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AN EXPENSIVE READY RECKONER

Samuel Mani*

Review of “Foreign Direct Investment in India” by Tony Khindria, Sweet and Maxwell, $105

As the name suggests, the intention with which Mr. Khindria wrote this book was one of providing a technical overview of the relevant Indian legislation. As an introduction to the subject at hand, namely studying and briefly recounting the legal aspects that have to be complied with in investing in and operating a business venture in India, he provides a brief preface that seeks to explain the need to have a book that is dedicated to investing in India. He points out that a foreigner seeking to invest in India must keep in mind at all times, that investing in India is not just a question of bringing in money and obtaining the necessary clearances; it is a socio-cultural experience unlike any other in the world and which requires a great deal of understanding. Furthermore, a cursory glance at the contents of the book is enough to give one an idea of the long and sometime torturous procedure that doing business in India entails. The ten chapters and fifteen annexures cover such a vast ground that even an expert in this area will be left feeling quite bewildered. The impression is one of gigabytes of information that has been somehow “zipped” into a brief and concise form for ready reference.

In the book, Mr. Khindria begins with the first document that an foreign entity investing in India will execute, a Memorandum of Understanding (“MoU”) with a suitable Indian company to set up a joint venture company. He uses the text of the MoU as a rather effective tool to provide a quick overview to the most immediate aspects that a foreign investor will want to know. The true utility of this is that all the clauses in this MoU are cross referenced so that a person who is interested in a particular aspect can then directly proceed to the place in the book where the information he is seeking is set out and explained in greater detail.

Having started off with the MoU, Mr. Khindria then proceeds to talk of investment related policies in which he tries to detail the manner in which the initial investment is to be made.

While Mr. Khindria has managed to give a general perspective of the nature of the regulatory regime in this area, placing reliance on the information contained therein should be done with the utmost caution. This is not to suggest that there is any defect in the position that is set forth by Mr. Khindria, but rather to say

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1 V Year, B.A.L.L.B. (Hons.), National Law School of India University.
that is an area that is primarily regulated by rules, notices, circulars, etc. issued by the various regulatory authorities, especially those issued by the Reserve Bank of India ("RBI") and the Securities and Exchanges Board of India ("SEBI"). The position with respect to most matters dealt with in this area of the book is susceptible to change without prior notice and this means that relying on the general position as set forth in this book might be dangerous, especially as a particular investor's position might be the recently introduced exception to the general rule.

The following chapters of the book deal with areas like contract law, company law, the system of taxation, the intellectual property regime, and sensitive issues like the environment and labour legislations the judicial system and the political and administrative set-up. Mr. Khindria must be congratulated for his comprehensive coverage of the major issues associated with each of these issues. He has provided the reader with a concise yet comprehensive statement of the Indian legal system as is applicable to the conduct of business and where necessary has supplemented the statement of the statutory material with decision of the courts of Law.

However, there are a number of places in the book where the arrangement and chapterisation leaves much to be desired. A glaring example is the portion dealing with share capital of companies. The logical beginning that one would expect is to define what is share capital and the different types of share capital that can be issued as per the Companies Act, 1956. One fails to understand how an exposition of transferability of shares before defining share capital is conducive in facilitating a clear understanding of the law relating to share capital and dealings in them.

One also wonders how Mr. Khindria missed mentioning that transactions in shares in India are regulated by the Securities Contracts Regulation Act ("SCRA"). Admittedly, the SCRA is intended to regulate the dealing of shares on the Stock Markets, but this does not mean that an foreign investor seeking to invest in India, especially one who wants to invest by buying shares in an existing Indian company, can ignore its provisions. Also, in the last section on page 105, Mr. Khindria states that a public company may have restrictions on the free transferability of its shares. This is in contradiction to Section 111A of the Companies Act, 1956 which specifically states that the shares of a public company must be freely transferable.

The treatment of the subject is such that most of the issues that would confront an entity which wants to invest in India by the Foreign Direct Investment route are covered. However, one is left with the impression that the treatment of certain areas is of an rather abrupt nature. For example on page 110, Mr. Khindria states that a public company is statutorily allowed to issue only two kinds of shares and then goes on to talk about four classes of shares without stating to which two of these four classes, public companies are limited. While one is fully appreciative of the fact that to delve in detail into each of the issues raised in this
book is outside the scope of the book, one is left with a rather incomplete understanding that may be dangerous. Like the old saying goes “A little knowledge is more dangerous than no knowledge at all”. In conclusion, one must however congratulate Mr. Khindria on a most comprehensive book that does most of what it sets out to do albeit with some minor hiccoughs mentioned above. One can only hope that Mr. Khindria will continue to follow up his maiden effort with further writings of a similar nature and also that this particular book will be revised and updated and most important of all, cost less.
INTRODUCTION

Bandhs are a legitimate form of political protest against governmental inaction, or studied silence, or refusal to concede even the just demands of people. Though bandhs have derived their origins from 'hartals' called by Mahatma Gandhi to protest against any act or legislation of an alien government, today they are being used frequently by political parties to meet political ends, and often take a violent turn with large scale loss of life and property. In this context, the judgment of the Kerala High Court that bandhs are unconstitutional, consequently upheld by the Supreme Court, assumes great importance.

A BRIEF SUMMARY OF FACTS

The petitioners in this case were two private citizens and the various chambers of commerce in the State of Kerala. The State of Kerala, the Director General of Police and five registered All India political parties were impleaded as respondents. It was contended that bandhs should be declared unconstitutional as they violate Articles 19 and 21 of the Constitution and that they also contravene the Directive Principles of State Policy and the Fundamental Duties enumerated in the Constitution. The petitioners further prayed that the calling for and holding of bandhs should be declared an offence under the Indian Penal Code.

The Kerala High Court held that the calling for a bandh by any association, organisation or political party and its enforcement, is illegal and unconstitutional. The court also took the view that the organisations which call for such bandhs and enforce them are liable to compensate the Government, the public and private citizens for the loss suffered by them due to the resulting destruction of private and public property. On appeal, the Supreme Court upheld the decision of the High Court, merely stating that the reasoning of the High Court was sound, and that no interference of their part was necessary.

WHAT THE COURT SAID

The Court, by declaring that bandhs violate fundamental rights and are hence unconstitutional, has apparently accepted the argument that fundamental rights are enforceable not only against the 'State', but also against private citizens.
This is in direct contravention of the Supreme Court ruling in *State of West Bengal v. Subodh Gopal Bose*, where the Court declared that the Fundamental Rights guaranteed in Part III of the Constitution serve as protection only against State action. It was the contention of the petitioners that a banh called for and enforced by a political party violates their Fundamental Rights enshrined under Articles 19 and 21. It is submitted that the High Court, by upholding the contention of the petitioners, has ignored past decisions of the Supreme Court which have held that the rights guaranteed under Part III of the Constitution are available only against 'state action'. Since political parties, which consist of private citizens, are not 'state' for the purposes of Article 12, their actions do not constitute 'State Action' for the purposes of Part III of the Constitution and thereby, cannot violate the Fundamental Rights of citizens enshrined in the same.

The Court, in arriving at its decision, made a fundamentally flawed assumption that all bandhs imply a threat to all citizens, that any failure on their part to honour the call would result in damage to life or property. The Court has passed a blanket ban on all bandhs, disregarding the fact that bandhs are

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3 AIR 1956 SC 108.

4 From a plain reading of Part III of the Constitution, particularly with reference to Article 12, which defines 'State', it is evident that the Fundamental Rights are protection only from 'State' action, following the development of the concept in the context of royal absolutism, where protection from State excesses was required. The Constitution of India governs the relationship between State and civil society, and the Fundamental Rights enshrined are to ensure that the State, meant to protect and uphold the rights of the citizens, does not violate them itself. In case of violation of rights by a private individual, the course of action lies under the ordinary law of the land - civil, criminal and tort.

5 They claimed that their right to move freely through the territory of India [Art. 19(1)(d)], right to practice any profession or carry on any occupation, trade or business [Art. 19(1)(g)], as well as their right to education, right to use public roads, right to locomotion, and right to medical treatment (all protected under Article 21) were violated whenever a banh is called.


7 The question of what constitutes 'State' for the purposes of Part IV has been extensively discussed by a Constitutional Bench in *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487. Justice Bhagwati discussed in detail the various factors relevant for determining whether a body is an agency or instrumentality of the State, and hence 'State' for the purposes of Article 12, which he summarised as follows:

(a) If the entire share capital of the corporation is held by the government, it would go a long way towards indicating that the corporation is an agency or instrumentality of the government.

(b) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with government character.

(c) Whether the corporation enjoys monopoly status which is State conferred or State protected.

(d) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.

(e) If the functions of the corporation are of public importance and are closely related to government functions, it would be a relevant factor in classifying a corporation as an instrumentality or agency of the government.

(f) If a department of government is transferred to a corporation, it would be a strong factor supporting this inference of the corporation being an instrumentality or agency of the government.

8 *Bharat Kumar's case*, 1997 (2) KLT 287 (FB).
essentially an expression of discontentment and protest, and that violence is neither inherent nor always pre-planned. In failing to distinguish between justified and unjustified *bandhs*, the Court has effectively destroyed a perfectly legal method of political protest, so essential in a democratic society.

**WHAT THE COURT COULD HAVE SAID**

The Supreme Court of India has on a number of occasions recognised that, if an individual is unable to enjoy his guaranteed rights as a result of State inaction, it can be considered to be a violation of the individual's Fundamental Rights.\(^9\) In the present case, by pointing out that the failure of the State to take action under the relevant provisions of the Code of Criminal Procedure\(^10\) and the Indian Penal Code\(^11\) amounted to a violation of the citizens' Fundamental Rights, the Court would have had the jurisdiction to grant the appropriate relief. It is submitted that this justification for the declaration made by the Court would be more rational and based on sound reasoning, unlike the justification used by both the High Court and the Supreme Court, that the Fundamental Rights of the people as a whole cannot be subservient to the claim of Fundamental Rights of an individual or only a section of the people.\(^12\)

**CONCLUSION**

It is submitted that it is neither desirable to ban *bandhs* entirely, nor leave them entirely unregulated. The economic loss caused and the hardship suffered by the calling of a *bandh* is too great to be ignored. The Court must try to strike a balance between the freedoms guaranteed by the Constitution, and the degree of social control permissible. In its efforts to grant relief to those affected by *bandhs* however, the Court has gone too far, its judgment guided by emotion rather than by sound legal reasoning.

Drawing an analogy from the Industrial Dispute Act and its handling of strikes, differentiating between legal, illegal, justified and unjustified strikes,\(^13\) the Court should have attempted to classify *bandhs* as legal or illegal, instead of imposing a blanket ban on all *bandhs*. This would allow for peaceful expressions of protest, and at the same time prevent undue hardship to the public. By declaring all *bandhs* as unconstitutional, the Court has, in effect, violated the very rights it has sought to uphold and has deprived the working class of a very strong bargaining weapon.

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9 This principle has evolved through a host of environmental pollution cases decided by the Supreme Court, one of the notable ones being *Indian Council for Environmental Legal Action v. Union of India*, AIR 1996 SC 1446.

10 See, Chapter 10: Maintenance of Public Order and Tranquillity.

11 See, Chapter 8: Of Offences against Public Tranquillity.

12 This was in response to the respondents contention that the imposition of any restriction on the right of a political party to call for a *bandh* would be a violation of the Fundamental right of the political party, protected by Articles 19(1)(a) and 19(1)(b).

13 See generally, Chapter 5 of the Act dealing with strikes and lockouts.
SHOULD LAWYERS BE BROUGHT UNDER COPRA: A REJOINDER

Anuj Bhuwania*
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The Apex Court in Indian Medical Association v. V.P. Shanta has authoritatively settled the law that Medical Professionals are within the purview of Consumer Protection Act, 1986. However, the issue whether Legal Professionals are also covered by COPRA is still open to debate. The preceding article seeks to establish a case for excluding lawyers from the ambit of COPRA. The rejoinder endeavours to critically counter the arguments set forth by the learned authors by problematising every contention advanced by the authors and exposing their inherent fallacies. In a nutshell our effort is to establish that any suggestion to take lawyers out of the purview of COPRA is grotesque and misconceived.

INCLUSION OF LEGAL PROFESSIONAL IN THE DEFINITION OF SERVICE

The authors have relied on Jackson and Powell in order to say that "in matters of professional liability, professions differ from other occupations for the reason that professionals operate in spheres where success cannot be achieved in every case..." However, the authors have glossed over the specific rejection of this argument in Shanta's case where Agrawal, J. recognised the devising of a rational approach to professional liability which provides proper protection to the consumer while allowing for the factors mentioned above. The approach of the courts requires professionals to possess a minimum degree of competence and to exercise reasonable care in the discharge of their duties. Immunity from judicial proceedings on part of certain professions can be justified on the grounds of public interest. However, the trend is towards the narrowing of such immunity, and it is no longer available to architects and medical practitioners.

The authors have argued that in the lawyer client relationship develops an intimacy that is required of a contract of personal service. The contract of service has been defined as a master-servant relationship where the servant must obey orders as to the work to be performed and manner of performance. If we use the

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2 Hereinafter COPRA.
3 See, footnote 5 of their article.
analogy from Shanta's case it can safely be said that the relationship between a lawyer and a client carries within it a certain degree of mutual confidence and trust. Therefore, the services rendered by the lawyer can be regarded as services of personal nature. However, since there is no relationship of master and servant between the lawyer and client, the contract between lawyer and client cannot be treated as a contract of personal service. It is a contract for services and the service rendered by the lawyer to his client is under such a contract and is not covered by the exclusionary part of the definition of 'service' contained in S. 2(1)(o) of the Act.

**HOW UNIQUE IS THE LEGAL PROFESSION?**

The authors have relied on two decisions of House of Lords regarding the immunity enjoyed with respect to negligence by barristers. However, in *Rondel v. Worsley* the House indicated that at any rate some kinds of work done by a barrister would no longer attract immunity from liability for negligence. This is further elucidated by Lord Diplock in *Saif Ali v. Sydney Mitchell & Co.* where it was said, "Each piece of before trial work should ... be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice ... "

Thus the immunity was limited to those aspects of his work which are intimately connected to his activity in court. In Shanta's case Agrawal, J. tracing the above development said, "Earlier, barristers were enjoying complete immunity but now even for them the field is limited to work done in court and to a small category of pre-trial work which is directly related to what transpires in court."8

However in India the law is well settled by statutory provision and judicial decision, which the authors have conveniently chosen to ignore. S. 5 of the Legal Practitioners (Fees) Act, 1926 provides that no Legal Practitioner who has acted or agreed to act shall by reason only of being a legal practitioner be exempt from liability to be sued in respect of any loss or injury due to any negligence in the conduct of his professional duty. After adverting to the provisions of the Act, the Supreme Court in *M. Veerappa v. Evelyn Sequeira,* held that an advocate who has been engaged to act is clearly liable for negligence to his client.
WHAT IS NOT "DEFICIENCY OF SERVICE" IN CASE OF LAWYERS?

The authors have argued that the test of a reasonable prudent man as laid down in Donaghue v. Stevenson\(^\text{10}\) is unknown to the legal profession. They have cited a number of cases in which the lawyers were held not liable for particular types of negligence.\(^\text{11}\) It is very difficult to understand why the authors are unduly obsessed with lawyers' negligence. After all Consumer Protection Act, 1986 is not confined to only liability for negligence, and legal professionals can be held liable for a number of torts.\(^\text{12}\)

The authors' conclusion on the basis of these cases is untenable because of two reasons. Firstly, these cases do not clearly establish that lawyers are immune from liability for negligence.\(^\text{13}\) Secondly, these cases held lawyers not liable for their professional misconduct, but did not confer any immunity from civil liability. They have argued that mere negligence, however gross, does not amount to misconduct: professional or otherwise.\(^\text{14}\)

Even assuming they are not wrong, their contention is untenable because of two reasons. Firstly, their argument that mere negligence is not enough presupposes that negligence is ascertainable, contradicts their earlier stand that in the case of lawyers it is difficult to define what is negligence. Secondly, mere negligence may not be enough to amount to professional misconduct, but COPRA has nothing to do with professional misconduct. No amount of waxing eloquent by the authors can change this legal truism.

THE EXCLUSIVE JURISDICTION OF THE BAR COUNCIL

The authors have argued that in the light of Law Commission recommendations, the Supreme Court decisions, and considering the scheme of

\(^{10}\) (1932) A.C. 562.

\(^{11}\) See footnote Nos. 19-25 of the Article.

\(^{12}\) See Pasley v. Freeman, (1979) 3 Term Rep 51; llyod v. Grace Smith and Co., [1912] A.C. 716; Bellairs v. Tucker, (1884) 13 QBD 562; Phosphate Sewage Co. v. Hartmont (1877) 5 Ch D 394; and number of other cases where the solicitors were held liable for fraud. In Symonds v. Atkinson, (1856) 1 H&N 146 the solicitor was held liable for conversion. In Johnson v. Emerson and Sparrow (1871) LR 6 Exch 329 the solicitor was held liable for malicious prosecution.

\(^{13}\) There are number of cases in all jurisdiction making lawyers liable for negligence. An attorney who fails in his duty, causing actual loss to the client is liable for the damage sustained in American Jurisdiction (Broste v. Stockhome, 105 Ariz 574, 468 P2d 933; Fitch v. Scott, 4 Miss 314; Saving Bank v. Ward, 100 US 195, 25 L Ed 621; McCullough v. Sullivan, 102 NJL 381; McLellan v. Fuller, 220 Mass 494; In UK it has been held that a solicitor is personally liable in tort (which includes negligence) where from his conduct it is clear that he has made himself a party to tort. See generally, Barker v. Brahan and Norwood, (1773) 2 Wm Bl 866.

\(^{14}\) But in recent case, the Disciplinary Committee of Bar Council of India held that, "It is well settled that gross negligence on the part of the advocate which leads to suffering and harassment of the client will amount to professional misconduct." B.C.I. TR. Case No. 104/1990, reported in 23 IBR 157 (1996).
Advocates Act, 1961, the Disciplinary Committee of Bar Council has exclusive jurisdiction to try an advocate. But the jurisdiction of Disciplinary Committee of Bar Council is limited to professional or other misconduct.\(^\text{15}\) The Disciplinary Committee of Bar Council has no jurisdiction to award compensation for torts committed. Also, the standard of proof before the Disciplinary Committee is very high and exacting\(^\text{16}\) unlike the civil proceeding in Consumer Protection Forum. In keeping with criminal justice analogy, disciplinary agencies primarily focus on punishment and deterrence. Compensation though allowed under limited circumstances remains a secondary goal.\(^\text{17}\) In Shanta's case while rejecting the argument based on exclusive jurisdiction of Disciplinary Committee, the court said, "The fact that they are governed by Medical Council of India and/or State Medical Council is no solace to the person who has suffered due to their negligence and the right of such person to seek redress is not affected."\(^\text{18}\) The 75th Law Commission Report compares the autonomous nature of Bar Council with that of the Medical Council by citing All India Bar Committee Report given in 1953 which was given legislative effect by the Advocates Act, 1961. It reads, "the Medical men have their General Medical Council under the Medical Council Act, 1993. So have the Chartered Accountants under the Chartered Accountants Act, 1949. It is required that lawyers have the same." When all these professionals are subject to their respective Disciplinary Councils and at the same time they are liable under COPRA for their negligence, how can it be argued that Bar Council exhausts the tortious remedy available?

CONCLUSION

On the one hand the authors have argued for the exclusion of lawyers from the purview of COPRA, and vesting Bar Council with exclusive jurisdiction,

\(^{15}\) S. 35 of the Advocates Act, 1961.

\(^{16}\) This rule was laid down long ago by the Privy Council in A, a Pleader v. The Judge of the High Court of Madras (AIR 1930 PC 144) where the court said, "before dealing with the charges it is right to state that, in their Lordship's opinion charges of professional misconduct must be clearly proved and should not be inferred from mere ground for suspicion, however reasonable. In another case L.D. Jaisinghani v. Naridas N. Punjabi, AIR 1976 SC 373 at p. 376, involving professional misconduct, a four Judge bench of the Supreme Court held that the evidence should be of a character which should leave no reasonable doubt about guilt. In a rather recent judgement In Re: An Advocate, AIR 1989 SC 245, the Apex Court has further reaffirmed this principle. Bar Council of India has also followed this approach consistently. Recently the Bar Council of India in one case observed, "The allegation of professional misconduct is of very severe nature and the same has to be proved by cogent and convincing evidence." (A v. T. D.C. Appeal No. 9/1984, Order dated 9-7-1988, reported in 15 IBR 368 (1988)).

\(^{17}\) David, B. Wilkin, Who Should Regulate Lawyer? 105 Hard L Rev 799 (1992); See generally, Stephen G. Bene, Why not Fine Attorney? An Economic Approach to the Lawyers Disciplinary Sanction, 43 Stan L Rev 907 (1991). In England according to S. 46(1) of the Solicitors Act, 1974, disciplinary jurisdiction over members of the bar is in the hands of Disciplinary Committee formed by the Master of the Rolls from the members of the council of the autonomous body. In Italy also there is a Disciplinary Committee known as 'ordine degli Avvocati e procuratori'. But in all these jurisdiction lawyers are liable in civil court for their torts.

