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PREFACE

In the discharge of its statutory obligations under Section 12(h) of the Protection of Human Rights Act, 1993, the Commission has been spreading human rights literacy and awareness through a variety of formats. The Commission's Journal, which was launched in 2002, seeks to promote debate and free exchange of ideas on a range of serious Human Rights issues.

In the current issue of the Journal for 2004, there are rich contributions from many experts on themes such as terrorism, judicial independence, right to information, trafficking in women and children, intellectual property and Human Rights, ethical issues in agricultural biotechnology and Human Rights and rights of persons with psychosocial disability.

In a separate Section, a number of important statements, decisions and opinions of the Commission on key Human Rights issues have been included. In addition, the Journal contains reports on Emergency Medical Services and summaries of the reports on Terrorism and Trafficking. There are also two book reviews on domestic violence and the Human Development in South Asia.

The Commission sincerely hopes that the Journal will spread awareness of Human Rights, provide food for thought, articulate discussion and generate action on many key issues concerning human rights.

November 17, 2004

(A.S. Anand)

Journal of the NHRC, Volume 3, 2004, 1-18

Terrorism – a threat to Human Rights?

Fali S. Nariman

Terrorism is making waves in the West - threatening Human Rights. Last week a ruling by the England's second highest Court (the Court of Appeal) has raised matters of deep concern. Reportedly, the Court dismissed an appeal by 10 men who are being held without charge on suspicion of having links with international terrorism. The appeal was on the ground that the evidence against them may have been extracted through torture at the United States military camp at Guantanamo Bay: the Court of three Judges unanimously rejected their appeal against their continuing detention; two of the three judges ruled that torture evidence could be used in a British Court provided that the State itself had not "procured it or connived at it". The third, Lord Justice Neuberger, dissented from this, stating that he did not consider it conducive to a fair trial.

Meanwhile in the United States President Bush's war on terrorism has provoked singularly shrill reactions: a Professor of Law at Yale University has suggested an Emergency Constitution for the United States. Professor Bruce Ackerman of Yale University has said that to fight terrorism it is necessary for the President of the United States to proclaim an emergency so as to put in place "a well-regulated and short-term practice of preventive detention"[1]*. His justification is that we will be living with terrorism for a very long time "and the courts alone will not be equal to the challenges ahead". Professor Laurence Tribe of Harvard University however sees grave danger to long cherished personal liberties in Ackerman's proposal for an Emergency Constitution to fight terrorism.*

All this does not augur well for the Rule of Law.

In this state of turmoil and controversy, the present article examines how Courts of Law around the world are coping with, and can (perhaps) more effectively combat, the menace of terrorism: within the broad framework of Human Rights.

It is said that we know "terrorism" when we see it, but there

1. (2004) Vol. 113 Yale Law Journal: "This is not a war" at p. 1880.

is no universal agreement as to its attributes: it depends on whether a group of people are (or for that matter, a State is) regarded as the perpetrator or the target!

"What looks, smells and kills like terrorism - is terrorism." - was Ambassador Jeremy Greenstock's, work-a-day definition, offered to UN delegates during a debate in the Security Council soon after September 11th, 2001.[2]

"Terrorism" is not a new phenomenon, and yet it has become fundamentally different from anything that was known before the destruction of the twin towers of the World Trade Centre in New York.[3]

What happened on September 11th underscored Karl Marx's analogy of - revolutions - they are like water on the stove (he had said): until the water reaches boiling point it only changes in terms of degree, but once it hits 212 degrees and becomes steam it changes its very nature! The same is true of international terrorism.

And the question is whether the Rule of Law is sufficiently comprehensive and adequate to confront this new menace?

In all civilized societies, terrorism can and should be fought, and contained conquered under a "Rule of Law" regime: - as generally understood[4] : but then, does the Rule of Law not require

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2. British representative at the UN - Ambassador Jeremy Greenstock - Quoted in an article in the Wall Street Journal - Europe - January 17, 2002 page 6

3. Although terrorism has yet to be authoritatively defined, States have already agreed on some of its core elements. On 9 December 1994, the General Assembly adopted the Declaration on Measures to Eliminate International Terrorism, in the annex to resolution 49/60. The Declaration stated that terrorism includes "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes", and further held that such acts "are in any circumstances unjustifiable, whatever the consideration of a political, philosophical, ideological, racial, ethnic, religious, or other nature that may be invoked to justify them". - Digest of jurisprudence of the United Nations and Regional Organisations on the protection of Human Rights while countering terrorism, New York and Geneva 2003.

4. What is the Rule of Law as generally understood? Without doubt the Rule of Law is the dominant legitimating slogan in the world today. It is perhaps the only universally shared good in a modern world in which the most evident lesson is how divided we are culturally, economically and politically. Perhaps it is easier to set out what the Rule of Law is not. In some countries the Rule of Law is that those who rule are the law! Leaders in some countries want rule by law, not rule of law - the difference is that under the rule of law the law is pre-eminent and can serve as a check against the abuse of power; under rule by law, the law can serve as mere tool for a government that suppresses in a legalistic fashion.

to be adapted or re-defined for the purpose of combating international terrorism? There are no easy answers.

In the national sphere, a US Federal Judge ruled (on August 2nd, 2002), that the Bush Administration must reveal the names of hundreds of persons arrested in the United States, many of them for immigration violations, following the September 11th terrorist attack. The Department of Justice resisted and contended that the risk of future terrorist threats to the US would be increased if the names were revealed: Judge Gladys Kessler of Federal District Court in the District of Columbia rejected the argument saying that the administration's reasons for withholding the names of those arrested were not persuasive.

> "The Court fully understands and appreciates that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens", she said. "By the same token, the first priority of the judicial branch must be to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship."
>
> "Unquestionably", she said, "the public's interest in learning the identities of those arrested and detained is essential to verifying whether the Government is operating within the bounds of the law."

She ordered the administration to "disclose within fifteen days the names of those it has arrested and detained in connection with its September 11, 2001 terrorist investigation."

In her 47-page memorandum on the case, Kessler noted that the government has revealed that it had detained in pursuit of its September 11 investigations 751 persons on immigration violations and continued to hold 74, had arrested 129 on criminal charges and as of June 11 (2002) still held 73 in custody, and had also detained an unknown number of persons as "material witnesses" who might provide information in terrorism cases."

"Standards" derived from domestic criminal procedures may sometimes be inappropriate for wholesale transplant into international tribunals. Such "standards' must recognise the special factual and legal burdens inherent in international prosecution. Tribunal designers can best address these burdens through targeted

procedural departures from domestic norms: such as in the controversial 1995 decision in Prosecutor vs. Tadic[5] which permitted witness anonymity; an evidentiary request by the prosecutor in this first ICTY trial compelled a panel of three Judges to determine whether witness anonymity was consistent with the defendant's right to a fair trial. The ICTY had indicted Tadic on 132 counts of crimes against humanity and war crimes and as the prosecution assembled its case it became evident that several witnesses were unwilling to testify in open Court. The prosecutor then applied to the trial chamber for protective measures for six prosecution witnesses identified only by letters - as witnesses F, G, H, I, J and K. The defence objected to several of the measures, including full anonymity for certain of the witnesses. However in a 2:1 decision the panel mandated anonymity for witnesses G, H, J, and K and allowed most of the other protective measures. Writing for the majority, Judge Gabrielle Kirk McDonald of the United States and Judge Lal Chand Vohrah of Malaysia found that the statutory rules implicitly permitted witness anonymity - whilst conceding that witness anonymity was an extraordinary measure in traditional domestic criminal trials and could impede accurate fact-finding, and that Tadic was entitled to receive "a fair and public hearing", the majority noted that standards drafted "for ordinary criminal and civil adjudications" were not appropriate for the "horrific" crimes and ongoing conflicts in the former Yugoslavia. In a strong dissent Judge Ninian Stephen of Australia (formerly its Chief Justice and later its Governor General) argued that witness anonymity went too far and was inconsistent with the defendant's rights. He warned that denying defendants the procedural protections afforded by "international standards" could lead to gross violations of defendants' rights and a corresponding decline in the effectiveness and credibility of the ICTY[6].

In the leading case of Doorson vs. The Netherlands [(1996) Vol.22 E.H.R.R. 330] the Strasbourg Court has recognised that respect for the rights of a witness may lead to some curtailment of

5. Tadic Protective Measures Decision Case No.IT-94-I-T, 105 International Law Reports 599 (International Criminal Tribunal for former Yugoslavia Trial - Chamber II - August 10, 1995).

6. In another procedural decision in Prosecutor v. Tadic - Case No:IT-94 (Trial Chamber II - dated 5.8.1996) the defence motion to exclude hearsay was denied by the panel - the decision was unanimous.

the rights of an accused. The Court has recognised that the use of statements made by anonymous witnesses to found a conviction is not under all circumstances incompatible with the European Convention. The European Court has held that principles of fair trials require that in appropriate cases "the interests of the defence are balanced against those of witnesses or victims called upon to testify." States must organise their criminal proceedings in such a way "those interests are not unjustifiably imperilled" - (quoted with approval in Van Mechelen v. The Netherlands (1997) 25 E.H.R.R. 647, para 54).

An article in the Harvard Law Review Vol.114 No.7 May 2001 has argued (at pp.1986-1990) that international tribunal rules should be left flexible and that "appreciation of the role of factual and legal circumstances in the calculus of procedural rights should dissuade the tribunals from relying on texts and doctrines developed for national legal systems."

Terrorism and terrorist related offences do lead to extraordinary harm and the sacrosanct "beyond-a-reasonable-doubt" burden of persuasion may sometimes be hardly appropriate. After all, the judges in the Tadic Case had only permitted witness anonymity in an extreme climate of "terror and anguish among the civilian population". (sic)

It has been suggested that to obtain the benefits of Court adjudication over a greater proportion of potential "cases", those who design or recommend the setting up of International Criminal Tribunals might consider adjusting the burden of persuasion to accommodate levels that might be unacceptable in the context of ordinary criminal cases.

The "beyond-a-reasonable-doubt standard" (rooted in common law jurisdictions) resists measurement; it is often approximated at a certainty of between 80 percent to 90 percent. The late Prof. Wigmore in his classic treatise on Evidence (3rd ed. 1940) - Para 325] - in discussing various attempts by courts to define how convinced one must be, to be convinced beyond, a reasonable doubt - wrote as follows:

> "the truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be as yet no successful method of

communicating intelligibly a sound method of self-analysis for one's belief. And yet the choice of the standard of proof makes a difference."

In a case concerning the validity of a New York statute[7] that permitted a determination of juvenile delinquency, founded on a charge of criminal conduct, to be made on a standard of proof less rigorous than that which would obtain had the accused been tried for the same conduct in an ordinary criminal case, Justice Harlan of the US Supreme Court (in a separate but concurring judgment) held that although he was in full agreement that the statutory provision offended the requirement of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment, he felt constrained to add some remarks about the nature of "standard of proof": His remarks are of juristic relevance and are worth reproducing: (397 US 358 at page 370 = 25 L.Ed. 2d. 368 at 379 - re: Winship):

> "I begin by stating two propositions, neither of which I believe can be fairly disputed. First, in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what probably happened. The intensity of this belief - the degree to which a factfinder is convinced that a given act actually occurred - can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although *the phrases "preponderance of the evidence" and "proof* beyond a reasonable doubt" are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.
>
> A second proposition, which is really nothing more than a corollary of the first, is that the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions.

7. In the matter of Samuel Winship - 397 US 358 = 25 L.Ed.2d.368 (December 1970).

In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favour of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in the plaintiff's favour. The criminal analogue would be the acquittal of a guilty man.

The standard of proof influences the relative frequency of these two types of erroneous outcomes. ..... Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each".

A reasonable doubt burden therefore is so designed as to ensure that erroneous judgments will more often set guilty defendants free than send innocent defendants to prison.

Then - what about cases in which the "comparative social disutility" (sic) of an acquittal would be much greater than it would be for, say, ordinary murder? The harm of imprisoning an innocent defendant for life on a false charge of genocide may be seen as roughly equivalent to the harm of imprisoning an innocent defendant for life on a false charge of murder. By contrast, the harm of letting a genocidaire go free is not likely to have the same impact as the harm of freeing an ordinary murderer. If the presumption of innocence really reflects "a rational world," should not the prosecutor's burden of persuasion drop considerably in cases involving charges of genocide?[8]

In recent times, Courts in the United Kingdom and the European Court of Human Rights have said that legislation for prevention of terrorism may have to be regarded in some special way: and interference with certain freedoms may perhaps be more readily justified in the case of terrorism than in the case of other offences. The speech of Lord Hope in the House of Lords in R. vs.

8. See Developments in the International Criminal Law - an Article in the May 2001 Issue of the Harvard Law Review Vol.114 No.7 at page 1992.

DPP ex parte Kebileni 2000 (2) Appeal Cases 326 has said as much.

Dealing with the provisions of Prevention of Terrorism (Temporary Provisions) Act, 1989 (Section 16A)[9] , Lord Hope stressed the need of striking a balance between "competing interests" and "issues of proportionality": -

> "In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention..... But even where the right is stated in terms which are unqualified, the courts will need to bear in mind the jurisprudence of the European Court which recognises that due account should be taken of the special nature of terrorist crime and the threat which it poses to a democratic society: Murray v. United Kingdom (1994) 19 E.H.R.R. 193, 222, para 47."[10]

The Law Lord then went on to say:

> "Then there is the nature of the threat which terrorism poses to a free and democratic society. It seeks to achieve its end by violence and intimidation. It is often indiscriminate in its effect, and sophisticated methods are used to avoid detection both before and after the event. Society has a strong interest in preventing acts of terrorism before they are perpetrated - to spare the lives of innocent people and to avoid the massive damage and dislocation of ordinary life which may follow from explosions which destroy or damage property. Section 16 A is designed to achieve that end. It

9. 16A "(1) A person is guilty of an offence if he has any Article in his possession in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose connected with the commission, preparation or instigation of acts of terrorism to which this section applies ..... (2) It is a defence for a person charged with an offence under this section to prove that at the time of the alleged offence the article in question was not in his possession for such a purpose as is mentioned in subsection (1) above."

10. Regina vs. Director of Public Prosecutions, Ex parte Kebilene & Others 2000 2 AC 326 at 381 = 1999 (4) All ER 801

would not be appropriate for us in this case to attempt . resolve the difficult question whether the balance between the needs of society and the presumption of innocence has been struck in the right place. But it seems to me that this is a question which is still open to argument".

Courts do take into account "the pressing nature of the relevant mischief" when deciding whether interference with a right (such as a right to fair trial) is justified: as for instance in McVeigh's Case - 1985 (5) EHRR 71. In July 2000, England's Lord Chief Justice, Lord Woolf, handed down a decision of the Court of Appeal, (in three Appeals that were heard together) - they raised related issues involving the Human Rights Act, 1998 - the principal issue was as to the effect of the 1998 Act on Statutory provisions that provided a benefit to a defendant who was being tried for a criminal offence, but required him to prove certain facts which the statute specified before he could obtain that benefit. It was submitted on behalf of the defendants that there could not be different standards of fairness in criminal trials to which the Chief Justice's response was:

"..... This we are prepared to accept as long as it is also appreciated that what fairness requires can differ depending on the circumstances of the case.....". (para 1021 para 14)

He said that this was well illustrated by the judgment of the European Court of Human Rights in Salabiaku v. France 1988 (13) EHRR 379 at 388 a passage from which judgment he quoted: "Presumptions of fact or law operate in every legal system... (but) it requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

In December 2000, in Brown v. Stott - 2001 (2) ALL E.R. 17 P.C. in an appeal from the High Court of Justiciary of Scotland - when considering the use of admission, in evidence by the prosecution, of a statement compelled under a provision in the Road Traffic Act 1988 - the Privy Council said that although it infringed the right against self-incrimination (in Article 6 of the European Convention) - the admission could be used, there being a clear public interest in the enforcement of road traffic legislation. England's Senior Law Lord, Lord Bingham, expressing the unanimous opinion of the Privy Council, said that the relevant

...rovision under which the statement of the defendant was compelled did not represent a "disproportionate response" to the serious problem of high incidence of death and injury on the roads caused by the misuse of motor vehicles. There was need therefore to maintain a fair balance between the general interest of the community and the personal right of the individual.

More recently, on July 5, 2001, in the case of Philips vs. U.K. Application No. 41087/98 (2001 Criminal Law Review 817) a Chamber of the European Court of Human Rights (by majority) reached the following conclusion (para 40):

> "The Court considers that in addition to being specifically mentioned in Article 6(2) (of the ECHR), a person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of a fair hearing under Article 6(1). This right is not however absolute since presumptions of fact or of law operate in every criminal law system and are not prohibited in principle by the (Human Rights) Convention, as long as States remain within certain limits, taking into account the importance of what is at stake and maintaining the rights of the defence (See the Salabiaku v. France judgment of 7 October, 1988 Series Article No. 141A of para 28)".

The majority (in Philips) held that the application to the applicant of the relevant provisions of the 1994 Act (Drug Trafficking Act 1994) "was confined within reasonable limits" - "given the importance of what was at stake and that the rights of the defence were fully respected" para 47).

Maintaining the balance - "the importance of what is at stake and the rights of the defence" - in terrorist related crimes

Although principles basic to the rule of law - the presumption of innocence, importance of a fair trial and guaranteeing the rights of the individual accused - do remain constant, in terrorist-related situations could not the rule of law be accommodated to take into account "the importance of what is at stake" whilst maintaining the basic rights of the defence?

In the first place the rights of victims cannot be ignored - especially in terrorist related crimes. These rights are not restricted

only to compensating those who have already suffered for the criminal wrongs done. Victims are entitled to see that the justice - systems ensure redress for wrong doing - that the person or persons responsible for the terrorist acts are brought to justice. Is the concept of the rule of law strong enough or elastic enough to devise means which would help maintain a balance of "justice"? - justice for victims as well as fairness to those charged?

Under Scottish criminal law, for instance, the concept of a fair trial is not solely a question for the accused. It was said in Miln v. Cullen (1967 JC 2C): "while the law of Scotland has always very properly regarded fairness to an accused person as being an integral part in the administration of justice, fairness is not a unilateral consideration, fairness to the public is also a legitimate consideration" (Lord Wheatley). The Judge went on to say "it is the function of the Court to seek a proper balance to secure that the rights of individuals are properly preserved".

There is much tension in the rule of law as applied to terrorist related offences. And there is increasing concern that the dice is loaded against the prosecuting agency and all in favour of the accused terrorist. This perception of reasonable people - people who also believe in the presumption of innocence, the need for a fair trial etc - cannot be wished away or ignored. Victims of acts of terrorism are not to be treated as mere victims of some tortious action and given ex-post facto benefits evolved by legal regimes in the form of "socialisation of risks". Social guarantees for the benefits of victims are simply not enough.

It has been advocated that in terrorist related offences the right of the accused to remain silent (a right given to him under many - if not most - criminal justice systems) should give way to the larger interests of society and of victims that are affected by the criminal acts. Long ago - in 1968 Lord Hartley Shawcross (for many years Great Britain's Attorney-General and a Prosecutor at the Nuremberg Trials) gave evidence to a Commission of Inquiry set up in Quebec, Canada, to study the administration of law. In his autobiography[11] this is what he says:

> "During evidence that extended over two days I told the Commission that I favoured the French procedure of *juge*

11. Life Sentence - The Memoirs of Hartley Shawcross: first published in 1995.

d'instruction who conducts a preliminary examination of witnesses, including the accused, whose answers then form a part of the evidence in the case. In 1968 the crime figure in England was already alarming enough. I said then that we were losing the war against crime. I urged strongly, as I continue to urge, that a defendant's right not to testify at his trial should be abolished. 'Silence', I remarked, 'is the refuge of the guilty... an innocent man will speak out as soon as he has the opportunity.' Meanwhile it is inevitable, however reprehensible, that some police officers will try to bolster the evidence against men who they believe and often know for certain are guilty, but against whom the evidence admissible under our rules is insufficient. It is a peculiarly Anglo-Saxon doctrine - the English philosophy seems to fall over backwards to protect the accused. In England judges are more or less umpires enforcing the rules of the game after which they throw it to the jury and ask 'Howzat?' The French *juge d'instruction* on the other hand is more like a scientist, probing for the real truth."

And nowhere have the adverse consequences of this "right to silence" been brought home more graphically than in the first full-fledged trial in a case of international terrorism - the Lockerbie Bombing Case. We now have the judgment of the Trial Court (viz. the Special High Court of Justiciary at Camp Zeist in the Netherlands) in the case of Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah, Prisoners in the Prison of Zeist. (judgment handed down in January 2001).

Based largely on circumstantial evidence (oral and documentary) the Special Court (consisting of three Scottish Judges) were convinced that it was a Samsonite suitcase containing the explosive device that was responsible for the explosion near Lockerbie on Pan Am Flight 103, (London - New York) and that this suitcase had been originally carried on an Air Malta Flight from Luqa to Frankfurt, where it was ultimately transferred to Pan Am Flight 103 (via a feeder flight 103A: Frankfurt to London). But the Court was unable to determine who placed the unaccompanied Samsonite suitcase on the Air Malta flight. The evidence did establish however that the second defendant Fhimah, was the station manager at the Luqa Airport, at the relevant time and that two relevant entries in his diary written by him implicated him

with the handling of the suitcase.[12] But Fhimah invoked his right to silence. The prosecution asked the Court to infer from the diary entries (and certain other evidence) that it was Fhimah who had obtained Air Malta tags and provided them to the first accused Megrahi, that Fhimah knew that the tags would be used for unaccompanied baggage and that he therefore "must have" assisted Megrahi in circumventing security at Luqa Airport: the Court after recording a finding that the entries in the diary, "can easily be seen to have a sinister connotation, particularly in the complete absence of any form of explanation", found that the prosecutor's theory was "speculative" and concluded that "there was insufficient corroboration for any adverse inference that might be drawn from the diary": corroboration from the second defendant's silence ("complete absence of any form of explanation") not being permissible under the law administered by the Court. The Court therefore acquitted Fhimah, but held Megrahi guilty of murder. The decision was subsequently affirmed in March 2002 when Megrahi's appeal was dismissed by the Special Court of Appeals, (this Court consisted of five Scottish Judges).

It is perhaps time that we recognised that in "terrorist related offences" (which could be suitably defined, by statute in which the

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12. The following are quotations from the judgment-

Para 84: "The principal piece of evidence against him (Fhimah) comes from two entries in his 1988 diary. This was recovered in April 1991 from the offices of Medtours, a company which had been set up by the second accused and Mr. Vassallo. At the back of the diary there were two pages of numbered notes. The fourteenth item on one page is translated as "Take/collect from the airport (Abdulbaset/Abdussalm)". The word 'tags' was written in English, the remainder in Arabic. On the diary page for 15 December there was an entry, preceded by an asterix, "Take tags from Air Malta", and at the end of that entry in a different coloured ink "OK". Again the word 'tags' (sic) was in English. The Crown maintained that the inference to be drawn from these entries was that the second accused had obtained Air Malta interline tags for the first accused, and that as an airline employee he must have known that the only purpose for which they would be required was to enable an unaccompanied bag to be placed on an aircraft."

Para 85: "There is no doubt that the second accused did make the entries in the diary to which we have referred. In the context of the explosive device being placed on KM180 at Luqa in a suitcase which must have had attached to it an interline tag to enable it to pass eventually on to PA103, these entries can easily be seen to have a sinister connotation, particularly in the complete absence of any form of explanation."

terrorist is found in actual possession of particular noxious substances which could be detailed) what is known as the right to silence is not really a right but a privilege, and although every accused has a right to be presumed innocent till he is proved guilty, in terrorist related crimes the accused has an obligation to assist in the discovery of the truth: as such it is suggested that in terrorist related crimes the accused should not have the right to remain silent. The accused, like any other witness knowing the facts, must give evidence: a presumption to be drawn from his failure to give evidence is not enough; this might well conflict with the presumption of innocence; hence there should be a positive obligation imposed by law on such a person to assist in the investigation and give evidence: this would not transgress "the rule of law" but further the purposes of the law. It would not be a "disproportionate response" to the serious problem of terrorism.

The Perceptions that strengthen (and sometimes weaken) the Rule of Law in combating international terrorism

The initial difficulty in combating "international terrorism" however is not in procedural law, but in the complete absence of a mechanism for determining who or which State is "right" - this involves surrender of some national sovereignty which States are still reluctant to do. Thus for instance recently before the ICJ, the United States was able successfully to rely on its reservation to Article IX of the Genocide Convention (included in its 1988 instrument of ratification) whereby the United States declined to accept referral of disputes under the Convention to the International Court of Justice. Consequently, when Serbia filed a case against the United States and pleaded for the issuance of an order granting provisional measures of protection concerning the NATO air campaign-: the application asserting that the United States had violated an array of international legal norms basing the Court's jurisdiction on the 1948 Genocide Convention to which both the United States and Serbia (FRY) were parties - the International Court held that it manifestly lacked jurisdiction to entertain Yugoslavia's application "and that "it cannot therefore indicate any provisional measure whatsoever in order to protect the rights invoked therein" and the Court ordered that the case be dismissed from the docket:[13]

13. Legality of the Use of Force (Yugoslavia vs. U.S.) Provisional Measures 1999 ICJ Rep. At para 29 (order of June 2, 1999).

The primary legal weapons against terrorism then are national laws: fairly and justly implemented. The task of applying them rests with national criminal justice systems.[14] And yet much of modern terrorism is inherently International, and States have a shared interest in improving International Co-operation in order to contain terrorism: a standing threat to the State's National security. A series of International legal measures, - global, regional and bilateral-are aimed at facilitating international co-operation against activities such as aircraft hijacking, attacks on diplomats and journalists, and taking of hostages and the like: which help to create general awareness of international problems.

Experience shows that the most valuable international co-operation in the suppression of terrorism amongst States is bilateral-co-operation in matters like intelligence-sharing, cross border policing and extradition of suspects. The most efficient collaboration takes place at highly informal levels in Intelligence and Police services - whilst multi-lateral conventions end up representing the lowest common denominator of agreement.

And within the Nation State there is need for a right balance between over reaction and under reaction: the former only helps to destroy democracy more rapidly and effectively than the sustained campaign by terrorist groups within the State; the latter (under-reacting to terrorism), occurs when Governments fail to uphold State authority which leads to "no-go areas" within the State, becoming dominated by terrorists - as is happening in some countries in Africa, and Asia.

The right balance between over reaction and under reaction - suggested ground rules:

(1) The Government and security forces must at all times act within the law simply because when they fail to do so they

14. It was because it is widely believed that the provisions of India's Prevention of Terrorism Law (POTA) enacted pursuant to U.N. Security Council Resolution of September 20, 2001 is not being (and is not likely to be) implemented by the police authorities in the States (which are controlled by State Governments) fairly and in a non-discriminatory manner that this law was bitterly opposed by opposition parties - it was passed by the Lok Sabha by a majority of votes but defeated in the Rajya Sabha - again by a majority of votes. Ultimately and with much acrimony it was passed (again by a majority) in a rare joint sitting of both Houses of Parliament on March 25, 2002. The new Government at the Centre has now vowed to repeal POTA.

undermine their democratic legitimacy and public confidence, and respect for the criminal justice system.

(2)(a) The secret of winning the battle against terrorism in a democratic society is in winning the "Intelligence War". Use of modern sophisticated information technology including surveillance devices pre-empt terrorist conspiracies before they happen; legislation facilitating acceptance in evidence of products of such "devices" would go a long way in bringing real terrorists to book. In this sphere individual rights of privacy must give way to the larger interests of national security.

(b) The more difficult task, of course, is to keep the secret Intelligence Agencies and all other institutions involved in combating terrorism firmly within the command and control of the elected Government - this must be ensured by adequate laws.

(3) Propaganda campaign by terrorists must be fully and effectively countered by democratic Governments; terrorists often achieve through political manipulation what they are unable to establish with the bomb and the bullet.

(4) Governments must avoid granting major concessions to terrorists. Giving - in to terrorist demands in a hostage crises encourages the exploitation of perceived weaknesses of open democratic societies; whenever terrorist blackmail succeeds, it damages confidence in the rule of law: this happened for instance in December 1999 when the Indian Airlines plane IC-814 was hijacked from Kathmandu to Kandahar and after prolonged negotiations its plane load of more than 150 passengers were released but not before four terrorists who had been detained by India under its National Security laws were released in exchange: one of the released persons was Omar Sheikh, recently apprehended by Pakistan authorities, who claimed responsibility for the kidnapping and subsequent death of Wall Street Newspaper journalist Daniel Pearl.

(5) The critical comment of President Musharraf on the prolonged detention of Omar Sheikh by the Indian authorities without putting him on trial, reveals another and even more

difficult aspect of anti-terrorist activity: viz. the difficulty of gathering sufficient "evidence" which would be acceptable in a Court of law to support a conviction: this is the dilemma faced by governments and societies wedded to the rule of law viz. whether in the larger interest of society, it is preferable to detain without trial on the basis of reasonable suspicion persons reasonably believed to be associated with terrorist related offences, or whether to bring them to trial in accordance with normal laws applicable in all criminal cases (with the individual safeguards associated with such trials viz. the presumption of innocence, right to silence and the like) and thereby to risk an acquittal for insufficient evidence.

In the London Times of 5th October, 2001, the former Chairman of the Bar, Anthony Scrivener, QC, analysed the document presented by Prime Minister Tony Blair to the House of Commons containing "evidence" of Al Qaeda and Osama bin Laden's involvement in the events of September 11th - the theme of this article was that "this was evidence that would not stand up in a Court". He wrote: "according to the Code of Crown Prosecutors 'when deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used and is reliable.' Further they should look closely at the evidence 'when deciding if there is a realistic prospect of conviction.' Without statements from witnesses who support the assertion, the evidential test for Crown Prosecutors is not met. It cannot be said there is a realistic prospect of conviction. But questions of security and intelligence are involved and these are matters for governments to evaluate, together with the hidden evidence, rather than for an advocate who has to work within the discipline of the law."

Conclusion

We must work within "the discipline of the law". I would commend Philip Alston's recipe; viz. that "to respond to mass atrocities with legal prosecution is to embrace the Rule of Law." The problem is in the loopholes of legal procedures - giving rise to doubts about the efficacy of laws to effectively deal with mass atrocities accompanying terrorist acts.

The criminal sanction is the best available device we have for dealing with gross and immediate harms and threats of harm, including harms from terrorist violence.

When Sir Robert Peel set about creating in the UK a modern police force, he recognised the relationship between what the criminal process has to work on and the way it works. Charles Reith, the historian of the British police, describes Peel's insight as follows:

> "Peel realised what the Criminal Law reformers had never done, that Police reform and Criminal Law reform were wholly interdependent; that a reformed Criminal Code required a reformed police to enable it to function beneficially; and that a reformed police could not function effectively until the criminal and other laws which they were to enforce had been made capable of being respected by the public and administered with simplicity and clarity. He postponed for some years his boldly announced plans for police, and concentrated his energies on reform of the law."[15]

What Peel saw as true about the police is true about all the agencies and operations of the criminal process including anti-terrorist groups and agencies, and the criminal process cannot function effectively unless the subject matter with which it deals is appropriately shaped to take advantage of its strengths, and to minimize its weaknesses.

Basically the criminal sanction against terrorists is at once the prime guarantor of freedom for all in society, though it is also capable of acting as a grave threat to the freedom of the individual person accused of a terrorist act. Used providently and humanely it is a guarantor of freedom, but used indiscriminately and oppressively, it is a threat to the rule of law. The tensions that inhere in the criminal sanction can never be wholly resolved in favour of guarantee and against threat. But we must make a beginning.

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15. The Police Idea (London 1938), page 236 - cited in The Limits of the Criminal Sanction by Herbert L. Packer (1968) Stanford University Press p. 366.

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Tension between Judicial Independence and Judicial Accountability

Dato' Param Cumaraswamy

Introduction

Since the early eighties international non-governmental organisations of jurists have been involved in standard setting for the protection of judicial and lawyer independence. They relentlessly pursued in creating universal awareness of the importance of an independent judiciary and the legal profession for the protection of the rule of law and realization of human rights for sustainable development in a democracy. These standards later became the basis of the UN Basic Principles on the Independence of the Judiciary and the Role of Lawyers, endorsed by the UN General Assembly in 1985 and 1990 respectively. The Basic Principles on the Judiciary was a compromise bargain with the Eastern European States, then the Communist bloc, who vehemently rejected the original text. Rather than not having any standards at all, the original text was considerably diluted and adopted. In 1990 the 8th U.N Congress on the Prevention of Crime and Treatment of Offenders in Havana, adopted the Guidelines on the Role of Prosecutors.

The continued pursuit of these organizations and the UN Standards were reflected in paragraph 27 of the Vienna Declaration and Programme of Action which reads:

"Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realisation of human rights and indispensable to the processes of democracy and sustainable development....."

171 nations assembled in Vienna adopted this Declaration. Practically all the sovereign States then in the Asia Pacific region were present there.

Following the adoption of the Basic Principles on the Judiciary and the Role of Lawyers and the Vienna Declaration the international community felt the need to monitor attacks on the independence of judges and lawyers. Hence in 1994 the Commission created the mandate on the Independence of Judges & Lawyers. The mandate was three-pronged. It has an investigatory, advisory and standard setting elements.

Unlike the regions of Europe, the Americas and Africa, where there are regional inter governmental charters on human rights, incorporating the principles of due process and providing for an independent judiciary to adjudicate the Asia Pacific region has none. In Europe and the Americas, there are also the regional courts on human rights. However, the Asia Pacific region made history in 1995 when Chief Justices in the region gathered in Beijing for the 6th Conference of Chief Justices of Asia and the Pacific adopted the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA region commonly known now as the `Beijing Principles' It was history because in no other region have the heads of the judiciaries got together and agreed to a common set of standards for the promotion and protection of their judicial institutions. Moreover, that such consensus was reached in such a diverse region having different legal systems, leaving alone other differences, was a significant achievement. Such a document emerging from the hands of the eminent Chief Justices was expected to carry greater weight than an intergovernmental document.

In dealing with European States, the Council of Europe Standards are useful supplementary materials particularly the 1998 European Charter on the Statute for Judges. Though the 1998 Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence is a welcome set of guidelines on good practices governing relations between Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights in the Commonwealth yet, technically the guidelines have not come into force as they have not been approved by the Commonwealth heads of governments.

Judicial Independence and Judicial Impartiality

The essence of judicial independence and impartiality and what constitutes an independent and impartial tribunal have been subjects of increased litigation in the last fifteen years before regional and domestic courts particularly in the Commonwealth. In one of the several leading judgments delivered by the Supreme Court of Canada, Antonio Lamer CJ (as he was then) said inter alia:

"Judicial independence is valued because it serves important societal goals - it is a means to secure those goals. One of the goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another societal goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule....."[1]

In an earlier case, the same Court in its judgment said, inter alia:

"The rationale for this two pronged modern understanding of judicial independence is recognition that the courts are not charged solely with the adjudication of individual cases. That is of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it....rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words judicial independence is essential for fair and just dispute resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies"[2]

On the judicial arm being the protector of the Constitution the 1973 landmark judgment of the Indian Supreme Court, in the

1. Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island and others (1997) Vol.150 D.L.R. (4th) Series pg. 577

2. Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island and others (1997) Vol.150 D.L.R. (4th) Series pg. 577

Keshavanda Bharaty, jurisprudential in context and premised on the doctrine of separation of powers, remains a high watermark of judicial independence.[3]

In yet another earlier case, the Canadian Supreme Court expressed the distinction between impartiality and independence. It described impartiality as a "*state of mind or attitude of the tribunal to the issues and the parties in a particular case*" whereas independence focused on the status of the court or tribunal in its relationship with others, particularly the executive branch of the Government. The Court went on to add that the traditional objective guarantees for judicial independence must be supplemented with the requirement, that, the court or tribunal be reasonably perceived as independent. The reason for this additional requirement was that the guarantee of judicial independence has the goal not only of ensuring that justice is done in individual cases, but also of ensuring public confidence in the justice system. The Court added:

"Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception." [4]

In the same case the Court referred to three core characteristics of independence:- security of tenure, financial security, and institutional security. The Court also established the standard for the test of reasonable perception of independence namely,

"The question that now has to be determined is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically [would conclude that the tribunal or court was independent]"

Reaffirming the close relationship between the concept of independence and that of impartiality the European Court of Human Rights added to the list of the core characteristics of independence. The Court said:

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3. Keshavanda Bharaty vs. State of Kerala AIR 1973 S.C. 1461
4. Valente vs. The Queen (1985) 2 S.C.R. 673

"The Court recalls that in order to establish whether a tribunal can be considered as 'independent' regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.

> As to the question of 'impartiality' there are two aspects to this requirement. First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must be impartial from an objective view point, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. The concepts of independence and objective impartiality are closely linked..."[5]

In a more recent case last year the Supreme Court of Canada said that the manner in which these essential conditions of independence may be satisfied varies in accordance with the nature of the court or tribunal and the interests at stake. The Court said, inter alia,

"....although it may be desirable, it is not reasonable to apply the most elaborate and rigorous conditions of judicial independence as constitutional requirements, since s.11(d) of the Canadian Charter may have to be applied to a variety of tribunals. These essential conditions should instead respect diversity and be construed flexibly. Accordingly, there should be no uniform standard imposed or specific legislative formula dictated as supposedly prevailing. It will be sufficient if the essence of these conditions is respected...."[6]

Independence of Judicial Officers in the Lower Judiciary

Very often principles of judicial independence are addressed to judges of the higher judiciary namely in the High Courts and the Appellate Courts. These principles are not often addressed to the judicial officers like Magistrates, Session Judges or District Judges of the lower judiciary though a very large proportion of

5. Findlay vs. United Kingdom (1997) 24 EHRR 221, 244-245; see also Porter vs. Magill 2002 2AC 357 at 489; North Australian Aboriginal Legal Aid Service Inc. vs. Hugh Benton Bradley & Anor. (2004) HCA31 judgment delivered on June 17, 2004

6. Ell vs. Alberta (2003) 1S.C.R. 857

cases particularly criminal cases are tried and disposed of, before these courts. The U.N. Basic Principles do not make any distinction between these two categories. Though the word frequently used in the Basic Principles is `judge' yet it should be read in the context of other terms like "independence of the judiciary" and "judicial officer". Neither does the Beijing Principles make such a distinction. National Constitutions provide for an independent judiciary. However, the fact remains that in many countries, particularly in the Commonwealth, judicial officers in the lower judiciary are not perceived as independent. Some of the insulations provided for the protection of the independence of the higher judiciary do not apply to these judicial officers.

This disparity is now gradually being challenged before the national courts. It was challenged before the Canadian Supreme Court in 1997 [7], later, the Court of Appeal of Scotland in 1999[8], the Supreme Court of Bangladesh in 2000[9], the Constitutional Court of South Africa,[10] and more recently again the Canadian Supreme Court with regard to the qualifications and independence of justices of the peace.[11]

These decisions of the Apex Courts on this very vexed issue are significant and should set precedents for other countries to follow or for governments to take necessary legislative measures to insulate these judicial officers with independence so that in their adjudicative process they are perceived by the consumers of justice as being independent and impartial.

The Role of Chief Justices and Presidents of the Apex Courts

Of late the position of Chief Justices or Presidents of Apex Courts have come under scrutiny in some countries. There have

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7. See endnote 1
8. Starrs and Chalmers vs. Procurator Fiscal (PF Linlithgow) (1999) SCCR 1052; (2000)SLT 42
9. Govt. of Bangladesh & Others vs. Md. Masdan Hossain & Others (Supreme Court of Bangladesh
   52 D.L.R. (AD)82. It is learnt that the Govt. applied for review of the judgement by Civil Appeal No. 189 of 2000 but the same application was dismissed by the Supreme Court on 18.6.2001
10. Van Rooyen & Ors vs. The State and ors - CCT. 21/01
11. see endnote 6

been complaints largely regarding abuse of power, interference with adjudicative processes of junior judges particularly those who await recommendations from the Chief Justice for promotions, etc. Chief Justices and Presidents are generally given the power to empanel sittings of the appellate courts. In such empanellment there have been allegations of `fixing' in selective appeals.

The U.N. Basic Principles and the regional standards do not provide for standards for Chief Justices or Presidents though principle 6 of the Beijing Principles regarding interference in the decision-making process must necessarily apply to Chief Justices. With regard to judicial appointments national constitutions which do not provide for an independent mechanism for selections and recommendations leave it to the Chief Justice to select and recommend. Similarly with regard to promotions. There have been allegations of favouritism, cronyism and nepotism.

Considerable executive involvement in the appointment procedure has resulted in the judiciary not being independent or perceived as independent. Provisions for consultation or advice too has resulted in doubts and suspicions whether such consultations and advices are genuine or mere shams. Vesting this power in just one person like the Chief Justice too is fraught with suspicions. However eminent he may be there is always the likelihood of abuse. The three judgments of the Supreme Court of India in what is commonly cited as the First, Second and Third Judge's cases in 1982[12], 1993[13] and 1994[14] respectively and the judgment of the Pakistan Supreme Court in 1996[15] demonstrate the struggle between the Executive and the Judiciary on this very issue.

In Malaysia there were serious allegations that independent judges who did not toe the line of a previous Chief Justice were not promoted or got transferred out. A few junior judges who wanted to leap frog senior judges for promotion would tailor their judgments to suit the needs of the Chief Justice. An allegation a

12. S.P. Gupta vs. Union of India AIR (1982) SC 149

13. Supreme Court Advoates on Record Assn. and anr vs. State of India JJ 1993 4 SC441

14. Special Reference No. 1 of 1998 JT 1998 5SC 304

15. Al-Jehad Trust vs. Federation of Pakistan PLD (1996) SC324

couple of years ago by a High Court judge that the former Chief Justice attempted to interfere with his adjudicative process in an election petition is still being investigated. Integrity of the Malaysian judiciary has been a concern since 1988.

Recently leap-frog promotions of three judges who were involved in the Anwar Ibrahim (the former Deputy Prime Minister) trials and appeals were perceived as rewards for having "delivered" what the Executive wanted. The Bar Council publicly protested and called for an extra ordinary general meeting to adopt resolutions calling for disclosure of the criteria applied and the setting up of an independent judicial services commission to select and recommend judicial appointments, promotions and transfers. Under the Malaysian Constitution recommendations for judicial appointments and promotions are made by the Chief Justice to the Prime Minister who in turn advises the King. The King must accept the advice.

The trend now in modern constitutions is to entrust the power of recommendations for judicial appointments with an independent council or commission. Such council or commission is composed of representatives of institutions closely connected with the administration of justice. The Council or Commission then recommends suitable men or women for appointment by the government. Such a commission is now being proposed for England & Wales. A debate is very much alive there.

A good example is the Philippines. In that Republic, pursuant to the 1986 Constitution a Judicial and Bar Council was created for judicial appointments. This council is composed of the Chief Justice, the Minister for Justice, a representative of the Bar association, a professor of law, a retired member of the Supreme Court and a representative of the private sector. This council advertises for judicial appointments, processes all applications, conducts interviews and selects suitable applicants based on proven competence, integrity, probity and independence which is the criteria provided in the constitution. Whenever there is one vacancy in the Supreme Court or High Court the council submits to the Executive President three names. The Executive President selects one among the three in the list.

