://www.hmsso.gov.uk/acts/acts1989/ukpga> (last visited 20 May 2005).

VI. CONCLUSION

The incident of Manorama Devi among several other incidents has driven home the point that unless something is done to mitigate the situation in the north-east, the people will continue to remain alienated and the situation volatile. There has been an earnest attempt by the political establishments in the State as well as the Centre to address this issue. The State Government of Manipur had set up a commission to probe into the death of Manorama Devi.⁶⁹ After the commission concluded its investigation, the Guwahati High Court in June 2005 directed the State Government to forward the report of the enquiry commission to the Union Home Ministry.⁷⁰ The Guwahati High Court also directed the Union Home Ministry to decide on publication of the commission report in tune with the citizens' right to information.⁷¹ Also the Central Government had set up an expert committee to review the provisions of the Act and to look into the 'legal, constitutional and moral issues' related to it.⁷² The report of this committee has been submitted to the Home Minister.⁷³ One can only hope that the Government publishes the report along with its decision as soon as possible.

One of the reasons why a person would become disgruntled with the system is when he believes that there is no avenue for getting justice. Some of the provisions of the Act are such that the common people are susceptible to be disillusioned. However, to have a balanced understanding of the provisions the issues at stake must also be looked into.⁷⁴ This is so because the scope of misuse of these provisions is so broad that they could

⁶⁹ 'HC directs Centre to act on Manorama Devi Probe Report', available at <http://www.deccanherald.com/deccanherald/jun242005/national559592005623.asp> (last visited 7 July 2005).

⁷⁰ *Ibid.*

⁷¹ *Supra* n. 13.

⁷² 'Centre Sets Up Panel To Review Manipur Army Act', *The Indian Express* (Mumbai India 2 November 2004) 3.

⁷³ 'Armed Forces (Special Power) Act Review Committee Submits Report', available at http://www.nepsindia.com/armed_forces.htm (last visited 7 July 2005).

⁷⁴ According to Lt Gen (Retd) Satish Satpute, 'Insurgency festers due to a sense of deprivation and hurt among the populace. The agitation takes the form of disobedience and turns to challenge the authority of the local government by the armed conflict. Such

easily trample the basic human rights of any innocent citizen, not to mention his right to live with dignity.

Having said that, the crux of the matter is whether the Act provides us with means to tackle terrorism and insurgency or to further invigorate it? If citizens are likely to get alienated by virtue of a harsh legislation, if the provisions of the Act are so controversial that they prove counterproductive, then it is a matter of common sense that such draconian provisions have to be amended.

Until then, Indian citizens residing in disturbed areas of the north-east will have to confront the draconian provisions of an Act that our country inherited from our former colonial masters specifically to subjugate and enslave Indians in the pre-independence era. According to Lt Gen (Retd) Satish Satpute, 'While review is a dynamic process which further refines and strengthens the application of an Act, while recommending changes a pragmatic understanding of the ground realities is very essential and the risk to the integrity and the security of the nation must not be lost sight of. All effort must be to equip the state agencies adequately with corresponding safeguards for the liberties of innocent civilians. What is beyond dispute is that Armed Forces only prepare a stage for re-introduction of a political process because military action alone can never conquer insurgency—it can only be achieved by winning the hearts and minds of the local populace through civilised and civic action.'

conflict receives covert support from the neighbouring hostile country in the form of secure bases, training and supply of weapons and ammunition. It must be understood that the law is enforced when there is a serious risk to the integrity of our nation, a possibility of the troubled area proclaiming independence from our union with active support from the neighbouring hostile nation. The stakes thus become very high. Grave threat to national security from failure of existing administrative machinery to remedy matters results in the act being invoked and such unusual situation warrants unusual steps although they may appear draconian to a civilian mind.'

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