\(^{18}\) Shanta's case at p. 666.
while on the other hand there is another school of thought which makes out the need for setting up of consumer courts to either supplement or supplant the disciplinary committee of Bar Council of India. By holding that legal practitioners fall within the purview of COPRA, no change is brought in the substantive law governing claims for compensation. The grounds of negligence, and principles which apply to the determination of such a claim before the civil court, would equally apply to consumer disputes before the Consumer Disputes Redressal Agencies under COPRA. COPRA only provides an inexpensive and speedy remedy for adjudication of such claims as there is no court fees required under it. If the authors are not denying the existence of civil liability for lawyers then what can be the reason for excluding the more efficacious mode of redressal under COPRA under the same substantive principles. It follows that the authors do not want to do away with lawyers' civil liability but they are only interested in avoiding this more effective and convenient forum. Thus, in effect, rendering such liability unenforceable and enabling the lawyers to get away with tortious actions. This seems to be the only concern of the authors.

As the legal profession searches for ways to regain some measure of the public's respect, as overlap between the disciplinary and tort sphere would be a step in the right direction. By creating the Model Rules of Professional Conduct, the legal profession's governing bodies have provided comprehensive, accessible, and enforceable rules of conduct for the nation's exploding population of lawyers. The fact that these rules were designed specifically for application in the disciplinary context does not overcome the logic, feasibility and functional value of extending their application to the tortious context. At the very least, the provisions of Rules Governing Advocates that relate to the facts of tortious suits should be admissible in helping to establish the proper standard of care.


20 Part VI of the Bar Council of India Rules.
SHOULD LAWYERS BE BROUGHT UNDER THE COPRA

Sujata Iyengar*
Gautam Narasimhan*

A three Judge bench of the Supreme Court in Indian Medical Association v. V.P. Shanta affirmed the growing activity in the field of consumerism and consumer protection. The Court in this momentous decision resolved along standing confusion by declaring medical practitioners were subject to the rules and mechanism of the Consumer Protection Act, 1986. This decision has not only evoked strong protests from the medical community, but also brought many legal issues to light. People today ask the question, if doctors can be made liable under the COPRA, why not lawyers? The article tries to show the impossibility of bringing lawyers within the ambit of the COPRA.

DEFINITION OF SERVICE UNDER S.2(1)(o) OF THE COPRA

If the lawyer’s relationship with his client envisages a service under s. 2(1)(o) of the COPRA, then the client is a customer under s. 2(1)(d)(ii). He can therefore claim compensation under S.14 for a resultant “deficiency” of service under S. 2(1)(g) of the COPRA. Service is defined under s. 2(1)(o) as “service of any description which is made available to the potential users and includes the provision of facilities in connection with banking, financial insurance, transport, housing construction, entertainment, but does not include any rendering of service free of charge or under a contract of personal service”.

As held in Lucknow Development Authority v. M.K. Gupta, this definition has three parts - the main part, the inclusory part and the exclusory part. The inclusory parts are merely illustrative whereas the main part is expansive to cover any form of service. Though the Supreme Court in I.M.A. v. Shanta categorically ruled out any exemption to the medical profession as far as the definition of service is considered, it should be noted here that there is a difference between an occupation and a profession.

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2a Hereinafter COPRA.
3 (1994) 1 SCC 243.
3a (1995) 6 SCC 651.
According to Jackson and Powell, in matters of professional liability, professions differ from other occupations for the reason that professionals operate in spheres where success cannot be achieved in every case, and very often success or failure depends upon factors beyond the professional’s control. Relying on this in *V.P. Nair v. Cosmopolitan Hospitals (P) Ltd.*, it was held that “the definition of service appearing in the main part is most comprehensive in nature.” This comprehensiveness has to be compared with *K. Rangaswamy v. Jaya Vittal*, a case involving professional misconduct by an advocate. It was held that according to s. 2(1)(o) of the COPRA, the service under a contract of “personal service” is excluded from the definition of the word service and since the advocate-client relationship falls in this category, it is automatically excluded from the definition of service. However, a later decision *C.K. Johnny v. Jaisundaram* held, that a client is a consumer as he has availed the service of the advocate for appropriate consideration. Of the two decisions, the former seems to lean itself on the exclusory part of the definition of service.

Though a contract of personal service usually envisages a master-servant relationship, the Court in *IMA v. Shanta* sought to give a wider meaning to it by quoting with approval cases which have held contracts involving civil servants, managing agents of a company and a professor of a university within the definition of personal service.

A lawyer is an agent of the client in many respects. He not only represents the client in court but according to law is also competent to act for his clients outside court in many instances thus giving the relationship a level of intimacy which is required of a contract of personal service. Though lawyers can be excluded from the definition of service merely on this ground, the following arguments strengthen the case against inclusion of lawyers under COPRA.

**LAW AS A UNIQUE PROFESSION**

*Ronald v. Worsely* laid down immunity for barristers on the ground that “advocate does not owe a duty only to his client, he also owes a duty to the Court and must observe it, even if to do so might appear contrary to the client’s interests.”

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6 (1991) CPJ 444.

7 (1991) CPJ 688.


11 [1967] 3 All ER 993.
Again, in *Saif Ali v. Sydney Mitchell and Co.*, Lord Diplock argued that the true justification of the immunity was not the barrister’s duty to the court, but rather the protection of the judicial process itself.

As Krishna Iyer J. in the *Bar Council of Maharashtra v. M.V. Dhabolkar* put it, “The legal profession is not trade - nor merchandise, but a monopoly adhering to high traditions.” This is closely aligned with the fact that the very concept of professional mis-conduct for lawyers has a moralistic element which necessarily involves disgrace or dishonour to the legal community and which impedes the administration of justice and confidence of litigants.

Lastly, it is an extremely skilled profession and as held in *Neel v. Magna*, “if the client must ascertain malpractice at the moment of its incidence, the client must have a second lawyer to observe the first.”

The 131st Law Commission Report, (1988) under the title of “Role of Legal Profession in Administrator of Justice” categorically stated that the duty of a lawyer to a client has to be looked at in the light of his duty to the Court, the Bar, and Society, thus strengthening the above proposition that in the case of law, the uniqueness lies in the fact that it is impossible to pinpoint a lawyer’s duty to any specific person or institution.

**WHAT IS “DEFICIENCY OF SERVICE” IN CASE OF LAWYERS?**

The basic facet of the legal profession is the lack of a simplistic definition of negligence. The test of “a prudent man” laid down in *Donaghue v. Stevenson* is unknown to the legal profession, and mere negligence as understood above, unaccompanied by moral deficiency does not constitute professional misconduct. By way of illustrations in the matter of *V.K. Narasinga Rao*, it was held by the AP High Court that negligence in filing the appeal does not amount to professional misconduct.

Again negligence in drafting the terms of a compromise decree was held not to be professional negligence. A dictum of a special bench of the Madras

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12 [1978] 3 All ER 1033.
16 (1971) 6 Cal 3d 176.
17 (1932) AC 562.
18 *P.D. Khanderkar v. Bar Council of Maharashtra*, AIR 1984 SC 110; *See also, G. Satyanarayananurthy, a Pleader, AIR 1938 Mad 965, In Re Pran Narain, Advocate, AIR 1935 Cal 484, B, Munnisami Naidu AIR 1926 Mad. 568.
19 AIR 1959 AP 593.
High Court has clearly held that neglect of duties would not amount to professional misconduct,\(^{21}\) since the element of *moral deficiency* is the main ingredient of professional misconduct.

Cases of misappropriation or misuse of funds, purposeful delay to defeat the limitation period\(^ {22}\) and filing appeals without proper stamps inspite of repeated reminders\(^ {23}\) have been thought fit cases, because they are considered to be “immoral and shameful” and are supposed to “dishonour” the legal community at large. Hence the traditionally understood notion of negligence as is seemed to be required by the definition of deficiency of service in s. 2(1)(g) of the COPRA has no foundation in the profession of lawyers as was stated by Lord Esher, in *Re G. Mayor Geope*.\(^ {24}\) Mere negligence, however gross, does not amount to misconduct, professional or otherwise.

**THE EXCLUSIVE JURISDICTION OF THE BAR COUNCIL**

S.9 of the Advocates Act, 1961 allows the Bar Council to constitute one or more disciplinary committees for a State, consisting of three persons, the qualifications of whom are listed under S. 35 of the said Act. The disciplinary committees have the power to (1) reprimand the advocate, (2) suspend the advocate from practice for a time period and (3) remove the name of the advocate from the state roll of advocates.\(^ {25}\) It should be noted that prior to the Advocates Act, 1961, Ss. 13, 14 and 15 of the Legal Practitioners Act, 1879, and S.10 of the Indian Bar Council Act, 1926 provided for the jurisdiction of the High Court for such purposes. But with the passing of the 1961 Act, the jurisdiction now lies exclusively with the Disciplinary Committee and this has been endorsed by the Apex Court to be the right forum for the trial of advocates.\(^ {26}\)

In fact, the Law Commission was moved to prepare a report on the exclusive jurisdiction of the Bar Council\(^ {27}\) when complaints were received that the disciplinary committees for advocates were not functioning properly. The following lines are excerpted. “If there have been a few isolated incidents in which the aggrieved parties are dissatisfied with the action taken by the disciplinary body, that should not be regarded as constituting adequate justification for a change in the law. The brief historical survey given also shows that the trend of legislation in India has been gradually towards greater autonomy in the field of disciplinary proceedings against members of the legal profession.” Hence with both the Apex Court and other juridical opinion being certain that

\(^{21}\) AIR 1926 Nag 568.

\(^{22}\) *In Re a Pledger*, Tirupur, AIR 1945 Mad 55.

\(^{23}\) *C. Padmanabha Ayyangar*, Advocate, AIR 1939 Mad 1.

\(^{24}\) 33 SJ 397 c.f. *supra*, n. 15 p. 243.

\(^{25}\) S.35 (3) (b) (c) & (d)


the jurisdiction lies exclusively with the Disciplinary Committee, it would not be right to vest jurisdiction in the Consumer Forums.

**CONCLUSION**

Putting aside for the moment the various legal arguments given above, there are innumerable practical difficulties in bringing lawyers under COPRA. Some may appear trivial - but it does seem rather incongruous to go to another lawyer in order to sue your former lawyer in the Consumer Court. Professional misconduct is an extremely serious allegation and therefore it is best to leave it to the specialised professional bodies themselves to address the issue. After the Supreme Court ruling in *IMA v. Shanta*, a significant change in attitude has taken place concerning the medical profession. Doctors have become much more cautious and unwilling to take any risks at all while treating patients. Fear of being sued has led doctors to run a battery of tests for even a simple diagnosis. It is debatable whether patents have realised that the rising costs of health care can be traced to greater insurance policy cover for doctors in the wake of the Apex Court ruling.

Should the same situation be thrust on layers, innovativeness and creativity in legal thinking will be greatly reduced. Courts must devise a rational approach to professional liability. They must provide proper protection for the public, whilst allowing for factors beyond the professional man’s control. Allowing lawyers to be sued under COPRA is not the answer to the problem.
PROSPECTIVE OVERRULING:
NEED FOR A RELOOK

VINAY REDDY*

INTRODUCTION

A simplistic definition of prospective overruling for the purposes of this paper would be “a variation of normal overruling decision whereby the new decision would not apply to already pending cases.” The Supreme Court’s power to prospectively overrule its earlier decisions was firmly established by the judgement rendered by an eleven judge bench in the Golaknath1 case. Until then, prospective overruling was primarily a device used by the American Courts in specific instances to achieve certain ends. As this device has been borrowed from America, Indian jurisprudence has not actually analysed the role played by prospective overruling and its actual impact and consequences which will be discussed during the course of this paper. While the issues and concerns relating to prospective overruling were thought to have been settled in 1967 by the Supreme Court, the criticisms levelled against the use of this device are several. Keeping in mind the Apex Court’s decision in the Mandal2 case, it becomes necessary to examine and analyse the major issues involved in cases wherein prospective overruling is resorted to. Such an analysis would enable one to understand whether the propositions laid down by the Supreme Court in the Golaknath3 case, as a matter of caution, are really necessary at all. Before doing so, it is imperative to clarify the effect of an ordinary overruling, how a prospective overruling differs from an ordinary one and the purpose served by such prospective overruling.

The impact of an overruling decision:

A normal overruling decision which applies both retrospectively and prospectively can never be fully retrospective in its operation i.e. it cannot apply to already decided cases for the following reasons.4

1. The principle of res judicata would prevent the reopening of already decided cases.

2. Reopening of already decided cases would also result in a load of litigation further burdening the already overburdened judicial process.

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2 Indira Sawhney v. Union of India, AIR 1993 SC 477.
3 Supra n.1.
3. The files of old cases may have been lost or destroyed thus making such a reopening impossible.

It is clear from the above that a normal overruling decision has no impact on already decided cases. It affects only pending cases and all transactions which occurred before the overruling decision but have not yet come up before the courts. "Normal" overrulings enable judges to make their decision based on the law as it stands at that time and not based on prior laws which are invalid at the time of the decision. Thus prospective overruling assumes significance only for the pending cases and transactions completed prior to the overruling decision. The overruling decision will not affect these pending cases. However, resort to prospective overruling gives rise to two problems:

1. Cases are decided based not on existing law but on prior law which is now invalid.

2. This gives rise to problems in the functioning of the judiciary as the judge has to determine the time frame in which the case arose and decide accordingly.

It is clear that retrospective overruling is the better option as it causes less problems. This is why retrospective overruling is used in an overwhelming majority of decisions. But there are certain exceptional circumstances which warrant a resort to prospective overruling in order to prevent undue hardship and inconvenience. These factors which must be taken into consideration may be briefly summarised as:

1. Degree of reliance on the old rule - if the old rule has been greatly relied upon in the conduct of past transactions, the court may choose to apply the new rule only to future cases to prevent injustice to such people.

2. Purpose of the new rule - if the objective of the new rule is to facilitate social change, giving the rule retrospective operation would be self defeating and serve no purpose whatsoever besides causing undue hardship to the people who had relied upon the old rule.

3. Administrative inconvenience - prospectivity may be resorted to by the courts if retroactivity were to upset the functioning of the administrative network and throw peoples' lives into confusion.

4. Stare-Decisis - A normal overruling decision could order values which stare-decisis seeks to promote viz. certainty in the law, protection of reliance and
enforcement of accrued rights. However, resort to prospectivity balances the interests of *stare decisis* and justice by reducing the ill effects of a normal overruling. Also prospective overruling may be resorted to keeping in mind the general interest of society.

It follows from the above that while retrospective overruling is the rule in the majority of cases as it involves less complications, certain exceptional circumstances may warrant a departure from this rule in the form of prospective overruling. It must be kept in mind that the court is not exceeding its powers by resorting to prospective overruling. It is merely a modification of the normal overruling in that, the court, while declaring a new rule of law, also decides the time frame in which such new rule operates, keeping several factors in mind. Deciding the time-frame of the new rule is merely a logical extension of the court’s role of ensuring justice.

Prospective overruling enables a court to perform its role more efficiently with less hardship being caused. It lets a court make an omelette without breaking any eggs! Thus prospective overruling is a tool which facilitates justice and is used only in special circumstances. Keeping in mind that prospective overruling is an exception, it becomes necessary to examine the *Mandai* case where the Supreme Court adopted a modified version of prospective overruling. In overruling *Rangachari*’s case prospectively, it was said that the new rule would operate only for five years after the judgment. While there may have been political reasons involved for the Supreme Court deciding as it did, it must be kept in mind that the judiciary in India has to walk a tightrope balancing the interests of justice with those of not antagonizing the public. The issue involved in this case was a very sensitive one regarding the right to continue reservations even in cases of promotions. The Supreme Court while holding that the government could no longer reserve posts in the case of promotions added that its decision would be operative only after five years from the date of the decision. Thus the Supreme Court clearly recognised its role as a facilitator of social change and it used prospective overruling as a device to make such change less abrupt.

Having examined the true nature and uses of prospective overruling, it must be noted that the purpose for using this device in India is severely limited by the *Golaknath* decision. As it was the first case in which this device was being used in Indian jurisprudence, the Supreme Court felt the need to move

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11 *supra* n. 2.
cautiously and laid down three rules to be followed while resorting to prospective overruling.

1. This device is to be used only in constitutional matters:- This appears to be a rather self-defeating rule as the rationale behind invoking this device is to render justice and justice can never be limited solely to constitutional matters. There are many non-constitutional issues where exceptional circumstances may warrant prospectivity, but this rule would prevent the use of prospective overruling in such a situation. It appears to be more of an obstacle to judicial relief and the sooner this rule is removed, the better it would be in order to facilitate justice in matters of property rights, criminal law, etc. 

2. The device can be used only by the Supreme Court. This again appears to be a very restrictive proposition for it completely prevents the High Courts from resorting to the use of this tool in any circumstance whatsoever. This may result in the decisions of High Courts causing injustice and undue hardship. Such a restriction also serves no purpose, because if a High Court has abused the device, the wide supervisory powers of the apex court would enable it to correct this abuse when the case comes up before it on appeal.

3. The nature of prospectivity to be applied in each case is left to the discretion of the court to be used in accordance with the case:- This is in stark contrast to the proposition that prospective overruling is a flexible device whose use depends upon individual facts and circumstances as was seen in the Mandal case.

Thus prospective overruling can be seen as a tool of general application which enables the Supreme Court to meet the ends of justice. It is one of the time.
many judicial innovations that has been evolved over the years and can also be viewed as a general equivalent to *res judicata* (or atleast an extension of it) as it ensures that past transactions are decided by the earlier rule and not by the new rule of which the parties evolved were unaware.19 Keeping the purpose which this device serves in mind, the obstacles laid down by the *Golaknath*20 case are more self defeating than directory and need to be reconsidered in order to allow the use of this device by High Courts and in cases of non-constitutional matters as well. This would enable the ends of justice to be served more effectively by the courts. The first step taken towards a reconsideration of prospective overruling came with the Supreme Court adopting a hitherto unused type of prospective overruling in India in 1993. While such progressive steps are welcome, a thirteen-judge bench needs to be constituted to overrule the two obstacles placed by the Apex Court in 1967.

19 Blackshield, *supra* n. 4 at 230-32.
20 *supra* n. 1.
INTERNAL SELF DETERMINATION: AN ALTERNATIVE TO THE SECESSIONIST MOVEMENTS IN INDIA'S NORTH EAST

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The international community of nations composed of multi-ethnic, multi-cultural and multi-linguistic agglomerates is witnessing a dangerous resurgence of nationalism resulting in nationalist movements. This wave of nationalist and ethno-centric feelings is undermining consolidated state structures and triggering secessionist movements. The most conspicuous instances are those concerning the former states of Soviet Union and Yugoslavia. In India, the ethnic movements in the North eastern region demanding self determination and an independent country has been going on for a long time with intensity. These developments take us to believe that the traditional multi-ethnic state that has for centuries constituted the mainstay of world communities has become ineffective and is probably doomed to die. Tribalism and micro-nationalism seem to depict the current scenario. This article endeavours to examine the present status of principles of self determination and the need to re-orient them in order to be universal and acceptable to include the principles of internal self determination which is a type of self government which emphasises on protection of ethnic minorities within existing states. Studying the developments of insurgent movements in the Northeast, the article presents an alternative solution within the framework of internal self determination.

THE PRINCIPLES OF SELF DETERMINATION IN THE POST-COLONIAL ERA

The international body of legal norms on self determination does not grant ethnic groups and minorities the right to secede with a view to becoming a separate and distinct entity. Law of self determination in a post-colonial world is understood to denote the right solely of "Peoples under foreign domination". In the understanding of the modern contemporary world, the principles of self determin
The principle of equal rights and self determination of peoples belonging to the territory without distinction as to race, creed or colour. Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country. 4


5 Namibia (South West Africa) Advisory opinion, 1971 ICJ 31. Western Sahara (Advisory opinion), 1975 ICJ 32.


7 Armbruster said, "The principle of Sovereignty excludes logically the right of self determination. If International Law guarantees the sovereignty of the existing states, it cannot permit, at the same time, this right of self determination."

8 Art. 1 of the Covenant on Civil and Political Rights 1966 states that, "All peoples have that right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Art. 1 of the Covenant on Economic, Social and Cultural Rights 1966 also state the same.

9 United Nations General Assembly Resolutions 1514 (xv) of 14 December 1960 - Declaration Granting Independence to Colonial Countries and Peoples: "Any attempt at the partial or total disruption of national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."
colonial era, for self determination as a principle to become truly universal in scope, needs be developed as a concept of internal self government. In this way the UN would not be restricted by Art. 2(7) of the Charter (which reserves certain matters within the domestic jurisdiction of states) in developing new principles of this sort. Principles of self determination have long ceased to be a matter solely within the domestic sphere. Its extension to people within state might in a more integrated world community, contribute to the strengthening of universal peace and safeguarding of respect for human rights as the basis of State sovereignty, thus fulfilling a more central function within the framework of which it is placed by the UN Charter. This will answer the present strong felt need for rethinking the concept of self determination and suggesting possible avenues for the future development of law in this area.

INTERNAL SELF DETERMINATION AS A SOLUTION TO HOLD TOGETHER THE MULTI-ETHNIC AND MULTI-RACIAL NATIONS

Internal self determination means right to self government,\textsuperscript{10} that is, the right for people to choose freely their own political and economic regime - which is choosing the best that suits their own conditions rather than accepting something thrust from outside, due to political or economic oppression. It is an ongoing right unlike external self determination for colonial peoples. Once it is implemented, the right of internal self determination is neither destroyed nor diminished by its having already once been invoked and put into effect. It is a new principle of International Law discerned from contemporary definitions of sovereignty, self determination and human rights. It is a new right of autonomy that supports creative attempts to deal with conflicts over minority and majority rights before they escalate into civil war and demands for secession. It recognises the right of minorities and indigenous people to exercise meaningful internal self determination and control over their own affairs in a manner that is consistent with the ultimate sovereignty of the State.\textsuperscript{11} It addresses the rights of people of an existing State.