Similarly the 1996 South African Constitution provides for a

Judicial Services Commission to recommend to the Executive President, suitable appointees for judicial appointments.

The 1998 European Charter on the Statute of judges, referred to earlier, provides, inter alia, "*In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the Statute envisages the intervention of an authority independent of the Executive and Legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representative of the judiciary.*" (emphasis added).

Whatever form the selection and recommendatory mechanism may be, what is essential is that, judicial appointments are perceived to be made independently and transparently based on merit and without improper considerations, political or otherwise.

As the office of the Chief Justice is the embodiment and reflection of the independence, impartiality and integrity of the judiciary in any democracy, it is, therefore, imperative that only those who can command that respect be appointed.

Abuse of Judicial Independence

Judges are conferred and clothed with independence in their adjudicative process so that they can dispense justice without fear or favour in accordance with the facts, evidence and the law presented to them. For this purpose many national constitutions provide for conditions with regard to the appointments, promotions, discipline, security of tenure and immunity to insulate them. These conditions are prerequisites for protection of their independence. These are found in the international and regional standards. The guarantee of judicial independence is for the benefit of the judged, not the judges. There have been cases where judges are said to have abused this independence. These insulations are sometimes used as a shield against investigations for judicial misconduct including investigations for corruption. They know that they cannot easily be removed; they know that they cannot be sued for their conduct or words uttered in the adjudicative process; they know that their salaries cannot be reduced. The common complaint of this abuse is the kind of terse and curt language some judges use against parties, witnesses, counsel and

even against parties not in court. In some countries such conduct triggered a public furore through the media drawing the executive, supported by the public, to seek greater accountability from the judiciary. Allegations of judicial corruption are on the increase.

Judicial Accountability

Accountability and transparency are the very essence of democracy. Not one single public institution, or for that matter even a private institution dealing with the public, is exempt from accountability. Hence, the judicial arm of the government too is accountable. In an interview to India Today in 1996 former Chief Justice of India, Justice Verma, was asked about his opinion regarding making the judiciary more accountable. The Chief Justice's reply was:

"It's long overdue. With the increase in judicial activism, there has been a corresponding increase in the need for judicial accountability. There is a perception that the people are doubting whether some of us in the higher judiciary satisfy the required standards of conduct. Since we are the ones laying down the rules of behaviour for everyone else, we have to show that the standard of our behaviour is at least as high as the highest by which we judge the others. We have to earn that moral authority and justify the faith the people have placed in us. One way of doing this is by codifying judicial ethics and adhering to them. (emphasis added)"

However, judicial accountability is not the same as the accountability of the executive or the legislature or any other public institution. This is because of the independence and impartiality expected of the judicial organ. Judges are accountable to the extent of deciding the cases before them expeditiously in public (unless for special reasons), fairly and delivering their judgments promptly and giving reasons for their decisions; their judgments are subject to scrutiny by the appellate courts. No doubt legal scholars and even the public including the media may comment on the judgment. If they misconduct themselves, they are subject to discipline by the mechanism provided under the law. Beyond these parameters, they should not be accountable for their judgments to any others. Judicial accountability stretched too far can seriously harm judicial independence.

It must be stressed that the constitutional role of judges is to decide on disputes before them fairly and to deliver their judgments

in accordance with the law and the evidence presented before them. It is not their role to make disparaging remarks about parties and witnesses appearing before them or to send signals to society at large in intimidating and threatening terms, thereby undermining other basic freedoms like freedom of expression. Another source of concern is the manner in which contempt of court powers are used to instil fear. When judges resort to such conduct, they lose their judicial decorum and eventually their insulation from the guarantees for judicial independence. They open the door for public criticism of their conduct and bring disrepute to the institution. That could lead to loss of confidence in the system of justice in general. Respect for the judiciary cannot be extracted by invoking coercive powers except in extreme cases. The judiciary must earn its respect by its own performance and conduct.

No doubt judges too have freedom of expression. The UN Basic Principles on the Independence of Judges and lawyers required judges to exercise their freedom of expression "in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary". Similarly the Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region states that judges are entitled to freedom of expression "to the extent consistent with their duties as members of the judiciary." If follows that judges do not have a carte blanche to say all and sundry both in the adjudicating process or even in their extra judicial capacities. Particularly in the adjudicating process they must be circumspect with their words to maintain their objectivity and impartiality.

In 1996 a Superior Court Judge of Quebec in Canada in dealing with the sentencing of the accused woman found guilty of second degree murder, in the death of her husband berated, a jury and made insensitive remarks about women and Jews. The remarks were:

> "When women ascend the scale of virtues, they reach higher than men..."but..when they decide to degrade themselves, they sink to depths to which even the vilest men could not sink". He also said "even Nazis did not eliminate millions of Jews in a painful or bloody manner, they did in the gas chamber without suffering".

Those remarks caused an enormous controversy in Quebec.

Many including the media called for the removal of the judge. Women's rights associations went in an uproar. The judge did not resign. The matter went before the Canadian Judicial Council.

By a majority of 4 to 1, the Inquiry Committee of the Council found the judge unfit for office. They went on to say that the judge undermined public confidence in him and strongly contributed to destroying public confidence in the judicial system. This recommendation went before the full Judicial Council headed by the Chief Justice. By a majority of 22-7 the Council recommended to the Minister to move the Parliament for the removal of the judge. The Judge eventually resigned.[16]

In another recent case again in Canada, a judge of the New Brunswick Provincial Court was removed for derogatory comments about the residents of a particular district while presiding over a sentencing hearing. The majority of the disciplinary panel found her comments incorrect, useless, insensitive, insulting, derogatory, aggressive and inappropriate. That they were made by a judge, makes them even more inappropriate and aggressive. The Supreme Court of Canada upheld the finding and made the following observations[17]:

> "Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies: *Beauregard, supra, at p.70, and Reference re Remuneration of Judges of the Provincial Court, supra,* at para. 124. Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.

16. The Bienvanne Inquiry, Canadian Judicial Council Annual Report 1996-97 Pg. 30

17. Moreau-Berube V New Brunswick (Judicial Council) (2002) SCC 11. File 28206

> Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to the democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.
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> The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens."

In December 2001 the New South Wales Court of Appeal delivered a judgment criticizing the conduct of a District Court Judge as having fallen "far too short of acceptable judicial behaviour" and might lead to an apprehension of bias.[18] The appeal judges added that her conduct was disturbing "comments totally unnecessary". That the judge "made little to maintain the proper decorum of either the court or herself" They described one of her statements as "disgraceful and totally unjudicial". In an opinion column in an Australian daily, which reported this case, the author in conclusion asked "How on earth do people like the judge concerned get appointed to courts in this country?" It is not known whether any disciplinary action was taken against that judge.

In South Africa in October 1999 in sentencing a 54 year old man to 7 years imprisonment in the Cape Town Court for raping his 16 year old daughter, the judge said that while raping his daughter was "morally reprehensible" the act was "confined" to his daughter and that, therefore, the man did not pose a threat to

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18. Damjanovic v. Sharpe Hume & Co (2002) NSWCA 407

society. He further said that the girl had a good chance of recovery. In a country where it is said that there is a rape committed every 36 seconds and where the law provides a minimum sentence of life imprisonment unless there are mitigating circumstances these pronouncements unleashed a wave of anger in women's rights groups. The prosecutor instantly filed a notice of appeal. In the aftermath newspapers reported that a Parliamentary Committee had summoned the judge to appear and explain himself over the sentence. This began a counter-protest from judicial circles as such action by Parliament would amount to encroachment into judicial independence. The wisdom of the Minister of Justice in a public statement quelled the situation. He said, inter alia:

"In terms of our constitution, the judiciary is independent from both the legislative and the executive. The principle of separation of powers and the independence is strongly entrenched in our constitution."

"The judiciary as an organ of State has to be accountable in its actions, but this did not mean that judges should appear before a parliamentary committee to explain their judgments."

These are just a few recent instances where judges have been taken to task by either disciplinary tribunals, appellate courts and the public when they abuse their judicial power. They undermine public confidence in the justice system.

The practice of retired judges particularly Chief Justices called to give evidence in foreign courts on issues related to forum non conveniens has drawn some controversy. The propriety of retired judges giving sworn evidence before foreign courts, some seen as renegading the very system of justice of which they previously presided as Chief Justices must be a source of concern particularly when it is seen against the backdrop of fees being paid for such evidence.[19] While it may not be objectionable for retired judges to give expert opinions on the law of their countries before foreign courts or arbitral tribunals yet it is questionable whether it is proper for them to give opinions about judicial delays in the system in their jurisdictions. Such conduct could undermine the high office of the Chief Justice.

19. See the Affidavits former Chief Justices of India, Ahmadi and Kirpal tended before the Supreme Court of the State of New York index no. 60371/02

The excessive use of coercive powers like contempt of court has been a concern in some countries. It was a serious problem in Malaysia a few years ago when lawyers were committed and sentenced. The manner in which this power was invoked summarily by the Supreme Court of Sri Lanka in the Michael Fernando case earlier last year brought the Court into severe criticism from various quarters. It obviously left a chilling effect on public's access to justice. It even intimidated the legal profession. An unrepresented lay litigant attempting to seek justice in the highest court of the land, however misconceived his grievance may have been, was convicted and sent to prison for one year for contempt of court.[20] His offence was that he objected to the Chief Justice presiding the court when the same Chief Justice was a respondent to the Petition before the court. The worst form of injustice in any civilized society is injustice perpetrated through the judicial process.

The often cited judgments of Lord Atkin in 1936, as a proper balance of the two competing interests and that of Lord Denning in 1968, on how courts should exercise restraint in too readily invoking contempt powers are worthy of constant reminders to judges all over the Commonwealth.

Lord Atkin said:

> "*The path of criticism is a public way: the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.*"[21]

Lord Denning said:

> "*This is the first case, so far as I know, where this court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us, but which we will most sparingly exercise: more particularly as we ourselves*

20. the case of Michael Fernando

21. Ambard vs.AG for Trinidad, Tobago (1936) 1 704 Pc

have an interest in the matter. Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticize us will remember that, from the nature of our office we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.

So it comes to this. Mr. Quintin Hogg has criticized the court, but in so doing he is exercising his undoubted right. The article contains an error, no doubt, but errors do not make it a contempt of court. We must uphold his right to the utmost." [22]

In a case in the sixties a lay litigant having lost her case threw the books at the three judges of the Court of Appeal of England & Wales. The books flew past the head of the presiding Judge, Lord Denning. All Lord Denning said was a direction to the Court usher to lead her out of the Court. She exclaimed: "I am surprised that your Lordships are so calm under fire". The conduct of Lord Denning in those circumstances demonstrated highest judicial compassion.

While the executive arm is often apprehensive of judicial independence the judicial arm is often apprehensive of judicial accountability. Judicial accountability is not inimical to judicial

22. R.V. Metropolice Commission Exparte. Blackburn (No. 2)(1968) 2All. ER. 319 at 320

independence. Though judicial accountability is not the same as accountability of the executive or legislative branches of the government yet judicial accountability without impinging on judicial independence will enhance respect for judicial integrity. The UN Basic Principles do not provide for judicial accountability save for provision on procedure for judicial discipline.

The Judicial Group on Strengthening Judicial Integrity in collaboration with the Consultative Council of European Judges of the Council of Europe and the American Bar Association and Central and European Law Initiative (ABA/CEELI) deliberated in the drafting of the Bangalore Principles of Judicial Conduct. The drafting was finalized and approved in November 2002 at the Hague.

The Principles were presented to the UN Commission on Human Rights in April 2003. There was unanimous support for these Principles from member States. In a resolution the Commission noted these Principles and called upon member States, the relevant UN organs, intergovernmental organizations and non-governmental organisations to take them into consideration.

In his report the Special Rapporteur on the Independence of Judges and Lawyers observed that these principles would go some way when adopted and applied in member States to supporting the integrity of judicial systems and could be used to complement the United Nations Basic Principles on the Independence of the Judiciary to secure greater accountability. [23]

Judicial accountability today is the catch phrase in many countries. Judges no longer can oppose calls for greater accountability on grounds that it will impinge on their independence. Judicial independence and judicial accountability must be sufficiently balanced so as to strengthen judicial integrity for effective judicial impartiality. Establishment of a formal judicial complaints mechanism, is therefore not inconsistent with judicial independence under international and regional standards. Principles 23-28 of the Beijing Principles imply some guidelines for such a mechanism. In this regard judges should take the initiative before it is forced upon them by political forces.

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23. E/CN.4/2003/65 page 12

In South Africa recently the judges themselves drafted a legislation to provide for a judicial complaints commission. There was however a dispute between the executive and the judiciary as to the composition of the commission. The judges wanted the composition entirely of sitting judges. The executive felt that it should not be left entirely with the judges as that would negate transparency. The Special Rapporteur recommended to the government that judges who took the initiative to draft the legislation for such a mechanism, should be entrusted to self-regulate the mechanism for an initial period of at least seven years. Thereafter the effectiveness of the mechanism could be reviewed.

The need for a separate complaints mechanism for judges is the subject of debate, in many countries including the United Kingdom, New Zealand, Australia, Ireland and India. In some jurisdictions informal internal mechanisms have been set up. But these are found unsatisfactory.

Another dimension of judicial accountability is judicial education. Often judges upon appointment feel that they are appointed for their learning and therefore do not require further continued education while holding judicial office. This is a fallacy. Continued legal education for judges should be provided not only to keep them abreast of developments in the law and practice both domestically and internationally but also to what is sometimes described as "social context education" or "sensitivity training". This is to enable them to be aware and better respond to the many social, cultural, economic and other differences that exist in the society particularly in pluralistic societies. Such education should include international human rights, humanitarian and refugee law. To assist governments to structure the justice system and train judges, prosecutors and lawyers on international human rights law the Office of the UN High Commissioner for Human Rights has last year published a Manual on Human Rights for Judges, Prosecutors and Lawyers. It is a training manual on human rights in the Administration of Justice. It is a comprehensive training tool of about 900 pages and can be found on the High Commissioner's Office website (www.unhchr.ch). Last year the Human rights Centre of the University of Essex published a Manual for Judges and Prosecutors on Combating Torture. This manual can be found on the University's website (www.essex.ac.uk).

Impact of the War on Terrorism on Judicial Independence

One of the major challenges for judges and lawyers in the next decade is to find a balance between counter-terrorism measures adopted by governments and preservation and respect for international human rights norms and the rule of law. No doubt terrorism itself is a violation of fundamental human rights and rule of law and must be combated accordingly. Practically all the various resolutions since Sept. 11, 2001 emanating from the UN General Assembly, Security Council and the Commission on Human rights provide that efforts to combat terrorism must be in compliance with established international norms. In reality is that so? The Guatanamo Bay experience is a glaring example of how these international standards are sidelined by a super power which has over the years championed the cause of human rights protection.

A draconian feature of these measures taken by governments is the provision for administrative detention for long periods without trial by an independent and impartial judicial tribunal. Compounding to that is the denial of right to counsel. The danger inherent in such detentions is that suspects are denied their individual rights and liberties based purely on reasonable belief of administrative officers generally from the security forces, including the police, often based on so called 'reliable' intelligence reports. It was on such similar belief that the United States and its coalition partners went to war with Iraq. The belief based on intelligence reports was that Saddam Hussein had weapons of mass destruction (WMD). Such weapons to date have not been found. From this and other recent revelations including how intelligence reports could be 'sexed up', lessons are to be learnt on the unreliability of intelligence reports. The flow of information on allegations of torture of those suspects in Guantanamo Bay and the Abu Gharib prison in Baghdad are further lessons to be learnt on the perils and oppressiveness of such detentions without judicial supervision.

The war against terrorism requires the interrogation of terrorists. Such interrogation must be conducted in a way that physical force, should not be inflicted on the suspects detained administratively. As said by the President of the Supreme Court of Israel - torture in interrogation of a suspected terrorist is not permitted even if using violence may save human life, by preventing impending terrorists acts:

> "We are aware that this decision does not ease dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties." [24]

On this very point in a recent address to international jurists gathered in Cape Town the Chief Justice of South Africa, Arthur Chaskalson, said the following:

> "We are living in troubled times. There is no part of the world that is immune from terrorism, or from the evils of organised crime. Xenophobia, fuelled partly by concerns over such matters, is resurgent. Great danger lies in succumbing to the seductive call that law abiding citizens have nothing to fear from harsh and arbitrary laws put in place to deal with such matters. That is how a descent into arbitrary rule invariably begins. We need to be on our guard lest overwhelmed by a legitimate concern to combat these evils, we find ourselves abandoning hard won rights, and resorting to practices which undermine the fabric of our democracy."[25]

Democracies should conduct the struggle against terrorism with proper balance between two conflicting values and principles. On the one hand we must consider the values and principles relating to the security of the state and its citizens. Human rights cannot justify undermining national security in every case and in all circumstances. Human rights are not a stage for national destruction. On the other hand, we must consider the values and principles relating to human dignity and freedom. National security cannot justify undermining human rights, in every case and in all circumstances. The war against terrorism does not grant unlimited licence to harm the individual.[26]

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24. Aharon Barak, The Role of a Supreme Court in a Democracy and the Fight against Terrorism: Cambridge Lecture delivered, July 18, 2003.
25. Arthur Chaskalson CJ, speech delivered on April 12, 2004 in Cape Town at the 2nd World Bar Conference.
26. see generally endnote 22

What then is the balancing act for Governments in combating terrorism? It cannot be other than measuring within the framework of the rule of law and complying with their obligations under international law including international human rights, humanitarian and refugee law as spelt out in General Assembly, Security Council and Human Rights Commission resolutions referred earlier. In this regard, the independent and impartial judicial tribunal, the third arm of the State must be allowed to play its rightful role in holding that balance. The two judgments delivered by the US Supreme Court on June 28, 2004 upholding the right to habeas corpus to the detainees in Guantanamo Bay and those classified as "enemy combatants" and denied due process and detained in US prisons are welcome checks on executive excesses.[27] In one of the majority opinions written by O'Connor J, the Court said, inter alia,:

> "Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege, that is, American citizenship. It is during our most challenging and uncertain moments that our Nation's commitments to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad..... The imperative necessity for safeguarding these rights to procedural due process under the gravest emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with guarantees which, it is feared will inhibit government action..... It would be indeed ironic if in the name of national defense, we would sanction the subversion of one of those liberties...which makes the defense of the Nation worthwhile... In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forego any examination of the individual case and focus exclusively on the legality of the broader detention scheme

27. Rasul vs. Bush, President of the US and Hamidi vs. Rumsfeld, Secretary of Defence, judgments delivered by the US Supreme Court on June 28, 2004.

cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the Nation's citizens..."[28]

Conclusion

This paper has attempted to highlight the prevailing tension between independence and accountability. When the international and regional standards on judicial independence were formulated, the issue of judicial accountability was not apparent. Emphasis was all on securing judicial independence resulting in the entrenching of the requisite protective insulations. No doubt it was implied in these standards that those appointed to the high office of the judiciary will be men and women of the highest calibre and therefore their performance and conduct will be beyond question.

Judges must also remember that the insulations provided to protect the independence and impartiality were founded on public policy. Public policy can change with times. The discerning public today supported with the fast improving information technology has high expectations of the judiciary. If judges by their performance and conduct do not meet those expectations the insulations will slowly but surely be whittled away, again, on grounds of public policy.

Independence of the judiciary is founded on public confidence - in essence public trust. Without that confidence and trust the judicial system cannot command the respect and acceptance that are essential to its effective operations. It is therefore important that a court or tribunal should be perceived as independent, as well as impartial and the test should include that perception.

It is not the personal confidence of the judges or their perceptions that matters. The right to an independent tribunal is that of the consumers of justice. It is the protective right of all human rights. It is neither a right nor privilege of the judges. Judges are often heard asserting that they are independent and impartial. As demonstrated in the judgments referred to earlier it is how the

28. Hamidi vs. Rumsfeld

public perceive their performance and conduct that matters. Judges must remember that public confidence in the system is the ultimate safeguard of their independence. As Shimon Shestreet said his classic work on "Judges on Trial":

"Written law if not supported by the community and constitutional practice, can be changed to meet political needs, or can be flagrantly disregarded. On the other hand, no executive or legislature can interfere with judicial independence contrary to popular opinion can survive."[29]

29. Judges on Trial by Shimon Shestreet Pg. 392

3. Keshavanda Bharati vs. State of Kerala AIR 1973 S.C. 1461
4. Valente vs. The Queen (1985) 2 S.C.R. 673
7. See endnote 1

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Trafficking in Women and Children

Sankar Sen

Trafficking in women and children is one of the worst violations of human rights. It is a matter of great shame that even after half a century since the adoption of Universal Declaration of Human Rights, the scourge of trafficking continues to afflict the global community. International Organisation of Migration (IOM) estimates that global trafficking industry generates up to US $ 8 billion a year from what may be described as "trade in human misery".

Although men are also victimized, the overwhelming majority of those trafficked are women and children. According to official estimates over one million women and children are trafficked each year worldwide for forced labour, domestic servitude or sexual exploitation. Trafficking is now considered as the third largest source of profit for organised crime behind only drugs and guns .[1]

Trafficking is a problem that today affects virtually every country in the world. Normally the flow of trafficking is from less developed countries to advanced countries. As trafficking is an underground criminal enterprise, there are no precise statistics regarding the magnitude of the problem. Very often estimates are found unreliable. But even by conservative estimates the scope of the problem is enormous. Between 700,000 and 2,000,000 victims are trafficked annually. About 2,25,000 victims come from South-East Asia, and 1,50,000 victims from South-Asia .[2]

CONTRIBUTORY FACTORS

Though trafficking is a global phenomenon, the problem has assumed serious dimensions in different countries of Asia, and particularly in South Asia. Trafficked women and children are used

1. Congressional Research Services (CRS) Report for American Congress, August 1, 2001

2. ibid

for a variety of purposes like prostitution, domestic work, camel jockeying, illegal adoption of children, organ transplant, begging, drug trafficking, forced marriage and various other exploitative forms of work. Both demand and supply factors relentlessly drive the trafficking operations. Some of the key push factors are inadequate employment opportunity, absence of social safety net, globalisation, open border facilitating movement of population. Other factors are erosion of old family system, unabashed pursuit of consumerism, and practice in some community of dedicating girls to gods and goddesses. In India, social acceptance of prostitution in some communities encourages this reprehensible trade.

Globalisation of the world economy has facilitated movement of people across the borders, especially from poorer to richer countries. International organised crime has taken advantage of this free flow of people, money and goods. There is also disinterest and even complicity of some governments and law enforcement agencies that ignore the plight of trafficked victims and downplay the magnitude of the trafficking problem. Sometimes police and other law enforcement officers are found to be in league with the traffickers.

At present there is no clear-cut definition of trafficking. The term is used to describe activities that range from voluntary migration to movements of persons, through force or violence for exploitative purposes. Trafficking has been defined in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons specially women and children, supplementing the UN convention against Transnational Organisation Crime, 2000, to which India is a signatory as:

"The recruitment, transportation, transfer, harbouring or receipt of persons by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or service, slavery or practices similar to slavery, servitude or the removal of organs".

It has been correctly pointed out that at the core of any definition of trafficking must be the recognition of the fact that trafficking is never consensual. It is this non-consensual nature of trafficking that distinguishes it from other forms of migration. Thus all kinds of illegal migration are not trafficking and the basic distinction between the two is question of consent[3]. Very often trafficking is equated with prostitution and this is one of the prime reasons why human rights violations inherent in trafficking are not properly understood. There is a need to understand various issues and manifestations of trafficking from a human rights perspective.

MODUS OPERANDI OF THE TRAFFICKERS

Traffickers acquire the victims in a number of ways. Sometimes women are kidnapped outright in one country and forcibly taken to another. Victims are also sometimes lured with job offers. Traffickers entice victims with false promises of paying jobs in foreign countries as models, dancers, domestic workers etc. They advertise these phoney jobs as well as marriage opportunities in local papers. Russian gangs reportedly use marriage agency databases and matchmaking parties to find their victims.

Alongwith men, women also play important roles in luring girls, promising them lavish lifestyles and attractive jobs, provided they run away from their homes. The prevalence of dowry system compels many poor families to avoid formal marriages of their daughters. The parents are often persuaded by traffickers to hand over their daughters for "*dowryless marriages*". In India social acceptance of prostitution in some communities encourage this clandestine trade. The traffickers target women from refugee camps, girls from large and broken families and lure them with promise of better life abroad. Very often on arrival at destination, travel documents are confiscated and victims are forced into prostitution or position of labour and exploitation. They are asked to repay for their transportation cost and living expenses with interest. Women are controlled through rape and violence and threats about the harm that will be done to members of their family.

Many of the traffickers are older women who are former

3. Report of the U.N. Special Rapporter Ms. Radhika Comaraswamy (28th October - 15-11-2000)

prostitutes or themselves forced into prostitution and now trying to escape abuse by providing a substitute. Often these agents speak several languages and have multiple roles[4]. The use of words like '*Mafia*' or depictions of traffickers as villain outsiders do not often correspond to the actual garb taken by most traffickers[5].

An important feature of trafficking network is an efficient coordination of what appears to be a fragmented process. The actors in the trafficking network collaborate and protect one another. Persons who operate at the recruiting end often do not know the people or their activities at the receiving end. Each actor concentrates on his or her responsibility in a chain of activities that involve recruitment, passage, forging papers and placement in work places. Another principle in management in the sex trade is mobility. Women are very regularly rotated among different brothels after a fixed period of time. This serves two objectives - one is to disorient the women and second is to prevent them from establishing a long lasting contact with clients to seek help.

FRAMEWORK OF LAW RELATED TO TRAFFICKING IN INDIA

The Constitution of India under Article 23(1) prohibits trafficking in human beings and forced labour. This right is enforceable against the State and private citizens. There are also provisions in the Indian Penal Code 366(a) that make procuration of a minor girl from one part of India to another punishable and Section 366(b) that make importation of a girl under the age of 21 years punishable. Section 374 provides punishment for compelling a person to labour against the will of the person.

Suppression of Immoral Trafficking in Women and Girls Act, 1956 (SITA) was enacted in pursuance of Trafficking Convention, which India signed in 1953. In 1986 SITA was drastically amended and renamed Immoral Traffic (Prevention) Act, 1986. Immoral Traffic Prevention Act, 1986 is a special legislation that deals with trafficking. The purpose of this enactment was to eliminate trafficking in women and children for the purpose of prostitution, as an organised means of living. The offences under the Act include

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4. Tumling, Karen C. 2000. Trafficking in children in Asia: a regional overview. Bangkok: Institute for Asian Studies, Chulalongkorn University.

5. Blanchet, Therese. 2002. Beyond boundaries: A critical look at women labour migration and the trafficking within. Dhaka: USAID

(1) punishment for keeping a brothel or allowing premises to be used as brothel (section 3), (2) punishment for living on the earnings of prostitution (Section 4), (3) procuring, inducting or taking persons for the sake of prostitution (S5), (4) detaining a person in premises where prostitution is carried on (S6), (5) prostitution in or the vicinity of public places (S7), (6) seducing or soliciting for purpose of prostitution (S8) and (7) seduction of a person in custody (S9). The law provides powers to the authorities concerned in respect of rescue and rehabilitation of victims and survivors, stringent action against exploiters including closure of brothels, surveillance, and externment as well as aggravated punishment when the offences are committed on children.

One of the primary problems of the Act is that, it makes prostitution as the only form of trafficking. Keeping in mind the new trends in commercial sexual trade, the Act has to incorporate larger aspects in prostitution itself instead of being confined to brothels. The act provides for constitution of special courts and summary trials but it does not prescribe procedures. In view of powerful network of traffickers it should provide for victim protection and rehabilitation.

INDIAN SCENARIO

Despite constitutional mandate and existing laws, Indian scene is quite disconcerting. India serves as a source country, transit centre and destination country where thousands of women and girls are initiated and exploited in the horrendous flesh trade every year. Actual number of women in sex work is difficult to estimate. A survey sponsored by the Central Social Welfare Board of India in 1991 in six metropolitan cities indicated that the population of women and children in sex work was believed to be around 70,000 to 1 million. Thirty percent of them were below 18 years old. Nearly 40 percent of them began sex work when they were under 18 and seventy percent of them were illiterates[6]. NGO estimates of sex work are however much greater. The Indian Association for the Rescue of Fallen Women estimated that there are 8 million brothel workers in India and 7.5 million call girls. Nearly at any time about

6. Report of the Central Advisory Committee on Child Prostitution. 20th May 1994.

20 thousand girls are transported from one part of the country to the other.

CROSS BORDER TRAFFICKING

There is also trafficking in women and children across the country's porous borders with Nepal and Bangladesh. There are no accurate data available on cross-border flow of trafficking, because of the complexities of regulation from country to country. There is no law on repatriation and no government agency to correct and verify the data. Only NGOs working in the field are able to provide some rough estimates on the subject. The combined estimates for girls being brought from Nepal and Bangladesh range from 500 a year to 10000 a year[7]. The same study shows that the average age of trafficked girls from Nepal to India fell from 14 - 16 in the 1980s to 10-14 years in 1994. However, trafficking from neighbouring countries accounts for only 10% of the coerced migration, the share of interstate trafficking is estimated to be around 89%. Studies by Rozario L., Gathia[8] and Haq[9] provide details of interstate trafficking routes in India. Action Research on Trafficking in Women and Children in India by National Human Rights Commission also identifies the geographical belts of exploitation. States like Andha Pradesh, Bihar, Karnataka, Madhya Pradesh, Rajasthan, West Bengal and Maharastra appear to be main states from where trafficked persons are sourced. The metro cities are the most frequent destination points.

POOR LAW ENFORCEMENT

Poor law enforcement is one of the key factors responsible for upsurge in trafficking. It is a paradox that in India, though there is a sharp increase in trafficking, the total number of crimes reported under Immoral Trafficking Prevention Act, 2002, was 5691, which is 35% less, than reported in 2001[10]. The number of cases registered under ITPA in India during the period from 1997 to 2001 is given below.

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7. UNDP 2002. Trafficking and HIV/AIDS in Bangladesh, India and Nepal
8. Gathia, Joseph. 1999. Child prostitution in India. New Delhi: Concept Publishing Company
9. Haq. K. 2000. Human development in South Asia, the gender question. Karachi: Oxford University Press
10. Crime in India, 2002. National Crime Records Bureau. Ministry of Home Affairs. Govt. of India

NUMBER OF CRIMES REGISTERED UNDER ITPA IN INDIA

States	1997	1998	1999	2000	2001	Total	Average
Andhra Pradesh	613	507	737	482	1332	3671	734
Arunachal Pradesh	0	0	1	0	0	1	0
Assam	20	34	5	17	6	82	16
Bihar	21	37	38	9	29	134	27
Delhi	117	75	78	94	95	459	92
Goa	134	30	28	28	28	248	50
Gujarat	5	8	40	47	61	161	32
Haryana	7	4	14	13	21	59	12
Himachal Pradesh	1	1	0	1	1	4	1
Jammu & Kashmir	2	1	4	2	7	16	3
Karnataka	1645	1403	1225	1308	1356	6937	1387
Kerala	41	27	62	92	132	354	71
Madhya Pradesh	16	16	33	23	15	103	21
Maharashtra	1653	444	390	160	223	2870	574
Manipur	0	0	0	0	4	4	1
Meghalaya	1	0	0	0	0	1	0
Mizoram	1	0	0	2	2	5	1
Nagaland	0	0	0	1	1	2	0
Orissa	11	11	22	17	24	85	17
Pondicherry	42	29	50	48	39	208	42
Punjab	3	5	14	26	32	80	16
Rajasthan	41	47	85	110	68	351	70
Tamil Nadu	3863	5937	6462	6950	5232	28444	5689
Uttar Pradesh	57	31	24	30	26	168	34
West Bengal	28	43	39	49	31	190	38
Grand Total	8322	8690	9351	9509	8765	44637	8927

The figures for the five-years given in the chart show that in Tamil Nadu, largest number of cases are registered, followed by Karnataka, Andhra Pradesh and Maharashtra. The data received from states also show that an overwhelming majority of cases are registered under the section 8 of the act (the charge of soliciting). This means that often law has been used to criminalize women and girls who have been arrested, despite the fact that they are more often victims rather than offenders. Majority of the arrestees are females. Clients and brothel-keepers are seldom arrested.

In an action research recently completed by the Institute of Social Sciences under the auspices of the National Human Rights Commission, a large number of police and judicial officers were interviewed. The interviews brought to light the fact that many of the law enforcement officials are unaware of the provisions of the law under which customers can be dealt with. Again while registering cases of trafficking, provisions of substantive law (IPC) are not combined with special law (ITPA). This allows very often the culprits to escape the clutches of law with light or no punishment.

There is also shortage of special police officers for implementing the law. This is one of the reasons as to why the police accord very low priority to cases under ITPA. Section 13(2)(a) of the Act authorizes the District Magistrate to appoint special police officers for implementation of the act. This provision of the act has not been properly utilized. This should provide an important weapon to the district authorities to identify competent personnel, especially women, and utilize them to effectively deal with trafficking. IPTA also provides power u/s 22(a) to establish special courts not only by the state governments but also by the central government. This provision is also minimally implemented. It is necessary to set up special courts by both centre and state governments so that trial of offences under ITPA can be completed and justice meted out to the offenders expeditiously.

Again trafficking has become a high-profit and low-risk business. Though the brothel keeper and traffickers amass huge profits out of this trade in human misery, very few brothel keepers have ever faced police action. A number of brothel keepers interviewed during the action research confided that they were able to avoid police action by bribing the police officials. There is

clear evidence of nexus between traffickers and law enforcement officers in some cases. Most of the traffickers focus on rural areas and targets are carefully selected on the assessment of their vulnerabilities.

Trafficking in women and children is an international crime and to effectively deal with traffickers many of whose operations are transnational, there is need for extra territorial legislation. An offence under the Act should have universal jurisdiction. A crime by anybody in India should be made triable in the country he\she resides. Similarly any crime under the law committed by an Indian national anywhere in the world, will be deemed to be an offence committed in India and can be tried by any court.

As per Section 13(1)(4) of ITPA, the Government of India has notified all officers of rank of inspectors and above of CBI as central trafficking police officers. However for want of jurisdiction under Section 5(6) of Delhi Special Police Enforcement Act, the CBI suo moto cannot take up investigation of trafficking cases even if they have international ramifications. There is need to set up a national task force duly empowered to take up such cases.

The need for training of law enforcement officers cannot be overemphasized. During the research study only 17% of the 852 officers interviewed stated that they received only refresher training after the basic post induction training. This impairs the capacity of the police officers to develop themselves professionally and upgrade their skills. They also remain insensitive because of lack of exposure.

PLIGHT OF THE VICTIMS

In the Action Research programme a large number of victims of commercial sexual exploitation were interviewed. The data from the victims showed that more than 60% of them are from deprived sections of the society and majority of them are from dysfunctional families. Most of them are illiterates. The victims also had to face a harrowing time in the brothels and a large number of them had no voice in deciding the number of clients they would have to serve. Victims are forced to have sex, often unprotected, with large number of partners and to work continuously for long hours. Many victims suffer mental breakdowns and are exposed to sexually transmitted diseases including HIV/AIDS. They are often denied

basic medical care. Of the 561 rescued victims interviewed during the research atleast 32% had some ailment and more then 8% were suffering from HIV and 17% from other gynaecological problems. The money earned by the victims goes to the brothel owner and it is for him to decide the mode and method of payment. Often the victims have to take loans from brothel owners to meet their personal needs and high rates of interest accentuate the debt bondage of the victims.

TRAFFICKING OF CHILDREN

Not only women but children also are helpless victims of trafficking. In India a large number of children are trafficked not only for sex trade but other forms of non-sex based exploitation that includes servitudes of different types, viz. domestic labour, industrial labour, begging, organ trade, camel jockeying etc. During the course of action research[11], the researchers interviewed a large number of children rescued from different types of exploitative situations. Analysis of the data collected throws revealing light on the social and economic background of the children, the nature of exploitation after they are trafficked and the forces and factors that pushed them into the abyss. The data collected point to the fact that illiteracy is one of the crucial vulnerability factors behind the trafficking of the children. As the parents of most of the children are poor and lack basic education, they find it difficult to send their children to schools. And unless the children are sent to schools, they will not be able to break out of the illiteracy trap.

A large number of children are trafficked also for the purpose of begging. Here children with physical disabilities are in a more vulnerable position. Poverty and physical disabilities are the ideal combination for children to be trafficked. Disabled children induce sympathy among the alms givers and this puts the child beggar in a serious risk of being deliberately maimed in order to increase his/her earning potential. An interesting case study done by the Action research team of ISS uncovers the ploy of drugging children for the purpose of trafficking. It is very likely that a network is operating for trafficking children for the purpose of begging. Further, thorough investigation by the law enforcement agencies and meaningful action to expose the network is called for.

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11. The Report has been released by NHRC on August 24, 2004

Children are exploited not only inside the country but outside also. There are press reports, as well as reliable secondary data, regarding trafficking of children. It was reported in the Press (The Hindu, October 1996) that a number of Bangladeshi boys were rescued in India while being trafficked for becoming camel jockeys. Peter Beaumont in Observer International (June 3, 2001) reported that, "The trade of boys for camel jockeying has been the subject of a campaign by both UN and anti-Slavery International. Evidence, however suggested that practice is becoming more prevalent." Determined action by India and Bangladesh authorities acting in unison for ending this grotesque transgression of human rights is called for.

SEX TOURISM

In India abuse by tourists of both male and female children has assumed serious dimensions. Unlike Sri Lanka and Thailand this problem has not been seriously tackled or discussed openly and remains more or less shrouded in secrecy. Many of the sex tourists are paedophiles who seek out children to satisfy their sexual urges. They can be of any nationality and come from different professional backgrounds. Though some of them are loners, paedophiles are usually members of organised gangs[12]. It is hard to measure the incidence of child sex tourism, but qualitative research and anecdotal evidence suggests that child sex tourism is growing and spreading in different parts of the world. There is also evidence that over the last few years increasing number of sex offenders, particularly from western industrialized countries, are shifting their operations to less developed countries due to increase in vigilance and action against the paedophiles in their own countries. Britain's conservative newspaper Telegraph observed on (25th March 1996), that "India is fast replacing countries in South-East Asia as the destination for paedophiles. Stricter laws against child abuse, the growing incidence of AIDS in Thailand, Cambodia and Philippines has led to an increase in demand for child prostitutes in India". Some of the factors responsible for this phenomenon of child sex tourism are:

1. Feeling among the foreign tourists that the children of third world countries can be exploited and the chances of detection are slender.

12. Desai, Nishtha, 2001. "See the Evil: Tourism Related Paedophilia in Goa", Mumbai, Vikas Adhyayan Kendra.

2. Belief that children are less likely to contract sexually transmitted diseases and hence sex with them is safe.

3. Mistaken notion that sex with virgin cures HIV.

4. Governments in many developing countries with a view to encouraging tourism turn a blind eye to this problem.

Goa Children Act, 2003, is a State legislation, which for the first time addresses the issue of sex tourism. There is a need for such legislation in other states where tourism and trafficking are closely linked. However, enforcement of law is more important than law itself.

Child pornography and sex tourism are closely linked. Indeed these crimes are mutually reinforcing. Sex tourists have been in the forefront in the production of pornographic materials in the form of pictures, films etc. depicting nude children and sex with children. This work has become easier with the advent of internet.

ORGAN TRANSPLANTATION

Traffickers also lure people including children to donate organs by offering big sums of money. The traffickers and the middlemen lure people to sell their organs. Recently during investigation of kidney transplant cases, the Punjab Police have uncovered the murky role of some doctors, hospital managers and members of Authorization Committee, who were acting in league with the traffickers. Organ Transplant Act, 1994, establishes an Authorization Committee to grant approval based on fulfilment of specified technical and medical requirements. The Act has been ineffectual and proper implementation is required in many states. Because of stringent rules regarding organ transplantation in other countries, India (along with China) has become a big centre for organ transplantation. Many doctors are worried about the long-term consequences. They point out that a number of HIV positive victims are trying to sell their kidneys to earn a living[13]. Vigorous implementation of Organ Transplant Act is needed to curb this cancerous evil.

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13. Kandela, Peter, India: Kidney Bazzar, Lancet, Vol. 337, issue no. 756, June 22, 1991

BARS & PUBS

With growing emphasis on tourism promotion bars and pubs have mushroomed in different tourist destinations. A study of trafficked bar girls from Mumbai conducted by two NGO groups - Save our Sisters (SOS) and VEDH revealed that there are about 2000 bars in Greater Mumbai where a large number of girls work. Most of the bar girls are from Bangladesh, Nepal and different cities of India. Many of them who came to Mumbai with the approval of their families face physical and sexual abuse and have to put up with whatever the clients want. Many of the girls interviewed by the researchers said that they had to go out with the clients and submit to their sexual demands. Though they initially joined the bars to work as dancers or waitresses, they became victims of sexual exploitation - a fall-out of tourism promotion.

JUDICIAL INTERVENTIONS

In Vishal Jeet vs. Union of India and others (1990 3, SSC 380) there was a PIL against forced prostitution of girls, devdasis, jogins and for their rehabilitation. The Supreme Court held that inspite of rehabilitative provisions under the various acts, the results were not satisfactory and it called for severe legal action against the exploiters. Several directives were issued by the Court which interalia, included setting up of a zonal advisory committee and measures to effectively curb Devdasi system and Jogin tradition etc. The apex court said that, "There cannot be two opinions - indeed there is none, that this obnoxious and abominable crime committed with all kinds of unthinkable vulgarity should be eradicated at all level with drastic steps." In Gaurav Jain vs. Union of India (1997 8 SCC 114) the Supreme Court passed an order directing constitution of a committee to make an in-depth study of the problems of prostitution, child prostitutes, children of prostitute, and evolve schemes for their rescue and rehabilitation.

The Supreme Court in the case of Gaurav Jain observed that, "Children of prostitutes should not be permitted to live in inferno, and the undesirable surroundings of prostitute homes". The Court was in favour of shifting them to juvenile institutions. There was an implicit assumption that these institutions will be better organized, and help in rehabilitation of the children. Unfortunately, many of these Juvenile Houses are in a bad shape and have failed

to fulfil these purposes. Children often run away from these homes to return to old surroundings. The staff of these homes are also ill-trained and ill-motivated. There is also acute shortage of Child Welfare Committees as envisaged under Juvenile Justice Act, 2000. Police officials stated to the interviewers that they very often refrain from rescue of children for want of rescue homes, where the rescued persons could be lodged.

JUSTICE DELIVERY

The Action Research by the National Human Rights Commission has also revealed that most of the persons convicted are victims who are charged with soliciting. The delay in trial, non-production of witnesses by prosecution, repeated appearances of the victims at court add to their sufferings. In this connection it may be mentioned that the judicial intervention by High Court of Delhi shows that the justice delivery process could be oriented to serve the best interests of the victims. It is important to note that due to the intervention of High Court of Delhi, especially during 2001-2003, there has been a definite improvement in justice delivery. During this period twenty traffickers and exploiters have been convicted as against nil conviction in previous years. The court has also in accordance with ITPA, ordered closure of several brothels. It has triggered adequate sensitivity among the judicial officials.