Internal self determination must also subsume into itself economic and cultural self determination. Thus, the right of these ethnic people to be taught in their own language about their history, about their culture, custom and tradition has to be recognised along with the right to economic independence and exclusive right over the natural resources of the region.\textsuperscript{12} This concern is adequately reflected in Art. 19 of the Draft Charter of Indigenous Tribal people. Various International instruments advocate principles of internal self determination, which


introduces a new element into International Law. The Atlantic Charter proclaimed the right of all people to choose freely the form of government under which they wish to live. Art. 1 of the Covenant on Civil and Political Rights and Economic, Social and Cultural Rights added the right of all people to freely pursue their economic, political and cultural development. The necessary implication is that the fundamental freedom guaranteed by various international instruments is to be encouraged by implementation of the right of self determination, which must in turn be in conformity with Art. 25 of the Covenant of Civil and Political Rights which expressly recognises the right of every citizen to participate in the conduct of public affairs either directly or through representatives. This is an expression of basic democratic principles and means that people cannot be deprived by their own regime of the right of self-governance. The right is a permanent continual right and exists as an inherent right in all people irrespective of the form of government which controls them. Art. 47 of the above Covenant protects the right of all people to enjoy and utilise fully and freely their natural wealth and resources. Art. 1 of the Covenant on Economic, Social and Cultural Rights also proclaims the same.

INSURGENCY: SECESSIONIST MOVEMENTS IN THE NORTHEAST REGION: IN SEARCH OF ALTERNATIVES

(a) Nagaland

The Naga insurgency movement, the oldest of all movements, is the product of a need to maintain "the underlying consciousness of unity and separate national identity which stems from their common ethnic origin, common heritage, common political and economic structures and common territory". Such a need to preserve and promote their way of living made the Nagas demand independence way back in the 1920s by presenting a memorandum to Simon commission. Thus, the Naga insurgency dates back to the early part of this century. The British, in order to keep the Nagas contented granted them autonomy by forming the Naga District Tribal Council in 1945. The Nine point Hydari Agreement was signed and provisions included in the Constitution to safeguard their interest. The Nagas stood by their demand for total independence but the Indian Government did not agree to it. By 1959 large scale violence erupted and Indian Army was moved into Nagaland to fight insurgent groups. In 1972 the Naga Federal government was banned and President's rule imposed. This led the fighting groups like NSCN and NNC to go underground and the leader of the movement, A.Z. Phizo escaped to London where he established a centre. Thereafter, the signing of Shillong accord not taking into confidence all the warring factions and subsequent non-
fulfilment of the terms of accord added fuel to the movement.\textsuperscript{16} By enacting draconian laws like “Armed Forces Special Powers Act” the armed forces were given sweeping powers to shoot and arrest and not be subject to investigation, trial and punishment for the same. The Army rule which led to gross violations of human rights left a deep impact on the minds of the people leading to hatred and discontent. The signing of accords and negotiations have failed time and again due to lack of political will on the part of the centre and lack of faith on the part of the insurgent groups. The Atlanta Peace Meet and the invitation offered by erstwhile United Front Government under the Prime Ministership of Sri. H.D. Deve Gowda followed by Sri. I.K. Gujral, seem only to have repeated past mistakes. As a result the gulf widens.

\textbf{(b) Assam}

The social discontent amongst the people of Assam may be traced to:\textsuperscript{17}

1) The demographic profile of Assam that has been altered by the influx of refugees and illegal immigrants from neighbouring countries and also migration from other parts of India.

2) No development in real terms despite having rich natural resources and forest wealth.

3) The centre’s partisan interest\textsuperscript{18} which at times aggravated the problems.

The State Government has also taken steps that go against regional consolidation, by neglecting and ignoring the Borodoloi report to include Koch-Rajbongshis of Assam,\textsuperscript{19} who are an integral part of Assamese society, to be recognised as Scheduled Tribes.

The Bodo-Kachari\textsuperscript{20} tribes, who have been marginalised and dominated by Assamese people have revolted against this domination. Their demand for autonomy and separate statehood has turned violent. The Bodo movement, spearheaded by ABSU-BPAC for separate statehood, has been characterised by violence and counter violence throughout. This has also led to clashes between

\textsuperscript{17} See, Dhrubajyoti Borah, \textit{Understanding Assam and North East, Administrator} 64 (1994).
\textsuperscript{18} When the Regional Assam Gana Parishad Government came to power in Assam in 1985, the central intelligence agencies started to instigate the Bodo tribals and trained the militants in subversive and terrorist activities including the use of explosives. It was done to destabilise non-Congress opposition State Government. It was a form of internal subversion. The Central Government have till date been unable to refute these facts convincingly.
\textsuperscript{19} Borah, \textit{supra} n. 17 at p. 65.
\textsuperscript{20} One of the major tribes inhabiting the State of Assam. They have a rich history of having ruled the entire Brahmaputra Valley they later came into conflict with Ahom Kings who overpowered them. Due to this they have a historical animosity.
INTERNAL SELF DETERMINATION AS A SOLUTION TO THE SECESSIONIST MOVEMENTS IN INDIA'S NORTH EAST

Bodos and Santhals, the Bodos and non-Bodos like Bengalis. The signing of the Bodoland Accord and the formation of the Bodoland Autonomous Council has not solved the problem due to inherent defects. The situation is the result of the indifferent attitudes of both Union and the State in not acting promptly that has brought the movement to a point of perpetual hatred, tension and bloodshed.

(c) Manipur

Manipur has also been hit by insurgent movements fighting for a separate country. Manipur Liberation Front (MLF) is an underground faction fighting for total independence. The region is backward and whatever little funds come from the Centre for development are siphoned off by corrupt officials. A large group of unemployed youths have gone underground to revolt against the system and for their own sustenance. Moreover, the feeling of regionalism and their quest to maintain their culture and identity rallied them around a common objective "a homeland away from India". There are demands to revive the traditional script and traditional Gods of Meitei and not Hindu Gods which are a later addition.

The moving in of the Indian Army and enforcing of Armed Forces Special Powers Act has only resulted in aggravating the situation. Large scale violations of human rights, arbitrary arrest and inhuman torture have left deep marks in the minds of people. Though unlike Assam, Nagaland or Manipur, simmering discontent has also been expressed in Arunachal Pradesh, Meghalaya, Mizoram and Tripura.

INTERNAL SELF DETERMINATION AS A SOLUTION TO THE SECESSIONIST MOVEMENTS IN INDIA'S NORTH EAST

The complex ethnic problems of tribals of the North East needs to be corrected by enforcing the new principles of internal self determination discerned.

24 Ibid. at p. 15.
26 In Tripura, due to large scale migration of Bengalis from East Pakistan, the tribals (indigenous people) have been pushed to the hills and been made a minority in their own homeland. The tribals have asserted themselves. The government has not come out with a lasting solution to the problem. As a result, tribal warring factions have gone underground, leading to violence. Also, there has been simmering discontent in Arunachal Pradesh, against the Centre's indifference to the Chakma-Hojong and Tibetan refugees problem. Violent incidents have shown that if timely action is not initiated, it will lead to insurgency problems. The people of Mizoram and Meghalaya nurture discontent for New Delhi's attitude towards development of the people. Corruption and bureaucratisation has let nothing trickle down.
from sovereignty, human rights and self determination. Internal self determination today ought to be considered as a principle mandating the recognition of group rights and regional autonomy. Accordingly, self determination should be conceived as a basis for the development of an alternative constitutional framework, affording a right to self determination and a meaningful measure of autonomy. Internal self determination comes as a range of choices and options rather than solely an ultimate goal of independence. As a result the gap between the legal right and political reality is considerably narrowed.

The problem can be approached by application of the following two steps. Firstly, for satisfactory solution of the problem, it is important that the people realise the value of internal self determination. The whole tribal population should be granted the continuing right to freely choose its own rulers through a democratic process.

Secondly, it is for the tribals to declare what type of protection they seek: autonomy, regional self-government, participation in the national decision making process etc. As we have seen, self determination primarily means the right of the people concerned to freely express their wish about their destiny. It follows that the choice among the various alternative ways of safeguarding its basic rights mainly vests with each tribal group and should not be imposed from outside.

The present regime governing protection of tribal groups and minorities is insufficient. The real problem facing the North-east is lack of economic development, poor infrastructure, unemployed youth and total neglect of the region. Though the concept of autonomy is still vague and imprecise, in many countries self government has proved to be workable and capable of reconciling the conflicting needs of minorities and the demands of State integrity.

The plans for tribal peoples and tribal areas, while articulating the regional and national plans, must be formulated in their respective milieu and must be operated by multi-tiered autonomous bodies keeping the scale of complexity of operation in view at each tier. It should have provisions for autonomy.

A plausible model of development within the framework of internal self determination should be:

27 Eide, supra n. 10.
28 See, Report of the CSCE Committee of Experts on National Minorities and Indigenous Peoples, adopted on 19 July 1991- "Section II(2) of the Report stipulates that the States participating in CSCE process emphasise that human rights and fundamental freedoms are the basis for the protection and promotion of rights of persons belonging to indigenous peoples and minorities".
29 Report of CSCE Meeting of experts of Indigenous Peoples and Minorities - "The means of achieving Internal self determination for ethnic groups and minorities is by strengthening positive action and participatory rights and granting a wide measure of autonomy".
31 See, Chapters XI to XIII, United Nations Charter.
(a) to ensure, with due respect for the culture of peoples, their political, economic, social and educational advancement, their just treatment and protection against intrusion from external forces.

(b) to develop and encourage the tradition of self-governance, to take due account of the political aspirations of the peoples and to assist them in the progressive development of their free political institutions, according to the tradition, culture and way of life of each tribe.

(c) to promote constructive measures of development, to encourage research and to enhance inter-tribal harmony.

The Northeast region may be considered as a special economic zone and a special Planning Commission (under the national planning commission) must be constituted entirely for the Northeast. The total economy of the region should be planned and it should incorporate both private and public sector investment efforts. Hasty privatisation unmindful of social and political consequences must be actively discouraged. Infrastructural facilities in power generation, transport, communication, financial infrastructure for providing capital, etc., must be built up. Products and technology should not be merely a so-called scientific techno-economic survey but should be improved through drawing upon the ecological prudence and value systems of peoples. Efforts should be made for debureaucratisation of the apparatus for implementing the plans and programmes.

The Northeast region is quite poor in technical and skilled man-power which necessary for modern industrial and service sector growth. The whole educational infrastructure of the region is totally inadequate to produce the required man power pool. The technical institutes need to be upgraded by equipping them with better facilities to generate required man-power. Industrialisation cannot be carried on by importing all the skilled man-power from outside. Therefore, there is a need to take up planned human resource development programmes. Trade between the Northeast and neighbouring South Asian countries and China must be opened up for the benefit of the region. There is no justification at all for importing fish, rice, etc., to Northeast from far away states like Haryana, Punjab or Andhra Pradesh, when the same is available from neighbouring Bangladesh, Myanmar and other Southeast Asian countries, at a cheaper rate. The industrial goods produced in this region such as coal, petroleum, tea, can find easy market in the neighbouring countries. Roads are already there up to the border. Only the political will is needed. This will integrate the region with regional and global economic activity. India's most effective access to the Southeast Asia, South China and the Pacific rim lies not through the Bay of Bengal but through the valley of the Northeast.

32 See, NECCC (I), A Scheme for Economic Development of North East, Administrator, 43 (1994).
See also, B.K. Roy Burman, Policy Issues for North East and Tribal Areas, Administrator 9 (1994).
33 See, Sanjoy Hazarika, Strangers of the Mist 388 (1994).
To make the principles of internal self determination really work and yield results, the Centre will have to set up some sort of monitoring device capable of inducing compliance. It is suggested that two important steps be taken at the implementation level. First, some sort of appropriate machinery should be set up whereby some international monitoring body may be entrusted with putting pressure demanding the implementation of these rights. Second, international standing should be given to the representatives of the peoples to enable them to put forward claims for realisation of their right. So long as these practical steps of organisational nature are not taken the efforts will be meaningless.

**CONCLUSION**

Bringing out models of development within the framework of internal self determination in accordance with Art. 1 of the Covenant on Civil and Political Rights, Covenant for Economic, Social and Political Rights, human rights and self determination would be the best alternative solution to ethnic movements in the Northeast. Autonomy may mean to part with some sovereignty in order that powers may be delegated to autonomous bodies and institutions. Many states fear that the granting of autonomy to ethnic minorities is the first step towards secession and towards the dismemberment of the State. But the contrary is true. Autonomy with principles of internal self determination is the best prevention against secessionist demands, if only granted in time. Therefore, the threat of the right of secession should become a motivation for granting internal self determination in time and thus making any wish for self determination superfluous. Though several attempts have been made to achieve, things have slipped back time and again to the original position. This may be due to lack of political will and peace proposals which were basically *ad hoc* in nature.
ENVIRONMENTAL IMPACT ASSESSMENT 
IN INDIA: AN APPRAISAL

George Cyriac*  
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An Environmental Impact Assessment (EIA) is a process of predicting and evaluating an action's impact on the environment, the conclusions of which are to be used as a tool in decision making. It essentially attempts to reconcile development values and environmental values with 'sustainable development' as the aim. The development of EIAs started with the National Environmental Policy Act of 19691 (NEPA) in the US which provided for EIAs in the case of federal projects. EIAs are now an integral part of the process of project clearance in most developed countries. They have also been recognised in various international instruments.2

LAW RELATING TO EIA IN INDIA

In India, EIAs of development projects were first started in 1977-78 when the Department of Science and Technology took up environmental appraisal of river valley projects. Subsequently, various other projects were brought under the purview of EIA. It was, however, with the enactment of the Environment Protection Act, 1986, that there was a broad move towards institutionalising environmental procedures. The Central Government, under S. 3(1) and S. 3(2) of the Environment Protection Act, 1986, and under Rule 5(3)(a) of the Environment Protection Rules, 1986, issued a draft notification in 19923 laying down norms and procedures for impact assessment. This was followed by a final notification in 19944 and two other notifications amending it.5 This broadly constitutes the law relating to EIAs in India. The procedure established by these notifications, and the alterations that these procedures have undergone in a short time have been examined here.

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1 42 U.S.C.A.S. 1540.
2 Principle 17 of the Rio Declaration adopted at the United Nations Conference on Environment and Development, 1992 state, "Environment Impact Assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment." These principles are also contained in Agenda 21, an action plan elaborating strategies and integrated programmes to halt and reverse the effects of environmental degradation and to promote sustainable development.
4 No. S.O. 60(E), 1994 CCL III 131.
LEGAL PROCEDURE FOR CLEARANCE UNDER DRAFT NOTIFICATION OF 1992

As per this notification, the expansion or modernisation of any existing industry, or the establishment of new projects listed in Schedules I and II to the 1992 Notification shall not be undertaken without obtaining an environmental clearance from the Central Government and the State Governments respectively. An application submitted to the appropriate authority should include an EIA Report and an Environmental Management Plan (EMP) prepared in accordance with the guidelines issued by the Central Government. These reports are then assessed by the Impact Assessment Agency (IAA) which is the Ministry of Environment and Forests at the Central and the State levels in consultation with a committee of experts.

The IAA will then prepare a set of recommendations based on technical assessment of documents and data furnished by project authorities, supplemented by data collected during visits to the sites or factory and interaction with affected population and environmental groups. The clearance is then given subject to these recommendations. Monitoring is done by the IAA by means of a half yearly report to be submitted to the agency by the project authorities. The legal framework created is clearly inadequate for reasons to be shortly examined. The position has also been exacerbated by the final notification which has eroded many of the positive aspects of the draft notification.

ALTERED PROCEDURE UNDER FINAL NOTIFICATION

The Final Notification issued in 1994 made the following substantial alterations to the earlier provisions:

1) The two schedules setting out projects which require clearance from the Central and State Governments have been substituted by a single one whereby only Central Government clearance is required. The schedule itself has been considerably shortened leaving out many crucial projects and for 16 projects, clearance is required only if the investment is in excess of 50 crore. The small scale sector is also exempt.

2) While earlier it was required that a detailed project report be submitted consisting of the EIA and the Environmental Management Plan, now only a summary feasibility report is required to be submitted.

3) The EIA, EMP and the conditions subject to which the clearance is given are now available to environmental groups and other concerned groups as well and not to the concerned parties alone. Furthermore, comments of the public may be solicited, if so recommended by the IAA in public hearings.

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6 No. S.O. 60(E), 1994 CCL III 131.
4) The public shall also be provided access to a summary of the EIA and the EMP at the headquarters of the IAA.

Interestingly, the provisions of this notification have also been altered subsequently in May, 1994.

Further alterations in procedure persuant to the amendments\(^7\) -

1) The IAA is no longer bound to visit the sites or factories and interact with the affected population or environmental groups. Hence the clearance and recommendations given by it may now be based solely on a technical assessment of the documents and data furnished by the project authorities.

2) The summary of the reports, recommendations and conditions subject to which clearance is given, shall now be made available to the concerned parties and environmental groups "subject to the public interest".

3) Even access for the public, to the above documents is now "subject to the public interest".

4) Similarly, the compliance reports submitted half yearly is accessible to the public "subject to the public interest".

It is submitted that the framework as it exists now are far from satisfactory and raises various issues, especially in the light of the objectives for which an EIA was conceived.

**CENTRALISED SYSTEM**

The system of clearances envisaged is a highly centralised one involving only clearance from the Central Government. The State Government and the local bodies have no role to play in the whole process. In fact the draft notification had provided for State Government clearance in the case of certain projects, but even this was modified to vest the power of clearance with the Central Government alone. Hence this does not provide for a situation where the Central and State Governments may be in conflict over a particular project as is often the case.

Such a move appears anomalous, especially when the trend worldwide is towards vesting decision making powers at the local level, more so when the issue is one which has a significant impact on the local population. Even the Constitution of India reflects this trend in the light of the 73rd and 74th Amendments whereby panchayats and municipalities are expected to bring about local self governance and are consequently to be vested with powers to further this end. In England for example, the requirement for an Environmental Impact

Statement is contained in the Town and Country Planning Act\(^8\) and the clearances therefore have to be given by the local authorities. Hence, the decision making process remains at the local level and local authorities will have to take responsibility for projects coming up in their region. A possible criticism is that the local authorities lack the expertise to evaluate these reports. Hence there is a proposal in the UK that a Council for Environmental Assessment be set up which could assist the local bodies in the process.\(^9\)

**CRITERIA FOR IDENTIFICATION OF PROJECTS**

The draft notification had two schedules, the first prescribing 24 industries which required Central Government clearance, and the second which enumerated 45 industries which required State Government clearance. The final notification has only one Schedule which contains a considerably shortened list of only 29 industries which require clearance from the Central Government alone. Furthermore, the notification contains an exclusionary clause to the effect that it would not apply in the case of certain projects if the investment is less than 50 crores or if it is reserved for the small scale sector with investment of less than 1 crore. It is submitted that it is the capacity of a plant to pollute and its likelihood of doing so that should be the criteria and not the quantum of the investment. In the US, the procedure laid down by the National Environmental Policy Act is that an Environmental Assessment (EA), is conducted at the outset based on which it is decided whether or not to require an Environmental Impact Statement (EIS) which is similar to an EIA. If it is concluded that it is not required, then a finding of No Significant Impact is prepared. The agency shall then make available this finding to the general public and the public response is to be considered before a final determination is made as to whether an EIS is required or not.\(^10\) Hence there are no fixed categories of projects which require an EIA and the determination in this regard also takes into account the views of the public.

**PUBLIC PARTICIPATION AND THE RIGHT TO KNOW**

The Final Notification provided that comments from the public may be solicited if the IAA so determines, which in itself was a dilution of the Draft Notification which had mandated this. However, the position as it stands now is that the IAA no longer has to even visit the site and can base its recommendations on the technical reports submitted by the project proponent. The availability of documents to the general public is also now made "subject to the public interest". The public right to know is a growing area of concern in environmental law.

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\(^{8}\) The requirement of an Environmental Impact Statement in the UK was as a result of EC Directive 85/337. Consequent to this, the Town and Country Planning (Assessment of Environment Effects) Regulations, 1988 (SI 1988 No. 1199), were passed.


\(^{10}\) 42 U.S.C.A. S. 1501.
India as well, public hearings in the case of certain major projects is a mandatory requirement. This is a positive step.

In the US, under the Freedom of Information Act,\textsuperscript{11} any person has the right to obtain a copy of nearly any document in the possession of any federal agency. Furthermore, any public interest group intending to use the documents to benefit the general public has the right to get the materials free of charge. The Act even permits a request stated in broad, categorical terms and the federal agencies have a duty to comply. At the State level, the Public Records Act accomplishes the same purpose. In India too, the Right to Information Bill is a positive step in this direction.