Trafficking for commercial and sexual purposes has been exacerbated by cultural and social practices. These include practices like *Devdasi*, prevalent in different states, community sanctions like *Nath uttara* existing in states like Rajasthan, etc. Though it may appear daunting it is not difficult to break community sanctions and provide relief to children of women trafficked for such exploitations.

TRANS-BORDER CO-OPERATION

For combating trafficking there is need for trans-border co-operation. Traffickers and exploiters have no boundaries, but law enforcement officials are bound by limitations of jurisdiction. This has become a serious handicap in anti trafficking programs. The SARRC Convention on Combating Trafficking in Women and Children for Prostitution (2000) envisages setting up of a task force to deal with trans border trafficking. But the convention has not

yet been ratified by all parties and so its implementation has not yet commenced. However, informal networks between government officials of both sides could be institutionalized for carrying out anti-trafficking operations. During the action research it could be seen that certain NGOs through their networking with NGOs abroad are able to carry out repatriation of women and children trafficked from those countries. However these ad-hoc initiatives have to be sustained, strengthened, and institutionalized. A regional workshop (22nd October, 2000) was held in Kathmandu to enhance cross-border cooperation to stop trafficking in women and children. A body called 'South Asia Professionals against Trafficking' (SAPAT) was constituted to fight trafficking in women and children and enhance cross-border collaboration and information exchange.

Trafficking is linked to international crime syndicates that peddle drugs, guns, false documents as well as people. It also is a global security threat because profits from trafficking finance, still more crime and violence. To successfully combat and suppress trafficking, which has been equated with modern day slavery and constitutes one of the greatest human rights challenges of our time a multi-pronged strategy has to be evolved. There should be enactment of a proper comprehensive legislation to target the traffickers and provide for proper rescue and rehabilitation programmes for the victim survivors. New norms take roots only when there is the power of enforcement behind them. Purposive action by central and state governments as well as civil society to empower the vulnerables and restore to the trafficked women and children their dignity and worth as human beings is called for. We cannot embrace our dignity as human beings unless we champion the dignity of others.

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Right to Information - For an Accountable and Participatory Governance

S. P. Sathe

The debate on the right to information has been going on in India since the late eighties. In 1989, when V.P. Singh's government assumed power at the Center, the enactment of the law conferring such power on people seemed imminent.[1] However, that government was short-lived and successive governments sidetracked the legislation until at last, the National Democratic Alliance Government led by Atal Bihari Vajpayee got the bill on Freedom of Information passed by both Houses of Parliament[2]. It obtained the sanction of the President also. It has, however, not yet come into force. A notification bringing the act into force is required to be issued.[3] We hope that the United Progressive Alliance Government will do so soon. Although the bill is not perfect, we hope that it will be suitably amended to make the right to information more effective and less cumbered by exceptions.

Right to Information- Location in the Constitution

Bennett Coleman Case

The right to information was held to be included within the right to freedom of speech and expression guaranteed by article 19 (1)(a) of the Constitution.[4] However, I have always felt that the right to information was to be found not only in article 19(1) (a) but also in several other articles and provisions of the law.[5] The Supreme Court recognized the citizen's right of access to a

1. This writer gave three lectures on the right to know at the University of Delhi in 1991. See S. P. Sathe, The Right to Know (Tripathi 1991).
2. Freedom of Information Act, 2002.
3. The rules have now been made and the Act should be made enforceable soon. Indian Express 17 Aug. 2004.
4. Benett Coleman v. India AIR 1973 SC 106; S.P. Gupta v. India AIR 1982 SC 149: (1981) Supp. SCC 87. Secretary Ministry of Information and Broadcasting v. Cricket Association of Bengal (1995) 2 SCC 161.
5. Sathe, supra n 1.

newspaper in *Benett Coleman v. India*[6] when it struck down the Newsprint Control Order, whereby, allotment of newsprint to a newspaper was restricted on the basis of the sales of such paper during previous years. While striking down the Newsprint Control Order, the Court observed that such restriction on the use of newsprint imposed an unreasonable restriction on freedom of the press, because it could not give as much reading material to the reader as it wished. But not only the newspaper's right to freedom of speech was infringed but the reader's right to read was also curtailed. The reader's right of access to the reading material in a newspaper was his/her right to information which was implicit in the right to freedom of speech.

Right of the Voters to Know the Antecedents of the Candidates Standing For Elections

When the Election Commission sought information about the candidate contesting an election about her property and criminal cases pending against him/her, that right to information was necessary to enable the citizen to exercise his/her right to vote properly. Is the right to vote, part of the right to freedom of speech? While actual casting of a vote is doubtless an act of expression, the right to vote is a constitutional right[7] and not a fundamental right, one becomes entitled to vote if he/she fulfils the qualifications laid down in the Constitution and in the Representation of the People Act, 1951.The right to know the antecedents of the candidate standing for election to a House of Parliament or a state legislature or a panchayat or a municipal corporation is a pre-condition to the exercise of a citizen's right to vote. The actual expression, that is, Voting may be influenced by such knowledge. When the government passed an ordinance, which was later replaced by an Act, to partially nullify the requirement of giving information by the candidate standing for election in her nomination application, the Supreme Court held in *P.U.C.L. v. India*[8] that Act as unconstitutional. Here again the Court did so because no law could take away or abridge a fundamental right and since the right to information was considered as a fundamental right, the impugned

6. See supra n. 4
7. Article 326
8. (2002) 5 SCC 399.

law was struck down. It was argued that the right to information was a derived right and not an original fundamental right and therefore it could be restricted by legislative action. The Court refuted this and observed that " the fundamental rights enshrined in the Constitution . . . have no fixed contents." " From time to time, this Court has filled in the skeleton with soul and blood and made it vibrant"[9]. The right to information is a human right, which is necessary for making the governance transparent and accountable. It also makes the governance more participatory. The right to information was peoples' power and they demanded that a legislation be enacted to compel the authorities to give them information as to what decisions they took, how those decisions were taken and who took them. The Supreme Court said in S.P. Gupta v. India[10]:

> The people of this country have a right to know every public act, everything, that is done in a public way, by those functionaries. They are entitled to know the particulars of every public transaction in all its bearings

There are, however, problems arising out of holding the right to information as being exclusively part of the right to freedom of speech. Although the right to freedom of speech contains the right to give information, I am not sure that it would include the right to receive information. If construed to include the right to receive information, it may conflict with the right to freedom of speech, which includes the freedom of the press. Freedom of the press includes the editor's freedom to decide what to publish and what not to publish. Can I insist that he/she must publish my article even it projects a viewpoint not acceptable to the policy of that magazine or newspaper? In Life Insurance Corporation of *India v. M. D. Shah*[11], the Supreme Court held that the editor of the house magazine of the Life Insurance Corporation, must publish the rejoinder written by Manubhai Shah to an article published in that house journal though that rejoinder had been published in the Hindu which doubtless had a wider circulation. Shah had published a critique of the LIC's premium policy in an article published in the *Hindu*. A rejoinder to Shah's article written by an employee of the LIC had also been published in the Hindu. That

9. Id, p. 438-39
10. (1981) Supp. SCC 87.
11. AIR 1993 SC 171

rejoinder was published by the LIC in its house journal. Shah wrote another rejoinder to that article, which he wanted to be published in the LIC's house journal also. The editor of the house journal, however, refused to publish that second article in her journal. By holding that Shah had the right to have his article published in the LIC journal, despite it having been published in the Hindu which doubtless had a much wider circulation did the Court not compromise the freedom of the editor to decide what to publish and what not to publish? If Shah's right to have his article published is part of his right to freedom of speech, does the editor's right not to publish it again in his journal, not a part of her right to freedom of speech which includes the freedom of the press? Shah would certainly have been entitled to have his reply published in the LIC's house journal if the original article to which the rejoinder had been written had also been published only in that journal.[12]

S.123 of the Evidence Act- Privilege to Withhold Disclosure of Documents

The right of the petitioners to know how judges were appointed was recognized when the Court rejected the claim of the government to withhold documents pertaining to such appointments from the view of the Court. In earlier decisions the Court had held that the claim to withhold disclosure of documents under section 123 of the Indian Evidence Act could be restricted only to such matters which pertained to the affairs of the State and the disclosure of which harmed public interest[13] The Court had held that it could only examine whether a matter in respect of which, a claim against disclosure of documents was made pertained to the affairs of the State. Whether it was in public interest to withhold such documents was not for the court to decide but was entirely for the government to decide. In *Rajnarain's* case[14], the Court had, however, undertaken judicial review of the claim to withhold documents on both the counts. Both matters were held to be justiciable. In *S. P. Gupta v. India*[15], which is known as the first Judges case, the Court was asked to decide whether judges had been appointed in such a manner as to ensure the independence of

12. For a critique of that decision see S. P.Sathe, Annual Survey of Indian law 1993 Vol XXIX p. 201, 221.
13. Punjab v. Sodhi Sukhdev Singh AIR 1961 SC 493: See, S. P. Sathe, Administrative Law chapter 10, p.642 (7th ed. 2004)
14. U.P. v. Rajnarain AIR 1975 SC 865
15. AIR 1982 SC 149: (1981) Supp. SCC 81

the judiciary. Article 124 (2) proviso of the Constitution required that such appointments should be made by the President in consultation with the Chief Justice of India. The Court observed that such consultation must be real and not merely formal. How could the Court determine whether the consultation had in fact been real unless it could go through the relevant papers containing recommendations and the CJI's opinion? It was argued that since the President made appointments on the advice of the Council of Ministers and what advice the Council of Ministers gave to the President could not be inquired into, by any court by virtue of article 74 (2) of the Constitution, such papers could not be disclosed. The Court observed that while what advice was rendered by the Council of Ministers could not be questioned, the basis on which such advice was given could not be immune from disclosure. Bhagwati J. as he then was, based such rejection of the claim for withholding the disclosure of documents on the ground that the right to know whether the CJI was consulted being a part of the freedom of speech guaranteed by article 19 (1) (a), the disclosure of the correspondence between the Law Minister and the CJI could not be withheld. One fails to understand how the petitioners who were lawyers could insist on the disclosure of such correspondence by invoking their right to free speech. Did they need such disclosure in order to make any speech? They could otherwise also say that the appointment of judges had not been proper and that the government was trying to pack the court. Their knowledge about the proper consultation with the CJI was necessary to make sure that the appointments of judges had been made in accordance with the spirit of the Constitution. The spirit of the Constitution required that judges should be appointed strictly on the basis of their professional competence and not on political considerations. Independence of the judiciary being an essential condition of the rule of law was indeed an aspect of the basic structure of the Constitution. Similarly in Secretary, *Ministry of Information and Broadcasting v. Cricket Association of Bengal*,[16] the Supreme Court held that the airwaves was a public property and its distribution among the government media and the private channels should be done on equitable basis. The Court by majority speaking through Justice P. B. Sawant held that freedom of speech included the right to impart and receive information from electronic media. Here

16. (1995) 2 SCC 261.

again the Court based its decision on the right of the viewers to watch the cricket match but really speaking, between various competing media channels, what was at stake was the right to equality. Till 1991, the Electronic media was a government monopoly and therefore the question of a private channel giving information or receiving information from it did not arise.

The right to information cannot be located exclusively in article 19 (1) (a) because it is to be found in several other provisions. For example, every person who is detained is entitled to know the grounds of detention.[17] A government servant is entitled to know why she is being dismissed or removed or reduced in rank and to be given an opportunity to make a representation against the proposed action[18]. This is also right to information. Not giving information may violate the principles of natural justice and could lead to arbitrary action, which violates the right to equality.[19] The right to know how government decisions were taken was necessary for avoiding discrimination and arbitrariness. In a recent case *Essar Oil Ltd. Halar Utkarsha Samiti*[20] the Court has held that the right to information emanated from the right to personal liberty and the procedure was established by law, guaranteed by article 21 of the Constitution.

In fact by holding that the right to information is included only in article 19(1)(a) (freedom of speech and expression), the Court indirectly restricts that right only to citizens since the rights under article 19 are vested only in citizens. I am opposed to such narrow location of that right because I strongly feel that such a right must vest in every human being. If the right to information is to be treated as a human right, it need not be restricted to citizens. If a person is illegally detained or dies in police custody or a woman detenue is molested, can her near relation not seek information about her even if they are not citizens? In view of the fact that the Supreme Court has liberalized the rules of locus standi and any person can now raise questions of legality of the State's action which violates the fundamental rights of persons who are poor and devoid of resources to come to court[21], the right to information must now

17. Art. 22 (1)

18. Art. 311 (2)

19. E.P. Royaappa v Tamil Nadu (1974) 2 SCR 348: AIR 1974 SC 555

20. AIR 2004 SC 1834.

be available to non citizens also. In fact the Constitution gives most of the rights to persons. (Articles 14, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30 and 32). The most important fundamental right, which Dr. Ambedkar had described as the very heart of the Constitution[22], is in article 32 and it is not restricted to citizens. When a woman from Bangladesh was raped by the employees of the Railway she could move the Supreme Court under article 32 and the Court ordered the railway Board to pay her compensation[23]. She could get access to the Court even though she was not a citizen of India. In such a situation could she not seek information as to what safety measures the railway took for preventing such crimes? Article 19 of the Universal Declaration of Human Rights, 1948 gives to "everyone" the right "to seek, receive and impart information and ideas through any media and regardless of frontiers". Article 19 of the International Covenant on Civil and Political Rights of 1966 provides that. "Everyone shall have the right to freedom of expression; the right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers." Such a right is of course subject to restrictions. But what is important is that in both the above international instruments the right to seek information has been given to "everyone". Since the rights under article 19 (1) of the Constitution are conferred only on citizens, it will be desirable to include non citizens in article 19 (1) (a) and in the other articles such as articles 14, 21, 25 and 32 also. The immediate effect of an impression that the right to information is located only in article 19 (1) (a) has led to the unnecessary narrowing of the scope of that right in the legislation enacted by Parliament as well as some state legislatures.

Mass Movement for Right to Information

The judicial decisions discussed above made the right to information a fundamental right. It has been our experience that mere judicial declaration of a right being a fundamental right is not enough to make it a reality. Although the Supreme Court

21. P.U.D.R. Union of India AIR 1982 SC 1473.

22. Constituent Assembly Debates Vol 7, p. 953. See B. Shiva Rao, The Framing of India's Constitution: A Stu

dy vol V p. 311, The Indian Institute of Public Administration, New Delhi, 1968.

23. Chairman, Railway Board v Mrs. Chandrima Das AIR 2000 SC 988: (2000) 2 SCC 465.

declared that the right to primary education was a fundamental right[24], it could not become a reality until it was included as a fundamental right by a constitutional amendment.[25] Similarly the right to information would have merely remained at the doctrinal level. But to make it a reality at the ground level, civil society's vigorous mass movement was needed. It began in Rajasthan by an organization of the people called the Mazdoor Kisan Shakti Sangathana (MKSS). This was an organization of peasants and workers. They held several public hearings, which revealed how fraudulently the affairs of the state were conducted. Wages were given to persons who did not exist. Roads were shown on paper, which were not built. Stones were shown to have been brought for construction of buildings, which in fact were obtained from the fallen buildings. But huge sum was shown to have been spent for the stones. Mass mobilization against corruption and abuse of power took shape for the first time in post-independent India[26]. Till now such mobilization did take place on political issues such as formation of linguistic states or against imposition of Hindi on the Southern states but mass mobilization against oppression and corruption took place for the first time. In India's history, the legislation for the right to information was the first, which came in response to the people's demand. "We the People of India" in whose name the Constitution speaks had remained passive for four decades. It was only in the eighties that the people began asking for legislation, which recognised their power. Up till now laws were often enacted to describe the powers of the state. The Land Acquisition Act described the power of eminent domain. The Indian Penal Code defined offences and prescribed punishments. The Indian Evidence Act described the laws of evidence and the Criminal Procedure Code described how people could be arrested, given bail and procedures for their trial for criminal offences. The Essential Commodities Act described the powers of the state to

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24. Unnikrishnan v. A. P. (1993) 1 SCC 645.

25. Article 21-A inserted by the Constitution (Eighty-sixth Amendment) Act, 2002.

26. See U.N.D.P. Human Development Resource Center, New Delhi, *People's Right to Information Movement: Lessons from Rajasthan (2003); Also see Harsh Mander and Abha Singhal Joshi, The Movement For Right to Information in India: People's Power for the Control of Corruption (Commonwealth Human Rights Initiative hereinafter cited as CHIR 1999.*

control the distribution and supply of essential commodities. The Import and Export Control Act provided permissions and prohibitions against import and export. The laws which specified special privileges of the State such as privilege to withhold documents from courts or the laws which forbade disclosure of information such as the Official Secrets Act, revealed the perpetuation of the colonial state. Administrative law described, when the state was bound to hear the people and what constituted a fair hearing. Judicial review of administrative action was sporadic and interstitial. Administrative discretion seemed impregnable to courts except through the limited window of the *Wednesbury's principle*[27]. The State's actions were presumed to be valid and the contrary was required to be proved. There were few laws that described the powers of the people. Civil society's active involvement in overseeing the governance started in the late Seventies when the public interest litigation emerged. But lobbying for legislation had not yet begun. A few protests such as the one against the law of rape as interpreted by the Supreme Court in *Mathura's* case[28] did take place. . The mass movement for the right to information doubtless broke a new ground in India's social renaissance. This was renaissance not against religious orthodoxy but against the perpetuation of an in transparent and unaccountable governance.

Legislation For Right to Information

Mere declaration of constitutional right was not enough. It needed to be converted into a ground reality through enabling legislation. Although the Court has held that the right to information is a fundamental right, every person cannot every now and then go to the court to have his right enforced. There has to be a specific legislation .The right to information legislation must

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27. Associated Provincial Picture Houses v. Wednesbury Corpn. [1987] 1 All ER 498. See, Sathe, Administrative Law chapter 8, p. 417(7th ed. 2004)

28. This case is popularly called Mathura case because Mathura was the name of the tribal girl who had been raped by two police constables.It is reported as Tukaram v. Maharashtra AIR 1979 SC 185. An open letter to the Chief Justice of India was written by Professors Upendra baxi, Lotika Sarkar, raghunath Kelkar and Vasudha Dhagamwar. (1979) 4 SCC (Journal) p. 17. Many women's organizations lobbied for the reform of penal law of rape and that movement is still continuing. See the most recent disappointing response of the Supreme Court in Sakshi v. India (2004) 5 SCC 518

specify who can obtain information, who is liable to give information, which information can be refused and who will decide whether an information was properly refused. It must also provide punishments against officers who delay or illegally refuse or give false information. The Indian administration, which is often described as Babu (bureaucrat) and neta (politicians) raj has been reluctant to give information. For fifty years the government functioned in the same style as the colonial government. Harsh Mander and Abha Joshi rightly observe that "the overwhelming culture of the bureaucracy remains one of secrecy, distance and mystification, not fundamentally different from colonial times."[29] The Statist model perpetuated by babus and netas treated people as their subjects. Rajasthan movement showed that people were waking up. Civil society was being energized. Such demands were replicated in other states also. The right to information laws were enacted in Tamil Nadu (1997), Goa (1997), Rajasthan (2000), Karnataka (2000), Delhi (2001) and Maharashtra (2000) That Act of Maharashtra was replaced by an Act of 2003 in response to an agitation launched by a respected social worker, Anna Hazare. The Union Parliament also passed the Freedom of Information Act, 2002. The Act has yet not come into force. One important lacuna that remains is the existence of the Official Secrets Act, 1923. This colonial law imposes severe restrictions on right to information. While its provision against espionage is quite justified, there are several others, which are against the tenor of an open society. Since this law is a Central Law, it will override all the state legislations on right to information. In the Central law, it has been said that the Freedom of Information Act, 2002 would override the provisions of the Official Secrets Act in case of a conflict.[30] This is a highly litigation generating provision. Whether there is a conflict will have to be decided, whether such a conflict can be avoided by adopting the rule of harmonious construction will be another question. This may severely impair the right to information. It would have been better if Parliament had repealed the Official Secrets Act and incorporated the provision regarding espionage in the Freedom of Information Act, 2002. Even now Parliament should consider such an amendment. The Freedom of Information Act, 2002 needs radical changes. It still contains many restrictions on the access to

29. See Harsh Mander and Abha Singhal Joshi, opp. Cited p. 8.

30. S.14 Freedom of Information Act, 2002.

information. We hope that the new government led by Dr. Manmohan Singh will review that Act and make suitable changes so as to facilitate the objective of an accountable and participatory government which is one of the items of the Common Minimum Programme of the United Progressive Alliance government.

The right to information is vital to democracy. Ultimately democracy means government of the people, by the people and for the people. People are sovereign and they must therefore be educated. The people of India who are the source of the Constitution must assert their right to have a good Government. Governance means the rule of law, individual liberty and independence of the judiciary. India can be proud of its judiciary, the Election Commission and the National Human Rights Commission, which have evidenced their robust independence. All the three non elected constitutional authorities have acquitted themselves very well as reliable pillars of democracy. These three statutory authorities have empowered the people because their own strength depends upon the support of the people. People support them because they have faith in their independence and integrity. India is admired in the world as the largest democracy. But it must now march from a representative democracy towards a participatory democracy. People must be not mere passive voters exercising their power once in five years. They must continue to assess their rulers on the basis of their performance. The elections of 2004 have given a pleasant surprise that the Indian voters despite 40% illiteracy and poverty have matured as voters and they will not be taken in by false promises. According to a study, in the elections of the Gujarat legislative assembly held in 2000, 18% persons of doubtful character had been successful. In the elections to the legislative assemblies of Delhi, Himachal Pradesh, Madhya Pradesh and Rajasthan held in 2003, only 9 % of such candidates had been successful. Obviously the 2003 elections were held after the EC requisitioned information about past and pending criminal cases and assets from the candidates filing nominations for elections.[31] The right to information will require a continuous public education and also education of the civil servants who work as information officers. The right to information must not acquire adversarial character between the citizen and the State. Both must

31. The Hindu 27, July 2004.

co-operate so as to make democracy more meaningful. Although bureaucrats have often tried to put spokes in the accessibility of information because vested interests have grown in secrecy, various initiatives have come from able civil servants as well as chief ministers. The example of Madhya Pradesh, can certainly be cited as an illustration.[32]

Laws Giving Right to Information: Still Many Imperfections

Most of the legislations on right to information show how apprehensive the babus and netas are of giving such a right to people. Therefore the laws carve out exceptions to the information that is givable. The exceptions, are often expressed in omnibus terms. For example, usually clause (2) of article 19, which permits reasonable restrictions on freedom of speech is replicated verbatim in the Right to Information Legislation. The grounds of restrictions mentioned in clause (2) of article 19 are "sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence" These constitute guidelines for Parliament or the state legislatures and also for the courts, which judge the validity of the laws with reference to them. Will an information officer be able to decide which information could be withheld in the interest of the sovereignty and integrity of India or which information cannot be given in the interest of the security of India? Such an officer is likely to play safe and deny information on any of these grounds. How many persons were killed in encounters? How many of them were really terrorists? How many of them could not be conquered and had to be killed in self defence ? Will these questions be refused on the ground that they pertain to the security of the State? The laws rightly allow refusal of information which pertains to other person's private life. The State has dockets of information about persons through their income tax returns, applications for industrial licenses or passports etc. All such information has to be refused because they pertain to the privacy of a person. But again privacy is not a defence for a public servant in respect of her public functions.[33] The legality of such refusals will have to be carefully scrutinized. The legislations are rather inadequate in that respect. While the Central law

32. Harsh Mander and Abha Joshi opp. Cited.

33. R. Rajgopal v. Ramil Nadu (1994) 6 SCC 632.

provides only for administrative appeals, the Maharashtra legislation provides second appeal to the Lokayukta. In order to avoid a large number of writ petitions to the High Courts against the refusal of information, it will be desirable if such matters are examined by a tribunal presided over by a retired or sitting judge of a High Court. We hope that the refusals will be few. One way to avoid the controversy is to adopt the practice of making information accessible to people from time to time even without having been asked. All matters of policy, administrative practice, decisions regarding the exercise of discretion could be published from time to time. They can be made available on the internet also. But again accessibility to internet is going to be limited for years to come. Internet will have to be an additional channel, not a substitute for normal methods of publication. This will make the administration more transparent and establish a rapport between the people and the State. They must not be pitted against each other as adversaries but must co-operate to make governance more people oriented.

The right to information empowers the people and therefore both the people as well as the bureaucrats/politicians need to be sensitized and educated. There must exist mutual trust and understanding. I am glad that the Yasjwantrao Chavan Institute of Development Administration called YASHDA, a government institute for the training of officers of Maharashtra has taken up an intensive programme for the senitisation and training of officers who will be providing information. I am sure the institutes of other states also must be conducting similar programmes. We have to change the culture of administration. That change is not only from colonial State to welfare state but to a democractic, participatory and accountable State which accords high place to human rights.

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Intellectual Property and Human Rights

S.K.Verma

In 1994, the Agreement establishing the World Trade Organization (WTO) was adopted and as a part of it, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)also came into force. The TRIPS Agreement laid down the uniform standards on the grant and enforcement of intellectual property rights (IPRs). The globalization of IPRs also simultaneously triggered a debate on the relationship between the human rights and intellectual property, because many developing countries, particularly the least-developed countries, are not in a position to implement the TRIPS standards in their jurisdiction without further compromising their develpoment at the cost of human rights.The HIV/AIDS epidemic in Brazil and South Africa and the cases of biopiracy and misappropriation of traditional knowledge, gene patenting and research on stem cells for patenting, and the right to "fair use" of copyrighted material have generated a fundamental debate on the relationship between human rights and intellectual property.

Intellectual property rights are considered to be diametrically opposite to human rights, concerned only with the economic returns without any social perspective. It is because the character of intellectual property rights as human rights is perhaps not fully appreciated so far. Intellectual property regimes are created with a social perspective, seeking to balance the moral and economic rights of creators and inventors in the form of copyrights and patents, with the wider interests and needs of the society. A main justification for copyrights and patents is stated to be that incentives and rewards to inventors and creators result in benefits for the society.[1] A human rights approach to intellectual property takes what is often an implicit balance between the rights of the inventors

1. Audrey R. Chapman, " A Human Rights Perspective on Intellectual Property, Scientific Progress and Access to the Benefits of Science" in WIPO/ United Nations High Commissioner for Human Rights, **Intellectual Property and Human Rights** (WIPO, 1999) 127

and creators, and the interests of the wider society within intellectual paradigms and makes it far more explicit and exacting. While holders of intellectual property, the creators and inventors, must receive an appropriate reward from the society for their efforts (by having exclusivity/monopoly over their creation for a limited period of time), the intellectual property rights should, at the same time, contribute to the scientific,cultural and economic enrichment of society. Intellectual property rights have become contexualized in diverse policy areas, for example, trade, culture and heritage, investment, environment, food security, scientific and technological progress. But despite these growing linkages, the character of intellectual property rights as human rights, as well as the relationship between the right to intellectual property and other human rights have not been fully explored.

Intellectual property rights are statutory rights and territorial in operation. They are monopolistic in nature, but limited in time. After the end of the statutory period, they come into the public domain and are accessible by all. At the international level, they are regulated through treaties and agreements, which lay down the substantive standards and procedures for enforcement of these rights. The principal intellectual property rights are in the nature of patent, trademark, industrial design and copyright. Patents are granted for inventions, comprising technological innovations, which are considered to bring social benefits to society by stimulating and sustaining economic growth of the society.[2] The patent question is ultimately one of social welfare. The patent system imposes certain costs and provides certain benefits to society. Ideally, the system should be designed to maximise net benefits to society. Most outstanding questions concern the relative magnitudes of the social costs and benefits associated with any patent system. In case of copyright, to encourage the production of creative works, society must secure the economic rights of their creators. Copyrights, like patents, establish a form of monopoly control that solves the problem of appropriability and thereby establishes economic incentives to create and make public artistic works. Society stands to gain from copyrighted works only if the

2. It is generally being argued that society benefits greatly from technological innovation and should therefore encourage it. See, Robert P. Benko, **Protecting Intellectual Property Rights: Issues and Controversies,** (1987, American Enterprise Institute for Public Policy Research, Washington, D.C.), 22.

ideas and information they embody are widely disseminated (copyright exists in expression and not in ideas), rather than restricting those ideas. Anglo-American copyright law explicitly reaffirms the fundamental social interest in the spread of ideas and information embodied in copyrighted works by providing for "fair use" , which permits limited production of copyrighted works without the author's permission for purposes of criticism, scholarship, teaching, and news reporting.[3]

Human rights include cultural heritage, traditional knowledge, the right to health, science and technology, access to knowledge in works of literature and art, and non-discrimination, where it has interface with intellectual property. Pervasiveness of intellectual property requires solid exploration of the linkages between intellectual property and development. Intellectual property system should serve as an engine for the economic, social and cultural progress of the world's diverse populations. There is a growing recognition of the central role of human rights in promoting peace and security, economic prosperity and social equity. There are more than 100 human rights instruments which give expressions to these goals. On the other hand, the intellectual property rights, which are private rights, are regulated through a set of international treaties. The principal treaties are the Paris Convention for the Protection of Industrial Property, 1883 and the Berne Convention for the Protection of Literary and Artistic Works, 1886 which are governed by the World Intellectual Property Organization (WIPO) and the Agreement on Trade-Related Intellectual Property Rights (TRIPS), 1994. The human rights treaties are universal in their reach and all the members to intellectual property treaties are members of the principal treaties on human rights. They are under legal obligations to respect human rights under the UN Charter and under general international law, and some human rights not only constitute individual rights but also, in the case of universally recognized human rights, *erga omnes* obligations of governments.[4] Human rights are held to comprise

3. Art. 52(1) of the [Indian]Copyright Act, 1957 as amended, provides the instances of "fair dealing".

4. See, the Barcelona Traction judgement, (1970) ICJ Reports 32; the judgement in the Nicaragua case, (1986) ICJ Reports 114. See also, Ernst-Ulrich Petersmann, " Human Rights and the Law of the World Trade Organization", Journal of World Trade 37(2): 241-281 (2003), at 245.

important norms that create *prima facie* obligations, particularly on the part of governments, to take positive measures to protect and uphold these rights.[5] The Preamble to the Convention establishing the World Intellectual Property Organization (WIPO) provides that the mandate of WIPO is " to encourage creativity, to promote the protection of intellectual property throughout the world", including all sections of human society.

Considering the importance of exploring these linkages, the WIPO, in collaboration with the Office of the United Nations High Commissioner for Human Rights held a panel discussion on Intellectual Property and Human Rights in November 1998.[6] Following this and spurred by WIPO's initiative, in August 2000, the Sub-Commission on the Promotion and Protection of Human Rights of the UN Commission on Human Rights adopted a resolution, requesting the United Nations High Commissioner to undertake an analysis of the human rights impacts of World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The Commission also requested the Secretary-General to submit a report on that question to the Sub-Commission at its next session.[7] In August 2001, in its 53rd session, the Sub-Commission considered two reports, one from the High Commissioner for Human Rights[8] and another from the Secretary-General [9], on the relationship between intellectual property rights and human rights in general ,and the impact of TRIPS on human rights in particular. The deliberations of the Commission resulted in the adoption of the resolution on ' Intellectual property and human rights'.[10] The resolution noted that actual or potential

5. J.W. Nickel, **Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights** (1987, University of Calif. Press, Berkeley & Los Angeles), p. 3, cited in Chapman, *op. cit.* at p. 132.
6. For papers presented at the panel discussion, see WIPO/UNHCHR, **Intellectual Property and Human Rights** *op.cit.* 1.
7. UN Commission on Human Rights - Sub-Commission on the Promotion and Protection of Human Rights, Intellectual Propety and Human Rights, Res. 2000/21, Doc. E/CN.4/SUB.2/RES/2000/7, 18 August 2000.
8. " The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights"Report of the High Commissioner, Doc. E/CN.4/Sub.2/2001/13, 27 June, 2001.
9. " Intellectual Property Rights and Human Rights", Report of the Secretary-General, Doc. E/CN.4/Sub.2/2001/12.
10. United Nations High Commissioner for Human Rights, Sub-Commission on Human Rights resolution 2001/21, " Intellectual Property and human rights", Doc. E/CN.4/Sub.2/Res/2001/21, available at http://www.unhchr.ch/huridoca.nsf.

conflict exists between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights, in particular the rights to self-determination, food, housing, work health and education, and in relation to transfer of technology to developing countries. Among others, it stressed the need for adequate protection of traditional knowledge and cultural values of indigenous peoples and, in particular, for adequate protection against " bio-piracy" and the reduction of indigenous communities' control over their own genetic and natural resources and cultural values. It also examined the implications of IPRs on the right to health looking specifically on access to medication in the context of pandemics such as HIV/AIDS. It requested the High Commissioner:

- to seek observer status with the World Trade Organization WTO) for the ongoing review of the TRIPS Agreement;
- to consider the need for an examination and, if necessary, to conduct such investigation, into whether the patent, as a legal instrument, is compatible with the promotion and protection of human rights and corresponding State obligations (particularly related to public health issues);
- to undertake an analysis of the impact of the TRIPS Agreement on the rights of indigenous peoples.

The resolution requested the WTO members States to take fully into account their obligations under international human rights instruments in the formulation of proposals for the ongoing review of the TRIPS Agreement.[11] The resolution passed by the Commission does not state that IPRs per se conflict with human rights. But it highlighted few important areas of special concern, which have great bearings on human rights. The UN Committee on Economic, social and Cultural Rights, in the meantime, also held a day of general discussion the subject in November, 2000.[12]

11. TRIPS Agreement contains provisions on standards concerning the availability, scope and use of IPRs, the enforcement of IPRs, the acquisition and maintenance of IPRs and related procedures, dispute prevention and settlement, and transitional and institutional arrangements. The Agreement has been subject to three overlapping review processes that were due to commence in 1999 and 2000: a built-in review of Article 27.3(b), relating to plant variety protection, due to take place in 1999; an overall review of the Agreement in 2000 under Article 71.1; and, a next round of multilateral trade negotiations. The Doha Ministerial Declaration 2001 embarked on this review process. See http://www.wto.org ,reproduced in 41 ILM 7 (2002).

12. For the discussion paper prepared by Dr. Audrey Chapman and background documents submitted by Specialized Agencies of the UN Programmes and individual experts, see Documents, E/C.12/2000/12, 13-19.

This paper will examine the universal recognition of human rights in international treaty law and in general intrenational law, which are relevant in the interpretation and application of intellectual property law and practice. It will then discuss the the impact of intellectual property regime on the right to health and the rights of indigenous peoples, the two most debatable areas which have attracted considerable attention in recent years.

Conceptualizing Intellectual Property under Human Rights

The recognition and protection of intellectual property is premised on the twin objectives of recognizing the rights of the creators, including inventors, over their creations by rewarding them with monopoly rights for a limited statutory period and helping in the development and growth of the society from these creations. Just as human rights law recognizes the need for protecting and mutually balancing human rights through non-discriminatory democratic legislation, intellectual property law emphasises on the balancing of rights of the creators of intellectual property and the society at large. The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the major human rights instrument addressing these objectives. There are other important international human rights instruments also, which recognize these goals and in fact complement intellectual property law. Article 27 of the Universal Declaration of Human Rights (UDHR) is the basis, which recognizes a series of claims or rights of individuals. It provides:

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

All these rights, covered under Article 27, including those related to science and culture, are considered to be universal, vested in each person by virtue of their common humanity. The human rights articulated in the UDHR are also held to exist independently of recognition or implementation in the customs or legal systems of particular countries.

Para. 1 of Article 27 emphasises on the sharing in scientific

advancement and its benefits. Para 2 on "the protection of moral and material interests" reflects a variety of interests, and broadly speaking covers intellectual property. Article 27 has to be read with Article 22 to get a fair view of the coverage of these rights. It states:

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and recourses of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.[13] (emphasis added).

Article 22 is not limited, as opposed to mere property rights protection, to the economic rights of authors and their works, but also covers their moral rights. In another view, intellectual property is considered to be covered as a part of property rights (Art. 17 of the UDHR). Article 17.1 of the UDHR declares that "Everyone has the right to own property alone as well as in association with others". Article 17.2 finds a commitment that " No one shall be arbitrarily deprived of his property." In the same vain, Article 28 of the UDHR states:

> Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

The UN Declaration on the Right to Development, 1986 states:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.[14]

This clearly requires the use of IPRs for personal as well as societal development, which puts an obligation on all States to foresee intellectual property protection at a level that fits into this dual purpose. In the context of intellectual property rights, Article 19 of the International Covenant on Civil and Political Rights (ICCPR) prescribes that:

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13. On the relationship between Articles 22 and 27, see " The International Bill of Human Rights", UN Fact sheet No. 2, p.7.

14. General Assembly Res. 41/128 (1986), Art. 1.1

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or, through any other media of his choice.

Nevertheless, the most significant provision, recognizing the human rights character of intellectual property is Article 15 of the ICESCR. It elaborates para. 2 of Article 27 by specifying that States Parties " recognize the right of everyone" both to " enjoy the benefits of scientific progress and its applications" (Art. 15(1)(b)) and " to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." (Art. 15(1)(c)). Thus, it recognizes the protection of the moral and material interests not only regarding the literary, scientific or artistic works of authors but also regarding inventions made by inventors. As opposed to authors and inventors, other rightholders of intellectual property, such as performing artists, are not covered by comparable, specific human rights provisions.[15] Much like the Universal Declaration, paragraph (1) of Article 15 recognizes the following rights of everyone:

(a) *To take part in cultural life;*

(b) To enjoy the benefits of scientific progress and its application;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of work of which he is the author.

To achieve these goals, the Covenant mandates States Parties to undertake a series of steps which are outined in paragraphs 2-4 of the Article:

(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

(3) The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

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15. Silke von Lewinski, " Intellectual Property, Nationality, and Non-discrimination", WIPO/UNHCHR, **Intellectual Property and Human Rights** (WIPO, 1999) 175, at 176.

(4) The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.

Though Article 27's provision on intellectual property was carried over into the ICESCR, the right to property was not.

The rights to intellectual property guaranteed under the two Covenants are further strengthened by the right to non-discrimination. Article 2 of both Covenants requires States parties to ensure that the rights prescribed apply to all individuals within their territory and subject to their jurisdiction and to ensure that these rights are exercised without discrimination of any kind. This guarantee applies to aliens and citizens alike, and encompasses the protection of intellectual property rights (IPRs). More specifically, differences in treatment between aliens and nationals or between different categories of aliens can only be limited according to law and must be consistent with other rights stipulated in the Covenants.[16]

The human rights articulated in these instruments are also held to exist independently of recognition or implementation in the customs or legal systems of particular countries. They are also part of customary international law or general principles of international law. But that covers only a certain minimum number of human rights, as for example, equality before law, prohibition of torture, genocide and slavery, which comprise civil and political rights. On the other hand, human rights to property or of protection of moral and material interests in the author's work, which are part of economic, social and cultural rights, are not covered. It is to be noted that whereas the right against torture, slavery or genocide and equality before law are considered to be basic rights for which a negative duty is imposed on the State, the intellectual property rights of the authors or inventors are not. The intellectual property rights' thrust of these human rights provisions is otherwise also debatable for their blindness.

16. Right to non-discrimination and equality before the law, fundamental to all human rights treaties, is akin to national treatment under intellectual property laws' treaties. But the national treatment is limited to convention countries or based on reciprocity between the parties.

The UDHR, though adopted as a Declaration of the General Assembly on December 10, 1948, overtime attained the status of customary international law and considered to be most authoritative source of human rights. Some of its provisions dealing with civil and political rights have gained more recognition than the provisions dealing with economic, social and cultural rights. But the legal nature of the Declaration remains controversial. Non-discrimination in respect of authors' rights (talked in Art. 27.2) so far has not been understood to constitute binding international law. On the other hand, the ICESCR is in the nature of a treaty and as such is legally binding on those nations that are parties to it. It articulates a series of responsibilities for States Parties, by using the format of "steps to be taken". However, in that context, the legal nature of ICESCR is also not very clear when in Article 2.1, it obliges the parties merely " to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means...."[17] However, to date, it is generally recognized that the two covenants, the ICCPR and ICESCR, contain binding legal obligations on the parties to implement the rights mentioned therein. Problems are discussed not in respect of their validity but rather of their applicability.[18]

Article 15 of the ICESCR, the main provision in this set of human rights instruments, is perhaps the most neglected provision and so far no concrete efforts have been made to delineate the scope and definition of the rights articulated therein. Without the conceptualization of the norms and method to effect them, these rights have not been considered as human rights so far. Added to these limitations, the literature conceptualizing the scope of Article 15 and related State Party obligation thereto has remained sparser than most of the other rights defined in the ICESCR. Protection under Article 15 of the ICESCR is limited to natural persons, who are authors of works or inventors and accordingly, does not cover any owners of neighbouring rights, such as performing artists, phonogram producers, film producers, broadcasting organizations and the like. The language of Article 15.1 (c) imposes an obligation

17. *Ibid.*, at p. 193.

18. See Lewenski, op. cit. It is being stated that whereas civil and political rights impose negative duties on the States , the economic, social and cultural rights impose positive duties on States requiring active intervention by the State.

on States Parties to protect the moral and material interests of authors and inventors. However, it accords a wide latitude regarding the manner in which a particular government confers intellectual property protection. In fact the reading of the provision makes it clear that a human rights framework imposes conditions on the recognition of IPRs. To be consistent with human rights norms, the subject matter considered to be appropriate for copyright and patent protection and the paradigm to be adopted have to meet the following considerations:

- Intellectual property rights must be consistent with the understanding of human dignity in the various international human rights instruments and the norms defined therein;
- Intellectual property rights related to science must promote scientific progress and access to its benefits;
- Intellectual property regimes must respect the freedom indispensable for scientific research and creative activity;
- Intellectual property regimes must encourage the devlopment of international contacts and cooperation in the scientific and cultural fields.[19]

Paras 2,3 and 4 of Article 15 impose three sets of obligations on States Parties: to undertake the steps necesary for the conservation, development and diffusion of science and culture; to respect the freedom indispensable for scientific research and creative activity; and to recognize the benefits to be derived from encouragement and development of international contacts and cooperation in the scientific and cultural fields. These together will require a more strategic approach from the governments about investments in science and technology which can include respect for the freedom indispensable for scientific research and creative activity by adhering to basic human rights norms recognized in the UDHR and the ICCPR.

Article 15.4 has to be read in conjunction with other obligations enumerated in the ICESCR, particularly, Article 2, which directs each State Party to undertake " steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources,

19. Chapman, op. cit. at p. 138.

with a view to achieving progressively the full realization of the rights recognized."[20] The most appropriate means to fulfil these goals has been a matter of considerable controversy and conflict between countries in the North and the South, particularly with regard to the role of intellectual property regimes. Whereas developed countries maintain that strong IP regime promotes economic growth and development, developing countries believe that it is not in their economic interest to implement stronger patent laws at their present development stage and accuse developed countries for seeking to impose " technological colonialism" through strong IP regime.[21]

A human rights approach establishes a requirement for the State to undertake a very rigorous and desegregated analysis of the likely impact of specific innovations, as well as an evaluation of proposed changes in intellectual property paradigms, and to utilize these data to assure non-discrimination in the end result and to see the fruits of these innovations reach to all sections of the society. While making choices and decisions, it calls for particular sensibility to the effect on those groups whose welfare tends to be absent from the ambit of decision-making about intellectual property: the poor, the disadvantaged, ethnic and indigenous communities, women and other marginal sections of society. Intellectual property regime, as defined in TRIPS Agreement has created an intellectual feudalism and kept these section out of its perview., except for exploitation. The human rights principle of self-determination enumerated in Article 1 of the ICESCR and ICCPR emphasize the right of all members of society to participate in a meaningful manner in deciding on their goverance and common future. Broadly speaking, this translates into a right to societal decision-making on setting priorities for major decisions on intellectual property, but in practice, it is not easy to follow. The governments must, nevertheless, find ways to reflect and safeguard the interests of all sections while implementing the intellectual property standards. The TRIPS Agreement leaves some

20. Art. 5, Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind, General Assembly Res. 3384 (XXX), Nov. 1975

21. A.E. Carroll, " Biotechnology and the Global Impact of U.S. Patent Law: Not Always the Best Medicine", The American University Law Review (1995) 2464-2466.

leeway for members to safeguard public interest while formulating laws on intellectual property.[22]

Right to Health and Intellectual Property Rights

As stated above, the important yardstick for the balance sought between, on the one hand, the interests of the authors and inventors and, on the other, certain societal objectives, has to be found in the IPR system itself. In the case of healthcare, they are stated to be in conflict. It is normally stated that inventions, the basis of patents in pharmaceuticals, serve the purpose of promoting progress and development of the society. But it is also a well-established fact that drugs and pharmaceuticals under patents are priced high, making them thereby out of the reach of poor people. There is also less R&D on developing countries' specific diseases because of small expected return on these drugs to big pharmaceutical firms, leading thereby to no cure for their diseases. Both these situations affect the right to health of peoples of poor countries. The national legislation on IPRs, therefore, must address these aspects in their IPR laws, by balancing the rights of the patent-holder and societal interests.

The United Nations human rights law and practice emphasize that human rights need to be protected and mutually balanced through legislation, administrative and judicial protection. For example, the General Comment No. 14 (2000) by the UN Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health states that "the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health". The obligations to protect and fulfil this human right should be implemented " preferably by way of legislative implementation, and ... a national policy with a detailed plan for realizing the right to health".[23] It further recognizes that " any person or group victim of a violation of the right to health should have access to effective judicial or appropriate remedies at both national and international

22. See Art. 7 (Objectives) and Art. 8(Principles).

23. See General Comment No. 14, paras 9, 36, in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev. 5 of 26 April 2001, at 90.

levels."[24] " Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necesary aid when required".[25] Since patents are very relevant in the field of drugs and pharmaceutical products, the IP regime becomes relevant in connection with the access to medicines and thereby in the protection and fulfilment of the human right to health.[26] The right to health is now explicitly mentioned and recognized by numerous international conventions. It attributes to all men and women a right to the highest attainable standards of physical and mental health, without discrimination of any kind. Article 25 of the UDHR states:

Everyone has the right to a standard of living adequate for ... health and well-being of himself and his family, including food, clothing, medical care and the right to security in the event of ... sickness, disability.... Motherhood and childhood are entitled to special care and assistance....

The ICESCR in Articles 7, 11 and 12 incorporates this right by stating:

> The States Parties ... recognize the right of everyone to ... just and favourable conditions of work which ensure ... safe and healthy working conditions ...
>
> ... the right to ... an adequate standard of living ... the enjoyment of the highest attainable standard of physical and mental health.
>
> The steps to be taken ... to achieve the full realization of this right shall include those necesary for:
>
> (a) ... the reduction of ... infant mortality and for the healthy development of the child;
>
> (b) the improvement of all aspects of environmental and industrial hygiene;
>
> (c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases;

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24. *Id*, para 59.

25. *Id*, para 39.

26. For a comprehensive survey of health-related WTO provisions and the Doha Declaration on the TRIPS Agreement and PublicHealth, see the joint study by the WHO and WHO secretariat on **WTO Agreements and Public Health** (2002).

(d) the creation of conditions which would assure to all, medical service and medical attention in the event of sickness.

The other important human rights treaties also have provisions with regard to health.[27] These human rights obligations may be of relevance in the interpretation of the intellectual property treaties particularly the TRIPS on the right to health.

In its General Comment No. 14 (2000), the UN Committee on Economic, Social and Cultural Rights emphasised that the human right to health is recognized in numerous world-wide, regional and national human rights instruments and "includes certain components which are legally enforceable".[28] The " right to health is closely related to and dependent upon the realization of other human rights ..., including the rights to food, housing, work, education, human dignity, life, non-dscrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health."[29] The Comment further recognizes that " any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels.[30] " Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required."[31] As the essential medicines and health services are tradable, TRIPS/WTO rules on access to medicines and health services may be of direct relevance for the protection and fulfilment of the human right to health.[32]

27. See Articles 10, 12 and 14 of the Convention on the Elimination of All Forms of Discrimination Against Women; Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination; and Article 24 of the Convention on the Rights of the Child.

28. *Op.* cit., para 1

29. *Id.*, para 3. On national and international jurisprudence relating to right to health, see B.C.A. Toebes, **The Right to Health as a Human Right in International Law** (1999).

30. *Id.*, para. 59.

31. *Id.*, para. 39.

32. For a comprehensive survey and discussion of health-related WTO provisions, see the joint study by the WHO and WTO on WTO Agreements and Public Health (2002).

The right to health is interpreted as " an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health." The right to health thus depends upon the availability, acceptability, quality and non-discriminatory, physical as well as economic accessibility of health goods and health services., which are tradable and subject to legal regulation and liberalization of WTO/TRIPS law. General Comment No. 14 confirms this potentially transnational legal effect of the human right to health: " States parties have to respect the enjoyment of the right to health in other countries"; depending on the availability of resources, " States should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide necessary aid when required."[33]

While Article 2 of the ICESCR provides for the progressive realization and acknowledges the constraints due to limits of available resources, General Comment No. 14 recalls that the Covenant,

> " ... imposes on States Parties various obligations which are of immediate effect. States Parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (Art. 2.2) and the obligation to take steps (Art. 2.1) towards the full realization of Article 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health."[34]

As regards governmental limitations on human rights (Arts. 4 & 5 of the ICESCR), such limitations should be of limited duration and subject to review in case they are imposed to protect the public health. " States Parties should refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment. Restrictions on such goods should never be used as an instrument of political and economic pressure."[35]

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33. Op. Cit. , para. 39, 34. Id.,para. 30, 35. Id., paras. 29, 41.

The expanding subject matters and " universalization" of both human rights and intellectual property law have prompted negotiations in various UN bodies, and also in the WTO, on the clarification of the complex relationships between the TRIPS Agreement and human rights. The advantages of IP as reward and incentive for research and development (e.g. of new pharmaceuticals) are no longer contested. The proper balancing between the social objectives of the TRIPS Agreement as evident from Articles 7 & 8 of the Agreement,[36] and its " regulatory exceptions" (in Article 6,[37] Article 31 for compulsory licensing, Article 40 concerning abuses of IPRs), and the appropriate scope of IP protection raise numerous issues. It is a generally held view that the result of implementing TRIPS will be to curtail the supply of generic copies of patented drugs, as full implementation of TRIPS by developing countries by January 2005 will require switching over to product patents rather than to process patents, as is being done so far in India. It will lead to sharp increases in prices of drugs, thereby making them inaccessible to a large population of these counties.[38]

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36. Art. 7 of the TRIPS provides: "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations." Art. 8 reads: " Members may, in formulating or amending their national laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement."

37. Cf. Art 6 of TRIPS relates to exhaustion of IP rights and provides: "For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 above nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights." It thus leaves open the issue of parallel imports.

38. The estimated increase in prices has been stated to be between 12% to 200%, even the lower estimates imply very substantive costs for consumers. See, J. Watal, " Pharmaceutical Patents, Prices and Welfare Losses: A Simulation Study of Policy Options for India under the WTO TRIPS Agreement", 23 The World Economy 733-752 (5:2000); C. Fink, How Stronger Patent Protection in India Might Affect the Behaviour of Transnational Pharmaceutical Industries, World Bank Policy Research Paper No. 2352, World Bank, Washington DC.

There seems to be broad agreement as the TRIPS provisions are sufficiently flexible to permit the necessary health protection measures so as to ensure access to affordable medicines to treat HIV/AIDS and other pandemics as Malaria, Tuberculosis etc. In the WTO Doha Ministerial Declaration on " The TRIPS Agreement and Public Health of November 14, 2001[39], all WTO members "affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all", and it reafirms the WTO members' right "to use, to the full, the provisions in the TRIPS Agreement, which provides flexibility for this purpose". Each member has been empowered to decide what constitute national emergency or other circumstances of extreme urgency related to public health crises. For this purpose, members can grant compulsory licenses and the grounds on which such licenses are to be granted (Art. 31 of the TRIPS) as well as to determine its own regime of exhaustion of IPRs and may thereby decide to allow parallel imports. (Art. 6, TRIPS).[40] It also reaffirmed the commitment of developed countries to provide incentives to their enterprises to promote technology transfer to least-developed countries(LDCs).[41] But looking into the problem of insufficiency of compulsory licenses[42] to meet the health crisis in developing countries, Para. 6 of the Declaration reads :

We recognize that WTO members with insuficient or no

39. See WTO Doc. WTO/MIN(01)/DEC/2, 20 Nov. 2001, para 4.

40. *Id.*, para. 5.

41. The least-developed countries have been granted the extension of transition period under Art. 66.1 until January 2016. Earlier it was upto January 2010. See para. 7 of the Doha Declaration.

42. Compulsory licenceses have rarely been used by developing countries for number of reasons: (i) they require an administrative and legal infrastructure that is absent in many developing countries; (ii) developing countries fear that sanctions might be threatened against them; (iii) compulsory licensing, under the TRIPS scheme has to be predominantly for the domestic market, thus curtailing its attractiveness for a large market; (iv) they are non-exclusive and for limited duration, they tend to be less attractive for the holder of compulsory license. Moreover, for the exploitation of the patent, the licensee may need the know-how of the patentee to manufacture the drug, which further make them unattractive. If these issues are not addressed, compulsory license will remain only a paper-tiger, though aimed at preventing abuses of the IP system.

manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and report to the General Council before the end of 2002.

Thus the Doha Declaration recognizes the problem of access to healthcare by people from developing countries. Similar technological, financial and trade problems may exist in case of exports of healthcare technologies, lack of know-how or trade secrets necessary for manufacturing medicines or other medical devices; or if a compulsory license for the production of an expensive drug for one single market would not justify the production costs without authorization of exports to third markets. While countries may authorize, pursuant to Article 31 of the TRIPS Agreement ,[43] the issuance of non-voluntary and non-exclusive uses of inventions, para. (f) of Article 31 stipulates that "any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use," subject to certain exceptions.[44] However, to make the compulsory licenses workable, developing countries need to establish workable laws and procedures to give efect to compulsory licensing, and provide appropriate provisions for government use. Article 30 of the TRIPS Agreement is also helpful in this connection, which authorizes the members to provide limited exceptions to exclusive rights conferred on the patentee under a patent, " provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner...."[45] This provision can be used to produce and export patented drug to another member to meet the

43. Article 31 deals with the conditions in case of grant of compulsory licenses: " Other use without Authorization of the Right Holder".

44. Article 31 (k) provides: "Members are not obliged to [this condition] ... where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive."

45. The use of this provision by Canada to speed up the introduction of generic drugs in Canada has already become controversial on the EU's complaint against Canada before the WTO dispute settlement body. See Panel Report in WT/DS114/R, *Canada-Patent Protection of Pharmaceutical Products*, adopted on 7 April 2000. the use of this provision in public health crisis is a matter of interpretation.

public health needs if a compulsory license has been issued in the importing country.[46]

In an attempt to give effect to Paragraph 6 of the Doha declaration on Public Health, which mandated the TRIPS Council to find an *expeditious* solution to this problem, the General Council of the WTO, on 30 August 2003, approved a decision to make it easier for countries in need to import cheaper generic medicines made under compulsory licensing if they are unable to manufacture the medicines themselves. The Decision to implement para. 6 is based on the TRIPS compulsory license regime (Art. 31) instead of exemptions to the exclusive rights (Art. 30). It sets out the conditions under which obligations of the exporting country can be waived (para 2 of the Decision), including the notification by the eligible importing country describing names and expected quantity of products; and should have insufficient or no manufacturing capacities of its own. Separate labelling, marking etc.are to be adhered by the exporting country for drugs so exported under the compulsory license, which should be given wide publicity so as to avoid any misuse of the drugs. According to the Decision, issuance of the compulsory license is required in the exporting country for exporting drugs to an eligible importing country. As the Decision is confined to patented drugs, issuance of compulsory license in the importing country is a precondition for waiving Article 31(f) and (h) (on the payment of adequate remuneration)obligations of the exporting country if the drug is patented in the importing country. A compulsory license would be required even if the drug is not patented in the importing country. The importing country has been exempted from the requirement of Article 31(h) of the TRIPS. It has been argued that the Decision is limited to certain epidemics only - HIV/AIDS, malaria and tuberculosis, but by the inclusion of "other epidemics" in para 1 of the Decision makes it wider in scope and Decision will come handy in all public health emergencies.

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46. The European Parliament has adopted an Amendment to the European Directive on 23 October 2002, which provides, "*Manufacturing shall be allowed if the medicinal product is intended for export to a third country that has issued a compulsory license for that product, or where a patent is not in force and if there is a request to that effect of the competent public health authorities of that third country.*" Art. 10(4), sub-para 1a (new), Directive 2001/83/EC.

Apart from compulsory licenses, which can be granted in national emergencies,the countries need to adopt a range of policies to improve access to medicines. Some of them may be taken within the existing IP system as is clear from the objectives (Art. 7) and principles (Art. 8) of the TRIPS. As there is considerable evidence that consumption of medicines is sensitive to price and most of the people are denied healthcare because of high prices,[47] developing countries may maintain price control of drugs in order to make them accessible to their populations, a measure which is resorted to even by some of the developed jurisdictions, such as Portugal, Spain and Japan.[48] This will also not affect the R & D in pharmaceutical sector for lack of incentives for diseases specific to these countries, but due to high prices demanded on patented drugs. The problem can be addressed even through resorting to differential pricing. The global drug companies, in this way may maximise their profits on products sold in both low and high income markets, while at the same time make these drugs accessible to poor people. To make this system effective, a number of measures may be required by the governments so that the cheap drugs, originating from the same source do not enter into high-priced areas. This can also be done through the introduction of "national exhaustion" principle by developed countries, stopping thereby the parallel imports of those drugs coming from developing countries, where that product is being sold at a lower price.[49] In this connection, it may however be mentioned that public health strongly depend on cost-intensive research, which will only take place if it is economically viable. Hence, for economic viability, IPRs are important, which provide the needed incentive for research. In the absence of IPRs, the R & D to develop a new treatment will only depend upon the public funding, whose availability in developing countries is not always guaranteed.

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47. Oxfam, "Generic Competition, Price and Access to Medicines" Oxfam Briefing Paper No. 26, Oxfam, Oxford (2002). See, http://www.oxfam.org.uk/policy/paper/26generic.html

48. See S.K. Verma, "TRIPS - Development and Transfer of Technology," 27 International Review of Industrial Property and Copyright Law 331 (1996) at p . 352.

49. See Report of the Commission on Intellectual Property Rights, **Integrating Intellectual Property Rights and Development Policy** (2002, London) 41.

Traditional Knowledge and Intellectual Property Rights

Since the adoption of the TRIPS Agreement, which has made inventions on life-forms (biotechnological invention) patenable, a number of cases of misappropriation (biopiracy) of traditional knowledge (TK) has brought the issue of protection of traditional knowledge on the agenda of international[50] debate and number of efforts are underway to protect TK. In most of these cases, the knowledge of traditional/local communities has been used without their consent and without rewarding them for this knowledge.[51] In certain cases related to folklore, it has been used in a culturally offensive manner. Partly as a result of these well-known cases, many developing countries, which are rich in traditional knowledge and genetic resources are pressing for the protection of TK and benefit sharing if is used in an invention that has led to its commercialization. As a result of pressure from developing countries, the WIPO General Assembly in 2000 created an Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).[52] Protection of TK and folklore is also being discussed within the framework of the Convention on Biological Diversity (CBD) and in other international organizations such as WTO/TRIPS, UNCTAD, WHO, FAO and UNESCO. Besides it is on the Agenda of the United Nations Human Rights Commission and UN Permanent Forum on Indigenous Issues. The WTO Doha Ministerial Declaration

50. Art. 27.1 of the TRIPs provides: "... patents shall be available for any inventions, whether products or processes, in all fields of technology, provided they are new, involve an inventive step and are capable of industrial application."

51. There is a large array of reported case of misappropriation of TK and genetic resources and patents have been granted, such as Neem, Turmeric, Basmati rice, Hoodia Cactus, African Potato, Ayahuasca, May Apple, Australian Smokebush, Periwinkle. For details, see Michael Blakeney, " The Protection of Traditional Knowledge Under Intellectual Property Law" [2000] EIPR 251, at p 253 et seq; Bernard O'Connor, "Protecting Traditional Knowledge: An Overview of a Developing Area of Intellectual Property Law", 6 JWIP 677, at p 680 et seq (5: 2003); Dr. Gerard Bodekar, " Traditional Medical Knowledge, Intellectual Property Rights & Benefit Sharing", 11 Cordozo J. Int'l & Comp. Law 785 (2003) at p 795 et seq; Muriel Lightbourne, "Of Rice and Men: An Attempt to Assess the Basmati Affair", 6 JWIP 875 (6: 2003); Ajeet Mathur, Who Owns Traditional Knowledge, Working Paper No. 96, Indian Council for Research on International Economic Relations (ICRIER), Jan. 2003, p 12 et seq.

52. WIPO Doc. WO/GA/26/6, August 25, 2000.

highlighted the need for further work on protecting TK by mandating the TRIPS Council that:

In pursuing its work programme including under the review of Article 27.3(b),[53] the review of the implementation of the TRIPS Agreement under Article 71.1 ... to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension."[54]

Protection of TK is necessary to ward-off cases of misappropriation and biopiracy. It is also considered important on the principals of equity and fairness as indigenous/local peoples have conserved, preserved their knowledge, innovations and practices. While being the true holders of this knowledge, they continue to remain poor. Whereas the multinational companies, by using their knowledge and getting IPRs over them get enormous monetary returns without acknowledging or sharing these benefits with these communities. Hence, they must be given fair share out of the commercial use of TK. It is generally viewed with disdain and inferior as it does not conform to accepted scientific methods of learning in the modern reductionist approach of science, with the result that the younger members of these communities are no more interested in carrying forward their knowledge. This has raised concerns about the loss of TK in due course of time and with that it is also feared that the sustainable development of environment will also be threatened as the TK is very vital in the sustainability and conservation of the biodiversity.[55] This will also

53. Art. 27.3(b) mandates the members to "provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. This provision shall be reviewed four years after the entry into force of this Agreement".

54. Para 19 of the Doha Declaration, WTO Doc. WT/MIN(01)/Dec/1, 14 November 2001.

55. Writing on biodiversity, Gray observes that: "the world biodiversity crisis is matched by a 'world cultural diversity' crisis. Indigenous peoples live predominantly in areas of high biodiversity while at the same time comprise 95 percent of the cultural diversity in the world" See A. Gray, **Between the Spice of Life and the Melting Pot: Biodiversity Conservation and its Impact on Indigenous Peoples**, IWGIA Document 70 (1991, Copenhagen).

threaten the food security of the world because the indigenous/ local communities through their traditional practices are preserving the land races by a process of selection and conservation. There is also need to enable these communities to harness TK for their economic upliftment and growth. Consequently demand for an effective protection of TK has gained momentum, either through the application of the traditional IPR system or by means of a new *sui generis* system such as traditional community rights or community intellectual property rights.[56] Thus the protection of TK is considered important on rules of equity, protection against piracy conservation concerns against its extinction, promotion of its use and importance to development.

So far discussions at the international bodies are centred around numerous legal, economic, policy and scientific issues in the TK protection under the intellectual property regime. Since the TK is deeply embedded in traditions and it is conserved and evolve with the land and habitat in which a particular community, holding the traditional knowledge, lives. The protection of TK through intellectual property rights may not be the holistic approach in its protection. It can only look into the commercial aspect of its protection. Moreover, each community has its special needs, which should be adequately addressed in order to conserve and respect the traditional practices. In fact, a multiplicity of efforts at national and international level would be required to protect TK. As the existing IP regime is found to be inadequate to protect the holistic character of TK, a predominant view is emerging towards devising an international *sui generis* regime for its protection. The international efforts, so far, have not resulted into any comprehensive mechanism to address the concerns and expectations of traditional/local communities, which mainly reside in developing countries.

In order to protect the interests of these communities, some countries have enacted *sui generis* legislations for the protection of TK, such as Brazil, Costa Rica, Guatemala, Panama, Philippines, Peru, Portugal and Samoa. Thailand is providing protection under its Plant Varieties Protection Act. Bangladesh has also drafted in 1998 its Biodiversity and community Knowledge Act, which is yet

56. See Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), Geneva, April 2001, 214-215.

to be enacted. India has made provisions for the protection of TK through the Patent (Amendment) Act, 2002, the Protection of Plant Varieties and Farmers' Rights Act, 2001, and the Biodiversity Act, 2002.[57] Number of regional initiatives have also been initiated to frame model laws on *sui generis* system of protection of TK, viz., the ANDEAN Community, the Organization of African Unity (now African Union), The Central American Protocol, the ASEAN, and the Model Law of the Pacific Island Forum.[58]

These *sui generis* models are not comprehensive enough to protect the interests of traditional communities which are the marginalized section of societies in most of the countries. Intellectual property rights can be useful to some extent, when their knowledge is put into commercial use and in which their right to share the benefits out of that use must be protected, and access to their TK in genetic resources, which leads to biotechnological inventions fit for patent protection, must be accorded with their involvement and free consent. For this matter, their customary laws must be accorded due recognition and respect through proper legislation and a human rights-centric approach would be required.

In this context, the UN Draft Declaration on the Rights of Indigenous Peoples, 1994 is worth mentioning, which was drafted by the UN Sub-Commission on the Promotion and Protection of Human Rights,[59] and includes human rights principles which have

57. A detailed summary of the salient features of these country initiatives is given in Carlos M. Correa, "Protecting Traditional Knowledge: Lessons from National Experiences", Discussion Paper, UNCTAD-Commonwealth Secretariat Workshop on Elements of National Sui generis Systems for the Preservation, Protection and Promotion of traditional Knowledge, Innovations and Practices and Options for an International Framework, Geneva 4-6 Feb. 2004, pp. 4-17; Bernard O'Connor, op. cit. At 690-693; WIPO Doc. WIPO/GRTKF/IC/3/7, May 6, 2002. See also http://www.grain.org/brl/index-eng.cfm.

58. For details of these regional initiatives, see S.K. Verma, "Protecting Traditional Knowledge: Is Sui Generis System an Answer?", (soon to be published) in International Review of Industrial Property and Copyright Law Munich, Germany.

59. The Draft was completed in 1993. It is currently the subject of discussion by a Working Group (or Drafting Group), set up by resolution 1995/32 of the Commission on Human Rights , 3 March 1995. See Doc. E/CN.4/sub.2/1993/29/Annex 1 of 23 Aug. 1993; see also Sub-Commission Res. 1994/95, 24 Aug. 1995. The Sub-Commission on the Promotion and Protection of Human Rights replaced the earlier Sub-Commission on Prevention of Discrimination and Protection of Minorities.

implications for TK and biodiversity. It accepts the right of self-determination of indigenous peoples (Art. 3). It recognizes their "collective right to live in freedom, peace and security as distinct peoples", (Art. 6(1)); their right to the full recognition of their laws, traditions and customs (Art. 26); and full maintenance, protection and promotion of past, present and future manifestations of their cultures (Art. 12). The Declaration demands that States abstain from removing them from their lands or territories (Art. 10), respect their traditions and indigenous knowledge (Part III) and restore and protect the environment (Art. 28). Cultural and intellectual property rights are recognized in Article 29 which reads:

"Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditional, literature, design and visual and performing arts."

The provision is thus wide in its implication, establishing a link between cultural property, cultural identity and collective right to own and control one's own cultural property. In this sense it is closer to the ILO Convention.[60] The indigenous communities have the right to determine and develop priorities and strategies to use their own lands, territories and other resources. This includes the right that States obtain their "free and informed consent" before any projects affecting their lands, territories or resources may be approved, "particularly in connection with the development, utilization or exploitation of mineral, water or other resources" (Art. 30). There is no explicit mention of TK and traditional resources (like with the ILO Convention), but the term "other resources" in Article 30 could be broadly interpreted to cover them. Though

60. The ILO convention No. 169 of 1989, superseded the earlier ILO Convention No. 107, 1957, Concerning Indigenous and Tribal Peoples in Independent Countries, entered into force in Sept. 1991 and has been ratified by 17 countries so far. It recognizes the rights of indigenous peoples over natural resources pertaining to their land, and to their traditional activities in order to maintain their cultures and economic self-reliance and development. (Arts. 15 & 23).

Article 29 covers them, but the degree of protection to be accorded to them by States has not been specified.

The Draft, if adopted, would be a significant step in protecting the rights of indigenous peoples, including TK, and will be holistic in approach, including cultural and land rights, but it makes formidable demands upon governments for the attainment of a number of objectives with heavy implications for State resources.

However, in order to protect TK, first of all it is necessary to define TK and who are its holders. So far no satisfactory definition has been laid down which is acceptable to all. The ILO Convention NO. 169, however, has provided a model definition of indigenous and tribal peoples in Article 1.1.[61] Protection of TK through IPRs may be useful in a limited manner in providing defensive protection, i.e., there should not be any unauthorized access to this knowledge, and positive protection, i.e., that the knowledge-holders should be able to get IP rights over that knowledge and use it for their economic development. But that will not take into account the continuous evolution of TK nor IPRs would help in the promotion and diffusion of TK. Thus, IPR system is unable to address the holistic nature of TK. Moreover, from an economic point of view also, it is not clear that a binding regime that propogates a monopoly in knowledge under an IPR regime is desirable from an efficiency point of view, particularly where the effect of such a system would be to protect knowledge assets that had been created in the absence of property rights protection.[62] The goal of intellectual property is stated to be to create knowledge by giving incentive in the form of monopoly rights for a limited duration, while TK is already being created without any incentive.

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61. It provides that the Convention applies to (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them form other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country... and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

62. Commercialization of TK is a sensitive subject for some TK holders who generally oppose it and stress upon its conservation and prevent the inappropriate commercial ization. On the other hand, IPRs promote the protection of only marketable technology or IPR-derived product.

There is also uncertainty factor involved over the economic value of TK till it is put into the form of tangible and tradable form.

Nevertheless to curtail the misappropriation of TK and using it for getting IPRs over it without sharing the benefits with the communities and peoples who are the real holders of this knowledge deserve serious consideration at the national and international levels. As demanded by developing countries, this should be legally regulated. The proposals put forward by them mainly centres around two demands to curtail the misappropriation of TK:

(i) patent applicants must disclose the country and source of origin of the biological material and the traditional knowledge; and

(ii) must provide evidence that the prevalent laws and practices of country of origin on prior informed consent and benefit-sharing have been fully respected.

These demands have been subjected to intensive discussions. The developing countries have also embarked on preparing databases on TK to avoid its misappropriation by unauthorized persons.[63] India has embarked on all these aspects to protect its TK after the well-known cases of *Neem and Turmeric.*[64]

In order to reap the benefits of IPRs by local/traditional communities, it is necessary that the governments should help in the commercial exploitation of this knowldge by helping in acquiring the IPRs and in marketing the right-related products. To arrest the continuous erosion of TK, communities must be involved

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63. The Protection of Traditional Knowledge and Folklore : Summary of Issues raised and Points Made, WTO Doc. IP/C/W/370, 8 August 2002, pp 4 and 11 (paras 9,10 and 27).

64. See section 10 of the Patents (Amendment) Act, 2002. Section 25 (1)(h) and (j) provide that failure to disclose to the Controller any information required under the Act as provided, or the complete specifications, or to provide the wrong source of the geographical origin of the biological material used in an invention, can be grounds for opposition. Section 64 (p) and (q) provide that wrong source or non-disclosure of the source of TK will be grounds for rejection or revocation of the patent. India has also prepared a Traditional Knowledge Digital Library (TKDL) CD on medicinal plants used in Indian systems of medicines, and is also preparing Community Biodiversity Registers at village level to document TK.

in evolving and implementing those measures. Any system imposed from above without their involvement would be under suspect and will not succeed. This will also enhance their capacity-building which will further help in checking the cases of misappropriation of TK.

National measures hold the key for the protection of TK, as the international measures will only be able to protect the economic aspects of TK if it is put into commercial use. Moreover, international regime will be mainly limited to its protection, and will not be concerned with its further development, diffusion and conservation, the tasks which can be met only under the national system. For example, the TK is very much land-specific and habitat in which indigenous/local communities live. If TK is to be maintained, the social and economic context in which it has developed must be maintained and land rights must be recognized. Separating them from their surroundings is killing the TK rather than helping in its enhancement or conservation. The land rights can be guaranteed and conferred only by the national governments and provide incentives to preserve the habitat. Similarly, the respect for their culture can also be ensured by national measures. In fact to attain the objectives of preservation, protection and promotion of TK, a pluralistic legal approach is required at the national level and modes may involve customary/traditional laws of these communities, intellectual property rights, common law concepts (viz., undue enrichment - where their TK has been put to commercial use without their authorization; prescriptive right - over their knowledge etc.); and legal and contractual agreements. A composite sui generis system, based on rule of equity and fairness, giving effect to all these aspects may be another alternative. Together, these measures will go a long way in preserving and protecting TK. In this context, the enactment of heritage legislation, recognizing biological and cultural heritage of the concerned communities, and providing incentives for community self-management initiatives, may prove to be very important. For indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights.[65] It is also important to note that

65. Irene-Erica Daes, " Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples", UN Doc. E/CN.4/Sub.2/1993/28, paras. 22 and 26.

the right of self-determination in relation to their knowledge management will be crucial for the sustainability and further growth of TK. This in turn requires conservation and continued access to environment upon which their way of life depends. If the TK is to be maintained, the social and economic context in which it developed has to be maintained. TK should not be understood merely as a set of information but as an integral part of living and dynamic societies and cultures.

Concluding Remarks

Human rights and intellectual property require the interpretation and design of national and international rules as instruments for the promotion and protection of human rights, with due respect for the broad regulatory discretion of democratic legislatures and governments regarding the domestic implementation and balancing of human rights and intellectual property rights for the protection of freedom and non-discrimination among peoples.The democratic definition and balancing of human rights may legitimately vary from country to country. A country, looking into its needs must give effect to intellectual property rights, which should fit into the broader agenda of human rights.

The present IPR regime is not flexible and it contains a "one-size-fits-all approach". According to some critics, the minimum standards of intellectual property protection set by TRIPS Agreement are too high for most of the developing countries, thereby putting them under tremendous pressure to adopt legislation that is not adapted to their specific needs. It limits their right to follow their human rights agenda and a large segment of society remains deprived of basic human rights. The benefits of scientific progress have not reached to all the segments of society. As the governments' policies derive their legitimacy from their protection of human dignity, the IPR system needs to be conducive to human rights agenda.While shaping and implementing IPR laws and policies, governments must derive their legitimacy from human rights instruments. This requires the easy availability and accessability of all essential necessities to everyone. Every country has its specific needs which require the proper balancing of human rights and intellectual property.

It may, nevertheless also be kept in mind that while safeguarding the societal interests , individual's right to pursue scientific pursuit and claim rewards should also be safeguarded because that will help in the further progress of the society. Human rights function of economic freedoms and property rights need to be kept in sight. But an individual has to accept limitations over his right for the greater societal benefit.The international IP regime must therefore strike a balance between rewarding innovators and making innovation available to all. Laws aim should be to seek a just system.

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Agricultural Biotechnology and Human Rights: Ethical Issues

S. Rajalakshmi and R.V. Bhavani

"Everyone has the right freely... to share in scientific advancement and its benefits"

- The Universal Declaration of Human Rights (1948)

Introduction

Five decades have passed since Watson and Crick deciphered the double helix structure of DNA and laid the foundation for modern biotechnology. Biotechnology provides an opportunity to convert bioresources into economic wealth. This has to be done in a manner that there is no adverse impact either on the environment or on human and animal health. Today, we know the full genetic sequence of several organisms from human beings to plants to plant pathogens and nature's own genetic engineer, the bacterium *Agrobacterium tumefaciens*.

This paper elaborates the applications and ethical concerns of Agricultural Biotechnology in the context of Human Rights. The Indian experience is cited to highlight the issues. The Green Revolution between 1970-80 brought about greatly improved crop yields but some parts of the developing world did not benefit. Poverty and hunger fell dramatically; however, Africa and parts of Asia saw little gain, and the initial rate of improvement of the Green Revolution was not sustained after the mid eighties. The best areas have already been saturated with semi-dwarf wheat and rice. Further yield increases are held back by water shortages, soil problems, and the emergence of new types of pest and disease. Food insecurity prevails, even in developing countries with food surpluses. Improving the productivity of small farms is by far the best means of achieving a substantial reduction in food insecurity and poverty. Many people are poor, and therefore hungry, because they can neither produce enough food on their small farms, nor obtain access through employment by working on those of others.

The challenge for any developing country in the next 25 years is enormous. It is not only to satisfy the growing demand for food, but also to help reduce poverty and malnutrition. Due to uncontrolled population growth and rising incomes, demand in the developing countries is predicted to increase by 59% for cereals, 60% for roots and tubers, and 120% for meat. This increased supply cannot come from area expansion alone, since per capita land availability has been showing negative trends in both Asia and other parts of the world. Looking at the situation worldwide, overall food production in recent years has increased at an annual rate of 1.3%, while the world's population has maintained an annual growth rate of 2.2%. Thus, the global food and health situation remain a cause for concern, with the logic that the use of genetically modified organisms represents a tool and an option that should be given serious consideration. But it comes accompanied with concerns of impact on human health and environment and raises many ethical questions.

What is Biotechnology

Molecular genetic engineering and conventional methods of genetic improvement share the same objectives of genetic modification, but differ in terms of the methods employed.

In order to produce new, desirable combinations of genetic factors, the molecular approach does not rely on random recombination among a large number of genes. Instead, it allows introducing sequences of DNA carrying specific characteristics into the genome of another organism. This produces a transgenic organism, which is also referred to as genetically modified organism (GMO). Such an approach reduces the time needed for selection while preserving the advantageous characteristics of the original genotype and adding individual genes that were lacking. All of this makes possible a precise and limited modification of the genome.

Transgenic approaches to plant and animal improvement are chosen in the face of lack of suitable conventional approaches to dealing with particular agronomic problems or need (e.g. rice sheath blight, insect / virus, etc.). There are some inherent limitations in conventional breeding such as lack of practical access to useful germplasm due to sexual incompatibility barriers or

undesirable linkage block and concomitant time lags in incorporating useful genes into existing varieties.

Applications of Biotechnology

New developments in transgenics allow production of crops with high yields, pest and drought-resistant properties and superior nutritional characteristics. Transgenic approaches have considerably broadened the range of gene pools, which are now accessible for plant and animal improvement purposes. For crops, improved agronomic traits include yield, pest and pathogen resistance, herbicide tolerance; tolerance to abiotic stresses such as acid soils, drought, salinity, and cold; shade and high density planting tolerance; water and nutrient use efficiency; reduced mycotoxin contamination; crop reproductive biology; and enhanced nutritional and product quality through influencing quality and quantity of oil, protein, carbohydrates, nutrients, and novel substances. In 2002, about 57.6 million hectares of global land were planted with transgenic crops. GM crops have demonstrated the potential to reduce environmental degradation and to address specific health, ecological and agricultural problems which have proved less responsive to the standard tools of plant breeding and organic or conventional agricultural practices.

In 2003, 67.7 million hectares of crops of genetically manipulated (GM crops) were planted by 7 million farmers from about 18 countries[2]. Agricultural biotechnology means a lot more than just creation of GM crops. Techniques like tissue culture help rapidly to propagate disease-free seedling plants, development of hybrids between plants that do not cross naturally, use DNA - based genetic markers that allow breeders to follow and select for important traits more easily, use DNA chips and other DNA based diagnostic techniques to characterize pathogen populations for more effective deployment of resistant varieties. The real potential for public benefit from these technologies exists in developing countries like ours where access to genetically improved crop varieties means a difference between hunger and a sustainable livelihood. The task ahead for Biotechnologists today therefore is to produce new crop varieties that are genetically altered to grow in poor soils and with less water, that use plant nutrients more efficiently, that can resist tropical pests and diseases - thus reducing

2. Clive James, "Global Status Of Commercialized Transgenic Crops", 2003.

yield losses - and that which add micronutrients and essential amino acids to deficient diets.

There are several advantages of GM technology over other methods. First and foremost is that it is specific; unlike crosses where many genes are transferred during sexual reproduction, here transfer of only a single gene (or a few genes) to the crop plant takes place. Second, the method is fast; like in any micro propagation technique, many plants can be generated quickly. Finally, the genes themselves are an advantage. Unlike any other breeding method, plant biotechnology allows one to put virtually any gene from any organism into a crop plant. In practice, scientists create a large number of transformed crop lines for a specific gene and then carry all these lines through to many rounds of conventional plant breeding, to ensure that the new line has exactly the same characteristics as the parent line, with the exception of the introduced characteristic. Thus GM technology does not eliminate plant breeding but supplements it just like other laboratory-based methods.

Biotechnology encompasses a wide variety of applications - a few of them are detailed below:

1. *Cell, tissue, and embryo culture:*

The quality of an elite line can be maintained by mass production of somatic embryos, which are genetically uniform because they derive from a uniform population of vegetative cells. This method is very valuable in cross pollinating plants as cross pollination between plants of elite lines results in loss of yield and other important agronomic traits when the seeds of such crosses are planted. Embryo culture is also used to rescue the embryos produced when plants of different species are crossed. For example, a cross between the wild rice *Oryza nivara* and domesticated rice *O. Sativa* is not normally viable but researchers at IRRI used embryo rescue to introduce a trait for resistance to the grassy stunt virus present in the wild rice to the domesticated rice.

2. *Clonal propagation of disease free plants:*

Large numbers of disease free plants can be made available through clonal micro propagation methods.

3. *Identification of chromosome regions (quantitative trait loci) that carry important multigenic traits:*

Molecular techniques greatly facilitate chromosome mapping of important agronomic traits. This will make it easier to follow these traits in the progeny of crosses and will therefore speed up classical breeding.

4. *Gene identification and isolation and transformation:*

Molecular tools that we have today are very useful in isolation and identification of genes of importance. We can now engineer specific genes from different organisms for specific functions and transform them across sexual barriers.

5. *Genetic engineering for agronomic traits such as pest and disease resistance or better adaptation to environmental stresses (such as salinity, drought):*

This is a very important area of research to make available more land for agriculture to meet the increasing demand for more food. Making plants grow with minimal water or plants that can tolerate increasing amounts of salt in the soil will make large parts of wastelands into productive land.

6. *Genetic engineering for greater nutritive value (such as vitamin A, minerals, and better amino acid balance):*

A lot of research in this area is being carried out to augment the hidden hunger and malnutrition prevalent in most parts of the developing world.

7. *Genetic engineering to reduce post harvest losses (longer shelf life):*

This technology is still in the research level but has tremendous application as it involves engineering delayed ripening genes into vegetables and thereby enable even resource poor farmers to market their produce.

8. *Genetically engineered male sterility to facilitate hybrid seed production:*

Hybrid plants produced by crossing two different lines often show increased yields because of hybrid vigor. Breeders routinely use this property of heterosis to develop high performing lines. A very rapid method to generate cost effective hybrid seeds is to engineer male sterility and a restorer system to crops and hasten the production of hybrid seeds.

9. *Expression profiling of genes:*

This allows a researcher to determine the level of gene expression of all genes at once and to study the effect of environmental perturbations (lack of nutrients, water deficit, pathogen attack) on gene expression. This will enable the researcher to identify the master switch for multi-genic traits.

A few GM products that are in the pipeline are elucidated below: -

1. *Plants with salt tolerance:*

About one-third of all irrigated land is affected by salt due to secondary salinization. The problem of salinity is most acute in the coastal regions affecting the productivity of the agricultural system. Above all, the prospects of sea level rise, expected to be in the order of 8-29 cm due to the global warming by 2025, necessitates immediate measures to foster the sustainable and equitable management of the coastal wetland ecosystems.

The plant molecular biology laboratory in MSSRF has initiated work on mangrove species with an integrated approach to gene isolation to development of transgenics in locally adapted cultivars and integration of pre-breeding with participatory breeding. This will help to strengthen the stability and sustainability of the fragile coastal ecosystem as well as the productivity and profitability of the coastal farming systems.

2. *Vitamin A-rich "Golden Rice"*

Swiss researcher Ingo Potrykus used three genes from daffodil and a bacterium into rice plants to construct the pro-vitamin A biosynthetic pathway. By coupling the genes to endosperm-specific promoters, the scientists targeted the pathway to grain endosperm cells[3].

Golden rice is now being tested and refined. The International Rice Research Institute in the Philippines is also transferring the pathway to agronomically important varieties via traditional breeding techniques. If the new strains satisfy culinary preferences, they could help alleviate vitamin A deficiencies responsible for millions of cases of death and blindness worldwide.

3. *Male sterility for more convenient hybridization:*

Male sterility can be engineered by the expression of the gene that encodes barnase, an enzyme with ribonuclease activity under a tapetal specific promoter thereby preventing viable pollen formation. Male fertility can be restored if in the same cells a protein encoded by barstar gene is expressed which will bind the ribonuclease and fertility is restored. Scientists have used these two genes to create elite lines of mustard that can then be crossed to efficiently generate hybrid mustard seeds.

4. *Slowing down of fruit ripening:*

Ripening can also be slowed down by interfering with ethylene production or with ethylene perception by the cells of the fruit. Biosynthesizing ethylene requires two enzymes, and eliminating either one, by suppressing the expression of these genes, results in fruits that make very little ethylene. Such fruits ripen very slowly, an advantage to farmers and customers. Such fruits can be left on the plant longer and can often be sold in markets that are farther away

5. *Molecular pharming:*

While currently biotech drugs are produced in conventional expression systems like bacteria, yeast, insect cells or mammalian cell culture, the use of transgenic plants and animals for manufacturing of biopharmaceuticals will be an economic alternative for the future. This method, also called "Molecular Pharming", has considerable potential for the production of complex proteins such as glycoproteins. Furthermore, in comparison to conventional methods (only mg proteins/l liquid), recombinant proteins produced by molecular pharming can be harvested in large quantities (g protein/l milk). The most famous example of molecular pharming is Tracy (PPL-Therapeutics), a sheep with an ability to produce human alpha-1-antitrypsin in its milk (35 g proteins/l milk)[4].

6. *Micronutrient-enriched GM crops:*

AmA1 protein from Amaranthus has been transformed into potato and these plants have more than two fold increase in tuber

4. Visit http://www.phytowelt.de/Phytowelt_presse_PDFs/molecular_pharming_es.pdf
Phytowelt GmbH - Press release

number, 3-3.5 fold increase in tuber yield in terms of fresh weight, and a 35-45% increase in total protein content[5].