However, besides obtaining information from the Government, greater transparency is also needed in the whole process of project clearance. In England, it is required that a non-technical summary of the information should accompany the Environmental Statement to enable non-experts to understand its findings.\textsuperscript{12} Besides this, an extensive consultation process is envisaged. The US NEPA also provides that the Environmental Statement shall be analytical, concise and that it should be written in a manner so as to enable the general public to understand it as well. It also provides for public hearings notice and public access to documents. It even goes as far as to require the agency to mail notice of hearings to those who request.\textsuperscript{13} Transparency is a hallmark of the procedure followed here. There are detailed rules on the conduct of these hearings. The public is entitled to copies of any comments made by other statutory consultees on the draft report. The Indian law is clearly lacking in these respects.

**INSUFFICIENT CONSIDERATION OF ALTERNATIVES**

In the US, the heart of the EIS is the section dealing with alternatives to the proposed action. The regulations mandate that the agencies rigourously explore all reasonable alternatives and devote attention to each alternative in detail so that reviewers may consider their comparative merits. The regulations provide for the circulation of the EIS to federal agencies and to any person, organisation or agency requesting it. The federal agencies especially have a statutory duty to respond and the agency preparing the final EIS shall consider the comments and -

1. Modify the proposed action, or  
2. Develop and evaluate alternatives not seriously considered earlier, or  
3. Supplement, modify or improve its analysis, or  
4. Explain why the comments do not warrant further agency response.\textsuperscript{14}

\textsuperscript{12} Simon Ball & Stuart Bell, *supra* n. 9 at 242.  
\textsuperscript{13} 42 U.S.C.A. S. 1502.25.  
In view of these defects, an emerging concept is that of a Strategic Environmental Assessment (SEA). The important differences between this and the EIA are:

* EIAs do not consider the cumulative impacts of more than a single project, i.e., the question of a synergistic impact - whether the total impact of several projects exceeds the sum of their individual impacts. EIAs do not usually consider this due to lack of knowledge concerning other developmental projects.

**INADEQUATE IMPLEMENTATION**

The primary problem in the implementation process is the excessive reliance placed on reports of the project proponent and the agency which carries out the EIA. Clearance may be given based on the report of the project proponent and the EIA itself is carried out by an agency appointed by the project proponent. Hence the assessment cannot be said to take an impartial view of the project. Furthermore, the only method of monitoring the implementation of the recommendations and conditions subject to which clearance is given, is by means of half yearly reports that are to be submitted to the IAA by the project authorities. This again lacks objectivity and in any case, past practice shows that the IAA does not take any action in this respect.

There have also been problems that have cropped up in actual implementation of EIA.

* EIAs are expensive to carry out, are time consuming and often take upto a year. Hence while the requirement that only larger projects carry out EIAs has come in for criticism, it may be unrealistic to expect small projects to undergo a detailed EIA procedure.

* The objectivity and thoroughness of an EIA are influenced by the agency carrying it out. The agency, being hired by the developer usually does not present a correct picture.

* The predictions in an EIA are rarely tested against what actually happens. Hence, impact predictions have little chance of being improved.

* The information required in an EIA is often limited as the regulations or guidelines may not require the full range of potential impacts to be addressed.

In view of these defects, an emerging concept is that of a Strategic Environmental Assessment (SEA). The important differences between this and the EIA are:

* EIAs do not consider the cumulative impacts of more than a single project, i.e., the question of a synergistic impact - whether the total impact of several projects exceeds the sum of their individual impacts. EIAs do not usually consider this due to lack of knowledge concerning other developmental projects.
EIAs also do not adequately discuss alternatives extensively as they are reactive in nature. An SEA takes place at the conceptualisation stage and hence this difficulty may be overcome.

An SEA would also take into account the secondary socio-economic effects of a project such as population displacement, economic hardship etc.\textsuperscript{15}

While this cannot be an answer to all the problems discussed, it would make the exercise more meaningful. In India, there has been some response to these trends. If one were to examine the Siting Guidelines for Industries,\textsuperscript{16} it is clear that the cumulative impact of various industries should be taken into account when preparing an EIA. However, it is clear when examining the defects in our laws and implementation machinery, especially when compared to those of the developing countries, we still have a long way to go in giving effect to the concept of an Environmental Impact Assessment.


INTRODUCTION

Most of the industrial factory owners do not perceive an improvement in environmental conditions to be in their interest. If that interest is to be promoted it is not enough to merely remind them of their social responsibilities. Towards this purpose the Supreme Court in 1996 and 1997 delivered five landmark judgements adopting the polluter pays principle in India as an improvement over the absolute liability principle.

The study focuses on the above mentioned cases together with developments in international treaty law that have contributed towards the evolution of the polluter pays principle. An improvement in environmental quality should be made in the interest of industrialists. The article suggests how this could be achieved economically through Market Based Instruments.

DEFINING POLLUTION

There are legislative definitions of what constitutes a pollutant in the Water (Prevention and Control) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981 and the Environmental Protection Act, 1986. The Water Act defines pollution as “such contamination of water...likely to create a nuisance or liable to render such water harmful and injurious to health” and the definitions in the subsequent legislations are similar. It is evident from these definitions that the emphasis is on the fact that pollution must have a tendency to cause harm, or must actually cause harm. Emissions per se are not pollution. Properly understood, pollution is the coercive imposition of a harmful waste product or emission onto another person or their property; it is a “trespass” under the principles of common law. If the trespass is so minor that it creates no harm or inconvenience to the property owner, it will normally be tolerated. Today’s pollution dilemma is often the result of what is essentially a universal “easement” granted by the State to polluters, even to producers of significant and damaging pollution. Hence, as the definition of pollution is commonly understood, for the pollutant to result in or cause pollution there must be some consequent harm or threat of harm.

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WHAT IS THE POLLUTER PAYS PRINCIPLE?

The polluter pays principle is an extension of the principle of absolute liability. The principle of absolute liability is invoked regardless of whether or not the person took reasonable care and it makes him liable to compensate those who suffered on account of his inherently dangerous activity. The polluter pays principle extends the liability of the polluter to the costs of repairing the damage to the environment. The polluter pays principle broadens the ambit of the principle of absolute liability. The importance of this principle is that the damage to the environment may be remedied and this is extremely essential to sustainable development. "The polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology."4

THE EVOLUTION OF THIS PRINCIPLE IN INDIA

Despite the potential that the polluter pays principle holds to protect the environment, it was not a part of the law in India till it was invoked in the Enviro-Legal Action5 case as late as 1996. In this case the court affirmed the principle of absolute liability as stated in the Oleum Gas Leak6 case and extended it. The court laid down, "The polluter pays principle demands that the financial costs of preventing or remedying the damage caused by pollution should lie in the undertakings which cause the pollution or produce the goods that cause the pollution." The judgement of the above case on the polluter pays principle and the justification for invoking it was reaffirmed by another Bench in 1996, in the case of Vellore Citizens Welfare Forum v. Union of India.7 In these cases the use of the polluter pays principle has been justified via the constitutional mandate,8 statutory provisions9 and international customary law.10

5 Id.
6 Supra n. 3, hereinafter referred to as the Oleum Gas Leak Case.
7 (1996) 5 SCC 647. In this case tanneries and other industries in the state of Tamil Nadu were discharging untreated effluents into the agricultural fields, roadsides, waterways and open lands. The untreated effluents were finally discharged into the River Palar, which was the main source of water supply to the residents of that area.
8 Under Article 21 and Article 47. The most relevant provision invoked was Article 48-A, which states that the State will endeavour to protect and improve the environment, and Article 51-A(g) which ensures the protection of the natural environment.
10 Infra.
THE PRINCIPLE AS A FEATURE OF CUSTOMARY INTERNATIONAL LAW

The polluter pays principle was promoted by the Organisation for Economic Cooperation and Development (OECD) during the 1970s when there was a great deal of public interest in environmental issues which resulted in demands on the Governments and other institutions to introduce policies and mechanisms for the protection of the environment.

The modern day principle of polluter pays was first incorporated in Principles 21 and 22 of the Stockholm Declaration, 1973. Thereafter, the European Charter on the Environmental and Health, 1989 and the Single European Act, 1986 made provisions for applying the polluter pays principle. The United Nations Conference on Environment and Development, 1992 in Principle 15 incorporates the polluter pays principle. More recently the member states of the Council of Europe and the European Economic Community adopted the Convention on Civil Liability For Damage Resulting from Activities Dangerous to the Environment, which specifically deals with transboundary pollution. It must be remembered that every breach of international law gives rise to an

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12 States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that the activities within their jurisdiction or control do not cause damage to the environment of other states or to areas beyond the limits of national jurisdiction.
13 States shall cooperate to develop further the international law regarding liability and compensation for victims of pollution and environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction.
14 The Charter provides that environmental standards should be constantly revised in light of new knowledge and new economic conditions applying the polluter pays principle whereby any public or private entity causing or likely to cause damage to the environment is financially responsible for restorative or preventive measures. cf Alexander Kiss and Dinnah Shelton, International Environmental Law 66 (1991).
15 11 ILM 1416 (1972).
17 States shall develop national laws regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in a more determined manner to develop further international law regarding liability and compensation for adverse affects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.
19 Object statement: "considering that emissions released in one country may cause damage in another country and that therefore the problems of adequate compensation for such damage are also of an international nature...having regard to the desirability of providing for strict liability in this field and taking into account the polluter pays principle."
obligation to make reparations. Although traditional norms of state responsibility concern the treatment of aliens and their property, the Trail Smelter arbitration recognised that the principle of state responsibility is applicable in a field of transfrontier pollution and consequently states may be held liable to private parties or other states for pollution that causes demonstrable damage to persons or property.

The question that gains importance is whether the mere presence of a principle in a few instruments can have the effect of giving it the status of customary international law?

The International Court of Justice in the North Sea Continental Shelf Case delivered a landmark judgement determining whether a particular provision in a treaty had acquired the status of customary international law, thereby making it binding on those nations who are not signatories to the treaty concerned. According to the decision, state practice and opinio juris can enable a treaty to acquire the status of customary international law. The former requires that there be widespread acceptance by nations of the new norm and the latter signifies that the practice must have been rendered obligatory by the existence of the rule of law requiring it.

The fact that 153 states were signatories of the Rio Declaration does not make the principle in the declaration one of international customary law. What is required is a demonstrable willingness to adhere to it and the practice of nations must alter according to the prescriptions of the new norm for it to attain the status of international customary law. In the absence of any clear intent among nations, incorporating the above two requirements of customary international law, one wonders how the principle of polluter pays has been incorporated into municipal law.

Therefore the principle of polluter pays stands on a weak legal foundation, mainly because its salient features have yet to be finalised by international law jurists.

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20 Chorzow Factory (Indemnity) Case, (1928) PCIJ Ser. A No.17, p.29. “Reparation must in so far as possible wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed. Restitution in kind or if that is not possible, payment of a sum corresponding to the value which a restitution in kind would bear, the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.”

21 1969 ICJ 3.

22 The North Sea Case was followed by subsequent decisions of the World Court. See Advisory Opinion on the Legality of the Threat of Nuclear Weapons, ICJ Communiqué No. 96/23 (July 3, 1996).


25 Both the relevant judgements fail to lay down a standard by which the damages in the case of environmental restoration are to be estimated.
THE ROLE OF MARKET BASED INSTRUMENTS

The development of the polluter pays principle must also include mechanisms to safeguard against its potentially harmful effects while at the same time reduce uncertainties about its economic impact.

Economists have expressed reservations about the economic viability of the polluter pays principle. Noted economist Kirit Parikh cites four reasons:

1. The application of the principle in urban areas where the industrial sector is dominated by medium, small and tiny enterprises operating in a highly competitive market is risky as any higher costs from emission or other effluent clean up charge might adversely affect their competitiveness in relation to large firms that are capable of affording the installation of necessary equipment.

2. Even though the polluter pays principle does not prohibit the polluter from passing on the additional costs that he might incur in terms of increased costs, thereby increasing price of his product, the reality in developing nations may not always be this way. These nations which rely heavily on exports of primary commodities for which demand in the international market is elastic may find that the costs are entirely borne by the producers in the form of damage to human health, property and ecosystems.

3. Representing a larger objection to the inclusion of Polluter Pays in Indian law, is the consequences it will have in the realm of the common property resource. The application of the principle will lead to the appropriation of rights by wealthy landlords to the disadvantage of the small land owners, if curbs are imposed on the manner in which a resource can be used, in this instance land.

4. The Court has not dealt with the fact that the level of charges to be imposed on the polluter are extremely difficult to estimate and therefore will give rise to difficulties.

The implementation of the Polluter Pays principle has significant economic consequences, especially in the Third World where trade is carried out in commodities that are the products of pollution intensive industries. To offset the potential economic harm, the principle must be implemented via Market Based Instruments. The main aim of this is to induce efficiency in environmental management through the use of market mechanisms.

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27 Gupta, Opt for Market Based Instruments, The Economic Times 6 (September 8, 1997), Bangalore.
CONCLUSION

The judgements of the Supreme Court undoubtedly go a long way in reaffirming the commitment of the judiciary in protecting the environment and remedying the ill-effects of pollution. However, the court has erred in the manner in which it has adopted the polluter pays principle, as one of international customary law without demonstrating how the principle actually fits into the ambit of international law.

A potential argument against such bonds is that it would favour relatively large firms that could afford to handle the financial responsibilities of activities potentially hazardous to the environment. But this will prevent firms that cannot handle the financial imposition from passing on the cost of the environmental damage to the public. This does not however exclude small firms from the ambit of this principle. It is desired that these firms bond together to handle financial responsibility for environmental damage. They may also feel it is more profitable to switch to less risky activities or technology that does not require such high assurance bonds.

CONCLUSION

The judgements of the Supreme Court undoubtedly go a long way in reaffirming the commitment of the judiciary in protecting the environment and remedying the ill-effects of pollution. However, the court has erred in the manner in which it has adopted the polluter pays principle, as one of international customary law without demonstrating how the principle actually fits into the ambit of international law.

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28 Hereinafter referred to as MBIs.
30 A similar legislation has been enacted in India, in 1991. The Public Liability Insurance Act, 1991. According to S.4(1) of the Act every owner shall take out, before he starts handling any hazardous substance, one or more insurance policies providing for contracts of insurance whereby he is insured against liability to give relief under S.3(1). Where death or injury to any person (other than a workman) or damage to any property has resulted from an accident, the owner shall be liable to give such relief as is specified in the Schedule for such death, injury or damage.
32 Environmental costs are referred to as negative externalities because they are external to the decision making process. As per the polluter pays principle a particular standard is issued which must be complied with. The compliance results in costs, which in the case of absolute liability are calculated only when the damage occurs, unlike the polluter pays principle, where the cost is a continuous calculation.
The drawbacks of the polluter pays principle as laid down by the Supreme Court are that there is no gradation system prescribed so that the Polluter Pays Principle can also have a deterrent effect on the industries. It is important for it to be financially unviable to violate environmental protection laws. Thus in addition to evaluating the cost of reparation of the damage, the size of the industry must also be considered so that the penalty can be graded accordingly. This is the only way to ensure that the polluter pays principle will have a deterrent effect on large industries, as often the damage to the environment is irreparable.

Nevertheless, the polluter pays principle has set the stage for efficiency based environmental management, through the use of market mechanisms. The authors have identified three challenges that need to be countered to make the polluter pays principle effective, that the Supreme Court did not address-

1) To develop scientific methods to determine the potential costs of uncertainty vis-à-vis environmental damage.

2) To adjust incentives so that the appropriate parties pay the cost of this uncertainty.

3) To offer appropriate incentives to reduce the detrimental effects of the high risk activity.

As strict liability for environmental damages becomes the norm, clairvoyant firms must take measures to protect themselves. The polluter pays principle is an improvement on strict liability because it explicitly moves the costs to the present where they will have a great deal of impact on decision making.

In lieu of the logic, fairness and efficiency of the polluter pays principle, it promises to be both practical and feasible in helping us ward off the impending environmental crisis.
CONTROLLING POLLUTION THROUGH TRADE RESTRICTIONS

Smitha Murthy*

INTRODUCTION

With increasing awareness about the fragile nature of the environment, fears have been expressed that if pollution is not controlled, the Earth may be destroyed and human life endangered. Recognising that industries cause such environmental damage, standards have been introduced to regulate and minimise pollution. Since pollution is not limited to any particular nation or region, the issue of legitimacy of restrictions placed on trade that harm the environment comes into sharp focus in this age of free trade.

ISSUES INVOLVED AND POSITIONS TAKEN

The key issue revolves around recognising the negative impact of trade on the environment and taking measures to counter or rectify these negative impacts in a fair manner, so that (a) the products of the weaker trading countries are not discriminated against and (b) the environment is not misused as a protectionist weapon by the strong against the weak?"1 Thus, three areas of concern may be identified in this debate:2

1. Environmental product standards may sometimes act as de facto Non Trade Barriers;
2. Friction may result on account of the effects of differences in process standards and regulations on international competitiveness; and
3. The growing concern about transborder environmental problems may result in increased pressure to resort to trade measures to control environmental effects and act as sanctions against ‘free riders’.

In this debate, three positions are normally taken up:3

1. The objective is economic success through free trade. Differing environmental standards between countries are a legitimate source of comparative advantage and any ban motivated by environmental concerns may be looked upon as thinly veiled protectionism.

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2 UNCTAD Secretariat, Trends in the field of trade and environment in the framework of international cooperation, 28 Foreign Trade Review 218 (1993).

3 Khor, supra n.1 at 257.
2. The objective is environmental protection through tough standards. As all economic activities have environmental impact and it is legitimate to curb such activity where the impact is too large.

3. Both growth and environment are important. Environmental protection supports, and may even create growth. So environment protection may be encouraged, provided they do not overtly restrict growth.

The underlying fear in all such discussions is that an unreasonable burden may be placed on the developing countries who are already burdened with structural reforms and the like. The rationale is stated as follows. Since the North is mainly responsible for environmental problems because of its consumption pattern, resource use and pollution, and has derived a major part of the benefits in the world trade, it has the 'cushion' to absorb any adjustment. With its economic clout, the developing countries fear that unreasonable standards may be imposed by the North on the South by arranging for "adjustments to world trade in a manner that is to their own advantage". Thus the question centres around whether environmental standards pose any threat to free trade. It is argued that once environmental standards are defined and environmental costs are incorporated, free trade mechanism may itself result in correcting any imbalance as it is in the interest of free trade to maintain sustainable economic activity. However it must be kept in mind that if free trade is pursued in order to increase trade, the present pattern of resource utilisation will lead to increased environmental degradation, which in many cases is irreversible and cannot be set right by any amount of financial investment.

The debate gets aggravated when Multilateral Environment Agreements ("MEA") deal with the question of imposition of same standards and rules to both member-nations and non-parties to such MEAs. This is so because environmental pollution is not confined by artificial territorial limits. It is argued that such a position is necessary to prevent circumvention of such provisions by members through increased trade with non-parties.

**SUGGESTED SOLUTIONS**

1. *Environmental Standards*: These may be of two types: a) Product standards, laying down characteristics of the products, and b) Process and Production standards (PPM's), laying down standards as to how the goods should be produced. At present, GATT allows discrimination only for product standards and not for PPMs.

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5 *Id.*

6 Vinod Rege, 'GATT law and environment related issues affecting the trade of developing countries', 28 Foreign Trade Review 123 (1994).
With respect to product standards, the agreements on Technical Barriers to Trade (‘TBT’) and Sanitary and Phytosanitary measures are also discussed in association with GATT. Under these Rules, “it is possible for an importing country to require that an imported product must meet the product standards it applies to domestic products.” In order to ensure that such standards do not cause barriers to trade, the two Agreements require countries to aim at harmonized standards and to participate in the formulation of such harmonization process. Environmental groups have expressed reservations about this approach to harmonization as they fear that harmonization will be achieved at minimum levels to take into account criteria prevailing in developing countries, thus sometimes resulting in lowering of standards. Developing countries, on the other hand, fear that such a process may only be motivated to keep the domestic industry of the importing country, competition-free. Moreover, they complain that such standard-making process fails to adequately take into account the characteristics of the products imported by them or the technology and the production methods used in these countries.

2. PPP and UPP: According to the Polluter-Pays Principle (PPP), the polluter should be made to bear the expenses incurred by the public authorities for the abatement of pollution and its prevention and for the maintenance of the environment in an acceptable state. According to the User-Pays Principle (UPP), the price of a natural resource should reflect the full range of costs involved in using it, including the costs of the external effects associated with exploiting, transforming and using the resource together with the costs of future uses foregone. The economic rationale given is that once environmental prices are fully internalized and are reflected in the prices, the market forces will ensure that techniques for abatement of pollution are adopted and exhaustible resources are conserved to levels consistent sustainable development.

However, this suggestion is not totally faultless. In developing countries, greater burden will be placed on the medium and small industries that form a major part of the industrial sector. This may affect their competitiveness vis-à-vis the larger firms which can invest in environment-friendly technology. Two other shortcomings may be noticed. One, the developing countries rely mainly on primary commodities for their international trade and therefore, this burden cannot be reflected in the export prices without risking the competitiveness of the products. Secondly, PPP and UPP become problematic when applied to common property resources - how to determine the costs involved in efficient use of these resources and in what manner to allocate such costs. Even otherwise,
it is difficult to practically allocate costs arising due to interaction of different pollutants, human factors, etc.

3. Ecolabelling: The functions of ecolabelling are:\(^{12}\)

a. To inform consumers about health hazards and safety,

b. To inform consumer about the ecological costs of production and consumption and

c. To promote ecologically friendly products.