The table below details the status of GM research in India

Table 1. Current Status of Transgenic Crops in India[6]

Crop	Institution/ Company	Transgene(s) inserted	Remarks
Cotton	MAHYCO	Pest resistance *(Bt)*	Approved to grow *Bt* cotton developed by the company Monsanto granted in March 2002
Cotton	NBRI	*Cry1E* and *Cry1C* with terminal altere at C-end	Develop transgenic resistant to *Spodopotera litura* and *Heliothisis armigera*
Potato	JNU	Protein enhanced	Generate nutritionally enriched plants Varieties are in the final stage of testing
Rice	ICGEB	Pest resistance *(Bt)*	Generate plants resistant to gall midge
Rice	TNAU	*GNA* gene	Generate plants resistant to gall midge
Mustard/ rapeseed	Delhi University South Campus	Bar, barnase, barstar	Generate herbicide-tolerant plants, male-sterile and restorer lines for hybrid seed production
Mustard	TERI	*Ssu-maize Psy* and *Ssu-tpCrtI* gene	Generate plants containing high levels of ß-carotene
Chick pea	ICRISAT	PGIP	To generate plants resistant to fungal pathogens
Muskmelon	UAS, Bangalore	*Rabies glyco-protein* gene	To develop edible vaccines

5. Subhra Chakraborty, Niranjan Chakraborty, and Asis Datta, "Increased nutritive value of transgenic potato by expressing a nonallergenic seed albumin gene from Amaranthus hypochondriacus", Proc. Natl. Acad. Sci, USA. 97, 3724-3729, 2000.
6. Manju Sharma, K.S.Charak and T.V. Ramanaiah, "Agricultural biotechnology research in India: Status and policies", Current Science Vol 84, No. 3 Feb 2003.

Biotechnology and Ethical Issues:

Biotechnologies applicable in agriculture evoke important ethical issues. These relate especially to humankind's right to enjoy food security, as well as fruits of scientific and technological progress whilst remembering the need to safeguard biodiversity, the balance of natural ecosystems and intellectual property right, as well as possible repercussions on social and economic development.

Possible costs, benefits and risks associated with particular GM crops can be assessed only on a case-by-case basis. Any such assessment needs to take into account a variety of factors, such as the gene, or combination of genes, being inserted, and the nature of the target crop. Local agricultural practices, agro-ecological conditions and trade policies of the developing country in which GM crops might be grown are also important.

It has been suggested that GM crops should not be used because there may be a very low probability of the occurrence of an unpredictable adverse effect on the environment or on human health. This case is frequently argued in terms of the so-called ***precautionary principle.*** The argument is that, irrespective of possible benefits, a new technology should never be introduced unless there is a guarantee that no risk will arise. However, no one can ever guarantee an absolute absence of risk arising from the use of any new technology. Such a principle would lead to an inappropriate embargo on the introduction of all new technology.

In some cases the use of a GM crop variety may well pose fewer risks than the agricultural system already in operation. An adequate interpretation of the precautionary approach would require comparison of the risks of the status quo with those posed by other possible paths of action. Such assessments must be based on sound scientific data.

The apprehensions of GM technology and the possible regulatory framework that a country could adopt can be summarized as below

Table: 2 Apprehensions of GM technology

S. No	Concern	Way Ahead
1.	GM plants will create super weeds; horizontal gene transfer	GM crops are unlikely to make weed control more difficult in the future or that transgenic weeds will invade pristine environments, any more than other crops have in the past.
2.	GMOs are not adequately tested	GMOs undergo strict regulatory procedures monitored by public sector/ government institutions that enjoys credibility and public acceptance
3.	Farmers will be exploited by MNC in the event of crop failure	An integrated GM seed-cum-crop Insurance System will help to ensure that desirable new technologies benefits resource poor small farm families.
4.	Exports will get affected on account of GMOs	Transgenic research should not be undertaken in crops/commodities where international trade will be affected
5.	Farmers will be dependent on MNCs to buy seeds each season	Development of apomictic hybrids will allow farmers to save and plant the seeds.
6.	Fear of the unknown / public are not sufficiently informed	Increase awareness through genetic literacy and mass media campaigns through Genome Clubs; take all stakeholders into confidence prior to release of a GM crop

Regulatory and Policy Issues - the Right to Information

It is important that any country should have in place appropriate mechanisms to determine whether it is desirable to introduce any new crop, GM or non-GM, into the environment, and to monitor its impact. Systems that enable the views of farmers and relevant stakeholders to be taken into account by policy makers are also required.

The regulatory measures undertaken by the Government of India for promotion and regulation of biotechnology is in a state of evolution. Efforts are also underway to make the regulatory system more open, transparent and accountable. The country has also a reasonably well-developed infrastructure for biotechnology research and education. Therefore, India is in a position to move forward vigorously in mobilizing the power of biotechnology for strengthening the national food, water, livelihood and environmental security systems. However, to tap this opportunity, we need a well-defined and forward-looking policy for food and agricultural biotechnology research, training and development, in our country.

In India, the regulatory procedure is best explained by the flow chart below.

Figure 1. The protocol for approval of a transgenic crop

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Institutional Biosafety Committee (IBSC)
Preparation and/submission of application data

Review Committee on Genetic Manipulation (RCGM)
Evaluation of application data from Institutional Bio-safety Committee (IBSC); Approval for Laboratory and Green House Trials & contained field trials for generation of environmental, toxicity and allergenicity data. Evaluation/monitoring of contained field Trials through

Monitoring-cum-Evaluation Committee (MEC)

⇩

Genetic Engineering Approval Committee (GEAC)
Approval for large scale Field Trials and Evaluation Protocol

⇩ Concurrent ⇩

Farmer's Field trials by **Company** ⟺ ICAR trials for VCU Involving SAUs and other appropriate State Agencies

⇩

GEAC
Evaluation of data
Environmental clearance of the event/gene

Ministry of Agriculture
Approval for commercial release/notification/
registration of variety (ies)/hybrid(s)

⇩

By DAC/ICAR

⇩

DAC/ICAR
Ministry of Agriculture & State Governments
(Post-release monitoring and vigilance)

Local communities must be included as far as possible in processes of decision making. The dissemination of balanced information, and the education and training of those involved is essential. In particular, farmers need to be informed about the technological potential and management requirements of GM crops. Expectations are sometimes inappropriately high, and knowledge about specialized farm management practices may be absent. Companies marketing GM crops in developing countries should share, with government, the costs of:

- locally appropriate schemes to elicit the preferences of small-scale farmers regarding traits selected by plant breeders;
- their participation, where appropriate, in plant breeding; and
- subsequent mechanisms to improve dissemination of balanced information, education and training about the use of GM crops

It is therefore important that all developing countries which are currently involved in the implementation of the Cartagena Protocol on Biosafety consider carefully how to interpret the provisions which concern the precautionary approach, to allow for appropriate regulation before the need arises. Any highly restrictive interpretation of the precautionary approach is likely to ignore the possibility that in some cases, the use of a GM crop variety may pose fewer risks than are implied by current practices or by plausible non-GM alternatives. In applying the precautionary approach, risks implied by the option of inaction (or by alternative actions) must also be considered The most appropriate approach would normally be a centralized and evidence-based safety assessment at the national or regional level. Environmental and health risks should be assessed on a case-by-case basis.

A long-term policy on Biotechnology Applications in Agriculture should aim to provide direction to research and development in relation to priorities, based on social, economic, ecological, ethical and gender equity issues, to devise a system for commercialization of transgenics / GM products, and to formulate a clear policy on GM food and feed in the country. The transgenic approach should be considered as complementary and resorted to when other options to achieve the desired objectives are either not available or not feasible. See Box 1.

Box 1. Policy guidelines for Applications in Agriculture Biotechnology[7]

Long-term policy on Biotechnology Applications in Agriculture

Since there is public, political and professional concern about transgenics with reference to their short and long term impacts on human health and the environment, their testing, evaluation and approval have to be stringent, elaborate and science-based. The general approach in this respect, therefore, should be that:

- Biotech applications, which do not involve transgenics such as biopesticides, biofertilizers and bio-remediation agents, should be accorded high priority. They will help to enforce productivity in organic farming areas
- Transgenic approach should be considered as complimentary and resorted to when other options to achieve the desired objectives are either not available or not feasible
- High priority should be accorded in transgenic approach to the incorporation of resistance to insect-pests and diseases including viruses and to drought and salinity (i.e. biotic and abiotic stresses)
- Transgenic research should not be undertaken in crops/ commodities where our international trade may be affected, e.g., Basmati rice, soybean or Darjeeling Tea. Wheat exporting countries like Canada and USA are abandoning their programme for breeding transgenic wheat varieties hybrids.
- The international guidelines being set up by the FAO-WHO Codex Commission for assessing and managing the health risks posed by GM foods should be closely followed. These risk analysis guidelines call for safety assessments to be conducted for all GM foods prior to market approval.

Availability of choice

When a decision is made to introduce new varieties of crops, whether GM or non-GM, problems might arise because the new seed might be more costly. Problems can also arise in cases where one single monopolistic seed supplier controls the provision of seed. It is therefore desirable that as far as possible farmers have a genuine choice. To provide a genuine choice it is important that support for the public sector be sustained, so that suitable seeds (whether GM or non-GM), which can be retained by farmers with minimal yield losses, are available. Policies also need to be in place to keep the private supply of seeds reasonably competitive.

Liability

Farmers and consumers should have complete information on the benefits and risks associated with GM crops. The evaluation procedure should include farmer participatory assessment, as is the case of non-GM crop varieties. The procedure of transparent evaluation should apply equally to both private and public sector varieties. A special insurance scheme for GM crops may be devised and introduced by the Ministry of Agriculture. An integrated GM Seed-cum-Crop Insurance System will help to ensure that desirable new technologies confer benefits to resource poor small farm families, without undue risks. Agreed standards should be published widely, taking into account in particular the situation of small-scale farmers in developing countries. Illiteracy and lack of adequate infrastructure for effective communication can present additional obstacles that need to be considered. Wherever possible, agreements should be established, to facilitate compensation of small-scale farmers who, in the event of loss or damage, are unlikely to be able to afford appropriate legal action.

Gene flow and biodiversity

The possibility that genes from GM crops could be transferred by pollen to other cultivars or wild relatives is of concern. Gene flow may require special attention when GM crops are used in developing countries. The introduction of GM crops in developing countries, which are centres of diversity of specific crops, may in some cases be problematic[8]. It is recommended that in the case of sensitive areas such as centres of diversity, introgression of genetic material from GM crops in related species should be monitored.

However, possibility of gene flow should not rule out the planting of GM crops in such areas, provided that regulatory requirements are met. Specific risks need to be assessed in particular contexts, and possibilities of safeguarding biodiversity must be considered carefully[9]. The establishment and maintenance of comprehensive gene and seed banks to conserve genetic resources of crop plants and their relatives is of crucial importance. *In situ* and *ex situ* gene banks will help conserve the rich heritage of local biodiversity and seed banks will ensure availability of seeds for cultivation.

Intellectual property rights (IPRs)

Biotechnology at public research centers should be encouraged, particularly research on plant genomes. These efforts should be given top priority, recognized as legitimate and made the subject of public financing, so as to ensure that such research remains alive, competitive in terms of its quality and part of the public domain. As the basis of knowledge that is required by, and belongs to, everyone (public good), rather than to individuals alone, but often ends up being private property.

Since 1999 a number of agrochemical and seed industry are tightly consolidated around a small number of multinational companies. There has been continuing concentration in the number of companies that control between them the provision of seeds and important research technologies. There are concerns that growth of patents in both the private and public sectors could have an inhibiting effect on publicly funded research. The challenge for the public sector, especially where research is directed at agriculture in developing countries, is how to access GM technologies without infringing IPRs. New initiatives, which recognize the potential of these constraints to inhibit research into crops relevant to developing countries, are therefore very timely. The example of Golden Rice shows that patented technologies need not necessarily be a barrier.

Since 1980, a revolution has taken place in protecting intellectual property rights for agricultural biotechnology, which has boosted incentives for private investment. However, the rights of indigenous peoples and low resource farmers who have

9. Sears, M.K., R. L. Helmich, D.E. Stanley-Horn, K.S. Obenhauser, J.M. Pleasants, H. R. Matilla, B.D. Siegfried, and G. D. Dively, "Impact of Bt corn pollen on monarch butterfly populations: A risk assessment", PNAS, USA 98: 11937 -11942, 2001.

maintained many of the landraces must be reconciled with the needs of industry and agricultural progress[10].

There are various conflicting issues inherent in the IPR regime embodied in the TRIPS agreement and the international human rights law. Ethics, rather than economic gains should take the center stage in the resolution of all such conflicts.

Conclusion

For a variety of reasons, many of the crops such as rice, wheat, white maize, millet, sorghum, yams, and others, which provide food and employment income for the poor in countries like ours have been ignored by the private sector. Much of the current privately funded research on GM crops serves the interest of large-scale farmers in developed countries. Consequently there is a serious risk that the needs of small-scale farmers in developing countries will be neglected. In determining which traits and crops should be developed, funding bodies should be proactive in consulting national and regional bodies in developing countries to identify relevant priorities There is not enough evidence of actual or potential harm to justify a blanket moratorium on either research, field trials, or the controlled release of GM crops into the environment. Research on the use of GM crops in developing countries need to be sustained, governed by a reasonable application of the precautionary approach. Accumulating evidence from new scientific developments must be used to inform discussions about the current or future use of GM crops. The views of farmers and other relevant stakeholders must also be taken into account.

The debate on biotechnology has to move beyond polarization. Certain technologies, such as human cloning, deserve to be banned outright, for reasons both intrinsic and moral. It is not enough to take out ethical positions regarding the pros and cons of various technologies but very imperative to look concretely at what kinds of institutions would be needed to allow societies to control the pace and scope of technology development. It is apparent that future economic and human development will be increasingly technology driven. Unless the technology push is matched by an ethical pull, to put it in the words of Albert Einstein, "The products of our brain will become a curse rather than a blessing".

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A Participative Evaluation of the Rights of Persons with Psychosocial Disability•

Amita Dhanda

Introduction

Rights are seen as mechanisms of accountability that persons in vulnerable positions possess against holders of power and authority[1]. Human rights discourse can trace its lineages to either the autonomy or the interests' model. Whilst the autonomy model lays stress on choice and self determination, the interests' model is more services and facilities oriented[2]. Writing nearly a decade ago[3] on the relevance of the two models to the rights of "persons with mental illness" I had pointed how each of the models constrained the assertion of human rights for "persons with mental illness". The autonomy model carried within it the danger of isolation and neglect and the interests' model could invisiblise the person.

Looking back and reminiscing on the various dialogues one has heard on the "rights of persons with mental illness" one remembers conversations between doctors and lawyers between policing authorities and civil libertarians or even between psychiatrists and anti-psychiatrists. The bearer of the rights that is the "person with mental illness" has been noticeable with her absence. I believe that this absence has significantly influenced perception on the purpose and content of these rights. Illustratively

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• Audrey R. Chapman, " A Human Rights Perspective on Intellectual Property, Scientific Progress and Access to the Benefits of Science" in WIPO/ United Nations High Commissioner for Human Rights, **Intellectual Property and Human Rights** (WIPO, 1999) 127

1. P Williams The Alchemy of Race and Rights (1993) ; J Feinberg Rights Justice and the Bounds of Liberty Essays in Social Philosophy (1980)
2. T Campbell et al (ed) Human Rights : From Rhetoric to Reality (1986)
3. Amita Dhanda " Law , Psychiatry and Human Rights" 430 Seminar 22 (June 1995)

I have in all my writings stressed that as an expression of solidarity I write from the standpoint of "persons with mental illness". However when I perused Principles for the protection of Persons with Mental Illness and the Improvement of Mental Health Care 1991(hereinafter the MI Principles) and used them as an advocacy tool to challenge the disqualifying legal regime which subsists in the Indian legal system I stressed on the fact that the Principles require community living for "persons with mental illness" and to achieve this objective of the Principles it was necessary that "persons with mental illness" possess skills of community living and for that to happen it was necessary to closely interrogate legal constructions of capacity and incapacity. In setting up this argument on the basis of the Principles I glossed over the coercive component of the Principles[4].

Significantly when the users and survivors responded to the Principles they gave short shrift to the evocative content of the Principles and fore grounded the forced interventions and the ever present possibility of losing rights. They also questioned the legitimacy of Principles which were finalized without consulting users and survivors[5]. The manner in which the rights discourse can alter if the dialoguing is initiated by users and survivors is again in evidence in the deliberations around the United Nations Convention on Disability Rights. The active participation of persons with psychosocial disability has substantially contributed to active deliberation on an inclusive and unqualified construction of capacity[6] which requires state parties to "recognize persons with disabilities as individuals with rights before the law equal to all other persons"; to " accept that persons with disabilities have full legal capacity on an equal basis as others ...and to ensure that where

4. The gloss is demonstrated by the fact that whilst I bewailed the enactment of section 18 (3) in the Mental Health Act 1987 which allowed a voluntary admission to be converted to an involuntary one I did not take issue with principle 16 (1) of the MI Principles which made provision to the same effect. See Amita Dhanda Legal Order and Mental Disorder 62 (2000)
5. The World Network of Users and Survivors of Psychiatry had at its first World Convention in July 2001 at Vancouver rejected the MI Principles as they were formulated without stakeholder participation .
6. This deduction is being made on the very many advocacy documents circulated by the World Network on Users and Survivors of Psychiatry and by the active participation of the Network's representative in the deliberations of the Working Group.

assistance is necessary to exercise that legal capacity : the assistance is proportional to the degree of assistance required by the person concerned and tailored to the circumstances and does not interfere with the legal capacity, rights and freedoms of the person".[7] A similar stress on non discrimination is in evidence in the manner in which the right to liberty and security of person has been asserted. Thus state parties are required to ensure that persons with disabilities "enjoy the right to liberty and security of the person without discrimination based on disability"[8]; "are not deprived of their liberty unlawfully or arbitrarily and that any deprivation of liberty shall be in conformity with the law and in no case shall be based on disability"[9]. These formulations are being highlighted here in awareness of the fact that they are at present only recommendations of the Working Group to the Ad hoc Committee. However even as recommendations they are ensuring that questions such as legal capacity and liberty are discussed on a common and not a separated platform. Other than the Working Group Report, the various interventions of the World Network of Users and Survivors of Psychiatry and Inclusion International during the third and fourth meeting of the Ad Hoc Committee show that for persons with psychosocial disability guarantees of "non discrimination" "freedom, equality and liberty" "support with equal respect and dignity" are non negotiable. They would hold any regime to be disability rights consonant only if it upholds these rights. Insofar as this is how persons with psychosocial disability perceive their own rights, it is my contention that any current day evaluation of their rights should be assessed on the touchstone of these non negotiable guarantees. Hence this article on the rights of persons with psychosocial disability is just such an evaluation of the Indian Legal System.

II Rights of Persons with Psychosocial Disability in Indian Law

Upon undertaking a thoroughgoing analysis of the Indian legal order on mental disorder I have found, that irrespective of the justifications proffered, the law was primarily prompted by

7. See article 9 of the Report of the Working Group to the Ad Hoc Committee on a Comprehensive and Integral Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities.

8. Id art 10 (a)

9. Id art 10(b)

the need to protect the interests of society[10]. This conclusion has been arrived at on a cumulative assessment of the legislative, adjudicative and litigative choices. The primary concern of legislations is to devise mechanisms to manage what are believed to be the disruptive consequences of mental disorder. The effect of this management on the person whose life and affairs are being managed is not a legislative concern. Thus, for example, the laws of civil commitment allow a person with mental disorder to seek voluntary treatment; but if the same person decides to discontinue treatment contrary to the opinion and advice of the treating doctor, the will of the person is not respected. Instead the relevant statute provides a procedure by which the user's choice can be overruled[11]. Similarly if a person accused of a crime is found to be of unsound mind and consequently unable to instruct counsel it is believed that his right to a fair trial is provided for by postponing the trial[12]. This is believed even when the statute neither specifies the period of postponement nor deals with the other consequences which a protracted trial may have on the life and liberty of the accused[13]. Similarly in ostensible fulfillment of the demands of a fair criminal justice system the defense of insanity is incorporated, which holds criminally non responsible any person who at the time of an offence is by reason of unsound mind unable to know the nature of the act or that it is wrong or contrary to law. However this acquittal on ground of insanity does not result in discharge, as a person acquitted on grounds of insanity could be kept in detention for an indefinite duration at the pleasure of the government[14]. Thus a "person of unsound mind" pays the costs for the induction of this

10. See supra note 4 at 315-19

11. Section 18 (3) of the Mental Health Act 1987

12. Sections 328 and 329 of the Code of Criminal Procedure 1973

13. For example a long postponement could cause the evidence trail turn cold and the witnesses who could testify to the innocence of the accused may get lost. This is especially so because a postponement causes the entire trial to cease whereas fairness would require that at least the trial of facts which determines whether the person did in fact do the act of which he has been charged should continue. It is pertinent to note that such continuance has been provided for in the United Kingdom by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

14. See Section 335 of the Code of Civil Procedure 1973. And for examples of such like indefinite confinement see Veena Sethi vs State of Bihar AIR 1983 SC 339; Moti vs State of Rajasthan (1988) 16 Reports (Raj) 576

fairness provision by losing both reputation[15] and liberty[16].

The above narration shows that both the procedure of compulsory civil commitment and the preventive detention provisions in criminal law proceed on the presumption that persons of unsound mind are a danger to self or others. It is this presumption of dangerousness which is proffered as the justification for depriving persons with psychosocial disability of their liberty rights. This is done without questions being raised on the factual veracity of the presumption of dangerousness even as a number of studies demonstrate the inadequacies and inaccuracies of the efforts to predict dangerousness and thereon establish that persons with psychosocial disability are no more dangerous than other persons[17]. It also needs to be noted that in devising these procedures the law singles out the risk taking behavior of persons of psychosocial disability, even as they are not the only persons indulging in such like behavior. All this makes for an anomalous and discriminatory legal regime of life and liberty of persons with psychosocial disability.

If the criminal justice system manages the problems of mental disorder by deferment, the civil law resorts to substitution and invalidation. Thus a guardian is appointed for a person who by reason of unsoundness of mind is unable to manage his or her own affairs[18]. If surrogate decision-making is one method of providing protection then the other technique is to invalidate a legal

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15. The reputation cost is that it is generally believed(as the innumerable cinematic representations show) that persons acquitted on grounds of insanity have it easy where they obtain freedom without having to pay the cost of their actions.

16. Thomas Szasz " The Insanity Plea and the Insanity Verdict" 40 (3 & 4) Temple Law Quarterly 271

    (1967) . Also supra note 4 at 129 -134

17. In a relatively recent article Thomas R Litwack " Actuarial versus Clinical Assessments of Dangerousness" 7 (2) Psychology Public Policy and Law 409- 443 (2001) has undertaken a comprehensive survey of literature on prediction of dangerousness and highlighted how each of the studies has found a consistent trend of over prediction in assessments of dangerousness. Such a position the author holds " would render assessments of dangerousness of institutionalized insanity acquittees untenable and (unethical)"

18. Section 50 of the Mental Health Act 1987

transaction entered into by a person of unsound mind. Both methods have the common consequence that they rendered invisible the beneficiary of the protection.

Thus the Contract Act lays down that a person who by reason of unsoundness of mind is unable to understand the terms of a contract or its effects on his or her interests shall lack legal capacity[19]. The statute envisages that a person who is generally of unsound mind may contract when of sound mind and admits in an illustration that this sound mind could exist even when the person is in a "lunatic asylum"[20]. The statute does not specify the legal status of a contract entered into by a person of unsound mind. However Courts have equated such a contract with a contract entered into by a minor and found it to have no legal validity[21].

This contractual incapacity gets extended to all one time transactions such as transfer, purchase and sale of property[22]. After a lot of back and forth inheritance rights have been conceded[23] but testamentary succession remains problematic[24]. For the ongoing management of property there are statutory procedures whereby after an extensive inquisition a manager to the property and a guardian to person can be appointed[25].

The incapacity attributed to "unsoundness of mind" is not

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19. Section 12 of the Contract Act 1872

20. Illustration (a) to section 12 of the Contract Act 1872

21. Kamola Ram vs Kaura Khan (1912) 15 IC 404 Doulatuddin vs Dhaniram Chuttia(1916) 32 IC 804

22. See section 7 of the Transfer of Property Act 1882

23. As the law stands today " persons of unsound mind" are not disqualified from inheriting under any system of law. Disqualifications on inheritance subsisted in Hindu Law and the process of lifting them has been a gradual one. Thus in 1928 the Hindu Inheritance (Removal of Disabilities) Act 1928 provided that a person could inherit if insanity supervened after birth. And only in 1956 section 28 of the Hindu Succession Act provided that no person would be disqualified from inheriting property on grounds of disease defect or deformity.

24. Section 223 of the Succession Act 1925 lays down that probate cannot be granted to any person who is a minor or of unsound mind. Section 226 of the Act disallows issuance of letters of administration and section 263 provides that probate or letters of administration maybe revoked if issued to a "person of unsound mind".

25. Section 50 of the Mental Health Act 1987

confined to the economic sphere alone; it also extends to the personal realm. Thus the right to marry is denied to a person who by reason of "unsoundness of mind" cannot comprehend the nature of the ceremony or is unfit to assume matrimonial responsibilities or procreate children[26]. Divorce can be obtained on grounds of unsoundness of mind if the respondent is suffering from a mental disorder of such nature and degree that it is no longer reasonable to expect the petitioner to live with him or her.[27]

To move from the personal to the political, once a person is pronounced to be of unsound mind by a competent court she or he can be denied the right to vote[28] or stand for election or hold and retain office[29]. It is a different matter that despite extensive research it is difficult to discern which court is competent to make such a pronouncement.

Unsoundness of mind thus becomes a construct on which the law hangs its procedures of exclusion, invalidation and substitution. Insofar as the disqualifying regime is not applicable to all "persons with mental illness" and in more recent years there are legislations referring to "persons with mental illness" in a more inclusive manner[30] the aforesaid statement may seem too sweeping in its purport. However before I embark on an analysis of the new legislative order it may be appropriate to dwell on judicial treatment of the disqualifying regime.

Adjudication, as we all know, is a case by case application of the legislative norm. The judiciary contributed its own mite to the "dangerous - incompetent" stereotype of "mental illness" when it has arrived at a finding of legal incompetence only on the basis of a psychiatric diagnosis[31]. The Courts have adopted a more critical

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26. Except for Muslim law this disqualification subsists in all other systems of personal law
27. See section 13(1) (iii) of the Hindu Marriage Act 1955 ;section 27 (1) (e) of the Special Marriage Act 1954 and Section 32 (bb) of Parsi Marriage and Divorce Act 1934.
28. Section 326 of the Constitution of India and section 16 (1) (b) of the Representation of People Act 1950
29. For an explanation on the functioning of this disqualification see supra note 4 pp 308-10
30. For an analysis of these legislations see infra
31. Supra note 4 records a number of such examples especially in the matrimonial context.

approach towards the stereotype, when they have viewed the psychiatric diagnosis as no more than a threshold condition which, can result in a determination of legal incapacity only if the further requirements of the law are fulfilled. Illustrations demonstrating such like interpretations are specially to be found in cases dealing with criminal responsibility[32] and those pronouncing on divorce on grounds of unsound mind[33]. It has also been seen that Courts have been more empathetic to the concerns of persons with psychosocial disability one, when they find that a person has been wrongfully diagnosed, and two, where they are faced with the woeful conditions in psychiatric institutions. It needs to be noted that Courts comment on the inadequacy of the service from their own perspective[34]; the perception of person with psychosocial disability nowhere merits attention.

One reason why persons with psychosocial disability are absent from judicial discourse is because of players other than users and survivors activating issues around "unsoundness of mind"[35]. It is claimed that all persons with psychosocial disability are not viewed as incompetent by the law. And the legal provisions are meant to be only applicable to those who have been rendered incapable by their condition. However studies of the litigation patterns show that efforts to obtain a legal determination of incompetence are made for all manners of persons from the eccentric to the non-conforming to the deviant[36]. These efforts (whether successful or not) are continually made because " unsoundness of mind" is equated with incompetence in law and a

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32. There is a long line of case law which stresses how legal insanity is distinct and different from medical insanity. Illustratively see

33. One of the most significant decisions adopting this approach was the ruling of the Supreme Court in

34. See for example in the Erwadi case the Supreme Court has issued its order on healing places coloured by the disaster at Erwadi. Cruelty of treatment is problematic whether it happens in healing places or in psychiatric institutions however the apex court has not limited its comments to cruelty it has instead ousted all alternative mental health interventions by labeling all of them as cruel. Consequently the court has given short shrift to the opinions of people to the contrary.

35. For data demonstrating the same see supra note 4 at pp .

36. Illustratively see cases filed for appointment of guardians to property in supra note 4 at 237-38

legally incompetent person is required to live his or her life in accordance with the dictates of others be it family, professional or state. The person's own perceptions, wishes and aspirations are legislated out of existence.

The above analysis shows that the one right that the law confers on persons with psychosocial disability is that a person shall not be found legally incompetent without a judicial determination. All persons with psychosocial disability have not been considered incompetent but this requirement of judicial determination means that the capacity of all persons with psychosocial disability is subject to question. Subsequent to a judicial proceeding a finding of competence may be returned but the challenge cannot be prevented. It is this all encompassing vulnerability which makes the legal construction of capacity discriminatory.

III Social Action Litigation for Persons with Psychosocial Disability

The above legislative survey has found the laws relating to persons with psychosocial disability to be in infringement of their constitutional rights of liberty and equality. And yet these legislative provisions have not been subjected to constitutional scrutiny primarily because, as already mentioned, the litigation concerning persons with psychosocial disability has occurred in their absence.

With the expansion of the rules of locus standi and the onset of Social Action Litigation the rights of various vulnerable groups have been the subject of contest before the appellate courts. Persons with psychosocial disabilities have also benefited from this development. The social action litigations filed for persons with psychosocial disability primarily focused on the fact of institutionalization. Thus petitions were filed challenging the detention of "insane under trials" or "insane acquittees" for periods longer than for which they could have been punished[37]. There were petitions which questioned the use of jails to house "wandering mentally ill persons",[38] and others which brought to the notice of

37. Veena Sethi vs State of Bihar 1982 (2) SCC 583

38. Sheela Barse vs Union of India WP (Crl) No 237 of 1989

the court the abysmal conditions prevailing in mental hospitals[39].

These petitions obtained symptomatic relief for individual persons with psychosocial disability but did not address the structural causes of the distress. Illustratively questions were being raised on the periods for which insane acquittees were kept in detention but the fact of detention was not questioned. Similarly anxiety was expressed on the long periods for which "insane under trials" were kept under detention; however the issue of open ended postponement was not questioned. There were no concerns voiced on whether the incapacity to stand trial provisions in its present form furthered fair trial? Similarly the hospital petitions focused on the conditions in specific hospitals without taking issue on institutionalization, forced commitment or treatment. The practice of housing "persons with mental illness" was outlawed, and a detailed program of creating community based services was approved. However in the monitoring follow up the court limited its oversight to maintaining territorial integrity alone and focused its attention on ensuring that persons with mental illness were not housed in jails but shifted to mental hospitals. Consequently States which did not have a mental hospital were pressurized to create institutionalized services. This remedy of establishing psychiatric institutions was suggested as it was seen to be upholding the rights of "persons with mental illness" and such a solution was devised because psychiatric institutionalization was seen as unproblematic.

In making the above proposition this article is not aiming to undermine either the efforts of the Supreme Court of India, the High Courts or the National Human Rights Commission in upgrading the facilities at specific mental hospitals[40]. It is only

39. B.R. Kapoor vs Union of India WP (Crl) No 1777-78 of 1983; People's Council for Social Justice and another vs State of Kerala OP No 7588 of 1986; R.C. Narayan vs State of Bihar W. P. No 339 of 1986.

40. In Aman Hingorani vs Union of India AIR 1995 SC 215 the schemes made by the Union Health Secretary with regard to Gwalior, Ranchi and Agra mental hospitals respectively were adopted by the Supreme Court. In an order delivered on 11.11.1997 in Rakesh Chandra Narayan vs State of Bihar WP (civil) Nos 339/86, 901/93 and 448/94 along with WP (civil) No 80/94 the Supreme Court transferred the supervision of these hospitals to the National Human Rights Commission. The Commission with the aid of a committee of non governmental organizations is making an effort at upgrading the facilities at the various hospitals. In a day long visit at the Gwalior mental hospital in December 2003 I did find an evident improvement in the resources situation but the crusade to obtain transparency and accountability and a rights consonant environment for the inmates seemed an uphill struggle.

pointing out that these efforts are symptomatic in impact they cannot usher structural change as they are not addressing structural questions. These social action litigations along with the interventions flowing from them have extended the fundamental rights jurisprudence to persons with psychosocial disability without interrogating the discriminatory medico-legal policy to which they were subjected.

It is only in 2001 that a petition filed by a psychiatrist[41] on behalf of his patient group has made an attempt to change this trend by challenging the constitutionality of section 81 (2) of the Mental Health Act 1987 which allows a "mentally ill person" to be used for research not directly beneficial to him provided her guardian has consented to such research. The petition also seeks a ban on unmodified electro-convulsive therapy. The petition in the main requires that deprivation of liberty should occur only after the observance of fair process safeguards. It requires that physical restraints should be only used as an extreme measure when required for the safety of the person with mental illness or others, and such restraint should be sanctioned by a Board of a psychiatrist, social worker and a NGO representative. In the same spirit of promoting fair process it requires legal aid lawyers to visit mental hospitals to assist persons with mental illness in their discharge applications.

The petition seems to have an ambivalent stance on guardianship where whilst on the one hand it challenges experimental research on persons with mental illness on the strength of surrogate consent on the other it bewails the absence of guardians and the need to appoint them. The petition in the main is prompted by beneficent motives of good Samaritans, hence speaks of what they believe is needed to uphold the rights of "persons with mental illness". Patient perceptions and aspirations do not find voice in the petition even as it is filed by a patient group. Despite these limitations, the petition is radical in present day India as can be evidenced from the opposition that it has invited both from the Indian Psychiatrists Society and the Association of Indian Private Psychiatrists. Further the petition albeit tentatively has set up a trend for more patient rights sensitive petitions being filed in the Supreme Court. Thus a 2004 petition filed by a disability rights

42. Saarthak vs Union of India WP No 562 of 2001

activist[42] asserts that" a patient" has a right to be assisted in the exercise of self determination. It is a different matter that in making its claims the petition heavily relies on the MI principles and accords an uncritical endorsement to them.

The administering of electroconvulsive therapy without anaesthesia has been recognized as torture by the European Convention on Protection against Torture[43]. Narrations of users and survivors refer to ECT as unmitigated agony and torture. Questions continue to be raised even on the use of modified electroconvulsive therapy consequently studies demonstrating the ethical and responsible use of the therapy have to be periodically carried out even in developed countries[44]. Use of unmodified ECT is seen to negate the credibility of a country's mental health system[45]. In this situation to refer to unmodified ECT as treatment seems like adding insult to injury. The use of unmodified ECT is being defended on the reasoning that if anaesthesia was insisted upon then a number of poor persons would be denied this state of art therapy. Surely if the therapy is required and desirable with anesthesia then logically it is anaesthesia which should be demanded as a right for poor persons with mental illness considering the right to health has been recognized as a right which flows from the right to life. Yet such an argument has not been made by the Associations of Psychiatrists opposing the petition. It needs to be noted that if unmodified ECT is banned then it will not be possible to administer ECT's in make shift clinics. This would also mean that one of the most expensive therapies would become unavailable to a large number of private psychiatrists because modified ECT cannot be administered by a lone psychiatrist in the privacy of his clinic, As the commercial considerations loom large over the debate I am forced to wonder whether it is these concerns that are prompting

43. In Hungary since 1994 the collaboration of a specialist in anesthesiology is a legal obligation. " Rates of Electroconvulsive Therapy Use in Hungary" 20 (1) Journal of ECT 42 (Mar 2004)

44. Grace M Fergusson et al " ECT in Scottish Clinical Practice : A National Audit of Demographics Standards and Outcomes" 20 (3) Journal Of ECT 166 (Sep 2004)

45. For reports to this effect see Chanpattana Worrawat and Barry Alan " Electroconvulsive Therapy Practice in Thailand" 20 (2) Journal of ECT 94 (June 2004) ; Motohashi Nobutaka and Higuchi " A questionnaire survey of Electroconvulsive Therapy practice in University Hospitals and National Hospitals in Japan" 20 (1) Journal of ECT 21 (Mar 2004)

the psychiatrists associations support for unmodified ECT.

The Indian Psychiatrists Society in its affidavit informs that unmodified ECT needs to be continued as anesthesia is contra indicated for some "persons with mental illness". It is general medical practice that patients who react unfavorably to one kind of treatment are provided an equally safe alternative. Doctors cannot without the consent of the patient decide on her pain thresholds. Contrary to general medical practice the doctors here are seeking authority to administer a more painful intervention of doubtful efficacy and without the patient's consent. A contention which more than anything else seems to show that the rights which are available to other patients are not available to " persons with mental illness" It is this same unequal treatment which explains how this entire debate is taking place in the absence of the person on whose body the so called treatment is to be administered. The manner in which the Indian Supreme Court resolves this petition shall serve as one more barometer of the state of the rights of persons with psychosocial disability.

IV "Mental Illness" under the Disability Legislations

As already mentioned other than the above discussed legislations "mental illness" also finds inclusion in the more recently enacted Disability Legislations. The definition of disability in the Persons with Disabilities (Equal Opportunity, Protection of Rights and Full Participation) Act 1995 includes mental illness[46]. The enactment is an effort to have disability inclusive policies in education[47] and employment[48]. It makes provision for affirmative action programs[49] and social security policies[50] as also physical access to transport and buildings[51].

The National Trust for (Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities) Act 2000 does not explicitly mention "mental illness". However "persons with mental illness" get included by implication as multiple disabilities is defined to

46. Section 2 (i) of the PWDA
47. Id sections 26-31.
48. Id sections 32-41
49. Id sections 42-43
50. Id sections 66-68
51. Id sections 44 to 46

mean the simultaneous presence of any two disabilities included in the PWDA[52]. This law sets up a Trust which could amongst other things support programs for the independent living of persons with disability[53] even as it also specifies procedures for the appointment of guardians for those persons with disabilities who are in need of them[54]. The statute speaks of providing guardianship only if required and only in those spheres where needed[55].

The PWDA applies to "persons with mental illness" however the incapacity regime subsisting in the remaining laws is the stumbling block to persons with psychosocial disabilities obtaining full benefit of the statute. Thus an interrogation of the incapacity regime is required to enable persons with psychosocial disabilities to fully realize the rights guaranteed under PWDA. The ordinary rule of statutory construction is that a later law prevails over an earlier statute. Further a statute has to be so interpreted as to render it workable. Insofar as the PWDA can not work for persons with psychosocial disabilities without the incapacity regime being given a go by it could be contended that the new law has in effect superseded the earlier exclusionary legislative provisions. However without an explicit supersession[56] and in the face of the medicalized IDEAS which has been notified by the Ministry of Social Justice and Empowerment[57] it may be difficult to mount such an argument. Consequently when it comes to accessing the rights guaranteed under the PWDA the position of persons with psychosocial disabilities is to say the least anomalous.

V Towards a Rights Consonant Legal Order

As was mentioned in the beginning of this article rights are trumps for the vulnerable[58] and instruments of obtaining

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52. Section 2 (h) NTA
53. Id section 11 (2) (a)
54. Id section 14
55. Id section 14 (3)
56. It could be contended that supersession is implied in section 72 when it lays down that the provisions of the Act are in addition to and not in derogation of any other law, rules , orders or instructions issued or enacted for the benefit of persons with disability.
57. This notification has been issued by the ministry on 27.2.2002
58. R Dworkin Taking Rights Seriously (1977)

accountability from the powerful. Rights have often to be obtained after protracted struggles. Persons with psychosocial disabilities are engaged in this struggle towards the realization of their rights of equality, liberty and dignity. This struggle is primarily being spearheaded by the "discredited"[59] in a bid to avoid the stigma, exclusion and discrimination confronted by the "discredited" the

"discreditable" wish to pass off as non disabled. The discreditable show that the exclusion requires persons to live a lie to not acknowledge a disability because of the manner in which a person with disability is treated upon disclosure.

The point being made is that a rights consonant legal regime has to make the bearers of the rights central to the discourse. As things stand this is not the situation for persons with psychosocial disability. For that half promise to be rendered whole it is imperative that there are moves in the law to recognize the equal status and capacity of persons with psychosocial disability. Though there are legal sites which can enable the creation of a non discriminatory legal regime for persons with psychosocial disability, no such regime at present exists. The possibilities of making these moves seems dismal if even those who are voicing concern for the rights of " persons with mental illness" are doing so with paternalistic motivations.

In this situation, the Convention on the Rights of persons with Disability provides opportunity to initiate a suitable forward looking discourse on the rights of persons with psychosocial disabilities. It is appropriate to clarify that I am not proposing a special rights regime for persons with psychosocial disability. Rather, I am highlighting the possibilities that the Convention has opened up for adopting a Disability Rights Regime which would acknowledge, amongst others, the deprivations endured by persons with psychosocial disabilities, and recognize rights which would prevent future denials. This expectation stems from the fact that disability discourse is about accepting diversity and acknowledging difference in such manner that place is made for the part within the whole.

Persons with psychosocial disability are seeking a right not

59 Susan Stefan " 'Discredited' and 'Discreditable' : the Search for Political Identity by People with Psychiatric Diagnosis" 44 William and Mary Law Review 1341 (Feb 2003)

to be discriminated on the basis of disability. It is pertinent to note that in asserting equality of rights, users and survivors are not denying the need for support. However their contention is that these needs of support should again not be seen as peculiar to persons with psychosocial disability, rather this need is an inevitable consequence of human interdependence. Legal recognition to the norm of supported decision-making would mean that that whilst the provision of support would not nullify the decision, at the same time the supporter will not turn decision-maker. Mechanisms such as advance directives and powers of attorney could be other legal devices to deal with the more non communicative phases of the human condition.

If acknowledgement of equality before law and legal capacity is one limb of the rights regime sought by persons with psychosocial disability; recognition of the right to liberty and protection from compulsory treatment is the other limb. It may be pertinent to note that though compulsory institutionalization has been most pervasively practiced against persons with psychosocial disabilities the deprivation is not confined to them, and custodial care has been an oft resorted method for dealing with persons with disabilities. Hence if the problem of forced interventions is addressed in an article of the Disability Convention the life and liberty concerns of all persons with disability would be addressed.

The explicit ouster of coercion from treatment should assist in rectifying the balance of power and make for greater parity of relationship between doctors and patients. It would also assist in making the therapeutic relationship more dialogical than authoritative. The introduction of such a change in doctor -patient relationship would, I hope, not just benefit persons with disabilities but would lead to a culture of medical responsiveness which would be extended to all recipients of care and treatment. It may be appropriate to clarify here that the freedom of medical professionals to develop treatments is not being questioned but the regimen by which such treatment is administered is being scrutinized. Hence what is being asserted is the freedom of choice, the right to be informed and a participative regime of treatment.