As pointed out earlier, GATT takes into consideration only product standards while ecolabelling includes PPMs as well. As with other solutions suggested, the question of what standards apply and more importantly, who will determine them remain questions that are not satisfactorily answered.

**CONCLUSION**

The question of controlling environmental pollution through trade restrictions poses a lot of problems, not the least being that they may act as thinly veiled protectionist strategies to overcome competition. In this context, the UNCED summit, popularly known as the Earth Summit, was successful to the extent that all its participants recognised the fact that a realistic and long term solution lay in dealing with both the environment and development crises simultaneously and in an integrated fashion.\(^{13}\) However, nearly six years down the line, there seems to be a faltering of enthusiasm: there has been a drop in the volume of aid by the OECD nations, little or no technology transfer because of present IPR regime, erosion of concern for development coupled with the persistence of development problems in the South.\(^{14}\) It may be in some ways linked to the growing power of the GATT/WTO regime.

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\(^{12}\) Khor, *supra* n.1 at pp. 271-2.


\(^{14}\) *Ibid*, at pp. 7-9.
STATE SPONSORED TERRORISM AND THE
INTERNATIONAL LEGAL REGIME

Samir Gandhi

INTRODUCTION

States in the International community have for centuries engaged in the practice of war, either openly or in its more subtle forms. Though the International legal regime has developed to curb the use of war as an instrument of dispute resolution amongst States, the menace of terrorism threatens to circumvent all these controls. Countries have used various devices for evading the legal repercussions of war. Most common amongst these devices has been the concealment of the State’s resort to the use of armed force by perpetuating aggressive acts without any overt State involvement - by proxy war. This allows the State to publicly claim that they are not involved in the acts of aggression thereby avoiding international sanction and retaliation. Hence there is a need to identify at what point should these covert acts of the State be deemed grave enough to qualify as an act of aggression or war, thus attracting international legal sanction. This article examines whether the existing International legal regime provides for the identification of State sponsored terrorism as a form of aggression under the 1974 Draft definition of Aggression adopted by the UN General Assembly as the parameter.

THE CONCEPT OF STATE SPONSORED TERRORISM

Terrorism is commonly recognised as a series of violent, criminal acts directed against a State, with a view and intention to create a state of terror in the minds of the public. A terrorist act is aimed at destabilising the existing socio-political set-up. Any government engaged in acts of violence or threat of violence, in order to pursue its policies of domination, exploitation or expansion and hegemony is deemed to be committing an act of terrorism. When a Government supports acts of terrorism by sponsoring terrorist groups, either by providing them with the financial support, or through the provision of a safe haven for the training and supply of arms, it is known as State sponsored terrorism.

There are certain factors that are inherent in the global strategic balance and the current conditions of international relations that are clearly conducive to unconventional and covert warfare of all kinds, most prominently that of State

* IV Year B.A., LL.B. (Hons.), National Law School of India University.
2 The Ad Hoc Committee on International Terrorism, 34 GAOR Supp. No. 37, UN Doc A/34/37.
sponsored terrorism.\textsuperscript{3} Today, the most widely used and commonly accepted forms of covert State aggression is State sponsored terrorism. The primary factor that weighs heavily upon the minds of potential aggressors is the global ostracisation that follows the event of an open unjustified armed conflict, through the imposition of sanctions and collective action by the international community. Therefore, it means that while there exists a strong deterrent in the form of strict legal regime in the event of a full scale war, the opportunity to incite instability in an enemy State continues to be provided through the staging of proxy wars by State sponsored terrorism. That is why State sponsored terrorism has emerged as the single largest threat to the process of peace.

**THE IMPOTENCY OF THE INTERNATIONAL LEGAL REGIME**

The fundamental principle of International Law is that an aggressive attack is to be prohibited and that proportional force may be used against such an attack.\textsuperscript{4} The problem that arises in the case of State sponsored terrorism is that the aggressive action of the State is not identifiable or attributable to it. This in turn means that the action is not deemed to be an aggressive act of State and the International legal regime is rendered impotent. This is primarily due to the fact that the threat in the case of proxy wars, as opposed to conventional warfare, is in the form of clandestine armed attacks. Several regimes fight guerrilla wars which go against the core Charter principles and simultaneously publicly deny any State sanctioned use of force as to gain protection from the very legal order that they are attacking. Thus their assault undermines both the authority of the prohibition against aggression as well as the effectiveness of the right to self defence.

It is amply evident that there is a pressing necessity for a more comprehensive International legal regime to control the menace of state sponsored terrorism that has emerged as the most dangerous brand of violence, the most often practised and on the most comprehensive scale.\textsuperscript{5}

Indeed to bolster the effectiveness of the International legal regime, it would be advantageous to examine whether the existing understanding of the International Law concept of aggression is broad enough for the affixation of liability upon a State sponsoring terrorist activities.

International law has traditionally emphasised the importance of protecting the territorial integrity and political independence of States against external

\textsuperscript{3} See, Y.K. Tyagi, Political terrorism: National and International Dimensions, 27 IJIL 160 (1987). The author is of the opinion that terrorism is a form of undeclared war.

\textsuperscript{4} This dual principle is embodied in Article 2(4) & Article 51 of the UN Charter and virtually every other normative modern statement on the use of force in International Relations.

\textsuperscript{5} See, The observations of States in accordance with GA Resolution 3034 (xxvii) UN General Assembly A/C 160/1, add. 5, p. 9.
aggression. The most concrete move taken to define aggression was the UN Draft Definition of Aggression, 1974. The Draft definition equates aggression with the use of armed force and sticks to the traditional notion of the aggressor being defined as the first to attack. The most significant development comes in the form of Article 3 of the Draft Definition where the requirement for the formal declaration of war is done away with and indirect aggression in some forms have been recognised. Clauses (f) and (g) are notable in this regard, as they do away with the requirement that the aggressor State's armed forces be directly involved, for an act to constitute aggression. This means that the very act of a State in allowing its territory to be used by another to perpetuate acts of aggression against a third State would be deemed as aggression as would the sending of armed bands by one State into another. This would sufficiently cover instances of State sponsored terrorism like that of the Pakistan sponsored invasion of Kashmir by armed bands, and their continuing support thereof; the Libyan act of harbouring terrorists and even the alleged use of Indian soil to train Tamil terrorists. Hence there does exist an acceptable parameter by which acts of State sponsored terrorism maybe deemed as those of aggression and suitable action taken against the aggressor State.

The problem that arises is what force the "Draft Definition of Aggression" carries in the International legal regime. It has yet to be converted into a Treaty and can be at best viewed as customary international law. However, some States have contended that the Draft Definition is nothing more than a recommendation and the Security Council is free to decide what weight, if any, it is to be given.

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6 Beginning with the Treaty of Versailles (1919), there were a number of moves by the International legal community to translate their concern for peace into concrete legal norms. See also: The Treaty of Mutual Assistance, 1925 under the auspices of the League of Nations which made aggressive acts into International crimes; The Kellogg-Briand Pact (1925) which contained a general renunciation of aggression; The Geneva Disarmament Convention (1933) which used the primacy test (first to attack) to define aggression; The London Charter (1945) & The Nuremberg Principles were post II World War provisions imposing criminal sanctions for acts of aggression.

7 UN Draft Definition of Aggression, GA Resolution 3314, 29 UN GAOR Supp (#31), UN Doc. A/9631. The definition that the UN was able to come out with the result of several compromises made at the time of drafting due to the concerns by members states. The General Assembly expressed its conviction that the 10 preambular paragraphs and 8 articles would contribute to the strengthening of world peace. For a detailed analysis of the Draft Definition, See, B.B. Ferencz, Encyclopaedia of Public International Law, Instalment 1, (1981), 1982; Also see, Defining Aggression, Where it stands, where it's going, 66 AJIL 491 (1972).

8 Although the Draft Definition deals with aggression, it completely excludes the threat of aggression.

9 Clause (f) makes the act of a State allowing its territory, which it has placed at the disposal of another state for perpetuating acts of aggression against a Third State, one of aggression. Clause (g) makes the sending of armed bands which carry acts of armed forces against other States of such gravity as to amount to substantial involvement, one of aggression.

10 The Draft Definition was used in The United States v. Nicaragua, 1986 ICJ Rep 14.

Under Article 51 of the UN Charter, the State that has been attacked may act in exercising its right of Self Defence or;

There are usually three possible outcomes of an act of State sponsored Terrorism being declared as one of aggression:

a) The Security Council, after having made a determination of aggression, under Article 39 of the U.N. Charter, or when the General Assembly makes a finding of aggression, recommends collective sanction to make the aggressor State restore or maintain peace or;

b) Under Article 51 of the UN Charter, the State that has been attacked may act in exercising its right of Self Defence or;

c) Apart from the aggressor State, the individuals responsible for the acts of aggression maybe charged before a tribunal for having committed the criminal offence of aggression.

The affixation of individual criminal liability upon aggressors is based on the Nuremberg Principles. The International Law Commission, in an attempt to chalk out a comprehensive principle of individual and State responsibility for acts that amount to aggression, has drafted articles of the Draft Code of Crimes Against the Peace and Security of Mankind. The significance of these developments is immense. International Law can not only impose sanctions upon the State responsible for terrorist activities that amount to aggression, but also affix liability upon individuals responsible for making the concerned decisions. Moreover, the Draft Code of Crimes goes one step ahead of the Draft Definition of Aggression by rendering even the mere threat of aggression a criminal act. Hence there is a positive initiative to move towards a more comprehensive

12 Article 39 allows the UN to take enforcement action against an act of aggression.
13 It is debatable whether acts of aggression not amounting to a full scale war amount to an "armed attack" as required for the exercise of the right of self-defence under Article 51 of the UN Charter.
14 The judgment of the Nuremberg International Tribunal in 1946 establishing the guilt of War criminal gave rise to certain principles of individual criminal responsibility which were subsequently formulated by the International Law Commission of the UN as a Draft Code of Principles Recognised in the Tribunal's judgement; See, F.B. Schick, "Nuremberg Trials and International Law of the Future", 41 AJIL 770 (1947). These principles were re-affirmed in the Genocide Convention (1948), adopted by the UN General Assembly on 9/12/1948.
affixation of liability for acts of a State as well its leaders in sponsoring or supporting terrorism. However it must be noted that these developments are to be treated with a fair measure of scepticism until such time that the Draft Code of Crimes are given Treaty status in International Law.

**CONCLUSION**

It is clear that while the International Legal Regime deals extensively with the threat of conventional war, the concept of aggression through proxy war and State sponsored terrorism, remains inadequately addressed. There is a pressing need for a binding legal norm that addresses these subtle, although by no means less dangerous, forms of aggression.

The International Legal Community took a step in the right direction by drafting the 1974 Draft Definition of Aggression, but fell short of translating its good intentions into binding law, by failing to give the Draft Definition the status of a Treaty. It is the opinion of the author that the Draft Definition of Aggression is broad enough to include within its ambit the concept of State sponsored terrorism and the waging of proxy wars and should be recognised as the universal yardstick for defining aggressive covert acts of States as aggression. Hence there is a pre-existing parameter in the form of the Draft definition that deems acts of State sponsored as aggression. When read along with the Draft Code of Crimes evolved by the International Law Commission, the International Legal Regime would be effectively enabled to wipe out the threat of State sponsored terrorism by affixing individual as well as State liability for the commission of crimes against the peace and security of mankind.
Any student of the Indian Evidence Act would require to start with one essential presumption - that the legislation be treated as *sui generis*. This is because, much discussed common law phenomena like legal burden, evidentiary burden, primary burden and secondary burden do not find mention in the IEA. In fact, the principles of Standard of Proof, which form the fulcrum of any criminal statute, are undefined in the Indian scenario. It is perhaps in this background that one needs to approach S.105 of the IEA.

In legal discussions the term ‘Burden of proof’ or ‘Onus Probandi’ is used in two ways: a) To indicate the duty of bringing forward arguments or evidence in support of a proposition; b) To mark that of establishing a proposition as against all counter arguments of evidence. This definition perhaps best defines the middle path taken in the definition of Burden of Proof in the context of general exceptions.

What is the rationale of placing the burden on the defence? George Fletcher has identified two fundamental notions as to why the defence bears the burden: a) The burden of persuasion in private legal disputes had a great impact on criminal cases in the 19th century and the rules of criminal law are functional...
analyses of the rules of settling private disputes b) The concept of presumption of innocence has reduced the above mentioned burden on the defence only to that what is available in the civil cases.

A. S.105 AND THE COURTS

A judicial analysis of S.105 begins with the watershed decision of Parbhoo v. Emperor7 and ends with the landmark three-judge bench decision in Vijayee Singh v. State of U.P.8 Though the Supreme Court on a number of occasions9 and the Privy Council in Jayasena v. Reginam10 have thrown light on the debate, the single most important influence has been Viscount Sankey’s dictum in Woolmington v. D.P.P.11 Some of the propositions which have emerged out of the judicial opinions on S.105 are as follows:

1. The burden on the accused under S.105 is not so onerous as the burden on the prosecution, and can be discharged by a balance of probabilities.12

2. The burden on the accused in S.105 can be discharged by creating a reasonable doubt as to whether he can avail himself of the exception of S.105.13

3. The burden on the accused in S.105 cannot be discharged by merely creating a reasonable doubt as to whether he can avail himself of the benefits of the exception but in some cases an indirect acquittal can be secured if the evidence on record creates a reasonable doubt as to the essential ingredients of the offence.14

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7 AIR 1941 All 402, hereinafter referred to as Parbhoo’s case.
8 AIR 1990 SC 1459, (per S. Ratnavel Pandian, Fatima Beevi and J. Reddy JJ.), hereinafter referred to as Vijayee Singh’s case.
11 (1935) A.C. 462. Hereinafter referred to as Woolmington’s case. The Court held that throughout the web of English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner’s guilt, subject to the defence of insanity and statutory exceptions. If at the end of and on the whole of the case, there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal.
13 Parbhoo’s case (as per majority, Iqbal Ahmed C.J., Ailsoop, Bajpai, Ismail, Braund and Mullah JJ.)
4. S.105 does not envisage the English situation wherein the Jury is left in reasonable doubt upon a review of all the evidence even after the explanation of the accused as regards. More so, the whole concept of reasonable doubt after the explanation by the accused, is wrong because the prosecution, in any event, has to prove its case beyond reasonable doubt at the very first instance.\(^{15}\)

In the light of the Supreme Court decisions which are law by virtue of Article 141 of the Constitution, approaches 1 and 3 have been disapproved. In Parbhoo’s case, the Full Bench of the Allahabad High Court brought out two important propositions. 1) In the case of self defence, where the accused has failed to satisfy the court beyond a reasonable doubt, it still remains open to the accused to use the evidence for showing a reasonable doubt as to the existence of the exception itself and if a reasonable doubt is created as to the existence of exception, then it is sufficient to secure an acquittal. 2) Reading Ss.4 and 105 it is clear that the court shall presume the absence of such circumstances as ‘proved’ unless and until they are ‘disproved’. Where the accused is unable to discharge the burden by expressly proving the existence of such circumstances or he is unable to discharge the burden of proving absence of such circumstances, the case would fall in the category of ‘not proved’. The court while presuming the absence of such circumstances, will bear in mind the general principle of criminal jurisprudence that the prosecution has to prove its case beyond reasonable doubt and the benefit of every reasonable doubt should go the accused.\(^{16}\) The first point in Parbhoo’s case came up for review in a nine judge bench of the Allahabad High Court in Rishikesh Singh v. State\(^{17}\) which partly disagreed with the logic of Parbhoo as follows: “The majority in Parbhoo’s case was not right in assuming that the accused can secure an acquittal if he creates a reasonable doubt as to the existence of exception. However in some cases the accused can secure an indirect acquittal... because there may be cases where, although the exception has not been proved, the evidence on record creates a doubt as regards some element which is the ingredient of the offence. So the court said that an acquittal can be secured by firstly, the creation of a reasonable doubt as to the ingredient of the offence, and secondly, complete proof of the exception on a preponderance of probabilities.

In the same year, the Privy Council decided the Sri Lankan case of Jayasena v. Reginam\(^{18}\) wherein their lordships quoted with approval the dictum of

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\(^{16}\) Vijayee Singh v. State, AIR 1990 SC 1472.

\(^{17}\) AIR 1970 All 51 (per Oak C.J., Broome, Mathur, B.D. Gupta, Gyaneshwar Kumar, Beg, Yashoda Nandan, Mukerji and Parekh JJ with a majority of seven judges agreeing upon the same point).

\(^{18}\) [1970] 1 All ER 219.
Mudholkar J., in Bhikari v. State\textsuperscript{19} and Dayabhai's case\textsuperscript{20} and commented that the Woolmington logic may not be applicable in codified systems of evidence law. The court was of the view that the very conceptual understanding of burden of proof varies between England and the Indian subcontinent, (the latter being based more on Stephen's digest), and that therefore, the propriety of importing common law doctrines and definitions into the Indian context was questionable. Finally, the dissenting note of Macklin J. in the government of Bombay v. Sukur\textsuperscript{21} needs to be considered “Though the absence of reasonable doubt is often the convenient way of expressing what is meant by ‘proof’ it is not the real test. Once the prosecution has convinced the jury, the effect of S. 105 is that the accused must prove to the jury that he has a right of private defence; if he does not prove that, then the act established by the prosecution stands as a criminal act and must be dealt with accordingly.

B. S.105 AND WOOLMINGTON'S CASE

The effect of Woolmington's case in the realm of general exceptions has been mainly to reaffirm the presumption of innocence, indirectly placing greater onus on the prosecution. This can be explained as follows:

Since is the interpretation is that a reasonable doubt which goes to strike a necessary ingredient of the offence is enough to acquit the accused, the accused is not under an obligation to prove on a balance of probabilities. Following the above, the prosecution will now have to disprove the exception failing which the defence can use S.105 to cast a reasonable doubt so as to secure an acquittal.

However, the opponents of this case make out the following points of criticism to the application in India. Firstly that English law has no application to a codified Indian statute.\textsuperscript{22} Secondly, that the IEA is in any event based on Stephen's digest which preceded Woolmington, and thirdly that the dictum of Viscount Sankey has exceptions to statutes and the IEA being a statute cannot fit into the Woolmington framework.\textsuperscript{23}

C. CONSTITUTIONALISATION OF THE PRESUMPTION OF INNOCENCE AND ITS IMPACT ON S.105

In many jurisdictions all over the world the phenomenon of constitutionalisation of the general principles of criminal law, and especially the

\textsuperscript{20} (1965) 2 S.C.J. 531 : AIR 1964 SC 1563. On this point reference may also be drawn to the Vijayee Singh's case, AIR 1990 SC 1472.
\textsuperscript{21} AIR 1947 Bom 38.
\textsuperscript{22} See, Lord Hudson in Jayasena v. Reginam, [1970] 1 All ER 219.
CONCLUSION

It should be remembered that as regards the Indian position on the constitutionalisation of the presumption of innocence is underway.24 Perhaps the forerunner in this regard is The Canadian Charter of Rights and Freedoms which provides for a constitutional guarantee of the presumption of innocence. As laid down by Justice Dickson in R v. Oaks25 “the presumption of innocence protects the fundamental liberty and human dignity of any and every person and if an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible to convict him despite the existence of a reasonable doubt. Similar utterances can be found in the South African case of S v. Bhulwana26 However, in the United States, though there is no specific guarantee of the presumption of innocence, the courts in In re Winship27 and Mullany v. Wilbur28 expanded the due process clause in the 5th and 14th amendments to constitutionalise the presumption innocence. However, the U.S. approach demands that there be an offence-defence difference, and the protection only applies to the true elements of the offence.29 However, it would be sufficient to state that the American experience of the presumption of innocence, though not so pronounced as in South Africa or Canada, needs to be noticed as it is one stage in the gradual evolution of constitutionalisation and if the Indian experience is to graduate from the present static stage, it is immediate perhaps the U.S. examples which require attention.30

25 26 DLR 200 (1986) c.f. Dr. S.V. Joga Rao, Presumptive evidence and presumption of innocence - A South African Perspective, reproduced in the Max Planck Institute Lectures. S. 11(d) of the charter provides that an accused person has the right to be presumed innocent until proven guilty according to law in fair and public hearing by an independent and impartial tribunal.
28 95 S Ct 1881 (1975).
29 Tot v. The United States, 319 US 463 (1943); The essential element is found out by applying the rational connection test.
30 A case is not being made for the importation of American precedents. In fact, one should also remember the opinions of Kania J. in A.K. Gopalan v. State of Kerala, AIR 1950 SC 27, Viswanath Shastri J. in Champaikan Dorairajan v. State of Madras, AIR 1951 Mad 120 (129) and P.B. Mukherjee J. in Mahadeb Jain v. B.B. Sen AIR 1951 Cal 563 (569) wherein the “Craze for American Precedent” have been warned against.
31 1995 SCC (Cri) 466.
clauses cannot be declared as *ultra vires*. However, adverting to the questions which were raised earlier with respect to the *Woolmington* formulation, there is a need to answer an oft quoted criticism... that the formulation vastly increases the burden on the prosecution. In answer to this, Paul Roberts retorts "What is wrong if the prosecution’s onus is made weightier? It is repugnant to public policy to allow conviction even when doubt exists."32 Whilst a normative suggestion is not sought to be made, given the present circumstances, wherein an abysmally low conviction rate stares us in the face, a comprehensive burden (as Fletcher puts it) on the prosecution may not be advisable. The existing formulation in *Woolmington’s case*, as reflected in the decisions of the Indian courts is a correct and thoughtful exposition of law.

CORPORATE CRIMINAL LIABILITY: A REVIEW IN LIGHT OF TATA-ULFA NEXUS

Sumit Baudh*

I. INTRODUCTION

It may be some time before the Tata Tea Ltd. can get out of the ULFA controversy. Although the story goes back several years, it began to unfold in August-September 1997 when an ULFA associate was discovered having connections with the company. Tata Tea Ltd. was found to have fully sponsored the medical expenditure of a top ULFA associate. As the inquiry intensified, it became apparent that this incident was only the tip of the iceberg. It soon followed that Tata Tea Ltd. had been supporting and assisting the outlawed terrorist organisation.

This article is not about political battles, neither is it a fact giving dossier of some commission. The article merely analyses the likelihood of fixing criminal liability on the company based on the presumption that it did support an antinational terrorist organisation. In doing so, the author has taken the opportunity to review the conceptual understanding of a much debated issue - corporate criminal liability.

At a preliminary level there are four obstacles in attaching criminal liability to corporations.

1. Attributing acts to a juristic person; since a corporation is only a legal entity it cannot "act" as a human being does.
2. Corporations cannot possess the moral blameworthiness necessary to commit crimes of intent.
3. The ultra vires doctrine under which courts have refused to hold corporations accountable for acts such as crimes, that were not provided for in their constitutional documents.
4. A literal understanding of criminal procedure which requires the accused to be brought physically before the court.

II. HISTORICAL BACKGROUND

The growth of corporate criminal liability can be traced in the terms of the following four stages. This is also a chronological account of how the courts overcame the following obstacles:

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1. **Public Nuisance** - Courts in England and the United States first imposed corporate criminal liability in cases involving non-feasances of quasi-public corporations such as municipalities, that resulted in public nuisances.¹

2. **Crimes not requiring criminal intent** - As the presence and importance of corporations grew, courts extended corporate criminal liability from public nuisance to all offences that did not require criminal intent. In the *Queen v. Great North of England Railways Co.*² Lord Denman ruled that corporations could be criminally liable for misfeasance and American courts soon began following this trend.³ This development eventually encouraged courts to extend corporate criminal liability to all crimes not requiring intent.

3. **Crimes of intent** - Courts were slow to extend corporate criminal liability to crimes of intent. Not until *New York Central and Hudson River Rail Road Co. v. United States*⁴ in 1909 did the Supreme Court clearly hold a corporation liable for crimes of intent. The motivating factor of this result was the need for effective enforcement of law against corporations. Creation of corporate personality had otherwise created too large a vacuum vis-a-vis application of criminal law to corporations.

4. **Expansion of corporate criminal liability** - Various historical developments in Western Europe as well as United States further contributed to the growth and expansion of corporate criminal liability. However, one of the most important factors favouring criminal liability over civil liability was that the public civil enforcers did not possess as much enforcement power as criminal enforcers did.

There emerged specific statutes, rules, regulations and notifications which spelt out corporate criminal liability in clear terms. However, even in western countries, standards vary with each legal system applying a different model of corporate criminal liability.⁵ The following part discusses two categories of these models.

**III. TWIN MODELS OF CORPORATE CRIMINAL LIABILITY**

**A. Derivative Model**

This model seeks to attach liability to a corporation as a derivative of

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² 115 Eng Rep 1294 (QB 1846).
³ *State v. Morris & Essex Rail Road Co.*, 23 N J L 360 (1852); see *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass (2 Gray) 339 (1854). American Courts followed English precedents and indicated corporations for affirmative acts (misfeasance) that resulted in public nuisance.
⁴ 212 US 431 (1909).
individuals liability. This is an individual centered model wherein the corporation enters only at the secondary level.

i) Vicarious Liability

In *Commonwealth v. Beneficial Finance Co.*, three corporations were held criminally liable for a conspiracy to bribe, the first company, for the acts of its employee, the second, for the act of its Director, and the third, for the acts of the Vice-President of a wholly owned subsidiary. The Court felt that corporate criminal liability was necessarily vicarious, since a corporation is a legal fiction comprising only of individuals.

Vicarious liability has generally been rejected in criminal law. In the context of criminal law, it has been considered unjust to condemn and punish one person for the conduct of another without reference to whether the former was at fault of what occurred. Nevertheless, vicarious liability has been an important part of the history of the law of corporate criminal liability. Even the Indian Courts seem to have adopted the same.

ii) Identification Doctrine

The doctrine of identification equates the corporation with certain key personnel who act on its behalf. Their conduct and states of mind are attributed to the corporation. These personnel are said to represent the “directing mind” of the corporation.

As with vicarious liability, the persons who are identified with the corporations must be acting within the scope of their employment or authority. The conduct must occur within an assigned area of operation even though particulars may be unauthorised. In comparison with vicarious liability, the identification doctrine narrows the scope of corporate criminal liability by restricting the range of persons who can make the corporations liable. It thus eliminates much of the over inclusive effect of vicarious liability. Moreover, the identification doctrine addresses issues of culpability more appropriately than does vicarious liability.

Identification liability is a modified term for vicarious liability, under which the liability of a restricted range of personnel is imputed to a corporation. Instead of all employees and agents having the capacity to make the corporation liable, only some category of persons with directorial or managerial responsibilities have this capacity.

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Identification liability differs from vicarious liability in the sense that it
does not involve the imputation of liability from one person to another, because
the directing mind is the corporation. The two persons have merged.\(^\text{10}\)

**B. Organisational Model**

If the derivative model is centred around the individual, the organisational
model is centred around the corporation, as such. Some offences require an
intention to commit the offences or some other subjective mental state such as
knowledge with respect to the conduct elements. The idea of attributing these
subjective mental states to corporations is indeed troublesome.

One method of attributing these mental states has already been discussed
in terms of identification doctrine. Another method is by proof that the “corporate
culture... directed, encouraged, tolerated or led to non-compliance” with the law.\(^\text{11}\)
The physical element of the offence is attributed from the conduct of officers,
employees, and agents acting within the scope of their authority or employment.\(^\text{12}\)
The fault element can be located in the culture of the corporation even though it
is not present in any individual.

“Corporate culture” is defined in broad terms that encompass informal
conduct and practices, as well as stated policies and formal rules. Corporate
culture is an attitude, policy, rule, course of conduct or practice, existing within
the body corporate generally or within the area of body corporate in which the
relevant activities take place.\(^\text{13}\) The corporate culture must have positively
favoured the commission of the offence in one of two ways. The culture may
have caused the offence to occur, either because the offence was actually directed
or because the nature of the culture led its commission. Alternately the culture
can have given psychological support for the commission of the offence, through
either active encouragement or passive tolerance. A corporation would be held
responsible because of this positive feature, just as an individual would be
responsible because of some positive state of mind.

The mode of assistance given to ULFA by Tata Tea Ltd. was so well structured
and organised that it formed a part of the very culture of the company to aid and
abet the terrorist group. All that happened was not a matter of one or two instances.
It was the company’s policy, thereby qualifying such a practice as corporate
culture. The knowledge and commission of such a practice permeated to every
level of the company. The status or designation of any one person, like the
Managing Director - Mr. Krishna Kumar, becomes irrelevant.

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\(^\text{10}\) *Tesco Super Markets Ltd. v. Nattrass* 1972 App Cas 153; cf Smith and Hogan, *supra* n. 8 at 174.

\(^\text{11}\) Criminal Law Officers Comm. [Code Committee] of the Standing Comm. of Attorneys-General,
Austl., *Model Criminal Code: Chapter 2, General Principles of Criminal Responsibility Section*


Corporate culture doctrine is a new addition to the models of attracting criminal liability to corporations. Elements of the same are yet to filter through the Indian Judiciary. What Indian Cases do reflect is a combination of vicarious liability and identification doctrines. This will become more apparent in the following parts of this article.

IV. DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY VIS INDIAN JUDICIARY

Indian Judiciary confronted the issue only in a few decades back. By then, corporate criminal liability as a jurisprudential issue had gained far greater momentum in the Western countries. Our judiciary’s response can be classified as follows:

A. Crimes not requiring criminal intent - Just as the development in Western Europe started with crimes not requiring criminal intent, the Indian Judiciary reacted similarly. In Ananth Bandhu v. Corporation of Calcutta\(^{14}\) the Court observed that if there is anything in the definition or context of particular section in the statute which will prevent the application of the section to a limited company, certainly a limited company cannot be proceeded against. For example rape cannot be committed by a limited company. There are other sections wherein it will be physically impossible for a company to commit the offence. It is also quite clear that limited company will not be tried for offences which require *mens rea*. It cannot be tried where the only punishment for the offence is imprisonment because it is not possible to send a limited company to prison by way of sentence.

Except in the above cases, a limited company can be proceeded against on the question of sentence also need not stand in the way of trial of this kind, because except in the case where no other sentence than imprisonment or transportation or death is provided, there is nothing to prevent a court from inflicting a suitable fine and a sentence of fine need not carry with it any direction of imprisonment in default. It is optional for the magistrate to proceed against the limited company instead of the officer.

This was further established in Punjab National Bank v. A.R. Gonsalyes, Bunder Inspector, Karachi Port Trust.\(^{15}\) It was held that a company can commit an offense only in a limited class of cases. These must be cases in which mens rea is not essential and must be cases in which it is possible for the court to pass a sentence of fine.

It was further held that it is necessary that the act charged against the company should be one contemplated in the Charter or Articles of corporation as

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\(^{14}\) AIR 1952 Cal 759.

\(^{15}\) AIR 1951 Sind 142.
being capable of being performed by the corporation or must be ultimately connected with its statutory or legal obligations.

B. Crimes of intent - It was not until much later that the judiciary evolved a jurisprudence to charge corporations of crimes of intent as well. This was largely on the basis of vicarious liability and identification doctrine combination. In *State of Maharashtra v. Messers Syndicate Transport Co. (P) Ltd.* and others\(^\text{16}\) the Court held that ordinarily a corporate body like a company acts through its Managing Directors, Board of Directors or authorised agents and the criminal act or omission of an agent including his state of mind, intention, knowledge or belief ought to be treated as the acts or omissions, including the state of mind, intention, knowledge or belief of the company.

A company cannot be indictable for offences like bigamy, perjury, rape which can only be committed by a human individual or for offences punishable with imprisonment or corporal punishment. Barring these exceptions, a corporate body ought to be indictable for criminal acts or omissions of its directors, or authorised agents or servants, whether they involve mens rea or not provided. They have purported to act under authority of the corporate body or in pursuance of aims and objects of the corporate body. This case obviously stands out from the previous two cases - it includes mens rea offences within the realm of corporate criminal liability.

Until now the jurisprudence had only reached High Court levels. The Supreme Court of India addressed the issue for the first time in *Aligarh Municipal Board and Others v. Ekka Zonga Mazdoor Union.*\(^\text{17}\) The court held that the law as it stands today admits of no doubt that a corporation is liable to be punished by imposition of fine and by sequestration for contempt for disobeying orders of competent court directed against them. A command to the corporation is in fact command to those who are officially responsible for conduct of its affairs. If they intentionally fail to comply with the court orders, they and the corporate body, are both guilty of disobedience and may be punished for contempt of court.

**Critique**

The Indian case law lacks any confirmation to a single model of corporate criminal liability. The only logical flow existent is the movie from offences not requiring mens rea to incision offences that do require mens rea to be proved. Thereby the Indian Courts have ascribed to a combination of vicarious and identification doctrine without drawing the necessary distinction. These are mere adhoc decisions depending more on facts of each case rather than a set jurisprudence.

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\(^{16}\) AIR 1964 Bom 195.

\(^{17}\) AIR 1970 SC 1767.
V. CORPORATE CIVIL LIABILITY: A SUBSTITUTE?

V. S. Khanna, an ardent opponent of corporate criminal liability, has suggested that corporate civil liability serves the purpose adequately and thus attaching criminal liability to corporations ought to be given up. His arguments revolve around American Legal System, wherein the concept is fairly well developed, discussed and debated. It would be too early a stage to consider swapping corporate criminal liability for corporate civil liability in the Indian context. This is mainly because of two reasons:

i) In India, the civil enforcement mechanism is not as efficient and powerful as the criminal enforcement system. It is preferable that powerful entities like corporation should as much as possible remain within the hard hands of criminal sphere.

ii) There is hardly any development of law in India over this issue. We are at a stage where there is no clear jurisprudential understanding of the concept within our system. At this stage it would be inappropriate to consider such arguments.

VI. LAYING THE FOUNDATION FOR INDIAN JURISPRUDENCE

The law of corporate criminal liability has traditionally adopted a nominalist theory of corporate personality, under which corporations are viewed as fictional entities and individuals are treated as the only true subjects of the criminal law. The result has been the development of models of corporate criminal liability. The model of vicarious liability and the model of identification share this requirement, despite the competition between them in other respects.

The assumption that corporate liability must be derivative has come under increasing attack in academic writings and in reform proposals. As yet however there is no clear consensus about how far one must move towards organisational liability and about how much of the traditional framework of the law of criminal responsibility can be retained in the shift. The Indian Judiciary is yet to so much as consider the organisational theory. Hence not much can be said about it in the Indian context.

The Indian jurisprudence on corporate criminal liability is limited to a few cases. The 47th Law Commission report has recommended that all criminal liability and punishment should be linked with the corporation and not merely with the name of the director or manager.

As far as punishment is concerned, the Law Commission suggested that Section 62 of IPC be amended to read “in every case in which the offence is

punishable with imprisonment only and not any other punishment, and the offender is a corporation it shall be competent for the court to sentence such offender to fine.20 Besides this, punishing the individual concerned would be in order. The Draft Amendment Bill to the IPC also contains provisions relating to corporate criminal liability but the amendment is yet to see the light of the day. The present scenario in India is indeed at the most formative of stages.

VII. CONCLUSION

Given the presumption that Tata Tea Ltd. did aid and abet terrorism in the State of Assam and given the inchoate development of law, the company can well be attached with criminal responsibility. The courts are capable of affixing joint liability between the company and the officials involved. What has started as a political battle, may lead to a jurisprudential analysis and debate amidst the legal scholars. Hopefully the courts will see this as an opportunity to lay down a lucid model for corporate criminal liability in India.

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20 Id.
TAX IMPLICATIONS OF REVERSE MERGERS

Vinod George Joseph*

DEFINITION OF REVERSE MERGER

'Reverse merger' is a commercial term that is not found in any statute. Traditionally the phrase reverse merger has been used to describe a merger of a healthy unit into a sick unit. Before 1977 the healthy unit would merge with the sick unit and the sick unit would survive. After taking advantage of its accumulated losses and allowances for depreciation of the sick unit, the sick unit's name would be changed to that of the healthy unit. This was because until Section 72A was inserted by the Finance Act, 1977¹ into the Income Tax Act, 1961, it was not possible for a new company formed out of the merger of two other companies to set off its profits with the accumulated loss of the companies that merged to give birth to it, or take advantage of their allowances for depreciation. The reason for this was that a company could set off its profits only with its own losses and not with the losses of any other company. So if a healthy company A Ltd merged with a sick company B Ltd to form company C Ltd, C Ltd could not set off its profits with the accumulated losses of B Ltd or utilise the allowances for depreciation of B Ltd. So A Ltd would merge into B Ltd and B Ltd would survive. A year or two after the accumulated losses and allowances for depreciation of B Ltd were used to set off the profits of A Ltd, the name of B Ltd would be changed to A Ltd (since A Ltd would have greater good will).

Section 72A was inserted into the Act to encourage reverse mergers. It allows the accumulated loss and allowance for depreciation of an amalgamating company to be treated as that of the amalgamated company. Hence A Ltd and B Ltd can merge to form C Ltd and the accumulated loss and allowance for depreciation of B Ltd will be treated as that of C Ltd. The same applies if A Ltd merges into B Ltd and B Ltd survives or B Ltd merges into A Ltd and A Ltd survives. The companies that exist prior to the amalgamation are called amalgamating companies and the company formed out of the amalgamation is called the amalgamated company.

PREREQUISITES FOR BENEFITTING UNDER SECTION 72A

Section 72A uses the term amalgamation and not merger. Hence the merger between the healthy unit and the sick unit, must fall within the definition of amalgamation given in section 2(1B) of the Act. This requires the merger to be in such a way that:

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¹ Hereinafter called the Act.
All the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation.

- All the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation.

- Shareholders holding not less than nine tenths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation.

Section 2(1B) of the Act specifically clarifies that fulfilment of the above conditions by sale of the property of one company to another or by the distribution of the property of a company on its winding up to another company will not amount to an amalgamation.

After a merger fulfils the requirements of section 2(1B) of the Act and is termed as an amalgamation, the Central Government has to be satisfied that the following conditions are fulfilled:

- The amalgamating company was not, immediately before such amalgamation, financially viable by reason of its liabilities, losses and other relevant factors.

- The amalgamation was in the public interest.

- Any other condition specified by a notification in the official gazette, to ensure that the benefits under this section is restricted to amalgamations which would facilitate the rehabilitation or revival of the business of the amalgamating company.

Once these conditions are fulfilled, the Central Government will make a declaration of its satisfaction of such fulfilment. After this is done, the accumulated loss and unabsorbed depreciation of the amalgamating company shall be deemed to be the loss, or as the case may be allowance for depreciation of the amalgamated company for the previous year in which amalgamation was effected. However, clause 2 of section 72A lays down further conditions for obtaining the benefits provided for by clause 1. It requires the following conditions to be fulfilled.

- During the previous year for which set off is claimed the business of the amalgamating company should be carried on by the amalgamated company, without any modifications except those approved by the Central Government.

- The amalgamated company furnishes along with its return of income, a certificate from the specified authority to the effect that adequate steps have
been taken by that company for the rehabilitation or revival of the business of the amalgamating company. This certificate will be necessary for all the assessment years when the carry forward and set off of unabsorbed loss and allowance for depreciation of the amalgamating company is claimed by the amalgamated company.\footnote{Circular No. 350, dated September 29, 1982.}

In the case of \textit{CIT v. Mahindra and Mahindra Ltd.},\footnote{[1983] 15 Taxman 1 (SC).} the Supreme Court reiterated that the three statutory conditions of Section 72(A)(1) of the Act are to be fulfilled for benefits prescribed therein to be available to the amalgamated company. In \textit{Atlas Cycle Industries v. Union of India},\footnote{[1983] 14 Taxman 254 (Delhi).} the Delhi High Court held that the Central Government and the specified authority are required by Section 72A of the Act to see whether the amalgamating company had the resources, or was in a position to obtain resources from any avenue to carry on its business prior to the amalgamation.

According to the guidelines issued by the Central Government,\footnote{Press note from Ministry of Industry dated 23.2.1981, \textit{c.f.} Prasad, \textit{Corporate Mergers and Take Overs} 216 (1993).} the specified authority, while taking a view on financial non viability of the amalgamating company, has to take the following factors into account: losses incurred during each of the three years proceeding amalgamation; accumulated losses on the date of amalgamation as compared to the paid up capital reserves and surpluses; repayment of term loans and interest thereon during three years preceding amalgamation; status of cash credit and excess drawings, if any during three years preceding amalgamation; extent and nature of liabilities in relation to the value and composition of assets on the date of amalgamation; projected future profits in case of undertakings which have commenced production five years prior to amalgamation.

\textbf{CONCEPT OF PUBLIC INTEREST}

One of the three conditions given in Section 72A(1) of the Act for obtaining a declaration of satisfaction from the Central Government is that the amalgamation must be in \textit{public interest}. The term \textit{public interest} has not been defined by the Act. However, the following guidelines\footnote{Press note from Ministry of Industry dated 23.2.1981, \textit{c.f.} Prasad, \textit{Direct Taxes: Law and Practice} 470 (1995).} have been given by the government to decide on whether the amalgamation is in public interest: amalgamation in the context of industrial policy in general and the policy with regard to the industry to which the sick unit belongs to in particular; basic liability of the sick unit; need for tax benefits for revival of the sick unit; how effectively the resources generated through tax benefits under Section 72A of the Act as...
supplemented by other resources that may be required, are made available by the amalgamated company for revival of the business of the amalgamating company's undertaking; nature of product manufactured by the sick unit; employment generated by the sick unit; location of the sick unit; consequences of closure of the sick unit on the industry, ancillary linkages, if any, employment in the region and creditors.

In view of the above the Calcutta High Court ruled in the case of Duncan Agro Industries Ltd. v. Secretary, Department of Industrial Development, that the point to be determined is whether the said purpose or interest would be in the general interest of the community as distinguished from the private interest of an individual.

PROCEDURES FOR OBTAINING BENEFITS UNDER SECTION 72A

Applications for obtaining approval of amalgamation of companies for purposes of Section 72A are required to be made in the prescribed form and addressed to the Secretary, Department of Industrial Development, Government of India. If this specified authority is satisfied that the requirements of Section 72A(1) are fulfilled, it recommends the Central Government to make the declaration mentioned in Section 72A(1). The application to the specified authority can be made even before the amalgamation has been effected in order to find out whether the specified authority will be recommending to the Central Government to make the declaration. This is provided for by clause 3 of Section 72A of the Act. However, even if the application to the specified authority is made prior to the amalgamation, the specified authority will make its recommendation to the Central Government only after the amalgamation has been effected.