In this context it may be appropriate to note that the interventions of the Indian government in the Convention deliberations have been primarily aimed at saving the existing legal

order whether it is guardianship or compulsory treatment. The government claims that the situation on the ground dictates its approach. But a Convention is not (as is being oft reiterated in the deliberations of the Ad hoc Committee) about settling a program of action but about agreeing to a set of principles. Further it is not making law for here and now it is also setting direction for the future. And these future directions have to be necessarily aspirational if present limitations are to be overcome. If the text of the Convention saves the existing restrictions then it not only legitimizes the present deprivations but also closes the door for change in the future. Whilst pragmatic considerations may guide the implementation of program under the Convention these considerations cannot and should not guide the adoption of principles and norms. This is because whilst an implementation compromise may result in some present deprivation, a normative compromise hocks the future. It is this future compromise which has to be averted if the deprivations of rights that blight the life of persons with psychosocial disabilities today are not to hamper their tomorrow.

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Important Statements / Decisions/ Opinions of the Commission

1. Remedial measures to ameliorate the plight of undertrial prisoners - Letter addressed by the Chairperson, NHRC to Chief Justices of all High Courts dated 1 July 2003

1st July, 2003

Dear Chief Justice,

I am writing to you on a matter, which has been a source of concern to you as well as to myself - the plight of under-trial prisoners.

While as Chief Justice of India, I had written to the Chief Justices of all the High Courts on 29th November, 1999 about the plight of under-trial prisoners languishing in jails, even in cases involving petty and bailable offences merely for the reason that they were not in a position to furnish bail bonds to get released on bail. I had suggested that every Chief Metropolitan Magistrate or the Chief Judicial Magistrate of the area in which a District Jail falls, may hold its court once or twice in a month in jail, depending on the workload, to take up the cases of those under-trial prisoners who were involved in petty offences and or were keen to confess their offences. I had tried to monitor the progress of action initiated by most of you on my suggestion and pursued the matter further vide my letters dated 14 April 2000 and 11 January 2001.

I wish to continue my efforts in regard to under-trial prisoners in my capacity as the Chairperson of the NHRC which has been considering human rights of prisoners as an area of special concern ever since its establishment in 1993.

Visiting jails to study the living conditions of prisoners is one of the mandatory functions of the Commission as spelt out in section 12 (c) of the Protection of Human Rights Act 1993. Visits to jails in various States by the Members and senior officers of the Commission especially the Special Rapporteurs bring out a very dismal picture of prison life in our Country. The Commission has observed that in most States jails are overcrowded, standard of

sanitation and hygiene is poor, medical facilities are inadequate and the overall atmosphere is depressingly sad. Overcrowding which throws every system and facility out of gear, is found to be the root-cause of the deplorable living conditions in our jails. It constitutes a glaring violation of the basic human right to life which means life with dignity.

For the past two years, the Commission has been conducting biannual analysis of prison population by obtaining data of prison population from all the States/Union Territories as of 30 June and 31 December of every year. I thought, I should share with you an important feature of the analysis of prison population as of 30 June 2002 conducted recently. The analysis reveals that :

i) Prison population of the entire country was 3,04,813 against the built-in capacity of 2,32,412. It shows an overcrowding of 31.2% for the country as a whole. However, in some States/ UTs such as Delhi, Jharkhand, Chhatisgarh, Gujarat, Haryana and Bihar, prison population is 2 to 3 times of the total capacity of all the jails.

ii) Under-trial constitute about 75% of the prison population in the country as a whole. The proportion of under-trials to the total prison population is 80% or more in 7 States and one U.T. It is 100% in the Union Territory of Dadar and Nagar Haveli.

iii) State/UT-wise position of jail population, degree of overcrowding and percentage of under-trials is given in the Annexure attached to this letter.

The Commission finds that despite several pronouncements of the Hon'ble Supreme Court of India and certain High Courts on the subject, under-trials are languishing in jails in large numbers all over the country. Slow progress of cases in Courts and the operation of the system of bail to the disadvantage of the poor and the illiterate prisoners is responsible for the pathetic plight of these "forgotten souls" who continue to suffer all the hardships of incarceration although their guilt is yet to be established. It is the overwhelming congestion of under-trials in jails which is making it difficult for the Prison Administration to ensure that the basic minimum needs of the prisoners such as accommodation, sanitation and hygiene water and food, clothing and bedding and medical facilities are satisfied.

I am sure you appreciate and share the Commission's concern

for human rights of the prisoners. In my opinion, the following measures may be found useful in reducing the congestion of under-trials in the prisons of your State:

i) Regular holding of special courts in jails and its monitoring by the Chief Justice/senior Judge of the High Court.

ii) Monthly review of the cases of under-trials in the light of the Supreme Court's judgment in Common Cause vs. Union of India [1996(4) SCC 775 and 1996 (6) SCC 775): In this judgment, the Supreme Court has issued clear directions for (a) release on bail and (b) discharge of certain categories of under-trials specified in the judgment.

iii) *Release of under-trials on Personal Bonds:* A number of under-trials are found to be languishing in jails even after being granted bail simply because they are unable to raise sureties. Cases of such under-trials can be reviewed after 6-8 weeks to consider their suitability for release on personal bonds, especially in cases when they are first offenders and punishment is also less than 2/3 years.

iv) Visit to District and Session Judge to Jail: The Jail Manuals of all the States contain provisions for periodical visit of the District and Session Judge as an ex-officio visitor to jails falling within their jurisdiction. Besides ensuring an overall improvement in management and administration of the Prison, such visits can help in identifying the cases of long-staying under-trials, which need urgent and special attention. The Commission has observed a mark improvement in the situation in the States where this obligation is being discharged seriously and sincerely by the subordinate judiciary. It would be useful to issue directions for such visits by all the ex-officio visitors to jails following in their jurisdictions.

May I also request you to keep us informed at the NHRC about the Action Taken so that we are in a position to circulate the same to other States with a view to bring about uniformity as well as intensity.

I shall feel privileged to receive any suggestions from you to deal with the problems of under trail prisoners.

With warm regards,

Yours sincerely,

(A.S.Anand)

To,
Chief Justices of all High Courts

CUSTODIAL JUSTICE CELL
PRISION STATISTICS AS ON 30-6-02

Annexure

Srl.	STATES	Jails Capacity	% Overcrowding, (-) means inside capacity	% UTs
1	ANDHRA PRADESH	10794	20.51	67.07
2	ARUNACHAL (No Jail)			
3	ASSAM	6193	11.64	64.15
4	BIHAR	21759	73.78	88.27
5	CHHATTISGARH	4438	110.16	52.42
6	GOA	294	89.46	60.49
7	GUJARAT	5418	100.22	73.7
8	HARYANA	6567	99.95	68.6
9	HIMACHAL PRADESH	868	0.92	54.45
10	JAMMU & KASHMIR	8100	58.55	91.67
11	JHARKHAND	5788	64.86	83.26
12	KARNATAKA	9191	11.37	79.34
13	KERALA	5904	9.4	68.92
14	MADHYA PRADESH	16239	65.87	56.94
15	MAHARASHTRA	19004	16.92	69.65
16	MANIPUR	1170	-66.07	92.19
17	MEGHALAYA	500	-2.6	94.66
18	MIZORAM	1012	0.89	79.14
19	NAGALAND	1160	-47.24	89.87
20	ORISSA	7542	53.78	75.03
21	PUNJAB	10854	16.97	68.24
22	RAJASTHAN	15707	-22.67	63.84
23	SIKKIM	100	72	51.16
24	TAMIL NADU	19240	-55.62	36.16
25	TRIPURA	744	34.81	57.93
26	UTTAR PRADESH	32380	69.84	87.37
27	UTTARANCHAL	2433	0.82	79.13
28	WEST BENGAL	19666	-25.88	79.42
	Total States	227065	28.74	73.94
	Union Territories			
29	ANDAMAN & NICOBAR	229	3.49	24.05
30	CHANDIGARH	1000	-57.3	74.24
31	DADAR & NAGAR HAV	40	-22.5	100
32	DAMAN & DIU	120	-57.5	68.63
33	DELHI	3637	217.4	78.52
34	LAKSHADWEEP	16	-100	
35	PONDICHERRY	305	-7.21	55.48
	TOTAL UTs	5347	135.14	76.84
	All India	232412	31.19	74.06

2. Modified Procedures/ Guidelines on premature release of prisoners - Letter addressed to all Chief Secretaries/ Administrators of States/ Union Territories dated 26 September 2003

M.L. ANEJA
JOINT REGISTRAR(LAW)
Tel. No.011 336 1764
Fax No.011 336 6537

Sardar Patel Bhavan
Sansad Marg, New Delhi

Dated the September 26, 2003

To

All the Chief Secretaries/Administrators of States/UTs

Sub : Procedure/Guidelines on premature release of prisoners.

Ref. : Commission's letter of even number dated 8.11.99

Sir,

The National Human Rights Commission has received a number of representations pointing out that the State Governments are applying differing standards in the matter of premature release of prisoners undergoing life imprisonment. After examining the vexed question of disparities and differing standards applied by the various States in considering the cases of prisoners serving life imprisonment for premature release under the provisions of section 432, 433 and 433 A of Cr.P.C., the Commission had issued broad guidelines vide it's letter of even number dated 8.11.1999 for the purpose of ensuring uniformity in the matter. After considering the response received from a number of States/UTs, the Commission vide their letter of even number dated 4 April 2003 put these guidelines on hold for the time being pending re-examination of the entire issue. The Commission has now decided to modify paras 3 & 4 of its guidelines issued vide its letter of even number dated 8.11.99. Para 3 as modified is as follows:

Eligibility for premature release

3.1 Every convicted prisoner whether male or female undergoing sentence of life imprisonment and covered by the provisions of Section 433A Cr.PC shall be eligible to be considered for

premature release from the prison immediately after serving out the sentence of 14 years of actual imprisonment i.e. without the remissions. It is, however, clarified that completion of 14 years in prison by itself would not entitle a convict to automatic release from the prison and the Sentence Review Board shall have the discretion to release a convict, at an appropriate time in all cases considering the circumstances in which the crime was committed and other relevant factors like;

a) whether the convict has lost his potential for committing crime considering his overall conduct in jail during the 14 year's incarceration;

b) the possibility of reclaiming the convict as a useful member of the society; and

c) Socio-economic condition of the convict's family.

With a view to bring about uniformity, the State/UT Governments are, therefore, advised to prescribe the total period of imprisonment to be undergone including remissions, subject to a minimum of 14 years of actual imprisonment before the convict prisoner is released. The Commission is of the view that total period of incarceration including remissions in such cases should ordinarily not exceed 20 years.

Section 433A was enacted to deny premature release before completion of 14 years of actual incarceration to such convicts as stand convicted of a capital offence. The Commission is of the view that within this category a reasonable classification can be made on the basis of the magnitude, brutality and gravity of the offence for which the convict was sentenced to life imprisonment. Certain categories of convicted prisoners undergoing life sentence would be entitled to be considered for premature release only after undergoing imprisonment for 20 years including remissions. The period of incarceration inclusive of remissions even in such cases should not exceed 25 years. Following categories are mentioned in this connection by way of illustration and are not to be taken as an exhaustive list of such categories:

(a) Convicts who have been imprisoned for life for murder in heinous cases such as murder with rape, murder with dacoity, murder involving an offence under the Protection of Civil

Rights Act 1955, murder for dowry, murder of a child below *14 years of age, multiple murder, murder committed after* conviction while inside the jail, murder during parole, murder in a terrorist incident, murder in smuggling operation, murder of a public servant on duty.

(b) Gangsters, contract killers, smugglers, drug traffickers, racketeers awarded life imprisonment for committing murders as also the perpetrators of murder committed with pre-meditation and with exceptional violence or perversity.

(c) Convicts whose death sentence has been commuted to life imprisonment.

3.2 All other convicted male prisoners not covered by section 433A Cr.PC undergoing the sentence of life imprisonment would be entitled to be considered for premature release after they have served at least 14 years of imprisonment inclusive of remission but only after completion of 10 years actual imprisonment i.e. without remissions.

3.3 The female prisoners not covered by section 433A Cr.PC undergoing the sentence of life imprisonment would be entitled to be considered for premature release after they have served at least 10 years of imprisonment inclusive of remissions but only after completion of 7 years actual imprisonment i.e. without remissions.

3.4 Cases of premature release of persons undergoing life imprisonment before completion of 14 years of actual imprisonment on grounds of terminal illness or old age etc. can be dealt with under the provisions of Art. 161 of the Constitution and old paras 3.4 and 3.5 are therefore redundant and are omitted.

Inability for Premature Release

Deleted in view of new para 3.

All the States/UTs are requested to review their existing practice and procedure governing premature release of life convicts and bring it in conformity with the guidelines issued by the Commission.

Yours faithfully,

Joint Registrar(Law)

3. Modified Instructions relating to death during the course of a police action - Letter addressed by the Chairperson, NHRC to all Chief Ministers/ Administrators of all States/ Union Territories on 2 December 2003

Justice A.S. Anand

Chairperson

(Former Chief Justice of India) 2nd December, 2003

Dear Chief Minister,

Death during the course of a police action is always a cause of concern to a civil society. It attracts criticism from all quarters like Media, the general public and the NGO sector.

The police does not have a right to take away the life of a person. If, by his act, the policeman kills a person, he commits an offence of culpable homicide or not amounting to murder, unless it is established that such killing was not an offence under the law. Under the scheme of criminal law prevailing in India, it would not be an offence if the death is caused in exercise of right of private defence. Another provision under which the police officer can justify causing the death of a person, is section 46 of the Criminal Procedure Code. This provision authorizes the police to use reasonable force, even extending up to the causing of death, if found necessary to arrest the person accused of an offence punishable with death or imprisonment for life. Thus, it is evident that death caused in an encounter if not justified would amount to an offence of culpable homicide.

The Commission while dealing with complaint 234 (1 to 6)/ 93-94 and taking note of grave human rights issue involved in alleged encounter deaths, decided to recommend procedure to be followed in the cases of encounter death to all the states. Accordingly, Hon'ble Justice Shri M.N. Venkatachaliah, the then Chairperson NHRC, wrote a letter dated 29/3/1997 to all the Chief Ministers recommending the procedure to be followed by the states in "cases of encounter deaths" (copy enclosed for ready reference).

Experience of the Commission in the past six years in the matters of encounter deaths has not been encouraging. The

Commission finds that most of the states are not following the guidelines issued by it in the true sprit. It is of the opinion that in order to bring in transparency and accountability of public servants, the existing guidelines require some modifications.

Though under the existing guidelines, it is implicit that the States must send intimation to the Commission of all cases of deaths arising out of police encounters, yet some States do not send intimation on the pretext that there is no such specific direction. As a result, authentic statistics of deaths occurring in various states as a result of police action are not readily available in the Commission. The Commission is of the view that these statistics are necessary for effective protection of human rights in exercise of the discharge of its duties.

On a careful consideration of the whole matter, the Commission recommends following modified procedure to be followed by the State Governments in all cases of deaths in the course of police action :-

A. When the police officer in charge of a Police Station receives information about the deaths in an encounter between the Police party and others, he shall enter that information in the appropriate register.

B. Where the police officers belonging to the same Police Station are members of the encounter party, whose action resulted in deaths, it is desirable that such cases are made over for investigation to some other independent investigating agency, such as State CBCID.

C. Whenever a specific complaint is made against the police alleging commission of a criminal act on their part, which makes out a cognisable case of culpable homicide, an FIR to this effect must be registered under appropriate sections of the I.P.C. Such case shall invariably be investigated by State CBCID.

D. A Magisterial Inquiry must invariably be held in all cases of death which occur in the course of police action. The next of kin of the deceased must invariably be associated in such inquiry.

E. Prompt prosecution and disciplinary action must be initiated

against all delinquent officers found guilty in the magisterial enquiry/ police investigation.

F. Question of granting of compensation to the dependents of the deceased would depend upon the facts and circumstances of each case.

G. No out-of-turn promotion or instant gallantry rewards shall be bestowed on the concerned officers soon after the occurrence. It must be ensured at all costs that such rewards are given/ recommended only when the gallantry of the concerned officer is established beyond doubt.

H. A six monthly statement of all cases of deaths in police action in the State shall be sent by the Director General of Police to the Commission, so as to reach its office by the 15th day of January and July respectively. The statement may be sent in the following format along with post-mortem reports and inquest reports, wherever available and also the inquiry reports:-

1. Date and place of occurrence
2. Police Station, District.
3. Circumstances leading to deaths:
   - i. Self defence in encounter
   - ii. In the course of dispersal of unlawful assembly
   - iii. In the course of effecting arrest.
4. Brief facts of the incident
5. Criminal Case No.
6. Investigating Agency
7. Findings of the magisterial Inquiry/enquiry by Senior Officers:
   - a. disclosing in particular names and designation of police officials, if found responsible for the death; and
   - b. whether use of force was justified and action taken was lawful.

It is requested that the concerned authorities of the State are given appropriate instructions in this regard so that these guidelines are adhered to both in letter and in spirit.

With regards,

Yours sincerely,

Sd/-

(A.S. Anand)

Chief Ministers / Administrators of all States and / UTs

Encl: as above

4. Remedial measures to curb illegal trade in human organs - Letter addressed by the Chairperson to the Prime Minister and Chief Ministers/ Administrators of all States and Union Territories dated 29 January 2004

D.O.No.11/5/2001-PRP&P **29 January 2004**

Dear Prime Minister,

The Commission is deeply concerned about the illegal trade in human organs and in particular, trade in kidneys which often involves exploitation of poor people and violation of their human rights. There are reports of organ trafficking involving clinicians, managers of clinical centers, middlemen and others. The National Human Rights Commission has come across a number of instances in which the 'compassionate donor' provision in the Organ Transplantation Act is being abused. In many cases, the donor is an unrelated and unacquainted person who is lured into donating an organ such as the kidney by financial offers made by or on behalf of the prospective recipient.

The practice of 'organ purchase' has acquired the dubious dimensions of 'organ trade' with touts operating as middlemen, and creation of allegedly false records of a compassionate donation. While several steps are reported to have been initiated in Karnataka to make the review process stricter, in the media there are disturbing reports of this pernicious practice being widespread in Tamil Nadu, Andhra Pradesh and a number of other States. This illegal trade in human organs is unethical and is a serious violation of human rights.

The Commission had constituted a Core Group of medical experts to go into issues relating to public health and human rights and in particular about the trade in human organs. They have collectively expressed the view that the clause relating to 'compassionate donation' in the Organ Transplantation Act has been frequently exploited in an unethical manner, which is violative of human rights. They have suggested certain remedial measures.

Having considered the matter in depth, the Commission recommends that the proposed remedial measures, which are

enclosed, be adopted. I am also writing to the Chief Ministers of all States and Union Territories with a request to initiate action on the Commission's recommendations.

May I request you kindly to have appropriate action initiated by the Central Government in this regard.

With warm regards,

Yours sincerely,

(A.S.Anand)

Encl: as above

Shri Atal Bihari Vajpayee
Hon'ble Prime Minister
South Block
New Delhi - 110011

D.O. No.11/5/2001-PRP&P 29 January 2004

Dear Chief Minister,

The Commission is deeply concerned about the illegal trade in human organs and in particular, trade in kidneys which often involves exploitation of poor people and violation of their human rights. There are reports of organ trafficking involving clinicians, managers of clinical centers, middlemen and others. The National Human Rights Commission has come across a number of instances in which the 'compassionate donor' provision in the Organ Transplantation Act is being abused. In many cases, the donor is an unrelated and unacquainted person who is lured into donating an organ such as the kidney by financial offers made by or on behalf of the prospective recipient.

The practice of 'organ purchase' has acquired the dubious dimensions of 'organ trade' with touts operating as middlemen, and creation of allegedly false records of a compassionate donation. While several steps are reported to have been initiated in Karnataka to make the review process stricter, in the media there are disturbing reports of this pernicious practice being widespread in Tamil Nadu, Andhra Pradesh and a number of other States. This illegal trade in human organs is unethical and is a serious violation of human rights.

The Commission had constituted a Core Group of medical experts to go into issues relating to public health and human rights and in particular about the trade in human organs. They have collectively expressed the view that the clause relating to 'compassionate donation' in the Organ Transplantation Act has been frequently exploited in an unethical manner, which is violative of human rights. They have suggested certain remedial measures.

To curb this abuse, the Commission recommends that the remedial measures which are enclosed be adopted. I request you to direct the concerned authorities to implement these measures. It would also be useful if the situation is monitored at the highest level at regular intervals. It would be appreciated if a report on the action taken on the above recommendations could be sent to the Commission at the earliest.

With regards,

Yours sincerely,

Encl: as above **(A.S.Anand)**

To

All Chief Ministers / Administrators of all States /UTs

ANNEXURE

Remedial Measures suggested by NHRC to all States/UTs to check illegal trade in human organs

a) State Medical Councils should screen the records of hospitals performing organ transplants (especially kidney transplants) and estimate the proportion of transplants which have been made through a 'compassionate donor' mechanism. In case of kidney transplants, wherever the proportion has exceeded 5% of the cases performed in any of the past 5 years, the State Medical Council should initiate a full fledged enquiry into the background of the donors and the recipients, as well as a careful documentation of the follow-up health status of the donor and the nature of after care provided by the concerned hospital. Wherever police enquiries are needed for such background checks, the help of the State Human Rights Commission may be sought for providing appropriate directions to the State agencies.

b) Cadaver Transplant programmes should be promoted to reduce the demand for 'live donors'.

c) Facilities for chronic renal dialysis should be increased and improved in hospitals, to provide alternatives to kidney transplantation.

d) Better facilities should be provided for transparent and effective counseling of prospective donors.

e) Wherever possible, a mechanism should be established for independent verification of the veracity of 'compassionate donation' by a group of experts which is external to the hospital wherein the transplant procedure is proposed to be performed.

5. Brief Presentation by Dr. Justice A.S. Anand, Chairperson, NHRC at the Session on "Balancing Human Rights Protections and Security Concerns: Regional Perspectives" at the Eighth Annual Meeting of Asia Pacific Forum (18 February 2004)

Terrorism poses a serious threat to national and international security. India has been a victim of terrorist attacks since 1980s. In the recent years, vicious terrorist attacks have occurred against democratic institutions, army camps, places of worship and facilities used by the civilians. By way of illustration, in the State of Jammu & Kashmir alone, terrorist attacks occurred in the Raghunath Mandir, in Jammu, on 30 March 2002, when 30 persons were killed and 17 injured; in Rajiv Nagar, Jammu, on 13 July 2002, when 28 persons were killed and 27 injured; in the Nunwan Camp in Anantnag on 6 August 2002, when 9 Amarnath pilgrims were killed and 3 others injured; and in Nadimarg, Pulwama district, when 24 Kashmiri Pandits were killed. In the State of Gujarat, an outrageous terrorist attack occurred on 24-25 September 2002, in the Akshardham Temple in Gandhinagar, taking the lives of 28 civilians; in addition, two security personnel lost their lives and six others were injured in seeking to protect the civilians and flush out the terrorists.

These incidents brought into sharp focus the need to combat and triumph over the evil of terrorism. India's lonely fight against terrorism for many years is now joined by other countries after recent instances of international terrorism. The National Human Rights Commission of India examined the issues both of terrorism as a factor that inhibits the enjoyment of human rights as also adherence to human rights standards in the fight against terrorism, on several occasions.

Terrorists are the sworn enemies of human rights and there can be no equivocation on this matter. The National Human Rights Commission of India is of the firm view that terrorism must be fought and defeated. This is essential for the protection of human rights themselves, for the right to life - itself a target of terrorists - is the most basic right, without which human beings can exercise no other right.

The question that arises, however, is in relation to the means

to be adopted to achieve this goal. The United Nations General Assembly Resolution 56/160 of 19 December 2001, adopted some eleven weeks after Security Council Resolution 1373, is quite clear on this matter when, in operative paragraph 6, it:

> 'Calls upon States to take all necessary and effective measures, **in accordance with relevant provisions of international law, including international human rights standards**, to prevent, combat and eliminate terrorism in all its forms and manifestations, wherever and by whomever it is committed, and also calls upon States to strengthen, where appropriate, legislation to combat terrorism in all its forms and manifestations'.

While an acceptable definition of terrorism still eludes the international community, the Supreme Court of India, as far back as in 1994, in a Bench in which I was a Member, dwelt at length on it and also drew a distinction between a criminal act and a terrorist act. In the Judgment in Hitendra Vishnu Thakur v. State of Maharashtra [(1994) 4 SCC 602], which has been used extensively in the work of UN and other international organizations, the Supreme Court of India said:

> "... ... ... *It may be possible to describe it (Terrorism)* as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of any ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb harmony of the society or "terrorise" people and the society and not only those directly assaulted, with a view to disturb even tempo, peace and tranquility of the society and create a sense of fear and insecurity. A 'terrorist' activity does not merely arise by causing disturbance of law and order or of public order. The fall out of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law. Experience has shown us that 'terrorism' is generally an attempt to acquire helplessness

in the minds of the people at large or any section thereof and is a totally abnormal phenomenon. What distinguishes 'terrorism' from other forms of violence, therefore, appears to be the deliberate and systematic use of coercive intimidation. ... ..."

In an opinion dated 14 July 2000, the Commission dwelt at length on various provisions of the Prevention of Terrorism Bill 2000 (proposed by the Law Commission in its 173rd Report and introduced in Parliament), and opposed that Bill, inter alia, because it did not conform to international human rights standards. In that opinion, the Commission had observed that there were now twelve global treaties pertaining to the subject of international terrorism. However, despite this array of international instruments, the Commission noted that it remained essential, both to the cause of human rights and to the fight against terrorism, that the measures required to be taken under each of these Conventions were fully and meticulously under-taken, both in terms of appropriate legislation, where this may still be needed, and in terms of other practical arrangements essential to the effective implementation of these Conventions. The Commission had accordingly urged the Government of India to do so and, in particular, to enact a suitable law to deal with the financing of terrorism.

In that same opinion, the Commission had also stated that

"...consistent with the view that it took in respect of TADA, the Commission is now unanimously of the considered view that there is no need to enact a law based on the Draft Prevention of Terrorism Bill, 2000 and the needed solution can be found under existing laws if properly enforced and implemented, and amended, if necessary. The proposed Bill, if enacted, would have the ill-effect of providing unintentionally a strong weapon capable of gross misuse and violation of human rights which must be avoided particularly in view of the experience of the misuse in the recent past of TADA and earlier of MISA in the emergency days."

The Commission accordingly expressed

"its inability to agree with the opinion of the Law Commission in its 173 rd Report" and recommended "that a new law based on the Draft Prevention of Terrorism Bill, 2000 be not enacted."

Such a course, the Commission stated, was

> "consistent with our country's determination to combat and triumph over terrorism in a manner also consistent with the promotion and protection of human rights."

It reacted similarly on 19 November 2001 when, at the height of the fever occasioned by the 'global war against terrorism,' the Commission opposed the Prevention of Terrorism Ordinance, 2001 which had been promulgated on 24 October 2001. In its Opinion of 19 November 2001, the Commission, while balancing security with Human Rights considerations, expressed its opinion thus:

> 'Undoubtedly national security is of primary importance. Without protecting the safety and security of the nation, individual rights cannot be protected. However, the worth of a nation is the worth of the individuals constituting it. Article 21 [of the Constitution], which guarantees a life with dignity, is non-derogable. Both national integrity as well as individual dignity are core values in the Constitution, and are compatible and not inconsistent. The need is to balance the two. Any law for combating terrorism should be consistent with the Constitution, the relevant international instruments and treaties, and respect the principles of necessity and proportionality.'

The Commission is of the firm view that a proper observance of human rights is not a hindrance to the promotion of peace and security. Rather, it is an essential element in any worthwhile strategy to preserve peace and security and to defeat terrorism. The purpose of anti-terrorism measures must therefore be to protect democracy and human rights, which are fundamental values of our society and the core values of the Constitution.

In the face of terrorism, there can be no doubt that the State has not only the right, but also the duty, to protect itself and its people against terrorist acts and to bring to justice those who perpetrate such acts. The manner in which a State acts to exercise this right and to perform this duty must be in accordance with the Rule of Law. The Supreme Court of India has, in DK Basu vs. State of West Bengal, cautioned that the

> "Challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism.

State terrorism would only provide legitimacy to terrorism: that would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that the various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves."

The consistent position developed by the Commission in respect of anti-terrorism legislation has been elaborated in greatest detail in the Opinions that it wrote on 14 July 2000 and 19 November 2001, in respect of the Draft Prevention of Terrorism Bill, 2000 and the subsequent Prevention of Terrorism Ordinance, 2001, both of which it opposed, as it had, in February 1985, opposed the continuance of the Terrorist & Disruptive Activities Act (TADA). The full text of the Opinions of the Commission has been placed on its web-site www.nhrc.nic.in.

On 26 March 2002, the Prevention of Terrorism (Second) Ordinance, 2001 was enacted into a Law following a Joint Session of Parliament. The Commission therefore took the position that it respects the constitutional process leading to the adoption of this Act, even though it had made known its opposition to the contents of the Act before it was enacted. The Commission retains the responsibility under its own Statute to ensure that the Act is not implemented in a manner that is violative of human rights, the Constitution, the laws of the land and the treaty obligations of the country.

The Prevention of Terrorism Act, 2002 defines terrorism in far greater detail. It seeks to deprive the beneficiaries of the proceeds of terrorism. It contains some safeguards against the possibility of abuse. There are severe penalties attached to the abuse of the process of law and malicious prosecution by police. Specific safeguards are provided for, in the Act with a view to prevent the possibility of the misuse of the special powers given to the investigating authorities and address the concern of violation of human rights. The Act raises the ban on the admissibility of confessions obtained in police lock ups and sanctions penalties for police officers found guilty of invoking the law against citizens on malafide grounds. Act essentially has limited application and extends to acts, which threaten the unity, security, integrity or sovereignty of India. Special Courts can take cognizance of an

offence under the Act only after the sanction of State Government or the Central Government; investigation of an offence under the Ordinance can be done by an officer not below the rank of Deputy Superintendent of Police; confession made before a police officer to be recorded before a magistrate within 48 hours; information of arrest of the accused to be given to a family member after arrest and this fact to be recorded by the police officer and allows presence of counsel during the interrogation of the accused.

India has a well-established judicial system, which has been consistently alive to the need to uphold fundamental rights of individuals in light of the constitutional provisions as well as human rights. On 16 December 2003, the Supreme Court of India in the People's Union for Civil Liberties & Another. Vs. Union of India (2003 (10) SCALE 967), while dismissing petitions challenging constitutional validity of the Prevention of Terrorism Act, 2002, however held that mere support to banned terrorist organization is not sufficient for prosecution under POTA. Criminal intention must be proved. The Supreme Court has moderated Section 21 of POTA, which deals with offences relating to the support given to terrorist organization, which was cast in a manner that virtually invited gross abuse. Similarly, it reduced the rigour of Section 49(7) of the Act by holding that an accused under the POTA could seek bail even before the expiry of one-year period.

The Commission has expressed its view that, when compared with TADA, the Prevention of Terrorism Act does contain some provisions that are aimed at providing safeguards against its possible misuse but emphasized that these safeguards are insufficient and more safeguards are required. It, therefore, continues to be the duty of the Commission to monitor the implementation of the Act with vigilance and to ensure that the provisions of the Act are not abused or human rights violated.

Section 60 of the Prevention of Terrorism Act, 2002 provides that the Central Government and each State Government shall, whenever necessary, constitute one or more Review Committees for the purposes mentioned in the Act. The Government took notice of the view of the Commission about the need of providing more safeguards and set up a Central Review Committee under Section 60 of the Act on 4 April 2003 under the Chairmanship of a former Chief Justice of the Punjab and Haryana High Court, with the

following Terms of Reference:

(i) the Review Committee shall take a comprehensive view of the use of the said Act in various States and shall be empowered to entertain complaints or grievances with regard to enforcement of the said Act and accordingly, give its findings and suggestions for removing the shortcomings, if any, in the implementation of the said Act; and

(ii) the Review Committee shall suggest measures to ensure that the provisions of the said Act are invoked for combating terrorism only.

Since the recommendations or directions of the Review Committee except those explicitly provided in the said Act were not binding on the Central Government and the State Governments and were only advisory in nature under the existing provisions, the Parliament amended Section 60 of the Prevention of Terrorism Act, 2002 through the Prevention of Terrorism (Amendment) Ordinance, 2003 (Ord. 4 of 2003) which was promulgated on 27th October 2003 to remedy the lacuna. This step is in keeping with the concerns expressed by the Commission of providing more safeguards against misuse and abuse of the POTA and to protect Human Rights. According to new sub-sections which were inserted in Section 60 of this Act,

"(4) Without prejudice to the other provisions of this Act, any Review Committee constituted under sub-section (1) shall, on an application by any aggrieved person, review whether there is a prima facie case for proceeding against the accused under this Act and issue directions accordingly.

(5) Any direction issued under sub-section (4), --

(i) by the Review Committee constituted by the Central Government, shall be binding on the Central Government, the State Government and the police officer investigating the offence; and

(ii) by the Review Committee constituted by the State Government shall be binding on the State Government and the police officer investigating the offence.

(6) Where the reviews under sub-section (4) relating to the same practice under this Act, have been made by a Review Committee constituted by the Central Government and a Review Committee constituted by the State Government, under sub-section (1), any direction issued by the Review Committee constituted by the Central Government shall prevail.

(7) Where any Review Committee constituted under sub-section (1) is of opinion that there is no prima facie case for proceeding against the accused and issue directions under sub-section (4), **then, the proceedings pending against the accused shall be deemed to have been withdrawn from the date of such direction."**

The Ordinance was replaced by the Prevention of Terrorism (Amendment) Act, 2003. According to the Statement of Objects and Reasons of the Prevention of Terrorism (Amendment) Act, 2003, these amendments empower the Review Committee to review, "on an application by an aggrieved person, whether there is a prima facie case for proceedings against the accused under the Act and issue directions accordingly. The directions of the Review Committee shall be binding on the Central Government, the State Government and the police officer investigating the offence. Where the directions relating to the same offence under the said Act, have been made by a Review Committee constituted by the Central Government and the Review Committee constituted by the State Government, the directions of the Central Review Committee shall prevail over those of the State Review Committees." The allegations of misuse and abuse of provisions of the Act are receiving attention of the Commission.

I may be permitted to conclude by quoting from a Lecture on 'Terrorism - An affront to Human Rights : challenge for democracies' delivered by me at the International Institute for Strategic Studies, London on 7 May 2002:

"Global awakening about human rights and the threat that terrorism has posed to human rights of the people all over the world is necessary. It is wrong to be selective about violation of human rights and the perpetrators of terrorism. Such selective approach leads to double standards, which make the motives of the

protagonists of human rights suspect. It also indirectly lends support to terrorists and terrorism. All nations must, therefore, co-operate to relentlessly and without any compromise fight terrorism. The liberal democracies should unite to condemn and combat terrorism. Concerted steps at a global level will have to be taken to tackle terrorism and safeguard human rights. But let me emphasise that in doing so, the approach should be human, rational and secular. It must be consistent with democratic principles. Any kind of partisan and sectarian approach would be counter-productive. We need to strike a balance between the liberty of an individual and the requirements of security of state and sovereignty and integrity of the nation while keeping an open mind to fight terrorism. A limited approach may help eliminate some present terrorists but not the causes or the phenomenon of terrorism, which produces terrorists; and that too at the cost of violation of human rights of many innocents. A proper balance between the need and the remedy requires respect for the principles of necessity and proportionality. We must avoid a descent into anarchy - in which the only rule is 'might is right'- combating terrorism should not be used as an excuse to suspend all the rules of international law and domestic civil liberties."

(Emphasis added)

6. Statement made by Mr R.S.Kalha, Member, NHRC of India on behalf of the Commission at the International Race Relations Round Table at Auckland, New Zealand on 3 February 2004.

Race Relations in the 21st Century

Session on Key Challanges

The Indian population is a homogenous mix and as such there are no distinct races. Racial Discrimination is, therefore, a non-existent issue in India. Discrimination based on religion, race, caste, sex, place of birth or any of them has been proscribed by the Indian Constitution (Article 15).

At the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban in 2001, the National Human Rights Commission of India expressed the opinion that "the exchange of views on human rights matters, whether at the national, regional or international level, can all contribute constructively to the promotion and protection of such rights." It added that it was not the "nomenclature" of the form of discrimination that must engage our attention, but the fact of its persistence. The Commission observed that the Constitution of India, in Article 15, expressly prohibits discrimination on grounds both of "race" and "caste" and that constitutional guarantee had to be vigorously implemented. The Commission held the view that the instruments of governance in the country, and the energetic and committed non-governmental sector of society that existed, could unitedly triumph over historical injustices that had hurt the weakest sections of our country, particularly Dalits and Adivasis. The Commission concluded that this was, above all, a national responsibility and a moral imperative that can and must be honoured.

Article 17 of the Constitution abolishes 'untouchability' and makes the enforcement of any disability arising out of 'untouchability' an offence punishable in accordance with law. The Parliament has already enacted the Protection of Civil Rights (Anti-Untouchability) Act, 1955. However, there are instances reported from certain pockets of the country about caste-based discrimination, denial of access to public wells/bathing ghats and temples. The persistence of manual scavenging, bonded labour and child labour, which affects, among other sections, members from

the Scheduled Castes, is also a cause for serious concern. The National Human Rights Commission of India has, therefore, taken up the issues with the concerned States and the Central authorities with a view to eliminate these practices in a time-bound manner. In response to a letter from the Chairperson of our Commission, the Prime Minister of India informed him that the need to end the degrading practice of manual scavenging was included as a part of the 15-point initiative announced on the Independence Day, 15 August 2002.

To give a clear expression to Constitutional provisions, an impressive range of legislative measures have been enacted to end discrimination against Scheduled Castes and Scheduled Tribes. These inter-alia include:

- The Protection of Civil Rights (Anti-Untouchability) Act, 1955.
- The Bonded Labour (Abolition) Act, 1976.
- The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.
- The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993.
- And various land reform acts.

The Government of India has also set up the National Commission for Scheduled Castes and Scheduled Tribes to protect and promote the rights of these sections. In addition, National Human Rights Commission of India has not only been taking up individual complaints of rights violations faced by these sections but also issues like elimination of manual scavenging and bonded labour etc. which affect them.

- Despite the affirmative action and 'compensatory discrimination' permitted under the Constitution and the range and scope of measures envisaged under those provisions, the regrettable fact remains that social injustice and the exploitation of Scheduled Castes, Scheduled Tribes and other weaker sections have not as yet been eliminated from our society. The challenge therefore lies in translating these legal provisions into reality and in strict enforcement of the existing laws. The key lies in the vigorous implementation of the full range of existing legal provisions.

- Despite the various efforts by the State, which have included perhaps the most far-reaching programmes of affirmative action ever undertaken in a democratic society anywhere in the world, the National Human Rights Commission of India remains deeply and painfully aware that atrocities against dalits recur (as sadly against other vulnerable sections of society as well), while serious gaps between policy directives and reality persist. There are many reasons for this: historical and cultural, economic and social, political and administrative, to name but a few.
- The crimes committed against the Scheduled Castes remain a cause of great concern to the Commission. According to the National Crime Records Bureau Report, Crime in India (2001), 33,501 crimes against Scheduled Castes were registered in 2001 as compared to 25,455 in the previous year (2000).

Education Gap

The education gap between persons belonging to the Scheduled Castes and Scheduled Tribes and the general population is a cause for concern to the National Human Rights Commission of India. While the special programmes and attempts made to improve literacy amongst Scheduled Castes resulted in dramatic increase in the literacy levels by over three times in the three decades between 1961 and 1991 in the case of Scheduled Castes, they were still quite low compared to the level of literacy of the population as a whole.

Economic Empowerment

- The access of persons belonging to Scheduled Castes to land and other productive resources is a challenge and is often the source of confrontation with other sections of the society.
- On the developmental side many steps have been initiated for amelioration of the economic conditions of the Scheduled Castes and Scheduled Tribes with special outlays being made, as also the earmarking of funds for special component plans, etc. If, however, the progress has not been up to expectation, the reasons are to be found, inter alia, in the failure to improve access to education and the failure of the land reform movement in certain parts of the country. Progress on these fronts would have provided the Scheduled Castes and

Scheduled Tribes access to usable capital and, most of all, helped alter the social environment in which discrimination has otherwise been able to persist.

The Challenge of Entrenched Attitudes:

There is a need to combat age-old biases and entrenched attitudes through education and through public information campaigns. The National Human Rights Commission is firmly of the view that the need to change attitudes and mindsets of civil society is the key to further progress and in this connection, the Commission has been holding workshops and seminars to educate and create awareness amongst the civil society.

Conclusion

For the National Human Rights Commission of India, the defence of human rights has been the defence of democracy itself, a democracy that is inclusive in character and caring in respect of its most vulnerable citizens. The Commission has been quite vocal and outspoken in defence of such rights. On the occasion of Human Rights Day function organized by the Commission on 10 December 2003, the Chairperson of our Commission, Dr.Justice A.S.Anand said:

> "By virtue of the responsibilities entrusted to NHRC, the Commission needs to be constantly vigilant and outspoken in the defence of human rights. In a democratic polity it is essential that criticism is received with respect even if not always with full agreement. The capacity to differ with civility and mutual respect is the hallmark of a democratic society and essential to the well being of a society." It is a great tribute to the strength and resilience of the Indian polity that the Commission has never lacked the democratic space in which to function, and to express its views as it thought fit and appropriate.

The Commission draws inspiration in its work for human rights from Mahatma Gandhi's extraordinary observation:

> 'It has always been a mystery to me how men can feel themselves honoured by the humiliation of their fellow beings.'

7. Statement of Dr. Justice A.S. Anand, Chairperson, NHRC at the 60th Session of the UN Commission On Human Rights Under Agenda Item 18 (B) (National Institutions and Regional Arrangements) at Geneva on 14 April 2004

Mr. Chairman,

Thank you for giving me the floor.

I rise to speak on behalf of the National Human Rights Commission of India of which I hold the Chair.

Ten years have gone by since the adoption by the UN General Assembly of the Paris Principles, aimed at constituting National Human Rights Institutions in conformity with them. On the occasion of the tenth anniversary of these Principles, there is a need to address challenges to the independence of National Institutions and also address constraints, which come in the way of their effective operation. The Secretary General of the United Nations, Kofi Annan, in his programme to strengthen United Nations human rights activities, has called for greater attention to be given to the strengthening of national human rights protection systems in each country. All concerned, both in the Government and outside, need to be sensitized about the need to scrupulously adhere to the Paris Principles.

Mr. Chairman,

We are living in difficult times. The recent terrorist act in Madrid on 11 March 2004 and prior to that a number of international terrorist acts including the assassination of the then High Commissioner for Human Rights, Sergio Vieira de Mello in Iraq were issues of deep concern to all of us. India also has been a victim of terrorist attacks, with attacks occurring against democratic institutions like the Parliament, the Jammu & Kashmir State Legislature, places of worship and other facilities used by civilians. These bring into sharp focus the need to balance security concerns and the protection and promotion of human rights. The National Human Rights Commission of India examined the issues both of terrorism as a factor that inhibits the enjoyment of human rights as also adherence to human rights standards in the fight against terrorism, on several occasions.

I believe that the oft-repeated saying, `one man's terrorist is another man's freedom fighter' is but one manifestation of the widespread confusion about the morality of terrorist forms of violence and even goes to encourage terrorism. It is wrong to be selective about violation of human rights and the perpetrators of terrorism. Such selective approach leads to double standards. It also indirectly lends support to terrorists and terrorism. All nations must, therefore, co-operate to relentlessly and without any compromise fight terrorism. But let me emphasize that in doing so, the approach should be human, rational and secular. It must be consistent with democratic principles and the Rule of Law. We need to strike a balance between the liberty of an individual and the requirements of security of state and sovereignty and integrity of the nation. It requires respect for the principles of necessity and proportionality. We must avoid a descent into anarchy - in which the only rule is 'might is right' - combating terrorism should not be used as an excuse to suspend all the rules of international law and domestic civil liberties.

The Acting High Commissioner for Human Rights, Mr. Bertrand Ramcharan, in his address on 15 March 2004 at the opening of the 60th Session of the Commission on Human Rights observed: "At the end of the day we must all continue to strive for the universal realization of Human Rights through constructive cooperation. International cooperation for the effective protection of human rights is the call of our time." The National Human Rights Commission of India shares the view that sustained cooperation at various levels including at the international level could go a long way in the protection of human rights and in addressing the challenges faced by the international community. The National Human Rights Commission of India, as the Chair of the Asia Pacific Forum of National Human Rights Institutions in 2003, contributed to this effort. In addition to cooperation at the regional level, the Commission has also taken up bilateral cooperation projects with the Human Rights Commission of Nepal involving technical assistance in Complaints Management System and investigation techniques.

Recognizing the crucial role of National Institutions, the United Nations has involved them in its efforts to draft a new convention on the rights of persons with disability. The Indian Commission, as Chair of Asia Pacific Forum of National Human

Rights Institutions in 2003, co-hosted an international Workshop of National Institutions from Asia Pacific and Commonwealth Countries between 26 - 29 May 2003 in New Delhi to deliberate on the rights of the disabled. The Workshop called for a paradigm shift from a welfare-based approach to a rights-based one. The Workshop concretized a proposal regarding the nature, structure, principles and elements of the proposed Comprehensive and Integral United Nations Convention to Promote and Protect the Rights of Persons with Disabilities. This proposal was submitted to the Second Ad Hoc Committee of the United Nations. There is a need to further develop such cooperation between the National Institutions and the Office of the High Commissioner for Human Rights, treaty bodies and other UN agencies working on human rights issues. The National Institutions must be given their rightful role.

The National Human Rights Commission of India, the Canadian Human Rights Commission and the Indira Gandhi National Open University have taken up jointly a project on the rights of the disabled. The project seeks to build the capacity of legal practioners, disability rights and human rights activists to address problems of discrimination, marginalization and exclusion of persons with disability.

Mr. Chairman,

In the past one year, the National Human Rights Commission of India faced a number of challenges and took several bold steps to protect the rights of persons belonging to vulnerable sections like minorities, dalits, the disabled, women and others.

The Commission has continued to play an active role in regard to communal disturbances in the State of Gujarat, beginning with the tragedy that occurred in Godhra on 27 February 2002 continuing with the violence that ensued, and the process of establishment of justice and due rehabilitation of the victims. In the year 2003, the Commission issued notice to the Government of Gujarat on the matter of the protection of victims and witnesses. Convinced that fair trial is a constitutional imperative for victims, witnesses and accused persons alike, the Commission viewed the acquittal by the Trial Court of persons who were accused of burning alive 14 persons in what has come to be known as the 'Best Bakery case' as `miscarriage of justice'. It filed a Special Leave Petition in the

Supreme Court on 31 July 2003 with a prayer to set aside the judgement of the Trial Court and sought directions for further investigation by an independent agency and retrial of the case. The Supreme Court by its verdict dated 12.4.2004 has set aside the judgment of acquittal in the said case and further directed fresh investigation into the case and its re-trial outside the State of Gujarat in the State of Maharashtra with a further direction to appoint Public Prosecutor for prosecuting the case.

The Commission has also filed a separate application for transfer of four other serious cases which had been identified in its proceedings of 1 April 2002.

Besides, the Commission has extended legal assistance to Ms. Bilkis Yakub Rasul, a victim of alleged mass rape in Gujarat during the post-Godhra communal disturbances. Following this, the Supreme Court directed the Central Bureau of Investigation (CBI) to investigate the case. The CBI has succeeded in arresting a number of accused persons including certain police officials in this case. The proceedings in all these cases are continuing in the Supreme Court.

The Commission took up the issue of enforced or involuntary disappearances in Jammu & Kashmir. On 14 May 2003, the Commission directed the Government of J&K to furnish the following information:

i) whether the State Government has established a system to record allegations of enforced or involuntary disappearances and, if so, the nature of that system;

ii) the number of such allegations recorded by it, the details of the system established thus far to investigate such allegations and the results, thus far, of such investigations;

iii) the measures that are being taken to prevent the occurrence of enforced or involuntary disappearances; and

iv) the measures that are being taken to bring to book those who may have been involved in such disappearances and to provide justice to those who have suffered.

Not satisfied with the response of the Government of Jammu & Kashmir, further information has been asked for by the Commission. The proceedings are continuing.

Mr. Chairman,

Under-trial prisoners constitute almost 3/4ths of the jail population in India. Their plight has, for long, been a matter of concern for the National Human Rights Commission. As Chairperson of the Commission, I have suggested to the Chief Justices of all High Courts to regularly hold special courts in jails for relief to undertrials particularly those accused of petty offences. The response from the High Courts has been encouraging with relief accruing to many under-trials.

Mr. Chairman,

During the preceding year, the Commission took a number of initiatives for the protection and promotion of economic, social and cultural rights and in particular, the right to health. Recognizing the importance of access to health care, and especially, access to emergency medical care, the Commission constituted an expert group of eminent medical practioners to prepare a blueprint for restructuring of the emergency medical care and also evolve guidelines regarding trauma care. The group has submitted its report to the Commission on 7 April 2004. Similarly, recognizing the implications of sub standard drugs and medical devices on human rights, the Commission held consultations with authorities in the Union Government, concerned States and NGOs. An expert group has been constituted to go into this issue. The Commission also proposes to hold five regional and one national public hearing on access to health care followed by a National Consultation on Primary Health Care and Human Rights in the course of the current year.

The Commission has been concerned about the protection of the rights of those affected / infected by HIV/AIDS. Based on the outcome of National Consultation in this regard held in 2000, detailed recommendations were made to various authorities. Besides, in various individual complaints alleging discrimination in access to education and in access to health care, the Commission intervened to set right the wrong and thereby secure relief for the affected persons. The Core Group on Public Health has recommended certain measures to prevent mother-to-child transmission of HIV/AIDS and follow-up action has been taken by the Commission. The Commission has taken up multi-media campaign to spread awareness about human rights and HIV/AIDS.

The Commission has designated a Member of the Commission as the Focal Point on HIV/AIDS related Human Rights issues.

The practice of 'organ purchase' has acquired the dubious dimensions of 'organ trade' with touts operating as middlemen. Concerned by the illegal trade in human organs which is unethical and often involves exploitation of poor people and violation of their human rights, the Commission has suggested a number of remedial measures to be adopted by the State to check this pernicious practice.

The Commission has been concerned about the plight of dalits and has taken steps towards protection of their human rights. The Commission has been redressing individual complaints of atrocities and has been recommending the payment of compensation and action against negligent public servants, wherever appropriate. The Commission also participated in the Durban Conference. It has set up a Dalit Cell in 2003 which is looking into complaints of alleged atrocities against persons belonging to the Scheduled Castes.

Steps for preventing trafficking in young women and children has continued to occupy a high place on the agenda of the Commission. The Commission and UNIFEM jointly began an Action Research Programme on Trafficking in Women and Children in India. With the assistance of the Institute of Social Sciences, a Survey has been conducted in twelve States to study the extent and magnitude of the problem. Through the Action Research, the Commission proposes to sensitize the public and the law enforcement agencies to the grave dangers inherent in trafficking and the need for its prevention. It is the endeavour of the Commission to strengthen laws and law enforcement processes, punish traffickers, revamp rescue and rehabilitation programmes, and help NGOs to take advantage of the National Plan of Action of the Government of India for this purpose. It is also endeavouring to create an authentic database so as to strengthen the vulnerable groups in the supply zones both economically and socially. Besides,

- A Manual for the Judiciary on Trafficking in women is being prepared to sensitize Judges on issues related to trafficking.
- A joint Project for Combating Cross-Border Trafficking with the National Human Rights Commission of Nepal is under consideration.

Mr. Chairman,

In exercise of its statutory responsibilities, the Commission has been reviewing legislations which have an impact on human rights. For instance, the Commission reviewed the draft Protection from Domestic Violence Bill, 2002 and gave its detailed comments for modifications to the Department of Women and Child Development, Government of India. The Commission is presently reviewing the Juvenile Justice (Care and Protection of Children) Act, 2000. The Commission reviewed the Child Marriage Restraint Act, 1929 and suggested many amendments in the form of the Child Marriage Restraint Bill, 2002 to restrain the practice of child marriages.

In order to strengthen and consolidate the relationship between the Commission and NGOs, the Commission has been holding a series of consultations with them, on a regional basis. This has proven to be of considerable value both to the Commission and to the NGOs, reinforcing their understanding of each other and their capacity to work together in the furtherance of rights across the country.

Pursuant to the Commission's efforts, human rights have been introduced in the curriculum of educational institutions from school level to the university level. The Government of India also finalized the National Action Plan for Human Rights Education as part of the observance of the UN Decade for Human Rights Education 1995-2004. In so far as mass awareness programme is concerned, the Commission is pursuing the matter with the Ministry of Information and Broadcasting to have follow-up action initiated on the Action Plan. Seven dossiers on economic, social and cultural rights were developed by a Bangalore based NGO. The Commission has extended financial support to this NGO for developing source material for human rights education in Indian universities and at the school level and for use by grass-root level organizations.

Keeping in view the need to build capacity, change mindset of public servants and thereby create a human rights culture, the Commission established a Training Division in September 2003. In the period October 2003-March 2004, eleven training

programmes have been organized for the police, civil servants, administrators, university teachers and other key stakeholders. In the period April-June 2004, seven more training programmes on different facets of human rights have been planned.

Mr. Chairman,

I am conscious that the struggle for Human Rights is an arduous one. It not only requires vigilance by various agencies but also sustained cooperation at regional and international levels. Our finest hour would be reached when human rights are made the focal point of good governance and are actualised by all and when justice eludes none. Permit me to remind ourselves what the apostle of peace, Mahatma Gandhi said:

> " Peace does not come out of a clash of arms,
> but out of justice lived and done."

Thank you.

8. Address of Dr. Justice A.S. Anand, Chairperson, NHRC at the 7th International Conference for Human Rights Institutions at Seoul on 15th September 2004

Terrorism and more particularly the counter measures which one takes to meet this menace is a matter of great concern and relevance today. Terrorism has been the subject of a huge debate over the years but as yet there is no universally acceptable definition of what is "terrorism", against which we have to fight. Indeed despite definitional difficulties, we can recognize terrorism in action since it is an assault on a civilized society. Terrorism is not merely a heinous criminal act. It is more than mere criminality. It is a frontal assault on the most basic human rights namely, right to life and liberty, by faceless murderers whose sole aim is to kill and maim human beings, whether they are innocent young children, elderly men or women. One of the rights incorporated in the Universal Declaration of Human Rights and in all International covenants is the right to life. For only this right ensures the enjoyment of all other rights. The right to life is of crucial significance for every person, every group of people, every class and every nation and as a matter of fact, for all humanity. This very right to life of the innocent people is the target of terrorism. It poses a formidable challenge to the enjoyment of human rights and causes unlimited miseries to the hapless innocent and ordinary people whose death, injury and agony is aimed at the destruction of human integrity.

While an acceptable definition of terrorism still eludes the international community, the Supreme Court of India, as far back as in 1994, dwelt at length on it and drew a distinction between a 'merely criminal act' and a 'terrorist act'. In its Judgment in Hitendra Vishnu Thakur v. State of Maharashtra [(1994) 4 SCC 602], the Supreme Court of India said:

> ".... It may be possible to describe it (Terrorism) as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity

travels beyond the effect of any ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb harmony of the society or "terrorise" people and the society and not only those directly assaulted, with a view to disturb even tempo, peace and tranquility of the society and create a sense of fear and insecurity. A 'terrorist' activity does not merely arise by causing disturbance of law and order or of public order. The fall out of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law. Experience has shown us that 'terrorism' is generally an attempt to acquire helplessness in the minds of the people at large or any section thereof and is a totally abnormal phenomenon. What distinguishes 'terrorism' from other forms of violence, therefore, appears to be the deliberate and systematic use of coercive intimidation..."

Different aspects of terrorism have been a concern of world community. The problem of hijacking was dealt with in the 1963 Tokyo Convention, 1970 Hague Convention and 1971 Montreal Convention. Though there have been as many as 12 conventions and a declaration dealing with the subject but it was the killing of Israeli athletes at the Munich Olympics which led to the inscribing of international terrorism on the agenda of the United Nations General Assembly in 1972 at the request of the then Secretary General of United Nation and the problem of international terrorism was confronted both politically and legally and in its entirety rather than concentrating on any specific acts of terror. The menace, however, still continues and is on the rise globally.

Conflicts and Terrorism have today emerged as serious threats to the humanity. They pose serious challenges to the international community. It is a strange paradox that while on the one hand, higher and better international human rights and humanitarian standards have evolved over the past five or six decades, on the other hand conflicts and newer forms of terrorism, which threaten human rights of people the world over, are on the rise and becoming more and more dangerous. One also finds resort to the use of more and more deadlier and lethal weapons, deliberate targeting of civilians, forced starvation of civilians and resort to

rape and other sexual violations besides taking hostages etc. Scientific and technological developments as well as the global network of communications are being viciously exploited by terrorists. What is a matter of serious concern is the existence of trans-national networks of terrorist organizations, which have a nexus with arms and drug traffickers and crime syndicates. Today's terrorists have modern technology to help them, permitting rapid international communications, travel and the transfer of monies. They have links with others of like mind across international borders. What makes it even more dangerous are recent media reports that they may well have access to weapons of mass destruction including biological weapons.

It must be remembered that there is a clear and emphatic relationship between national security and the security and integrity of the individuals who comprise the state. Between them, there is a symbiosis and no antagonism. The nation has no meaning without its people. The worth of a nation is the worth of the individuals constituting the nation. This is the emphasis laid in the Constitution of India, which holds out the promise to secure both simultaneously. Just as there can be no peace without justice, there cannot be any freedom without human rights. International terrorism is a modern form of warfare against liberal democracies and needs to be dealt with as such. The goal of these terrorists is to destroy the very fabric of democracy and it would be wrong for any democratic state to consider international terrorism to be "someone else's" problem. The liberal democracies must, therefore, acknowledge that international terrorism is a collective problem. They must unite to condemn and combat it. When one free nation is under attack, the rest must realise that democracy itself is under attack. The oft repeated cry, "One country's terrorist is another nation's freedom fighter" is but one manifestation of the widespread confusion about the morality of terroristic forms of violence and even goes to encourage terrorism because it clothes the terrorist with a cloake of respectability - totally undeserved.

Let us be clear that there can be no alibis or justification for terrorism under the spurious slogans of self-determination and struggle for liberation. As Senator Jackson has aptly stated:

> "The idea that one person's 'terrorist' is another's 'freedom fighter' cannot be sanctioned. Freedom fighters or

revolutionaries don't blow up buses containing non-combatants; as terrorist murderers do. Freedom fighters don't set out to capture and slaughter school children; terrorist murderers do... It is a disgrace that democracies would allow the treasured word 'freedom' to be associated with acts of terrorists".

However, having said this, I must acknowledge that though nothing justifies terrorism, far too many people live in conditions where it can breed. It is common knowledge that systemic human rights violations for long periods of time are often the root cause of conflicts and terrorism. When there is tyranny and wide spread neglect of human rights and people are denied hope of better future, it becomes a fertile ground for breeding terrorism. The existence of social, economic and political disparities in a large measure contribute to the eruption of conflicts within the State and beyond. The importance of promoting Economic, Social and Cultural Rights to contain such conflicts must, therefore, be realized and appreciated. The protection and promotion of Economic, Social and Cultural Rights must go hand in hand with protection of Political Rights for giving human rights a true meaning. The neglect of Economic, Social and Cultural Rights gives rise to conflicts and emerging forms of terrorism which are threatening the democratic societies worldwide. It cannot be denied that disillusionment with a society where there is exploitation and massive inequalities and whose systems fail to provide any hope for justice are fertile breeding grounds for terrorism, which more often than not thrives in environments where human rights and more particularly Economic, Social and Cultural Rights are denied by the State and political rights are violated with impunity both by the State and non-State actors. Systemic denial of Economic, Social and Cultural Rights, like right to food, health, education etc. are causatic factors of conflict and terrorism. Any worthwhile strategy to resolve conflicts and terrorism will have to ensure enjoyment of the full range of Economic, Social and Cultural Rights.

According to UNDP's Human Development Report of 2002:

- Of the 81 new democracies, only 47 are fully democratic. Many others do not seem to be in transition to democracy or have lapsed back into authoritarianism or conflict.

At the beginning of the 20th century, studies have indicated that the percentage of civilians killed during conflicts was about five percent as compared to 90 percent at the end of the 20th century, with disproportionate impact on women and children. As the events in the former Yugoslavia and Rwanda have shown, gender-based violence in conflict often carries a political and symbolic message. So devastating is its effect that rape, enforced prostitution and trafficking are now included in the definition of war crimes and crimes against humanity.

The next question and a vexed one, is: How do or should democratic States which adhere to the Rule of Law and respect basic human rights deal with this menace?

Undoubtedly, the spectre of terrorism is haunting many countries of the world. It has acquired a sinister dimension. The terrorist threats that we are facing are now on an unprecedented global scale. But it must be remembered that the fundamental rationale of anti-terrorism measures has to be to protect human rights and democracy. Counter terrorism measures should, therefore, not undermine democratic values, violate human rights and subvert the Rule of Law. Consequently, the battle against terrorism should be carried out in keeping with international human rights obligations and the basic tenets of the Rule of Law. No doubt "the war on terrorism" has to be relentlessly fought but that should be done without going over-board and in effect declaring war on the civil liberties of the people. The protection and promotion of human rights under the Rule of Law is essential in prevention of terrorism. If human rights are violated in the process of combating terrorism, it will be self defeating. It is imperative that the essential safeguards of due process and fair trial should not be jettisoned. We should emphasize that basic human rights and more particularly Economic, Social and Cultural Rights must always be protected and not derogated from.

Our experience shows that the rubric of counter-terrorism can be misused to justify acts in support of political agendas, such as the consolidation of political power, elimination of political opponents, inhibition of legitimate dissent. Labeling adversaries as terrorists is a notorious technique to de-legitimize political opponents. It is during anxious times that care has to be taken that state does not take recourse to bend the Rule of Law to

accommodate popular sentiment for harsh measures against suspected criminals. An independent judiciary and the existence of an effective human rights institution are indispensable imperatives for protection of fundamental human rights in all situations involving counter-terrorism measures. It provides vital safeguards to prevent abuse of counter- terrorism measures. Counter- terrorism or anti-terrorism measures must, therefore, always conform to international human rights obligations.

In addressing the Security Council on 18th January 2002, the Secretary-General stated:

> "While we certainly need vigilance to prevent acts of terrorism, and firmness in condemning and punishing them, it will be self-defeating if we sacrifice other key priorities - such as human rights - in the process"

Speaking on terrorism, Ms. Mary Robinson the then United Nations Commissioner for Human Rights, cautioned against the violation of human rights in the global 'fixation' with the war against terrorism and said:

" What must never be forgotten is that **human rights are no hindrance** *to the promotion of peace and security. Rather* **they are an essential element of any strategy to defeat terrorism."**

While dealing with some fundamental issues relating to terrorism in the Annual Report of 2001 she said:

"There should be three **guiding principles** for the world community: the need to eliminate discrimination and build a just an tolerant world; the cooperation by all States against terrorism, **without using such cooperation as a pretext to infringe on human rights;** and a **Strengthened commitment to the rule of law."**

> **"... true respect for human life must go hand in with securing justice",** and that **"the best tribute we can pay to the victims of terrorism and their grieving families and friends, is to ensure that justice, and not revenge, is served".**

It must, therefore, stand as a caution that in times of distress, the shield of necessity and national security must not be used to protect governmental actions from close scrutiny and accountability where the same affect enjoyment of human rights. In times of international hostility and antagonisms our institutions,

legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from petty fears and prejudices that are so easily aroused. Indeed, in the face of terrorism, there can be no doubt that the State has not only the right, but also the duty, to protect itself and its people against terrorist acts and to bring to justice those who perpetrate such acts. The manner in which a State acts to exercise this right and to perform this duty must be in accordance with the Rule of Law. The Supreme Court of India has, in DK Basu vs. State of West Bengal, [jt 1997(1) SC 1] cautioned:

> "State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to terrorism: that would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that the various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves"

The National Human Rights Commission of India is of the firm view that a proper observance of human rights is not a hindrance to the promotion of peace and security. Rather, it is an essential element in any worthwhile strategy to preserve peace and security and to defeat terrorism. The purpose of anti-terrorism measures must therefore be to protect democracy, rule of law and human rights, which are fundamental values of our society and the core values of the Constitution. It is wrong to be selective about violation of human rights and the perpetrators of terrorism. Such selective approach leads to double standards, which make the motives of the protagonists of human rights suspect. It also indirectly lends support to terrorists and terrorism. All nations must, therefore, co-operate to relentlessly and without any compromise fight terrorism. Concerted steps at a global level will have to be taken to tackle terrorism and safeguard human rights. The fight against terrorism requires close co-operation of all countries both at law enforcement and judicial levels in order to put an end to illegal trafficking which feeds terrorist networks. To clip the wings of terrorism, the international communities must target the roots of frustration as well as the feeling of injustice. But let me emphasise that in doing so, the approach should be humane, rational and secular. It must be consistent with democratic principles. Any kind of partisan and sectarian approach would be

counter-productive. We need to strike a balance between the liberty of an individual and the requirements of security of state and sovereignty and integrity of the nation while keeping an open mind to fight terrorism. A limited approach may help eliminate some present terrorists but not the causes or the phenomenon of terrorism, which produces terrorists; and that too at the cost of violation of human rights of many innocents. A proper balance between the need and the remedy requires respect for the principles of necessity and proportionality.

In conclusion while I confess that I cannot prescribe a quick fix solution to tackle the scourge of terrorism, but, as the head of a National Human Rights institution, I consider that National Institutions can play a crucial role in the resolution of different forms of conflicts. From the causes identified earlier in my talk, may I submit for your kind consideration some suggestions regarding the role which the National Institutions can play in that behalf. In my view:

1) There is an urgent need for evolving and putting in place a mechanism for channelising the grievances of the people, especially the vulnerable sections of our society by the National Human Rights Institutions. Their role is vital. Therefore, countries, which have not set up a National Institution so far, must do so without any further delay on the guidelines contained in the Paris Principles.

2) Once the mechanism is put in place, the National Institutions must, on their part, ensure speedy redressal of grievances brought before them. Neglect or delay in the consideration of such issues, often adds to the frustration of the people, making them even more cynical. The National Institutions need to generate a feeling amongst the citizens that it is a forum where the citizens shall be heard about their grievance. The hope of being heard can restrain a citizen from becoming a potential terrorist.

3) The National Institutions also need to focus on the socio-economic dimensions and related inequities in the society which provide a fertile ground for the growth of terrorism. Learning from each other's experience in that behalf would be rather useful. Therefore, greater co-operation between the National Institutions for that purpose is necessary.

4) The importance of the role of non-state actors for furtherance of the objectives of the National Institutions needs to be properly appreciated. National Institutions should step up the pace of dialogue and scope of joint partnerships with the non-governmental organizations. Such a linkage, our experience shows, bridges the gap between the government and civil society and helps in creation of public awareness;

5). Issues relating to Economic, Social and Cultural Rights and monitoring their implementation should form an important agenda for all National Institutions.

6). Networking between National Institutions and sharing of information and best practices between them can be very useful.

These are only some of the illustrative and not exhaustive suggestions and I wish also to add a disclaimer. Whether these suggestions can actually advance our fight against terrorism and addressing its causes or not shall have to be tested because the suggestions are aimed at making the National Institutions put their think-caps on to see what they can do to fight the menace of terrorism.

Friends, we need to strive for a world free of fear and oppression while remaining steadfast to our democratic values and adherence to the Rule of Law. We must act now. Let us remember the words of wisdom of the United Nations Acting High Commissioner for Human Rights, Mr. Bertrand Ramcharan, spoken at the Opening Session of the "Sub-Commission on Promotion and Protection of Human Rights" in Geneva in July 2003. He said:

> "Whatever we may say about tomorrow..... the challenge of human rights protection is immediate and pressing" particularly in our struggle against terrorism.

Thank you for your patience.

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Emergency Medical Services in India - Present Status and Recommendations for Improvement.

1. Introduction

India is undergoing a transition in almost all spheres of health. Due to increased urbanization, changing life styles and enhanced life expectancies, there is a definite epidemiological metamorphosis in the disease pattern, mortality and morbidity. Industrialization, increased vehicular traffic, automation, terrorism and social violence are some of the factors responsible for making trauma cases reach epidemic proportions. Trauma has been dubbed **"the forgotten epidemic"** and the **"neglected disease of modern society"**. It kills and maims hundreds of thousands of individuals annually and costs society billions of dollars through direct expenditure and indirect losses. Health care delivery including Emergency Medical Services (EMS) accordingly has to match the existing and emerging needs. In spite of the monstrous situation, it is ironic that the trauma management is not well organized, especially in the developing countries. The situation is **especially worrisome in India** where thousands of people die annually in road traffic accidents for want of proper trauma care facilities. Provision of emergency medical care for trauma related emergencies as well as other medical and surgical emergencies, is a necessity of a welfare state. **It is not only a social commitment but also a constitutional obligation since right to health and medical care is a fundamental right under Article 21 read in conjunction with Articles 39(c), 41 and 43 of the constitution.**

Existing Scenario

2. Accidents both in the developed and developing countries rank amongst the leading cause of mortality and morbidity. Globally trauma is one of the leading causes of death and disabilities. It is definitely one of the most tragic and expensive

health problems. A recent report of the National Crime Records Bureau reveals one accident every two minutes in India. For every trauma related death, there are many injured and disabled persons. The male age group of 15-40 yrs is the most affected by trauma. The cost of trauma in terms of direct costs and loss in terms of productive life are astronomical. Apart from trauma and accidents there are other surgical and medical emergencies, which need attention. Some of the major external causes of injuries are - road traffic injuries, falls, fall of objects, burns, poisoning, drowning, animal related injuries, suicides - attempted suicides & violence of various types. Along with this, disasters in India are a major medical emergency care. These disasters would be fall of high raise and other buildings, floods, cyclones, fires and poisoning. **It is estimated that nearly 4,00,000 persons loose there live due to injuries, nearly 75,00,000 persons are hospitalized and 35,000,000 persons have minor injuries receiving emergency care at various places in India.** The medical, surgical and pediatric emergencies are also major events requiring immediate interventions to save lives and to extend medical care. In most of these injury prone situations, it is the young people specially, children, women and elderly who are at greater risk of sustaining injuries. It is imperative that EMS are planned and operated comprehensively and effectively to cater to the requirements.

3. Experiences of developed countries have shown that a significant number of deaths are preventable with appropriate pre-hospital and trauma care services. This has been possible with better timing and quality of acute interventions, better training and reorganization of emergency medical care services, establishment of trauma care systems, combination of basic and advanced life support systems and better diagnosis and management of injuries. Such systems have not been developed in India and have resulted in more deaths and injuries. The various components of emergency medical care services are:

(a) Availability of trained personnel
(b) Appropriate communication systems
(c) Adequate transportation
(d) Facilities in emergency rooms
(e) Referral and transfer based on triage
(f) Inter hospital and intra hospital referral services

(g) Adaptation of evacuation policies

(h) Accessibility, availability, affordability and awareness about emergency care

(i) Consumer information and participation and

(j) Scientific information systems

4. The present EMS in the country is functioning sub optimally and require up gradation. The main lacunae that exist in the EMS are as follows.

(a) Absence of an integrated EMS. EMS is effectively operational only at a few tertiary care institutions.

(b) Lack of facilities, infrastructure including communication and trained manpower especially at the primary and secondary healthcare institutions. Some elements of emergency care exist only in urban areas, while the large proportion of population lives in rural areas without access to care. This requires travel for longer distances to reach the urban hospital and precious time is spent in transportation without adequate medical care.

(c) Absence of a comprehensive policy at the National level related to accidents/trauma care/injury cases.

(d) Absence of a central coordinating body at National/State level integrating/optimizing EMS related activities.

(e) Health care facilities are generally not suitably prepared to respond to emergencies. The preparedness level of medical and paramedical staff in dealing with emergencies and trauma management in India is lacking on all fronts. There are no trained Trauma specialists nor any trained Para-medical staff and technicians. Rapid response system including effective referral linkages is poorly developed/absent.

(f) Emergency and Pre-hospital care are not closely integrated with hospital care and rehabilitative care within the broad EMS care and post-operated component are not integrated as essential components of EMS.

(g) Non-availability/non existence of data, surveillance, monitoring and/or analysis related to EMS. Absence of trauma audits and evaluatory research even in urban areas has been conspicuous.

(h) Non-existence of Emergency Medicine as a specialty.

(i) Lack of training facilities for doctors, paramedical and general public on emergency/First Aid Management.

(j) At times there is considerable delay in receiving appropriate medical care since medical attendants and the general public fear being implicated in Medico legal cases.

(k) Delay in reaching definitive hospitals due to improper/ inadequate referral procedures / transportation.

(l) Provision of care is being delayed by private hospitals due to medico legal complexities and inability of patients to pay.

(m) The costs of emergency care are substantial. Patients not covered by insurance scheme or health care provision of their respective employment are unable to meet the costs of emergency care.

(n) Lack of sustainable administrative, financial and legislative mechanisms for emergency care.

(o) Lack of minimum and basic standards for EMS in terms of personnel, equipment and facilities. Uniform and specific guidelines and protocols for care at different levels have not been identified or implemented in the country.

5. Centralized Accident and Trauma Services (CATS)

Although CATS was well conceptualized and planned but its execution has been very poor. The following drawbacks/ lacunae exist in the system.

(a) The ambulances are only patient carrying vehicles and not patient "caring" vehicles. Their staffing, equipment, maintenance and continued training of staff are far below the desired level. Only 20 to 25% ambulances are road

worthy thus only 7 to 8 road worthy ambulances are available to the entire Delhi metropolis.

(b) Besides this the communication facilities are extremely poor and there is lack of co-ordination and non existing accountability/responsibility.

(c) Public education about the existing facilities like CATS is almost non existing.

(d) Involvement of NGOs and voluntary agencies is only during disasters and that too poorly co-coordinated with no integration with pre-hospital services.

Recommendations

6. ***Essential Requisites.*** **The main requisites are as follows:-**

(a) EMS must provide holistic management of medical and surgical emergencies including trauma.

(b) Establishment of a database for EMS with a focus on crucial elements of EMS care, manpower, facilities in selected centers of the country.

(c) Establishment of a multidisciplinary and multisectoral committee at the National and State levels for policymaking, planning and implementation of EMS.

(d) Enunciation and implementation of a comprehensive National Accident with clearly defined, time bound goals and objectives along with resources Accident Policy.

(e) Networking amongst all agencies associated with EMS.

(f) Training of medical, paramedical and general public in emergency/first aid management.

(g) Infrastructure including equipment augmentation/ availability for provision of effective EMS.

(h) Awareness of the available facilities and actions to be taken at various levels for provision of emergency care.

(i) Referral system at different levels of health care delivery system for effectivity and optimization of resources.

(j) Additional budget allocation in the ministry of health

for developing, implementing and scientific EMS systems. for improvement in EMS.

(k) Implementation of improvement steps in a phased but time bound manner.

7. Details of Recommendations

(a) Comprehensive EMS

EMS must provide holistic management of medial emergencies, both trauma and disease related. All components of care i.e. pre-hospital, hospital and post hospital related to EMS must be catered to. EMS should have response readiness for preventive and early warning service as well as to medical/surgical emergencies including trauma.

(b) Committees

Establishment of multi-disciplinary and multi-sectoral Committees at the National and State levels for policymaking, planning, implementation and monitoring. A lead technical group should also be formulated along with these committees. These committees should have members from the concerned departments such as Ministry of Health and Family Welfare, Ministry of Defense, Ministry of Transport, local bodies, private hospitals, NGO's etc.

(c) National Accident Policy

The Government should enunciate a comprehensive National Accident Policy with detailed objectives, suggestions, organizational structure, staffing and training. A proposed National Accident Policy is appended at Appendix-A for guidelines.

(d) Networking

Networking of information, materials and/or manpower is essential for optimization of resources, the National Trauma Center "Jai Prakash Narayan Apex Trauma Center" being established at New Delhi may be utilized as a networking hub for the State of Delhi. Other regional institutions should be identified in different parts of the country (State Capitals/ Medical Colleges) - Telemedicine may also be utilized for optimization and effectivity.

(e) *Regional Referral System*

It is essential for healthcare services to have an effective functional regional referral system. It has advantages of user convenience, appropriate use of facilities and, optimum use of resources. Medical colleges in State may be designated as referral centers for the adjacent/nearby 3-4 districts. The referral flow/system will be from dispensaries to PHCs to CHC to District Hospitals to Medical Colleges. For referral system to function efficiently it is essential that the EMS is strengthened at all levels ie dispensaries, PHCs, CHC, district hospitals and Medical Colleges. Networking in terms of communication, materials, transport and manpower must be ensured between the various healthcare institutions. Information available already should be utilized to develop a implementable plan of action. It is essential that layout and design of the accident and emergency services are standardized.

(f) *Pre-hospital care*

Pre hospital care of emergency cases is at present the weakest link in the EMS at all levels of healthcare delivery. There is near dysfunctional and redundant ambulance services. The pre-hospital care in terms of availability of ambulances, communication and training for staff needs to be augmented. There is need to effectively network and coordinate the existing ambulances for effective use with a common number across the country and states. The recommendation of these in the proposed National Accident Policy appended at Appendix 'A' should be implemented.

(g) *Development of Emergency Medicine as a Specialty*

(i) In India Emergency Medicine is not recognized as a specialty. Interns or residents usually staff the emergency services with very minimal specific training in emergency medicine. The main changes that will accrue if Emergency Medicine is developed as a specialty are:

i. a. It will facilitate prompt evaluation of Emergencies.

i. b. It ensures comprehensive diagnostic work up in a single setting.

i.c. It minimizes the need for inter departmental and inter hospital transfers thus facilitating patient care.

All India Institute of Medical Sciences (AIIMS), New Delhi and PGIMER, Chandigarh and in other regional centers should commence a course in Emergency Medicine to facilitate the introduction of the course in other medical colleges..

(h) Training

It is essential that structured training is imparted to doctors, paramedical, fire personnel, police personnel and general public in emergency procedures/First Aid measures. Such training should be conducted at District Hospitals, Medical Colleges. A short-term crash course should be developed for district hospitals, corporation hospitals and rural hospitals covering basic principle of EMS over a period of 3 days. Standardized, comprehensive and structured First-Aid training, Basic Life Support and Advanced Life Support for personnel working at various levels of healthcare institutions should be planned and implemented in all states. Training in First Aid should also be imparted to children in high schools and colleges to increase awareness the schools, teachers and the general public through TV programs and by NGOs, so that maximum number of persons are aware of the measures to be undertaken in an emergency till a doctor/healthcare are available. Radio and TV program like "Doctor Ke Aaney Tak" can be introduced for educating general public in providing first aid and before victim is shifted to healthcare institution.

8. Phased Plan of Action

It is essential that recommendations should be implemented within a specified time frame. The appropriate authorities as per the following time frame should implement the recommendations enumerated.

Recommendations

(a) For immediate implementation

(i) Enunciation of a National Accident Policy.

Action by: Ministry of Health and Family Welfare, Government of India.

(ii) Establishment of a central coordinating, facilitating, monitoring and controlling committee for Emergency Medical Services (EMS) under the aegis of Ministry of Health and Family Welfare as advocated in the National Accident Policy at Appendix- "A"

Action by: *Government of India.*

(iii) Designating 3-4 districts to Medical colleges, which will act as referral centers to their respective earmarked districts in each state and UT.

Action by: Ministry of Health and Family welfare, Government of India in conjunction with State Governments.

(iv) Establishment of Centralized Accident and Trauma Services in all districts of all States and various union territories along with strengthening infrastructure, pre-hospital care at all government and private hospitals.

Action by: *Central and State Governments*

(v) Development of computerized information base at all levels of health care to help in perspective policy planning and networking.

Action by: *Central and State Governments.*

(vi) There is a need to establish a National Trauma Registry for data collection and analysis.

Action by: *Central Government.*

(vii) Information dissemination to all of the existing facilities, legislations, referral system, existing networking to facilitate EMS health care utilization.

Action by: *State and Central Governments.*

(viii) States to develop proposals for up-gradation of EMS with organizational infrastructure and financial details for appraisal by Ministry of Health and Family Welfare and Planning Commission.

(ix) Training in EMS to be organized in the Medical Colleges and other regional areas.

(x) The existing expert group constituted by the NHRC will further recommend the infrastructure facilities, equipment, staffing and training at various levels of healthcare delivery viz primary health centers, sub-district/taluka hospitals, district hospitals, medical colleges and teaching institutions.

(b) Recommendation for Long Term Implementations (5 years).

(i) Implementation of the proposed recommendations of the National Accident Policy.

(ii) The speed and efficiency are the two most vital considerations for any trauma care services. It would be ideal to setup a well equipped and adequately trained staffed trauma center at Regional and National level. All District Hospitals to have specialized multidisciplinary trauma care facilities.

(iii) Establishment of Emergency Medicine as a specialty.

(iv) **Dedicated communication toll free number to respond for emergency. The access code of such a dedicated number should be such that it is easily remembered by all e.g.** *4444* **or** *9999* **and should be common for the entire nation.** The interface system should be able to receive multiple calls at any one time and also coordinate a speedy response.

(v) The golden quadrangular road project presently under progress should have a communication call center, Ambulance equipped and staffed as recommended in the National Accident Policy every 30 Kms. Emergency care centers manned by paramedical staff should be established every 50 kms. All the National Highways should also have the same facilities.

(vi) Constitution of a committee by the NHRC to monitor the progress of implementation of recommendations at National and State level.

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Appendix 'A'

National Accident Policy

1. Aim

The aim of the National Accident Policy is to have a comprehensive guideline document for planning and implementing measures for injury prevention, mitigation, management and rehabilitation.

2. Objectives

The main objectives of National Accident Policy will be

(a) Providing trauma care services to all citizens of India.

(b) Providing adequate and prompt relief to trauma victims and reducing the resulting disablement.

(c) Undertaking such measures as are necessary to prevent or reduce trauma accidents and the disability of accident victims.

(d) Training staff in trauma accidents, prevention and relief.

(e) Furthering research in the fields of trauma accidents, prevention and management of accident victims.

(f) Creating community awareness and undertaking community education and participating in trauma accident prevention.

3. Organisational Set Up

(a) Accident Prevention and Relief Authority

There should be a multi-disciplinary and multi-sectorial committee at the national level, which should be responsible for policymaking, planning and implementation of activities to prevent accidents and provide relief to accident victims. Representatives from all concerned ministries such as that of Transport, Tourism, Civil Aviation, Railways, Health, Home, Finance, Law, Industry and Agriculture should be a part of this body. The chairman of this body should be secretary, Ministry of Health and Family Planning. The day-to-day routine co-ordination activities should be carried out on behalf of this body by a technical expert (medical), who should be

designated as Director, (Accident, Prevention and Relief Program).

Similar organizations should be set up at state level to co-ordinate and carry out accident prevention and relief activities in their respective states. The state committees should work in collaboration with each other and with the National Accident Prevention Authority. This authority would when necessary form appropriate subcommittees and expert bodies for in-depth study of problems.

Sub committees could initially be constituted for domestic and recreational accidents, transport accidents, occupational accidents and natural disasters.

(b) Surveillance and Monitoring

Surveillance and monitoring of all accidents are necessary to determine the magnitude and nature of the problem and also to identify psychosocial and environmental factors responsible for accident prevention programs. To enable such monitoring to be effective, all accident cases should be made notifiable as in the case of infectious diseases.

(c) Accident Analysis Center

A National Accident Analysis Center should be set up. This should be linked to state level analysis centers, which should have feeder networks in all large cities. The national/state centers should analyze and publish accident data periodically and carry out research on preventive measures. This should aim at developing simple trauma registries in all places and institutions with technical expertise should undertake detailed studies.

(d) Management of Accident Victims

Accident being one of the major causes of death and disability in the productive period of life, i.e. 15 to 40 years, management of accident victims should be a matter of serious concern to all concerned and should receive top priority in any health care delivery system. In view of rapid industrialization, wide spread use of mass road transport for goods and increasing mechanization of agriculture, accidents are no longer a purely urban problem. A very large number of villagers sustain

mutilating injuries to their extremities in the agriculture sector as a result of threshers, chaff cutting and hulling machines.

Management of trauma requires not only correct and adequate treatment but it is more important that such treatment be instituted, without undue loss of time. Community awareness and community education is, therefore necessary so that accidents are reported without delay to both the investigative (police) as well as rescue (Medical) authorities. Medical management of the victims should receive priority over all legal and other formalities.

(e) **Accident Rescue Squad**

This should consist of fully equipped vehicles and sufficient number of trained rescue personnel. In such areas where a good network of motor able roads exist, adequate fleet of ambulance vehicles viz 4 wheeled / motor cycle / scooter designed for accident relief works should be provided. In inaccessible areas such vehicles could be improvised using the local mode of transport, e.g. bullock carts and boats. The responsibility for maintenance and upkeep shall rest with the local authorities. All ambulances should have two-way radio control with hospital and local police headquarters. A camera to photograph the accident victims at the spot should be provided in each vehicle. All vehicles should be provided with equipment required for resuscitation of the injured.

All personnel should be specifically and adequately trained and this training should include first aid, basic resuscitative procedures, recognition of injuries and their severity, communication skill and vehicle driving in case of emergencies. A minimum of two such trained persons in addition to the driver should man each vehicle. Rescue squad personnel should be posted for short periods regularly in accident units and designated hospitals for purpose of continuing education. Mobile medical team, if required, in specific instance may be sent from designated hospitals.

The National Highways including the ongoing Golden Quadrangular Project should have Ambulance Stations every 30 kms. and Emergency Care Centers every 50 kms.

(f) Institutional Management.

Since in a vast country such as India requirements vary from place to place, a multi-tier system needs to be evolved consisting of accident receiving stations, accident units and designated hospital for accidents.

(g) Accident Receiving Stations

These should operate in rural areas and areas of low accident density and should function primarily as first aid centers dealing with minor injuries including simple fractures. More serious accidents, if any, should after first aid, be shifted to the nearest accident unit/designated hospital by locally available ambulance. Any primary health center or block level dispensary could be organized as an accident receiving station.