After the Central Government makes the declaration, another application has to be made to the specified authority to obtain a certificate that the amalgamated company has taken adequate steps for the rehabilitation on revival of the business of the amalgamating company. This application should also be addressed to the Secretary, Department of Industrial Development, Government of India giving all relevant information regarding: steps that are required to be taken to rehabilitate and revive the business of the amalgamating company; action taken so far on each of the steps; reasons for any delay in taking action, if any.

This application must be signed by the Managing Director of the company and should be accompanied by a certificate from the statutory auditors of the company. In the case of Atlas Cycle Industries Ltd. v. Union of India, the Delhi High Court held that the specified authority under Section 72A cannot reject the

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7. [1983] 144 ITR 94 (Cal.).
application on the ground that the amalgamating company is a subsidiary of the amalgamated company and the amalgamation will not bring any additional management expertise.

**SHOULD SECTION 72A BE RETAINED?**

A merger is a method by which under-utilised assets can be potentially put to full utilisation, and inefficiency can be turned into efficiency. However in the case of intragroup mergers, a reverse merger is a convenient way of cutting down on tax liability. It is common knowledge that the books of accounts can be maintained on acceptable accounting standards and still show continuous book losses. When accumulated losses correspond to the norm of the definition of a sick unit, a merger with a profitable unit is the same group of companies that can yield rich dividends. Usually a genuinely sick unit will find it very difficult to find a profit making unit willing to merge with it due to the simple reason that a sick unit implies huge liabilities to bankers and creditors which in absolute turns can be more than the value of its assets. Hence reverse mergers are usually intragroup and mainly for the purpose of tax avoidance.

The main loophole in Section 72A is that it does not take into account the fact that after a reverse merger, there can be a de-merger of the company that was formed by the merger. If companies A Ltd. and B Ltd. had merged to form C Ltd., then company C Ltd. may form a subsidiary company D Ltd. and transfer the assets of company B Ltd. to it. If company A Ltd. was the healthy unit and company B Ltd. the sick unit, the new company C Ltd. will enjoy the tax benefits from the unabsorbed loss and allowance for depreciation of company B Ltd. for an assessment year or two and then demerge.

However doing away with Section 72A of the Act would be too drastic a step. If such reverse mergers were not encouraged through tax concessions as Section 72A of the Act does, the only way out for sick units would be to close down or to be taken over by the Government. Closure of a sick unit has many social ramifications and a takeover of all sick units by the Government is not feasible either. The Raja Chelliah Committee Report on tax reforms has acknowledged the practice of buying losses through the acquisition of loss making companies. However it has stated that in the larger interest of the economy, the tax benefits for reverse mergers given in S. 72 is necessary. It has noted that in the case of several sick undertakings, the only hope for their revival is through new promoters replacing those who have failed before. The entry of such new promoters would automatically involve substantial change in shareholding. If there is denial of the benefits of carry forward and set off of accumulated losses and allowances for depreciation, no healthy unit will be tempted to merge with a sick one. Hence it can only be concluded that Section 72A must not be deleted.

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What must be ensured is that the scrutiny of any proposed amalgamation by the specified authority is made more stringent. It must see to it that the sick unit is revived or rehabilitated by the merger. In case of a demerger, there must be provision for imposing a fine that will be equivalent to the tax benefits enjoyed as a result of the reverse merger, if it can be shown that the merger was solely for purposes of tax avoidance. It is imperative that the government should insert a provision into the Income Tax Act, 1961 that provides guidelines that can be used in case of a demerger to see if the earlier merger was solely for purposes of tax avoidance. If it is found to be so, a fine equivalent to, or greater than the quantum of tax avoided as a result of the merger should be imposed on the amalgamating company that benefitted from the merger. Such a provision is needed in view of the Supreme Court decision in Mc Dowell and Co. Ltd. v. Commercial Tax Officer. In his decision Chinnappa Reddy, J., came down heavily on tax evasion through colourable tax planning devices. It was ruled that in a welfare state like India, it is the obligation of every citizen to pay taxes without subterfuges. The earlier view that a person could arrange his affairs in such a way as to avoid taxation was expressly overruled.
THE COMPANIES BILL, 1997: PROVISIONS ON RAISING FINANCE

Nithyanandan R*
S. Suhas*

The Working Draft of the Companies Bill, 1997 has been tabled in Parliament and been made public. This Article reviews the changes proposed in the Companies Bill regarding raising of capital. These aim at enabling companies to get access to domestic and international markets, and raise more funds in a shorter timeframe, besides making them aggressively competitive in world markets. Each sub-element covered in the report is discussed below.

SEBI AS SOLE AUTHORITY

The Bill has proposed (vide Clause 47) that the provisions relating to prospectus, allotment, listing and other matters relating to the issue of securities, shall be administered by SEBI in the case of listed public companies and companies proposing to be listed. In other cases, the Government shall be the administering authority. This is being done as there is an overlapping jurisdiction (Department of Company Affairs and SEBI) and conflicts in administration of law in the existing Companies Act. Against this backdrop, Schedule II of the existing Act has been deleted and shifted to the Rules. The Bill (vide Clause 50) provides for the registration of the prospectus with SEBI (instead of the Registrar of Companies), while a copy will be forwarded to the Registrar of Companies ("RoC").

In the Companies Act, 1956, registration of prospectus is done by the RoC for all types of companies, and the role of SEBI is restricted to vetting of prospectuses to ensure that the guidelines issued by it are duly complied with. As a result of this proposed amendment, the role of the RoC has been reduced to record-keeping. Though the rationale behind this proposal may appear sound, it is not clear how the administration of certain provisions of the Act can be vested with an authority other than the Department of Company Affairs ("DCA"). The RoC must continue to be vested with the administration of the Companies Act, including provisions relating to prospectus (such as the registration of prospectus) and this should not be diluted and taken away on the grounds of liberalised policies. In fact, the role of the RoC in the liberalised environment is much more important than it was ever before.

Indeed, while vetting the prospectus, RoC approaches the issue from a totally different angle based on the history of the company, documents filed by the company with it, past record of the promoters/company, etc. Hence it is in a

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better position to examine the offer document with respect to the past record of the company, promoters background, legal compliance and offer its comments. Further, while the role of SEBI focuses on the issue of securities, the role of RoC does not stop with the issue alone, but extends till the company is wound up. The RoC has also got powers of investigation under various provisions of the Act and hence it is only proper that the administration lies with RoC. It is possible that the shifting of administration of the Act will complicate matters further when a company gets delisted for various reasons.

It is felt the SEBI’s role must continue to be that of managing intermediaries of capital markets, laying down guidelines for the issue of securities and protecting investor interests. Recently, SEBI issued a guideline to exempt companies from vetting the offer documents which fulfil its guidelines and in the process to concentrate on those companies which come out with issues which are not in line with the guidelines. This is a clear case of control by exception. This aspect has not been considered by the Bill since SEBI itself wants to restrict its role relating to capital markets. In view of the volume of transactions spread over different parts of the country, a premier watchdog body such as SEBI cannot be expected to fulfil purely administrative functions. It would be wise to strengthen the already existing offices of the RoC and make themselves responsible for proper administration of listed companies also within the framework of SEBI guidelines. An overall view of the administration of companies must be taken into account before dividing the administration of the Act between SEBI and the Central Government. In any case, the minimum that requires to be attended is to suitably amend the Bill to provide for registration of prospectus by SEBI only after clearance from the RoC.

**RAISING CAPITAL BY UNLISTED COMPANIES**

The Working Group had earlier recommended that public unlisted companies accessing funds (debt, equity, hybrid or any other form of security) from their members or by private placement should come under the purview of the DCA insofar as regulation, policing and enforcement are concerned. As per Clause 73 of the Bill dealing with further issue of capital, the scheme of option given to employees, officers or working directors made by a public company shall be subject to the conditions specified by the Government or SEBI as may be applicable.

It appears that the recommendation of the Group has been specifically accepted only in respect of employee stock options. In other cases such as private placement, the Bill is silent and the Government is not specifically empowered to administer the provisions of the Act relating to the issue of securities by unlisted companies. In the liberalised context, it is essential to frame proper guidelines and stringent disclosure norms relating to fund-raising by even unlisted companies in order to protect the interests of investors and ensure transparent corporate governance. The Bill should be amended so as to specifically provide for such
things, and empower the Government to frame guidelines and regulate the issue of securities by unlisted public companies.

**FREEDOM TO SELL, PURCHASE, TRANSFER AND ACQUIRE SHARES**

The Bill has deleted Sections 108A to 108I of the Companies Act, 1956 under which prior permission of the Central Government is required for the acquisition and transfer of shares. This is being done in view of the repeal of the MRTP Act and the enactment of the Depositories Act, the new Takeover Code and changes in the Securities Contracts (Regulation) Act, 1956.

**HYBRIDS, DERIVATIVES, OPTIONS AND SECURITIES WITH DIFFERENTIAL RIGHTS**

The Working Group had earlier recommended the introduction of suitable provisions to enable companies to issue hybrids, derivatives, options and shares and quasi-equity instruments with differential rights. The Group had also recommended framing of suitable guidelines by the DCA (for private and unlisted companies) and SEBI (for listed companies) for issue of securities, with greater stress on disclosure of corporate information.

The reason behind this recommendation is to meet the complex requirement of financing needs. The recommendation is given effect in the Bill in the form of definition of “securities” which includes hybrids, derivatives, options as well as shares and quasi-equity instruments with differential rights. The administration of the Act relating to issue of such securities is vested with SEBI (for listed companies and companies seeking enlistment) and DCA (for other companies). While the recommendation is logical, it is not clear whether the market/investors would be really in a position to understand the implications and risks associated with such securities. It should be noted that the Group, while making this recommendation, had advised the DCA and SEBI to lay stress on disclosure requirements instead of analysing the risk potentials of such instruments which are rarely quantifiable. Under the circumstances, it is not fair to expect the market and the investors to take a sound investment decision.

**BUY-BACK OF SHARES**

The Bill has introduced provisions relating to buy-back of shares vide Clause 68. These include passing of a special resolution, filing a declaration of solvency and complying with certain norms such as a ban on issuing any new shares (including rights issues but excluding bonus issues) for 12 months, maintenance of a debt-equity ratio of less than 2:1 and such other restrictions relating to voting rights, dividend rights, bonus issues and rights issues eligibility. This buy-back can be for preventing a take-over or for treasury operations.

While this is a welcome move, it should be ensured through suitable guidelines that this provision is resorted to only to meet certain specific purposes and not misused by the corporate sector to get rid of some shareholders. Guidelines
should protect the interests of the minority shareholders as well as employee shareholders. A clear-cut guideline in this regard should be framed immediately after enactment of the Companies Bill.

**FULL BUY-OUT**

The Bill, vide Clause 272, provides that in the event of any person, group or body corporate acquiring 95 per cent of the shares of a public listed company (either through takeover or otherwise) and the company getting de-listed, the residual shareholders should sell their shares to the 95 per cent owner at a price determined in accordance with Government rules. This amendment seeks to legislate in India the key feature of shareholder democracy. This move takes care of the interests of the residual holder who may face the problem of selling at a lower price due to non-listing. This is similar to the provisions of Section 395 of the present Act and must be implemented with strict compliance norms. Proper certification by the company's auditors should be insisted upon for determining the share prices to be offered to the residual shareholders. It would also be worthwhile considering the extension of this proposal on a voluntary basis to investors whose holding exceeds the threshold limit of 80 per cent ownership, as, for all practical purposes, the minority shareholders have very little leverage.

**INDIA DEPOSITORY RECEIPTS (IDR)**

The Working Group had earlier recommended the issuing of Indian Depository Receipts (IDR) similar to Global Depository Receipts (GDR) or American Depository Receipts (ADR). This would imply that foreign companies could issue IDRs where the underlying security is the equity or any other security of a foreign company. Clause 43 of the Bill empowers the Government to prescribe rules for issue of IDRs. This provision could take care of the possibility of India getting economically integrated with South East Asia and the SAARC countries. It should, however, be ensured that the funds are used only for Indian operations and dubious diversion of funds abroad is avoided.

**GLOBAL DEPOSITORY RECEIPTS AND AMERICAN DEPOSITORY RECEIPTS**

The Group has recommended that issuers of GDRs and ADRs must file with the RoC the (i) prospectus or offering circular after such issue (ii) basic data on the issue such as price of the depository receipt and amount subscribed and (iii) material details after conversion to shares. This is to monitor the flow of foreign investment in India through the GDR and ADR route, which will have an impact of Indian capital market. In the Bill, no specific provision has been made for ADRs, but Clause 52 stipulates that the information memorandum containing the aforesaid particulars must be filed with the RoC after the closure of offer. This provision recognises the role of GDRs and ADRs in the capital market.
SHELF PROSPECTUS

The Bill, vide Clause 51, provides for the filing of the shelf prospectus, which will have a validity period of 365 days with suitable updates on material facts, litigations and changes in financial position between the previous offer and the next. This facility is extended to public sector financial institutions and banks and companies specialising in infrastructural finance. The Government is empowered to extend this facility to other corporate bodies.

This provision will enable financial institutions going to public more than once in a year, since it is not necessary to prepare a full-fledged prospectus every time. This is a good suggestion and the Government should provide for the compulsory updation of data once in a quarter, with severe punishment for failure to comply with guidelines.

BOOK-BUILDING

The Group had earlier recommended that the definition of “prospectus” should exclude the information memorandum issued at the time of book-building (prior to prospectus). It had also recommended the filing of such memorandum with the RoC on formal closure of book-building. Clause 52 of the Bill incorporates these recommendations.

Book-building is essentially a pre-issue exercise to get better idea of the demand and final offer price of an initial public offering (IPO). The provision needs to be implemented with judicious care and caution in the prevailing capital market environment.

EMPLOYEE STOCK OPTIONS

The Group has recommended that the employee stock options (warrants or other securities with pre-specified date of conversion) should be explicitly incorporated in the new Act. Accordingly, Clause 73 of the Bill provides for such issue of securities to employees, officers and working directors, provided the option together with the existing capital shall not amount to an increase of more than 5 per cent of the existing capital.

It is felt that there is no need to legislate regarding employee stock options. As part of human resources development, managements themselves would volunteer to offer employee stock options in line with the guidelines.

THE ‘TREE’ COMPANIES AND THEIR KIN

The Group has recommended that the “units” issued by plantation, forestry, horticulture, fisheries and similar companies be treated as “security” for the purposes of the provisions of prospectus under the Act. These are now outside the purview of SEBI, DCA or the RBI. The track record of the large number of companies in these sectors is not at all encouraging, and the gullible investor gets trapped without any worthwhile legal remedies in case of the failure of such companies to fulfil these promises.
It is necessary to prescribe suitable guideline to include these “units”. The Bill, vide Clause 2(57), defines “securities” as those which include units or any other instrument which entitles the owner to be allotted any kind of property or payment of money in lieu thereof at a future date. Thus, these types of companies are now treated as “security” and covered under the Act. This is a welcome move and must be enforced in letter and spirit. The recommendations of the Working Group on raising of capital takes into account contemporary developments in the capital market and have been incorporated in the Bill. While this is laudable, it should be ensured that the liberalisation and simplification measures are backed by strict compliance norms and transparent disclosure requirements. Hence, SEBI and the Government must notify appropriate guidelines soon to protect the interests of investors and all concerned.
NOTES AND COMMENTS

NBFC REGULATION: MISTAKES OF THE PAST AND CHALLENGES OF THE FUTURE

Gautam Rohidekar*

INTRODUCTION

After India has adopted the policy of economic liberalisation, the spotlight has been firmly focused on the financial markets and the regulatory system. 1997 will go down in history as the year of the 'CRB' scam. Chain Roop Bhansali, a Chartered Accountant from Sujangarh in Rajasthan, wove a web of financial deceit with a string of dummy companies he had floated over the last few years.

**NBFCs - REGULATORY FRAMEWORK**

a) Statutory Framework

The NBFCs come under the purview of Chapter III-B of the RBI Act, 1934 and directions issued thereunder. Section 45-I(e) specifies that a non-banking financial institution may be a company, corporation or a co-operative society.

b) Guidelines

There have been several directions issued under the various provisions in Chapter III-B which are quite exhaustive.¹ The Act and the Directions read together have had the effect of classifying the companies according to the business they carry on.² A point to be noted in this regard is that a company which carries on the business of agricultural operations, or industrial activity, or acquisition of immovable property is not an NBFC.³

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¹ The relevant & important directions are:
   i) Non-Banking Financial Companies (Reserve Bank) Directions, 1977.
   ii) Miscellaneous Non-Banking Companies (Reserve Bank) Directions, 1977.

² The NBFCs can be classified into:
   i) An equipment leasing company;
   ii) A hire purchase company;
   iii) A housing licence company;
   iv) An investment company;
   v) A loan company;
   vi) A mutual benefit financial company;
   vii) A miscellaneous NBFC (Chit Funds);
   viii) A residuary NBFC.

³ Section 45-I(c).
THE CRB SCAM

Until January 1997, registration was not compulsory for NBFCs. This enabled CRB capital markets, an NBFC which collected deposits to operate in

Thus, it becomes fairly obvious that the NBFCs have acquired a dubious reputation over the years. They have shown a remarkable tendency to break rules and also exploit all the loopholes that an inefficient regulatory system seems to offer them.

THE CRB SCAM

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4 Id.
6 Ibid. at p. 1044.
7 Peerless General Insurance & Investment Company v. RBI, AIR 1992 SC 1033; This case came up because Peerless contested the application of RNBC Directions 1987 to one of their schemes. This decision has nothing in common with the 1987 decision.
the dark and indulge in malpractices. Bhansali started out with Rs. 4.58 crore as his deposit base, but by 1996 this had grown to an astounding Rs. 139.83 crores, largely due to the fact that he used to offer a relatively high interest rates of 7-10%. Under the existing NBFC (RBI) Directions, 1977, he could not offer an interest of more than 14%. But he circumvented this requirement by providing for staggered rates of interest i.e., higher the investment, the higher the interest rate, and those who could invest a lot of money (in violation of the law) were offered more than 14%.

Another significant development was the credit rating given to these deposits. CARE, a leading credit rating agency had always given the deposits of CRB capital markets an A+ rating. This, to the layman, meant that the deposit return was highly probable, both on the interest as well as the capital that had been invested. Though the credit rating came down after September 1996 as the irregularities came to the fore, during the boom time, the credit rating was the propeller drawing in the funds. Today, after the scam, the agency claims that it based its rating on the balance sheet as given by the auditors of CRB capital markets, and repeated requests for more information were turned down. Thus based on information which was available, the deposit was given an A+ rating. This raises certain issues of regulation. Shouldn't non-disclosure of information, per se, be a ground of giving a below par rating? Shouldn't more care be exercised in giving such ratings? The crux of the issue is that in the mind of the investor a good rating makes up for the lack of reliability and safety which are there in bank deposits. If credit ratings are given in such a lax manner, it is obvious that the investor would be the one to suffer.

The NBFC (RBI) Directions, 1977, as a rule, do not permit any deposit which is repayable within twelve months. The maximum period ranges from sixty months to eighty four months.

Even the nomenclature of business was misused by the CRB group. Loan or investment companies are not allowed to raise deposits which exceed, two times the 'Net Owned Funds' of such a company. An equipment leasing company is allowed to collect deposits which may be as high as ten times the net owned funds of the company. Although the main business of CRB capital markets was in disbursing loans and investing in companies it masqueraded as

10 Credit Analysis & Research a subsidiary of IDBI and a very respected credit rating agency.
11 The auditors vanished after the news of the scam broke out.
12 Paras Section 6 & 7.
13 Para 5(c) NBFC (RBI) Directions, 1977.
14 Net Owned Fund (hereinafter NOF) is defined in explanation to para 3 of the above Directions as the aggregate of the paid-up capital and free reserves reduced by loss and other charges.
15 Para 5(3).
an equipment leasing company and hence raised a large amount of money which it was not entitled to.\textsuperscript{16}

This scam has also raised the issue of the legal status of deposits. It is astonishing to note that the Act and the Directions are absolutely silent on the point. Hence, the law which would be applicable is the Companies Act, 1956 under which secured creditors and secured debenture holders claim priority in the distribution of assets on liquidation. It is only after this that unsecured debenture holders' claim are met and it is in this category that the deposit holders are classified. Hence, a deposit is an unsecured instrument and if a company goes into liquidation, there is a good chance that the amount may not be repaid. This is what has occurred in the CRB scam.

Also it appears that the RBI itself was not aware of its regulatory power. Under Section 45-K the RBI has the power to call for any information "relating to or connected with deposits received". Under Section 45-K(4), any NBFC can be banned from accepting deposits on violations of directions issued under clause (3) of the same section. The RBI wielded this power in the CRB matter but it was too late. A lot of money by way of deposits had already been collected. S.P. Talwar, Deputy Governor of RBI has observed "we did not have the power to inspect the asset side of a NBFC till recently..."\textsuperscript{17} This only shows the ignorance about existing legal provisions. Section 45-L which is in a omnibus kind of provision clearly empowers the RBI to look into all matters of the NBFCs. It only takes on RBI order to be issued and the NBFC has to disclose all information.\textsuperscript{18}

Lastly, the misdeeds came to light in September 1996 only because CRB capital markets on its own, applied for registration. It was prompted by the fact that if it was registered, it could promise more than 15% interest on deposits which non-registration would not give it. Thus, the scam came to light not because of any effort at regulating the company but because the company decided to avail itself of a benefit.