(h) Accident Units

At least one accident unit for every 100,000 to 250,000 populationin low accident density areas and for every 10 sq. km. radius in high accident density areas needs to be set up. Any taluka/sub divisional hospital could be suitably modified and equipped for this purpose. These should cater to the bulk of casualties, undertake resuscitative measures and carry out routine treatment of injuries. The bulk of fractures both simple and compound requiring closed manipulation, internal fixation of simple fractures, hand and abdominal injuries and patients with head and chest injuries requiring observation could be effectively dealt with at these units.

An inpatient complement of 15-50 beds depending upon local needs and the local accident rates would need to be provided in all centers.

(i) Designated Hospitals

Every accident unit should be linked to a designated hospital. These hospitals should be able to handle all major trauma cases. Each designated hospital should have its own accident unit and rehabilitation wing. It should have highly trained and competent staff in all specialties. While it would be ideal to have neurosurgical and thoracic surgery facilities in all designated hospitals, it is realized that such facilities may not

be available because of the high cost and lack of trained manpower. It is important, however, that at least one designated hospital in each state should have these facilities. This hospital could function as a referral unit for specialized neuro and thoracic surgical work.

1. Prevention of Accidents

Preventive measures and strategies must be ensured. Some of the aspects which must receive due consideration are:-

(a) First aid training and medical fitness as a prerequisite to obtain a driving license.

(b) Mandatory use of safety devices such as seat belts and helmets for appropriate vehicle drivers and passengers.

(c) Strict enforcement of law relating to violation of traffic rules and safety prevention.

(d) Mandatory use of safety devices in industry and agriculture.

(e) Widespread training in first aid, so that at least one member in each family knows basic first aid.

(f) Inclusion of accident prevention and first aid in school curriculum.

(g) Extension of insurance scheme to cover all categories of workers including agriculture and self employed. Promotion of prevention measures should be in-build in such an insurance scheme.

(h) Periodic review of laws relating to accident prevention.

(i) Educational programs for prevention of accidents through Media etc.

5. Training Services

Training services are necessary not only for medical and paramedical personnel concerned with accident victims but also for employers and employees of industrial sectors and the community at large.

(a) Regional Training Institutions

Five regional training institutions should be set up in

each of the regions of the country, i.e. central, north, south, east and west for advanced training methodology of accident management and prevention. Regular refresher courses should be undertaken for medical and senior paramedical staff. It is necessary that a three months orientation cum refresher course is provided every five years to all medical staff of the designated hospitals.

(b) Designated Hospitals

These should provide training facilities for all categories of Para medical staff including rescue personnel. Staff from the accident receiving stations should be provided regular refresher course at these hospitals. A two-year diploma course for rescue personnel and technicians could be conducted at these hospitals. Regular orientation classes for nursing personnel should be conducted.

6. Accident Education Programs

There should be regular accident prevention campaigns and programs for community education and participation. Such programs should concentrate on school children, teachers, employers and employees, both in the organized as well as unorganized sectors. The population at large should be motivated to take advantage of first aid course conducted in these units regularly. The personnel attached to the accident receiving stations should carry out similar motivation and training program in accident prevention, awareness and first aid.

7. Implementation of Policy and Resource Mobilization

While formulating such a National Accident Policy due consideration should be given to the constraints of finances, technical know how, manpower, cultural and social factors. Existing facilities should as far as possible be integrated, augmented, suitably modified and modernized. Implementation of this policy aims at reducing the number of accidents and their resulting disability. This would reduce the load on the general surgical teams, thereby increasing their efficiency and reducing the hospital expenditure.

Subsequently, financial input would have to be provided for capital expenditure in the form of physical facilities and equipment and additional posts in all categories will have to be created. Resources for these can be mobilized by including the scheme as a national plan project spread over 3-5 year plans. A financial outlay on such a scheme will be more than compensated by eliminating loss to the exchequer on account of avoidable accidents and improving the national economy by reducing man-hours lost, reducing hospital expenditure per patient, shorter hospital stay and reduction in the permanent disability extent of accident victims.

8. **Ambulances:**

Well equipped & adequately staff ambulances play an important role in pre-hospital care.

(a) Number

Suggested norms - 1 ambulance for 50,000 population.

(b) Deployment

For response time of 15 minutes:

1 ambulance could be considered to cover an area of 10 km. radius

To be need based and flexible, keeping in view the following

- Accident prone areas
- Disaster prone areas
  - Response vehicles for transportation
  - Ambulance providing BLS
  - One ambulance per district to provide ALS

Ambulance Design/Attributes:

- Patient compartment
- Driver compartment
- Accommodation for
  - Two Junior Ambulance officers
  - Two lying patients
  - Equipment and supplies
- Other Design Features for smooth Ride
- Augmented suspension system

- Freedom from noise and vibration
- Ease for loading/unloading
- Ventilation/Air conditioning
- Maximum fluorescent Lighting
- Minimum Acceptable Measurements;

Staffing Patterns

- Same as that existing is recommended, i.e.
  - Graduates with multidisciplinary skills
  - 1 Ambulance station officer per Ambulance Station
  - 2 Junior ambulance officers per shift per ambulance
  - 1 Multipurpose attendant per shift per station
- +30% training and leave reserve:-
- Continuous Training to be given to all staff in
  - First AID
  - CPR
  - Wireless communication
  - Driving
- Training syllabus to be revised regularly to keep pace with the advances in Trauma Management.
- One ALS (Advanced Life Support) equipped ambulance per district.

Equipment for BLS (Basic Life Support)

- For Airway maintenance
  - Oropharyngeal airway of different sizes
  - Nasopharyngeal airway of different sizes
- For artificial ventilatory support.
  - Self filling bag valve mask units
    - Adult - Pediatric
  - Pocket face mask with 1 way valve for oronasal ventilation
  - Jaw lock
  - Oxygen therapy equipment
    - 1 fixed system of 3000 L reservoir
    - 1 portable system of 100 L

- Suction equipment
  - 1 fixed airflow >30L/min with vacuum of 300 mm Hg within 4 seconds
  - 1 portable suction operated by motor/hand/foot.
- For Patient Monitoring Activities
  - Sphygmomanometer (Adult & Pediatric)
  - Dual head stethoscope
  - Skin temperature indicating devices
- Equipment for Advance Life Support
  - Venous cut down kit
  - Tracheal intubations kit
  - Plural decompression kit
  - Tracheotomy kit
  - Minor surgical repair kit
  - Portable cardiac monitor and Defibrillator
- Material and Supplies
- Two way communication facilities
- Public Address systems
- Warning Light Systems

Motor cycle/scooter ambulances must also be planned and deployed. This will be useful in areas where traffic intensity high or when there is non-availability of roads for 4-wheeled ambulances maneourability. The motorcycle / scooter ambulances must be equipped with life saving medicines and equipment including portable oxygen cylinder. Personnel trained in emergency care should man these.

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Terms of Reference of the Group

1. To study the existing system for emergency medical care in India.
2. To study the existing system for emergency medical care (Centralised Accident & Trauma Services) set up by the Ministry of Health & Family Welfare in the National Capital Territory of Delhi.
3. To suggest appropriate models of emergency medical care which should be developed by different States/Union Territories and their essential components.

Group of Experts

The group comprised of the following members:

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Report of the Advisory Council of Jurists - Reference on the Rule of Law in Combating Terrorism - Executive Summary, General Recommendations and Observations - Final Report (draft) April 2004

PART A

EXECUTIVE SUMMARY

General Recommendations and Observations[1]

- The Advisory Council condemns all acts of terrorism. Terrorism is a violation of victims' human rights and such acts (particularly against civilians) cannot be justified, whatever the motive.[2] States have a duty to protect potential victims from such human rights violations.
- Any comprehensive response to terrorism must include measures to eliminate conditions that may allow terrorism to flourish. The protection and promotion of universal human rights is one such measure.
- Regional and international co-operation is essential in order to combat terrorism (particularly international terrorism) in all its manifestations.
- Any counter-terrorism measures must, however, be enacted and administered within a culture of legality and must comply with international law, including human rights instruments and standards.

1. The Advisory Council also draws attention to the resolution of the Pre-Forum NGO Consultation set out in Appendix 9 with which we are in substantial agreement.
2. See for example the comments in Security Council Resolution 1269 *On the responsibility of the Security Council in the maintenance of international peace and security*, 19 October 1999; S/RES/1269 (1999).

- This culture of legality and the rule of law can only be secured with a competent and independent judiciary and legal profession.
- The Advisory Council expresses its concern that there is a widening gap between commitment to international human rights standards and their implementation in national laws and administrative practices insofar as they relate to counter-terrorism measures. In particular, the Advisory Council draws attention to the following disturbing practices:
    - Administrative detention for prolonged periods without charge or opportunity for adequate judicial review;
    - Detention without notification to the family of the date and place of detention;
    - The failure to ensure access to legal advice from the time of detention;
    - The failure to protect the special rights of children in the administration of anti-terrorism legislation;
    - The targeting of minority groups solely on the basis of ethnic or national origin or religious or political persuasion;
    - The failure to assure a proper process for determining refugee status for all asylum seekers;
    - Extrajudicial killings, such as in 'fake encounters';
    - The grant of impunity for gross violations of human rights by, for example, law enforcement officers or members of the military;
    - Overly expansive and vague definitions of terrorism in national laws which risk restricting rights such as freedom of speech, expression and association;
    - The introduction of draconian measures targeted to counter terrorism when existing laws are adequate for the purpose;
    - The misuse of anti-terrorism legislation to stifle legitimate political dissent and other fundamental freedoms;
    - The failure to provide adequate safeguards in anti-

terrorism legislation to prevent their misuse;

- The promulgation of counter-terrorism measures by executive decree without adequate parliamentary scrutiny;
- The erosion of rights to due process, including the presumption of innocence; and
- The proliferation of special tribunals to deal with terrorism offences, thereby undermining the right to a fair and public hearing by an independent and impartial tribunal.

- The Advisory Council recommends that immediate steps be taken by all relevant authorities to ensure that these unacceptable practices cease forthwith.
- National Human Rights Institutions (NHRIs) should be conscious of the above matters in the performance of their functions, including complaint handling and monitoring of human rights performance within their jurisdiction.
- NHRIs should report on a regular basis to the Office of the Commissioner for Human Rights on the extent to which the content and administration of counter-terrorism measures fail to comply with international human rights law.
- NHRIs should seek to influence legislators and inform public debate about the human rights implications of counter terrorism measures and the legal obligations of States in relation to international human rights instruments and norms.
- NHRIs should take an active role in educating all sectors of the community, for example, lawyers, journalists, doctors, police, the military, the judiciary and legislators, on the meaning and application of the international law of human rights and the general principle of the rule of law.

Summary of Answers to Questions Posed by the Reference

(i) How international human rights instruments and standards define 'terrorism', particularly with reference to other rights including the right to freedom of association and freedom of expression

- There are no international human rights instruments and standards that define terrorism.
- However, there is a general working definition contained in

Article 2 of the UN Draft Terrorism Convention, which provides:

> Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally causes:
>
> (a) death or serious bodily injury to any person; or
>
> (b) serious damage to public or private property, including a place of public use, a state or government facility, a public transportation system, an infrastructure facility, or the environment; or
>
> (c) damage to property, places, facilities or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss,
>
> when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

- This definition has been used in counter-terrorism laws in the region and may therefore be gaining acceptance as an appropriate definition.
- The Advisory Council notes, however, that, in designing and implementing any counter-terrorism measures, particular attention needs to be given to ensuring respect for the rights to freedom of opinion, freedom of expression and freedom of association.
- States must avoid including, within any definition of 'terrorism' or associated definitions, (such as 'terrorist', 'terrorist organisation' and 'terrorist act'), legitimate and peaceful political action and protest.

(ii) The reasons for which a person can be deprived of their liberty under international law

- Under international law, deprivation of liberty must be:
  - in accordance with law; and
  - not arbitrary.

- For detention not to be arbitrary, it must be:
  - o for a legitimate purpose;
  - o *necessary and proportionate in pursuit of such purpose;* and
  - o non-discriminatory.

(iii) The length of time for which a person can be deprived of their liberty under international law without being charged

- Anyone arrested or detained for any reason, including in relation to a terrorist offence, has the right to be brought promptly (without delay) before a judicial officer to challenge the legality of their detention.
- All persons arrested or detained on a criminal charge are entitled to a trial within a reasonable period.
- Even where detention is lawful and not arbitrary at inception, it can become arbitrary if the length of detention is not necessary and proportional to the circumstances. There should be an opportunity for regular judicial review of the continuing necessity for detention.
- It is recognised that terrorist offences are serious offences and may present particular security concerns. The investigation of these offences may also take longer because of their complexity and possible international component. All of these factors must be weighed by a judicial authority when making a decision as to the necessity to detain and the appropriate limits on the length of detention.

(iv) The nature of special protections that should be extended to minors when imprisoned, detained or searched in accordance with international law

- Minors/children must be treated in accordance with the CRC and related rules which require special protection for those under 18 years of age. The overriding principle is that the best interests of the child must be a primary consideration.
- In particular, imprisonment or detention of children must only take place as a measure of last resort and be for the shortest possible period of time.

- The Advisory Council notes the disturbing trend towards the use of children in terrorist acts. This breach of children's rights must be proscribed by law and active measures taken to prevent and eliminate such practices while providing adequately for social recovery and reintegration of the children concerned.

(v) The safeguards to be followed in the event of imprisonment or detention of a person in accordance with international law

- Every person detained is entitled to be treated with humanity and with respect for the inherent dignity of the human person.
- In particular, in addition to effective judicial review of detention and due process rights, the following safeguards apply to all persons detained or imprisoned:
    - o The right to be free from torture;
    - o Humane and appropriate conditions of incarceration;
    - o Notification of and access to family;
    - o Immediate access to legal counsel;
    - o Consular assistance; and
    - o The right to an interpreter.

(vi) What safeguards are stipulated by international law relating to the right to a fair trial in the event a person is charged with an offence

- Every person who is charged with an offence, including a terrorist offence, is entitled to a fair and public hearing by a competent and impartial tribunal established by law.
- Everyone charged with an offence has the right to be presumed innocent until proved guilty.
- Other key safeguards include:
    - o The right to be informed of the nature and cause of the charge;
    - o The right to adequate facilities for the preparation of a defence, including the right to legal counsel;

- The right to defend oneself or through legal assistance of one's own choosing;
- The right to examine witnesses; and
- The right not to be compelled to testify against oneself or confess guilt.

- The Advisory Council recognises that there may be particular concerns in terrorism trials with issues of witness protection and the use of classified information. In these circumstances it is important that any measures to protect witnesses or classified information be consistent to the greatest extent possible with the rights set out above, that they be authorised by the judicial authority trying the case and that they be imposed only to the extent strictly necessary.

(vii) The manner in which search and seizure powers can be exercised in accordance with international law

- Under international law any exercise of search and seizure powers, including interception warrants, must be lawful and not arbitrary (i.e. must be necessary and proportional). In particular, such measures must:
  - be non-discriminatory; and
  - take into consideration rights to privacy, family and correspondence.

- There may be justification for restricting the right to privacy in light of the threat to national security posed by terrorism. Any information gathering powers, including the power to apply for interception warrants, must, however, be clearly defined and subject to judicial oversight. They must also be necessary and proportional to the threat to national security and be non-discriminatory.

(viii) The international human rights standards relevant to determining the penalties that can be imposed for committing acts associated with 'terrorism'

- Penalties can only be imposed after a fair trial in accordance with law and by a competent, duly constituted and impartial tribunal.

- The Conventions on Terrorism require, for the crimes covered by those conventions, the imposition of appropriate penalties which take into account the grave nature of the offences.
- All penalties should be appropriate, reasonable and proportionate to the crime.
- International law prohibits cruel, inhuman and degrading punishment. International law does not specifically prohibit the death penalty. However, there is an evolving and growing international trend against the death penalty and the Advisory Council of Jurists, in its Report of December 2000, urged States to move towards its abolition.
- Where States have not abolished the death penalty it should only be imposed for the most serious crimes, for example those that have led to large-scale loss of life.
- The death penalty must not be imposed on those who were children at the time of an offence and must not be carried out on pregnant women.
- The Advisory Council notes with concern incidents of extra-judicial killings, being killings by law enforcement officers, the military or vigilante groups outside of the judicial process and without lawful excuse.
- Such killings are contrary to the fundamental human right not to be arbitrarily deprived of life. The perpetrators should not be entitled to claim immunity from prosecution in respect of such crimes.

(ix) The international human rights standards that can be derogated from and in what circumstances

- In no circumstances whatsoever can torture or cruel, inhuman and degrading treatment and punishment be justified.
- Certain human rights have become norms of customary international law, including the right to be treated humanely while in detention and certain minimum standards of due process (including the presumption of innocence). Such norms must always be complied with by all States.

- Departure from some other human rights standards might be permissible under the ICCPR only:
  - In times of lawfully proclaimed public emergency which threatens the life of the nation; and
  - Where departure from those rights is non-discriminatory and strictly necessary and proportionate to the emergency.

(x) The relationship between anti-terrorism measures and the rights to seek asylum and to non-refoulement

- Anti-terrorism measures should not undermine access to asylum for refugees (those fleeing their country of origin by reason of well-founded fear of persecution).
- Terrorists are, however, excluded from refugee protection. Refugee status cannot be claimed by any person where there are serious reasons for considering they have committed:
  - crimes against peace, a war crime or a crime against humanity;
  - serious non-political crimes; or
  - acts contrary to the purposes and principles of the United Nations.
- Where a person has grounds for claiming refugee status, but where there are also reasons for suspecting them as a terrorist, they should have access to fair status determination procedures to assess their claim to refugee status and whether they are excluded from refugee protection.
- Non-refoulement is a customary rule of international law binding on all States. This means that refugees should not be returned to a territory where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.
- An exception is permitted where there are reasonable grounds for regarding a person as a danger to the country in which they are seeking asylum, or where they, having been convicted of a particularly serious crime, constitute a danger to the community of that country. In such cases there should also

be a fair procedure to determine whether a person comes within such exception.

- Even if a person is not entitled to protection as a refugee, they cannot be returned to a situation where they are likely to face torture or a risk to their life or other fundamental human rights.

(xi) The nature of the obligations on States under international human rights instruments and standards which are to be kept in view while enacting and implementing anti-terrorist legislation, at the same time maintaining the primacy of the rule of law

- International human rights standards impose obligations upon States when enacting and implementing anti-terrorist legislation.
- International human rights standards guarantee the primacy of the rule of law and this must be borne in mind as a priority in enacting and implementing anti-terrorist legislation.
- International human rights standards should not simply be 'kept in view' in enacting, implementing and administering anti-terrorist legislation, but they must be guaranteed and incorporated into national laws and practices.

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Summary of the Report on Action Research on Trafficking in Women and Children in India 2002-2003

Executive Summary

Trafficking in women and children is a gross violation of human rights. The commercialization of innocent lives is not only a serious crime but an abuse of inherent human dignity that results in physical/social/mental damage to millions of lives every year. However, the existing systems in the spheres of prevention, protection and prosecution are not adequately geared towards tackling this complex problem in a holistic and rights-based manner. The definitional and conceptual understanding that guided anti-trafficking work so far has equated trafficking with 'prostitution'. It has, therefore, limited the scope of addressing different forms of trafficking. It fails to address the vulnerability of the victims and the process that put them in a situation of abuse as victims of commercial sexual exploitation (CSE). It places the onus of abuse on the victims themselves and refrains from addressing the abuser/perpetrator. In most countries, legal provisions dealing with trafficking are designed to address 'prostitution' and not trafficking. Trafficking has not yet been prioritized as a 'serious crime' and it is still being dealt with as a minor offence as it is equated with 'prostitution'.

One of the most important constraints in developing sustainable and comprehensive strategies to combat trafficking has been the lack of validated data and information. It was to fill this gap and to collect reliable data that the National Human Rights Commission (NHRC) launched this Action Research on Trafficking in Women and Children, with the involvement of the Department of Women and Child Development, Government of India. UNIFEM, which is committed to the cause of women and girl children, and has supported national level researches on trafficking in Nepal and Sri Lanka, extended their partnership to NHRC and sponsored this project. The research was a multi-centric study

carried out in 13 states/UTs under the academic insight of a reputed research institute, the Institute of Social Sciences, with the technical and financial support of UNIFEM. The objective of this research was to study the trends and dimensions of trafficking in order to identify the vulnerability factors and issues so that it would facilitate the response systems in developing and implementing holistic policies and programmes to combat trafficking.

The primary data was collected by interviewing 4006 persons falling under seven categories, spread over 13 states/UTs. These categories are a) victims of CSE, b) survivors, c) brothel owners, d) traffickers, e) clientele, f) trafficked children rescued from exploitative labour and servitude, and g) police officials.

Out of the interviewed survivors and victims who were trafficked for CSE, the maximum (29.5%) were from Andhra Pradesh, followed by Karnataka (15%), West Bengal (12.5%) and Tamil Nadu (12.3%). Intra-state trafficking was also observed to be very high in almost all the states studied except Delhi and Goa.

It cannot be claimed that the research has answered all the questions/concerns and dilemmas that surround this multidimensional problem. But is has definitely made an attempt to unravel some of the key issues and pose critical questions on those that need further study and exploration. Several recommendations and suggestions, to address the problem, have also been put forward. The data collected and analysed is in no way exhaustive but is definitely indicative of the problem and its dimensions. The numbers do give a comprehensive picture on the nexus of trafficking and how it works, who the victims are and why they are victimized. They are also very useful in understanding the socio-economic backgrounds of the people involved and how the law impacts their lives. The highlights of the findings of the field research are given below:

464 Victims of commercial sexual exploitation interviewed

- Age group: 13-15-1.9%; 16-17 - 2.8%; 18-21--14.7%, 22-35-68.5%
- Starting life in brothels: 44.3% when<18 years; 22.9% when<16 years
- Age at marriage: 60.6% were married as children
- First sexual experience: 73.3% when <18 years; 45.6% when<16 years

- Age at the commencement of brothel life: 22.9% when they were less than 16 years, 44.3% when they were less than 18 years
- 51.9% stated that their traffickers were males and the rest said that the traffickers were females
- Modus operandi adopted by traffickers: 68% were lured by promises of jobs and 16.8% by promises of marriage
- 70% of the victims were from deprived sections of society
- A total of 1,092, traffickers were involved in trafficking 437 respondents. This shows the nexus among traffickers
- Savings: 61.3% had no savings despite being exploited in brothels for several years
- 10% of the respondents were subjects of re-trafficking
- 72.5% had been convicted earlier on charges of soliciting.

561 Survivors of commercial sexual exploitation interviewed

- 20.7% were children below 18; mostly from West Bengal, Maharashtra and Tamil Nadu
- 61.7% were already being exploited in brothels before the age of 18
- 51.7% were from deprived sections of society
- Age at first sexual experience: 41.35% at 7-15 years of age
- Age of entry into CSE: 61.7% when they were less than 18 years of age
- 24.2% had been rescued earlier and were victims of retrafficking
- 57.9% were arrested by the police earlier
- 15.4% had to bribe the police for release
- 40.9% were released by brothel owners
- 75% were trafficked by two or more persons
- Average number of clients was seven per day
- 10% of customers were students
- Main modus operandi of trafficking: 62.4% were trafficked by lure or deception

- Family members accepting payment from traffickers: 18.3%
- *Health factor:* 32.3% had health problems, and among them 8.3% had HIV, 30.4% had STDs and 17% had other gynaecological problems

852 Clients interviewed

- Age: 26.6% -- 16-25 years , 26.5% -- 26-30 years
- Less than 18 years: 14 respondents
- Youngest client interviewed was 16 years
- 45.5% were married and 72.9% of them were living with their spouses 82.3% of the married clientele had wives below 35 years of age
- 85% were local residents
- 93.8% were frequent visitors to brothels
- First sexual experience: 7.6% when they were 10-15 years, 33% were when they were 16-18 years
- 34.2% had first sexual experience at home, 35.7% in brothels
- Preference patterns in brothels: 39.2% prefer young girls, 29.9% go for looks and body shape
- *Reasons for preference for young girls:* 53.3% feel they are more submissive to exploitation, 33.8% due to fear of AIDS and other diseases
- Only 67.9% use condoms and 32.1% do not go for safe sex measures
- 26.5% take the victims of CSE to their homes
- 82.6% never encountered police in brothel - explains poor law enforcement against abusers. Regression analysis shows that police inaction is a significant factor that prompts clients to visit brothels frequently.

412 Brothel Owners interviewed

- 67.2% were victims of CSE before becoming brothel owners (BO), 11.4% had inherited the brothel
- At the time of interview 393 BOs had a total of 2,702 victims of CSE in their brothels, that is, an average of seven victims of CSE per brothel

- At the time of interview, 860 children were being exploited in the brothels. They are awaiting rescue
- 198 brothels had 615 girls who were 17-18 years of age
- 82 brothels had 245 girls who were less than 16 years of age
- The highest demand is for virgins
- Clients include 21.8% students and 53.4% businessmen, as stated by the BOs
- Linkage with traffickers: 75.7% have direct dealings with traffickers and others use conduits
- 73.8% said that customers have specific demands and supply is made by them based on demand
- High profit confirmed: Maximum earnings are made from children in CSE
- 34.5% had not faced any police action - speaks about poor law enforcement/nexus
- 53.4% stated that they avoid arrest or police action by bribing the concerned police officials

160 Traffickers interviewed

- There were both male and female traffickers (among the respondents, the ratio was approximately 50-50)
- 37.5% of the traffickers were in their thirties, and 23.1% were in the age group of 18-30 years
- 90% were Indians; 10% were Nepalese
- Modus operandi of traffickers: 51.9% lured their victims with promises of jobs or money, 16.3% with false promises of marriage
- Money spent on trafficking the victims: 26.3% of the respondents spent less than Rs. 5,000 per trafficked person
- 57.5% stated that the money is arranged by brothel owners/ pimps
- 60.6% said that they gave money to the families of the trafficked victims.

510 Rescued children, trafficked into labour, interviewed

- Age group: 6-10 years - 14.7%; 11-12 years - 21%; 13-14 years 27.6%; 15-18 years - the remaining children

- Reasons for leaving studies: 34.2% due to poverty/no means; 27.9% to earn for the family, 18.3% because of physical abuse by family members
- Age at the time of trafficking: 37.8% were 10 years or less, 41.7% were in the 11-14 age group
- Trafficking en masse: 50% of the victims were trafficked in groups
- Modus operandi of traffickers: 74.5% were lured by promises of jobs
- Trafficking: 39.6% held family members or relatives responsible
- Exploitation at workplace: 39% were physically abused, 11.8% verbally, 12.4% sexually, 36.2% were victims of multiple abuse and only 0.6% had no complaints
- 69.8% had no freedom to move
- 30.4% tried to run away but failed
- 33.8% had health problems
- 54 respondents suffered permanent physically disability due to exploitation

The study has brought out some important facts and figures regarding trafficking. It has illustrated a strong linkage between trafficking and migration. It has provided us with the understanding the addressing the vulnerability of migrants is an important tool to prevent trafficking. There is an added dimension in trafficking because of unconventional means of commercial sexual exploitation like sex tourism and exploitation in massage parlours, beer bars, etc. These have created a high demand for children. There are not many initiatives to understand and address these issues except for a few like the Goa Children's Act, 2002. Similarly, a clear linkage has been established between trafficking and those reported missing. It has also brought to light that an average of 22,480 women and 44,476 children are reported missing in India every year. Out of which 5,452 women and 11,008 children continue to remain untraced.

All these exemplifies that trafficking is a complex phenomenon with many facts and to prevent/combat it, a thorough knowledge of the regular trends as well as its changing aspects

have to be understood well. The study has also drawn up a psycho-social profile of the survivor. The harm and disability caused to the individual and society has been calculated in monetary terms and a staggering amount has been worked out. The need for providing appropriate care and attention to the survivors as well as for developing protocols and guidelines that would be in their best interests has clearly emerged as a priority need.

The chapter on the legal framework gives a bird's eye view of the international/regional/national systems and structures that are in place. There is no doubt that the Immoral Traffic Prevention Act, (ITPA)1956, is a social legislation with a lot of inherent strength to combat trafficking. The legal regime, no matter how well meaning, has little relevance unless the laws are properly implemented. A Study of the law enforcement scenario shows that the various provisions of ITPA are underutilized or not utilized at all. There is enough evidence to show that they are misused time and again. A total of 65,602 persons were arrested under ITPA during the five-year period of 1997-2001, out of which 87% were females. On the other hand, it was found during the course of the research that a large number of traffickers, transporters, brothel owners, clients and other such exploiters, who are mostly males, are untouched by the law.

Law enforcement is hampered by serious limitations as trafficking is a very complex crime, extending beyond the jurisdictional boundaries of law enforcement officials. This is further compounded by lack of proper procedures for assessment of age of the rescued victims, inadequacy of women police staff, and absence of training/orientation/infrastructure as well as public support systems.

In this context, the data collected by interviewing 852 police officials (117 senior officials and 735 middle/junior rank officials) presents the following scenario:

- 54.8% police officers give no priority at all to trafficking, 25.3 give it low priority, 12.2% consider it to be a medium priority issue and only 7.7% think it is a high priority issue
- Reporting on trafficking appears to be only 40%. As stated by the police officers themselves, 60% of the cases go unreported

- The sex-disaggregated data of law enforcement shows that 93% of those arrested, mainly under Section 8 A (ITPA), 95% of those chargesheeted and 90% of those convicted were women
- 40% of the police officials were not aware of the issue of trafficking
- Only 6.6% of the police officials had undergone some sort of training/sensitization on the issue.

The justice delivery mechanism is another area that is in need of change and improvement, especially when it comes to orienting itself to human rights, gender issues, victimological principles and standardized sentencing policies. Moreover, the proceedings of the court as well as its ambience need to be made victim-friendly and less intimidating for women given the fact that the majority of the victims are women and children.

Prevention of trafficking is possible only with an integrated approach involving simultaneous action at the levels of protection of the rights of victims and survivors as well as prosecution and stringent action against exploiters. Community awareness and community involvement are essential to prevention. Good practice models of community policing in prevention have been observed during the study. *Involvement of Panchayati Raj Institutions (PRIs)* in anti-trafficking work has produced very good results in several states and should be replicated in other places as well. The media also has a large role to play in prevention. Moreover, political will is an essential requirement in the given context.

The government, through the Department of Women and Child Development (DWCD), has taken some important steps towards prevention of trafficking by introducing schemes like the SWADHAR and grant-in-aid programmes, which empower women and children by addressing their social and economic needs. However, a lot more needs to be done to bring in radical change in the given situation.

This action research by the NHRC has been a pioneering one in that it has combined social science research with real-world involvement and action at several levels. Broadly, these action programmes include:

- Sensitisation of officials, creation of public awareness and generation of accountability

- Facilitation of individual or group activities on prevention, protection and prosecution
- Setting up a national network of government officials (Nodal Officers) in all states and linking them up with NGOs and INGOs across the country.
- In all, more than 34 training programmes involving more than 2000 police officials, seven training programmes of judicial officers and 41 training sessions for NGOs and civil society members have been facilitated.

Recommendation and suggestions:

The recommendations and suggestions which emanate from the research have been put under the following categories.

- Cross-cutting issues
- Prevention of trafficking
- Protection of victims and survivors
- Prosecution of traffickers and other exploiters
- Changes proposed in ITPA

Cross-cutting issues

It is important that all anti-trafficking interventions/initiatives should strictly follow the human rights paradigm, so that the rights of the trafficked persons are always protected. It is imperative to understand that this gross violation of human rights occurs due to many socio-economic factors that add to the vulnerability of the victims. Some of the main causes of vulnerability to trafficking, as the study shows, are economic and gender disparity, which limit women's access to developmental processes. Apart from creating political will and making it a public issue, it is essential to set up a National Nodal Agency to coordinate various activities. There is a need to build up coordination among NGOs at the national level, develop GO-NGO partnership and also bring in corporate involvement. The issue of cross-border trafficking calls for effective bilateral cooperation and regional initiatives. Even though cross-border cooperation requirements cannot be geographically confined to the bordering districts, to start with, such systems can be built up on the border areas by involving law enforcement agencies and NGOs on either side.

Prevention of trafficking

In order to prevent trafficking, micro-studies should be carried out for vulnerability mapping of the source area as well as demand areas and simultaneously addressing these vulnerabilities. The role of the family has been found to be critical in prevention of trafficking. The community and the family should be sensitised to issues of gender, women's rights and child rights. At the community level, community policing is an essential requirement. Special efforts need to be made to address cultural practices and the new forms of exploitation, viz. sex tourism. The media can play an important role in prevention and case studies have substantiated this. Prevention of cross-border trafficking calls for Rights Awareness Intervention Centres at appropriate places, as demonstrated by the SEVA model at Gorakhpur.

Protection of victims and survivors

The study has underlined the need for minimum standards of care and attention in rescue and post-rescue activities, conforming to human rights. Towards this end, a handbook of do's and don'ts is required. After rescue, the victims should be provided with legal representation, medical care, psycho-social counselling and appropriate rehabilitative orientation/training as well as facilities for sustained livelihood. It is important that the victims should be segregated from the exploiters so that they are not further harassed.

Prosecution of traffickers and other exploiters

On the prosecution front, there is a need to ensure that all crimes are reported and registered so that legal action is taken. However, Section 8 ITPA should be used with a lot of care of make sure that the victims are not revictimised. The element of mens rea (intention) has to be investigated to find out who the real culprit is. For example, a child who is made to solicit, with or without mens rea, and an adult who is made to solicit under coercion, duress, threat, lure, etc. cannot be and should not be held liable or guilty under Section 8 ITPA. If the victim is a child, the Juvenile Justice Act has to be invoked. Misuse of local and special laws, resulting in harassment of women and children by branding them as 'prostitutes', should be stopped. The study shows that lack of training is a serious impediment to effective law enforcement and justice delivery. The concerned officials should be given specialized training so that they can bring issues of gender and child rights into perspective while implementing law or delivering justice.

It is important for designated government ministries/ departments in charge of women and child rights to facilitate the process of ameliorating the shortcomings in the legal framework as well as strengthening social structures which can promote women's and children's rights. It is also necessary for the women's ministries to monitor the implementation of the laws relating to trafficking in its entirety.

The second volume of the report is a compendium of 154 case studies developed during the research. Each case study has a theme and a message. For purposes of presentation, they have been grouped into five categories as below:

- Case studies on the trends and dimensions of trafficking
- Case studies on the vulnerability factors
- Case studies profiling the exploitation and exploiters
- Case studies on prevention and other proactive responses to trafficking
- Case studies on law enforcement and other reactive responses to trafficking.

This report on trafficking in women and children in India is relevant for the government, all human rights agencies, civil society, the media, social activists and policy planners. It is a document, which will help all concerned to understand the issues in all its multi-dimensional aspects and assist them in preparing a holistic strategy to take appropriate steps for preventing and combating trafficking. No doubt, the study has established that serious human rights violations have resulted due to shortcomings on many fronts, but while identifying the gaps and shortcomings, it has also elaborated on the processes and actions, which have led to positive results. The action programmes that have already been initiated could be replicated/sustained and other long/short term programmes developed along those lines. It is up to the agencies concerned to prioritise their action plans and strategies accordingly. It is better late than never. Therefore, this is the time to act, as the agenda has been set. Further, the rich and voluminous database which has been built up from the field study can be a source of further study, research and documentation on various other issues not covered in this report.

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BOOK REVIEW

Rinki Bhattacharya (2004): Behind Closed Doors: Domestic Violence in India.

Sage Publication, New Delhi

Domestic violence is widespread and cuts across barriers of wealth, educational levels and social status. Around 24 to 50 percent of women are victims of domestic violence according to a survey of 24 countries across the world by UNICEF (2000). In India while total incidents of crimes are declining, crime Against Women has shown an increasing trend over the years. There has been a sharp 5.9 percent increase in 1999-2001. Cruelty by husband and relatives contribute to the major share of Crime against Women and has shown a 7.4 percent rise in 2000-2001.

Family pressures, concerns about children, the lack of economic independence, and the sense of guilt that most women feel, all contribute in keeping these crimes behind closed doors. It is the interrelatedness of various- cultural, social, political, legal, economic factors causing this heinous crime. All sectors of society across cultures have to bear the consequences of violence against women, which not only act as a threat to her fundamental rights but also to her basic human rights. Apart from the direct costs which are incurred when primary services are used to prevent violence, economically it affects her productivity level, and it also has a deep impact on social relations and quality of life. She has to live her life in a zone of terror where the perpetrator is none other than her husband and close relatives.

The book "Behind Closed Doors: Domestic Violence in India" by Rinki Bhattacharya features several painful real life stories of victims of domestic violence cutting across all sections of society. The book also features a historical and conceptual background, her social work for the cause, and suggestions towards policies for future intervention.

In the introductory chapter the editor highlights the deep roots of this evil, which lies in the traditional subordinate status of women in our society. Rigid concepts of marriage, patriarchal traditions in family and wrongly justified male ego leads to this heinous crime. The rights of women become superfluous and in most cases it is deeply rooted in our customs and beliefs. There is still so much sanctity attached to marriage and family life that most of the women suffer in silence. Even if she voices her humiliation and anguish she fails to get any social or economic support.

Anwesha Arya in one of the chapter has effectively brought the dichotonomy that exist in India about treating women. In one hand as she is the creator i.e. she is worshipped in the form of Goddess in most part of India and on the other in the reality she has a de-glorified status. While contextualizing domestic violence based on old and new patriarchal tradition S. Ghosh has brought clearly a strong integration of family, community and state which acts as a web for not allowing a women to come out of abusive relationship. A special mention has been given in one of the chapter of the book by Kalindi Majumdar of police attitude towards the problem as they form a strong link between family/community and state. The hostile, indifference attitude of the police often act as a hindrance for women to get justice.

The narratives of battered women ranging from different social strata are combined together in the book. The book, dispels some of the myths about domestic violence and empower more women to break the silence. The 17 victims not only belongs to different regions of India, but also from varied socio- economic strata of society, which suggest that violence is not restricted to particular section of women. Social and financial statute, education, and urban-rural divide do not come in the way of a man's violence towards his wife. The narratives include life of a poor farmer's daughter and also that of a women belonging to a educated and rich family. The varied nature of violence that the women suffered reflects the degree of cruelty that they have to endure, which includes forceful abortion, starvation, organized control of their lives. Some victim accounts about the history of violence in their family, which they are the prey. The book also gives an accounts of the life of victims who are not in marital union, which suggest that the nature of domestic violence that is widespread and is

spreading its tentacles in non traditional relationships also and it can soon increase in proportion due to escalating prevalence of live in relationship in urban India.

Even if some women have the courage to come out of violent relation there is little social support for victims of domestic violence and very little safety net for the majority of abused women. In her book Rinki suggests some measure to improve the life of the battered women, in the form of sensitising police, lawyers, doctors, and government agencies to the issue so that no case of violence goes unrecorded. She emphasised the need for healing through long-term counselling. Shelters should be provided for abused women with governmental support till the victims are properly rehabilitated. Re-building of women's economic resources is also of great importance. But most important is the need to sow the seeds of change which should start from our home and then move to the society.

The book is a significant contribution to our knowledge of various forms of domestic violence which ranges from violent physical, mental torture to sexual abuses that she has to endure. Through her book she posses question on the sanctity attached to marriage and family life, which makes very few women to come out in the open to seek support or attempt to escape the situation. Though the case studies were varied, it would have been more effective if she drew a comparative picture of the causes and nature of violence and also provided suggestion based on their narratives. Due to the fact that the book is written in such an incredibly readable style and the case study of the victim are so gripping, Rinki Bhattacharya's book makes an excellent contribution to highlight the suffering of women within four walls.

Dr Ranjana Kumari

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BOOK REVIEW

Human Development in South Asia (Oxford University)-2003
The Employment Challenge

Mahbub ul Haq Human Development Centre, Rs. 450 pp. 1-IV and pp 200 including annexures and index

The twentieth century saw a synthesis of liberty and welfare; a fusion between emphasis on the individual, his autonomy and liberty, and emphasis by socialism on the group and on economic and social welfare for all; between the view of government as a threat to liberty, a necessary evil to be resisted and limited, and the view that sees government as a beneficial agency to act vigorously to promote the common welfare. The fusion did not come easily. Countries with traditions of political liberty and limited government were hospitable to notions of economic liberty and laissez faire and were hostile to activist intervening, planning government.

It is an indisputable fact that food, shelter and clothing are the basic human needs for the mere survival of any human being. Fulfillment of the basic needs of a human being requires access to adequate means of livelihood. Such accessibility, in turn necessitates entitlements, to be translated into the form of rights, viz, right to work, right to social security, right to standard of living adequate for the health and well being of himself and his family. The easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood.

Basic human right to livelihood can be guaranteed through a wholesome employment policy by the developing countries particularly in the South Asian Region. Hence studies which place people at the centre of economic, political and social policies in respect of this right in particular assume great significance. The report under review "Human Development in South Asia 2003" is one such study.

The study commences with a detailed examination and comparative profiles of employment challenges in South Asia and concludes with the chapter titled "Towards Growth with Employment and Human Development" prepared by a team headed by Mrs.Khadija Haq.

The report comprises 9 Chapters excluding the overview. In the overview the report emphasises that employment is one area, particularly in the context of South Asia where the 3 components of the Human-centered Policy, --- Human Development, Human Security and Human Rights --- converge.

In the 1st Chapter titled "Working out of poverty: to a conceptual framework", the report lays down a development strategy for South Asia. It emphasises that such strategy should include the need to provide employment opportunities to its large and expanding workforce. The strategy should also take full advantage of the process of change that is altering the shape and structure of the global economy. It is significantly pointed out that the world's rich nations have also failed to open their markets to the goods and commodities produced by the poor of the developing world especially when such opening would come at the expense of their own producers.

The subsequent chapters demonstrate the paradigm of employment challenge faced by developing countries of South Asia, its labour markets, the interface between poverty and employment. The challenges thrown by WTO rules and the impact of trade liberalization on employment, its effects on agriculture and other groups are serious concerns and issues addressed and highlighted in the study. The issue of gender discrimination and issues leading to gender injustice are very important contribution to policy makers undertaken in the study. The interface between education per se, technical and vocational education which generate entrepreneurship and promote employment are subjects of serious discussion for the developing countries.

Labour standards, entitlement of fundamental rights to labour, their enforcement and the impact of globalisation on such rights are very well analysed in the study. Other issues of population growth linked to immigration, migration and other factors of demographic asymmetry are valuable contributions. The

models suggested in the study can certainly serve as directive principles for the policy makers in solving the problems of population, employment and human development in South Asia.

Human development cannot take place without employment. Unemployment is certainly a denial of human rights. Though the study is a very valuable contribution and can serve as a policy document for developed and developing nations, it ignores certain important issues which directly relate to the study undertaken. One fundamental right which is central to any system of good governance is the right to information which should have been properly addressed by the study. Corruption in the system is another core issue which negates human development in developing countries. This should have found some relevant discussion in the report. Human development through good governance and creation of a civil society in a democratic set up responsive to basic human needs of food, shelter and clothing are the demands of the day and every government in South Asia. On the whole, human development report on South Asia is an important study and various recommendations of the report if properly implemented will go a long way in the promotion of human rights regime not only at the national but also at the international level.

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