\textit{CHANGES BROUGHT IN UNDER THE RBI AMENDMENT ACT, 1997}

The first point is about the time in which the amendment was brought into force. The amendment was independent of the scam and though it received Presidential assent on 28th March, 1997, it is deemed to have come into force on 9th January, 1997. One can only wish that the amendment was brought into force a bit earlier, because the amendment atleast addresses all the loopholes that the scam highlighted. There have been some far reaching changes in the law.

\textsuperscript{16} Supra, n. 12 at p. 6. The difference was to the tune of Rs. 88 crores which was nearly 2/3rds of the amount raised between 1994 and 1996.

\textsuperscript{17} Supra, n. 14 at p. 71.

\textsuperscript{18} Sections 45-L(1) gives this general power in sub-clause (2).
(i) The first important change is to section 45-I which is the definition clause. A comprehensive definition of a NBFC has been adopted and the definition is very wide. It includes a "financial institution which is a company" or "a non-banking institution which is a company and which has as its principal business the receiving of deposits". This is a consolidation of all definitions which were prescribed in the directions and is a step in the right direction.

(ii) A new section called Section 45-IA has been introduced. Under clause (i) of this new provision every NBFC whose NOF exceeds 25 lakhs rupees, must register itself within six months, if it is less than 25 lakhs rupees it is given 3 years time to apply for registration.

(iii) It is also interesting to note that when a NBFC applies for registration, the Act mentions several criteria which have to be satisfied before a certificate of registration is issued. Among the important ones are "public interest" and "interest of the depositors". In fact, throughout the amendment these are two prerequisites for the exercise of any power by the RBI. It is a far reaching provision which should give RBI complete control over NBFCs.

(iv) The concept of NOF has been completely changed and has been made more relevant and up-to-date. The NOF is now defined as the aggregate of paid up equity capital and free reserves. From this aggregate, what is deducted is accumulated balance of loss. Also, investment of the NBFC in its subsidiaries, group companies and other NBFCs is also deducted. If in excess of 8% of the paid up capital and free reserves, loans, debentures, advances or bonds have been given to subsidiaries, or group companies even this amount has to be deducted. It is fairly obvious that this new method of calculating NOF, on whose basis ceilings on deposits and interest rates are based is far superior to the old model. In addition to this, it addresses the problems caused by the CRB scam where the NBFC invested nearly 50% of its money in subsidiaries and group companies. This is definitely a step in the right direction.

(v) Other provisions relate to the kind of securities which a NBFC can invest in, which were already prescribed in the Directions. A new section makes creation of a reserve fund from the net profit to the tune of 20% compulsory.

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19 Supra, n. 25 at p. 62. Section 2(3) of the Amendment Act.
20 The New Section 45K(L)(i).
21 The New Section 45K(f)(ii).
22 Section 45IA(4). Some of the considerations are the company's ability to fulfill claims of depositors which will arise in due course.
23 Supra, n. 20.
24 Explanation to Section 45IA(5) 3rd proviso.
25 Section 45-IB.
26 Section 45-IC.
There are many provisions in the new amendment which confer extensive powers to the RBI to inspect books of accounts of NBFCs and no aspect is left out. The provisions are slightly harsh on NBFCs but are necessary.\(^{27}\)

(vi) Now we come to the most important amendment. A new section now rests the power in the Company Law Board (CLB) to order repayment of deposits.\(^{28}\) Every deposit shall, unless renewed, be repaid in accordance with the terms and conditions of such deposit and, if it is not repaid, the CLB on its own or on the basis of an application by the depositor, order that the deposit be repaid. The grounds of this order can be either "to safeguard the interests of the company" or "in the interest of the depositor" or "public interest".\(^{29}\) An NBFC is to be given an opportunity to present its case before the CLB.\(^{30}\) The order may be related either to the repayment of interest or the deposit amount or both. It should be noted that this provision does not create any charge on the assets but only makes the repayment of deposit legally binding. So, if there is a deposit which is still not mature and the company goes into liquidation, there is no charge on the assets.

**CONCLUSION**

At the present juncture NBFCs are in dire straits. The NBFCs do not know what other restrictions or limitations would be imposed on them. They have even approached commercial banks who are traditionally their competitors for funds and even the RBI wants to regulate the amount being lent to the NBFCs. The latest amendment which makes repayment of deposit legally binding is also very harsh. If an investor deposits with NBFC, he makes a conscious decision preferring it over a bank deposit. He has taken that risk already. What the amendment does is to take away that element of risk which upsets that balance. An investor has to take a risk. A proper solution would be to improve the way credit ratings are given to these deposits. That system should be made more accountable and transparent and then the decision should be left to the investor. One understands the RBI's rigid stand on NBFCs but this sector should not become the victim of over-regulation. It requires a fine balance and one can only hope that the RBI walks this tight rope.

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\(^{27}\) Section 45-JA; Section 45-MB, Section 45-MC; Section 45-NA, 45-NB, which are all new provisions.

\(^{28}\) Section 45-QA.

\(^{29}\) Section 45-QA(2).

\(^{30}\) Section 45-QA Clause (u) proviso.
DO BE DO BE DO - LANGUAGE, LAW AND THE THEORY OF DECONSTRUCTION

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INTRODUCTION

One of the most important skills a law student acquires is the use of language. He/she is encouraged to use language economically and yet lucidly. However, every lawyer or law-maker knows the weaknesses of language, be it in statutory interpretation or while drafting a sale deed. The limitation of language can be illustrated by a simple comparison of the following statements:

"To do is to be" - Sartre
"To be is to do" - Nietzsche
"Do be do be do" - Frank Sinatra

This sums up quite effectively how language works and does not work. It is in this context that the deconstruction theory is resorted to. It not only breaks down legal theory, but also the very language of law with the help of linguistic techniques. The focus of this paper is to examine the theory of deconstruction as a tool for lawyers and evaluate its effectiveness in the interpretation of legal texts and theories.

A BACKGROUND TO DECONSTRUCTION

Philosophical thought in 19th century Europe had rejected God and Reason in the wake of new inventions and discoveries. Revolutionary ideas erupted in the likes of Nietzsche and Freud. They discredited life in toto - rejected it as having no meaning or intrinsic value. Their quest was not for an ultimate truth; rather they proclaimed that there was no one truth. Nietzsche's cry that 'God is dead' was echoed by the likes of Camus and the Existential scholars. His philosophy took root in France under Jacques Derrida who applied it to the interpretation of literary texts. Derrida extended Nietzsche's notion of meaningless into language - he believed words were signs on paper and what they signified was relative to each reader. Interestingly, in Indian Philosophy the quest for the meaning of life has thrown up many answers, including Nietzsche's that life has no meaning. The story of Shvetaketu epitomises the existential message - that the essence of the Banyan tree lies in the emptiness within the seed.

Deconstructionists apply existential principles to the reading of literary texts. Their premise is to de-centre or to move away from the centre, or the notion of being, as knowledge is perspectival and no reading is the final reading.

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Derrida questions the structure of language, the meaning of signs and the inter-relation between them. He examines how a sign is reduced to thought and infers that every sign has infinite meanings. This indeterminate character of the meaning of signs is the basis of Derrida's theory.

The techniques used by Derrida to deconstruct include the use of etymology and language. Another technique is to inverse so-called 'oppositional hierarchies' or two connected ideas/concepts. Deconstructionists also try to reach common point between two opposing concepts - for instance, nature and culture meet at the point of incest taboo (called as 'scandal'). At this point they are no longer in opposition and influence each other equally. Derrida's resistance to theory and to structure has been enhanced by critics such as Foucault, de Man, Fish and Miller. All of them are critical of the use of language as a medium of expression. They believe language is an unreliable medium for stating simple truths due to its rhetoric and figural component.¹

An immediate implication of this is that any text is historically conditioned. Foucault goes ahead to say that even the interpreter/reader is equally conditioned and hence the meaning is only derived from the interaction between the text and reader. Or in other words, the text is both all meaningful and meaningless. Deconstructionists, therefore, look for hidden and unintended meanings and inter-links between words - they let the text speak for itself through what they call the free play of texts. A deconstruction of myths will lead us to the conclusion that there is no common theme or 'Centre'.² Likewise, if one were asked to identify the core of music, it would be impossible. It is only the shadows that are actualised.

In summary the tenets of deconstruction are:

1. all readings are misreadings;
2. each reader must produce his own meaning from the text;
3. let the text speak for itself;
4. the birth of the text leads to the death of the author;
5. the only purpose is to end in an impasse.

The resistance to theory on the part of the deconstructionists is only a manifestation of theoretical contradictions. However, one cannot argue that this is sufficient reason to do away with theory altogether. As de Man points out, it would be like 'rejecting anatomy because it has failed to cure mortality'.³ The importance of language and play of words in deconstruction theory is a limiting factor - theorists use the same language or word games to expose structural flaws. In this sense the theory is trapped within language. Derrida attempts to 'escape'

² Jacques Derrida, *Structure, Sign and Play in the Discourse of Human Sciences*, *ibid.* at 117.
³ Paul de Man, *supra* n. 1 at 335.
by coining his own phrases such as *differance* to mean difference and deference with respect to the meaning of signs. The limitation is not only of practical consideration but also professional. Deconstructionist critics are authors in their own right and use the very medium they seek to demolish. This contradiction works to the advantage and disadvantage of the writer-critic. For one, it makes him doubly cautious of his choice of words, and secondly, it binds him within his choice. His aim is to be precise, yet language often fails him. He, like his interpretation, ends in an impasse.

**ADAPTATION OF DECONSTRUCTION THEORY TO LEGAL THEORIES AND TEXTS**

The applicability of deconstruction theory to law includes both deconstruction of legal theories as well as legal texts. The deconstructionist's definition of the word 'law' would be closer to the positivist definition of law as it is: the word law derived from Middle English Law *legh*, Old English *Lagu* from Scandinavian (Iceland) or Layer, the plural of which is *Lag*, literally that which is laid down.\(^4\) Deconstruction of a legal theory involves freeing it of its assumptions and claims. For instance, a critique of Hart's theory of rule application will reveal that his so-called language centred premise is essentially a 'traditional' and objectifying body of ideas.\(^5\) Hence, the critic concludes that rules are taken most seriously when they are treated most sceptically.

Whereas Hart believes that rules must be applied, the critic argues that the meaning and application of rules is contextual and therefore open. Further, applying rules is a political matter of taking sides: the only questions are which and when. For example, the meaning of the word 'vehicle' originally meant horse-drawn carriages. It later came to exclude these from its ambit. Hence, rules have a core of accepted meaning and a penumbra of uncertainty - in such a case, Hart's three-step process of rule application is anything but cut and dry.

A deconstruction of contract theory is an attempt to de-link the basic notions of intention from obligation. Atiyah points out that intention need not always create obligation even in explicit promises - what of the person who orders a meal in a restaurant without any intention of paying? He is presumed to have created an obligation because it would be unfair to the promisee who has placed reliance on him. These are the very reasons underlying the obligation of an implicit promise. Atiyah thus shows how the classical Will Theory of Contract ultimately depends upon the implicit promise (which is 'supplementary' or 'less privileged' in Derrida's terminology). The theory reflects the 19th century notion of executory promise where implicit promises were the exception. This example of deconstruction exposes the pervasive underlying ideology which gives rise to the privileging. Moreover, it gives us the chance to investigate the unquestioned ideological assumptions in our current doctrine. Atiyah replaces Will Theory

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with reliance and benefit as the sources of the promissory obligation, thus establishing a new hierarchy. The author points out that underlying the binding nature of implicit promises is the Will Theory or the intention to create such obligation. Hence, Will Theory and reliance-benefit theory exist in a relationship of difference. More interesting is the deconstruction of a legal text: what happens when a critical essay such as a judgement extracts a passage from an authority or an earlier case and cites it? J.M. Miller answers this question using the analogy of host and parasite.

Miller rephrases the question as - is a citation an alien parasite within the body of its host, the main text, or is it the other way around, that is, the interpretative text being the parasite which surrounds and strangles the citation which is its host? According to him, the cited passage is the food; the essay, the host; and the critic, the parasite. The passage is broken, divided, passed around and consumed by the critics. Hence, it is at once good, a gift and a host. Further, if the passage is food for the critics, it must have in its turn eaten, that is, relied on earlier texts. Miller's analysis is centred around the citation of a poem or part of it in a critical essay. It is especially relevant to the critique of a judgement under Common Law where the principle of stare decisis applies. The judges are bound by precedents yet they have to face new circumstances each time. It is the iterable character of law which thus makes Rule of Law possible.

The Supreme Court of India has expanded the right to life under Article 21 of the Constitution to include the right to live with human dignity, right to housing, and right to work. Each expansion of the right is derived from a preceding judgement. Thus, each 'eats' from the other and is, in turn, 'eaten' - the role of the Judge being that of the parasite. Or, to use Dworkin's phrase, it is the process by which the chain novel of law is created.

To this analysis can be added the Foucauldian perspective. Foucault questions what is an author? Is a Judge or legislator an author? If a judgement or a statute is a text, it should speak for itself. There is no need to go back to the author for reference. What the author intends may not be what the text says. Hence, he disregards the author as the origin and the owner of the work. This can be supplemented by a practical analysis of the legislative procedure - legislators may have voted without reading the bill, they may have voted because they are paid to do so or in return for political favour. In such a case why do we attach so much importance to the legislator's intention? The complexity of legal texts often results in the lawyer making a partial reading of the text, be it case law or an article. He represents only favourable interpretation of the text. Hence, a legal battle is an attempt to defend opposing interpretations. In the language of deconstructionists, this would be a verification of the first tenet, that all readings are misreadings. If this is true, then law cannot be a rational enterprise and it would be impossible to achieve the Rule of Law. At the same time, it is the

7 J.H. Miller, The Critic as Host, supra n. 1 at 144.
iterable nature of legal materials and the incompleteness of legal interpretations which enables the Rule of Law to operate in the manner we think it should. Thus, Derrida would conclude that the free play theory and the intent theory must co-exist in an uneasy alliance - in a relationship of differance or, in other words, what is not intended is as important as what is intended.

A CRITIQUE OF DECONSTRUCTION

The application of deconstruction of legal theory provides the lawyer with three important uses for it:8

1. Deconstruction provides a method for critiquing existing legal doctrine - a deconstructionist reading can show how arguments offered to support a particular rule undermine themselves and instead support an opposite rule.

2. Deconstruction techniques can show how doctrinal arguments are informed by, and disguise ideological thinking.

3. It provides a new kind of interpretative strategy and a critique of conventional interpretation.

An important contribution of deconstruction techniques to Law is the understanding in the concept of locus standi. The traditional notion only permitted the aggrieved to sue. The presumption being that injury done was quantifiable as it affected one/few persons. However, upon closer examination it was found that the aggrieved party could even be many. Hence, the concept was broadened to provide for Public Interest Litigation (PIL). This effectively shattered the premise that injury had well-defined limits. Environmental damage cases have shown that human suffering is often incalculable as no accurate measurement of potential adverse effects is possible.

As to the question, why deconstruction? It is not merely a semantic or reductionist exercise. It provides us with striking insights and unsuspected incongruities and differences in our literary and philosophical writings.9 In law, it is contemporary with reconstruction or the attempt to replace fault norms with more coherent ones.10 Moreover, as Gadamer points out,11 the interaction with the text throws into relief the prejudices of the interpreter. This leads us to the interference that both the text and the interpreter must be understood within the limits of their effective history, stylised practices and prejudices.

Critics of deconstruction project the theory as useless12 Fish believes that meaning is determinable and that Derrida and de Man are under a misconception.

8 J.M. Balkin, supra n. 6 at 745.
Further, deconstruction belongs squarely within the framework it seeks to deconstruct. It has no practical application as it does not replace the edifice it seeks to destroy and it cannot be anti-foundationalism and provide a foundation at the same time. As to the bottom-line, is nihilism the unavoidable consequence of deconstruction? It is best answered if compared with psychoanalysis. Dreams, like texts, are human creations. Their interpretation may result in enlightenment and emancipation of the subconscious mind. The goal of emancipation is an act of self-realisation - for the deconstructionist, it is a political and moral choice informed by the activity of deconstruction itself. Hence, one may liberate the text, but most often one ends in an impasse.

Notably, deconstruction cannot be limited to a particular ideology or methodology. Ancient Vedic scriptures used it as a tool of reasoning before it was recognised as such. Its potency as an analytical aid is every interpreter's discovery. For the die-hard believers in the meaning of life or law, deconstruction is anathema. They prefer to struggle with rules of statutory interpretation rather than look for the obvious. A parting shot to Nietzsche comes from an unlikely source - graffiti on the wall: "God is dead" - Nietzsche: "Nietzsche is dead" - God.

**CONCLUSIONS**

At this point the question to be asked is, who is the ideal interpreter? According to Gadamer, it is a person who is as aware of his prejudices as he is of the texts. The interpreter should approach the text with the presumption that it has an answer. If necessary, he must reconstruct his question in order to allow for a dialectic between the text and himself. To this extent, Gadamer is closer to Foucault than Derrida - whereas Foucault interacts with the text purposefully, Derrida merely 'plays' with it. However, Gadamer believes that the dialectic of question and answer is absent from legal interpretation as the lawyer/Judge/student approach the text with a purpose - to perfect the art of winning arguments. Hence, he infers that legal interpretation is methodological and not hermeneutical, that is, there is no genuine attempt to understand on the part of the reader.

It has been pointed out that the deconstruction techniques will be of use to Left legal scholars because of the historical connection between continental philosophy and Left political thought. Moreover, they have more to gain from showing the ideological character of the status quo than does the Right. Critical Legal Studies scholars enlist deconstruction as a weapon against every last precept and principle of established judicial thought to expose the antinomies of classic liberal reason and jurisprudence.

13 J.M. Balkin, *supra* n. 6 at 748.
14 Brad Sharman, *supra* n. 11 at 389.
15 J.M. Balkin, *supra* n. 6 at 786.
16 Christopher Norris, *supra* n. 12 at 168.
WHY DOESN'T IGNORANTIA JURIS EXCUSE? - A STUDY OF THE LAW RELATING TO MISTAKES

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INTRODUCTION

The functions of criminal law are two fold in nature. Primarily, it aims at the imposition of corrective measures to prevent the occurrence of criminal acts. Subsidiarily it aims at correction in relation to the mental state of the person or persons responsible for the criminal act. If the aim of criminal law were only the former, it would serve to punish the act itself, irrespective of whether it was done unconsciously, negligently or intentionally. However, the law aims at punishing those responsible for the act, and responsibility appears to imply a certain mental state - in this context, a guilty mind. The maxim "actus non facit reum nisi mensit rea" has acquired an imposing presence in criminal jurisprudence. It is by virtue of this maxim that the idea of mistake as an excuse has come to be accepted.

The general principle is that a person is presumed to know and intend the natural consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of his crime.

The absence of mens rea is one such excuse. The excuse of mistake is based on the ground that a person who is mistaken or ignorant about the existence of a fact cannot form the requisite intention to constitute the crime and is therefore not responsible in law for his deeds. This has been incorporated in the common law principle "ignorantia facit doth excusat, ignorantia juris non excusat" (ignorance of fact excuses, ignorance of law does not excuse).1

The long application of this principle is apparent from the seventeenth century case of R. v. Levett,2 where an accused was acquitted on this ground. After this, there has been considerable development in the law relating to mistake, in spite of which incoherence continues regarding the exact scope of this defence. Added to this, the jurisprudence and statutes behind this defence continue to vary from country to country, making it vital to examine the comparative position in various countries. The principal issues that surround the question of mistake as a defence relate to the presence of any additional requirements or qualifications

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2 79 ER 1064, where the accused killed a woman, who was hiding behind a curtain in his house, mistakenly believing her to be a burglar.
MISTAKE UNDER INDIAN LAW

Another important issue is the application of mistake as a defence in strict liability offences. The question of greatest importance (which forms the principal focus of this article) is that of the presence or absence of the defence of "mistake of law". The maxim "Ignorantia juris non excusat" is under challenge by a number of emerging developments and it, therefore, becomes vital to examine the precise scope of this defence, and to study if these developments can be applied in the Indian context.

MISTAKE UNDER INDIAN LAW

The defence of mistake in Indian law falls under the category of general exceptions to criminal liability in the Indian Penal Code. Specifically, it is incorporated in Ss. 76-79 of the Code. The justification for exemption on the ground of mistake of fact, as mentioned earlier, is the principle that such a mistake would negative the requisite intention. Thus, a bona fide belief of the existence of facts which, if true, would have made the act innocent in law, is an excuse. However, mistake of law is not a defence, because every man is presumed to know the law and is to be held responsible in case of its breach.3

Thus, S.76 deals with persons who consider themselves bound to perform certain acts, and as long as this belief is founded on a mistake of fact and not a mistake of law, such an act is not an offence. S.79 deals with acts that a person considers himself justified in performing because of a mistake of fact and not a mistake of law.4 The distinction between the two sections lies in the difference between legal compulsion and legal justification. Courts in India, following English decisions, have acknowledged mistake of fact as a defence in the case of bigamy and other statutory offences.5 Further, in Keso Sahu v. Saligram,6 it was held that to bring a case under S. 79, it was sufficient to show to a reasonable extent that the belief as to the fact was in good faith.

The defence of mistake of law is of no value in India. This is made clear by its specific exclusion in S.76 as well as S.79. The justification for this is that the

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4 In Raj Kapoor v. Laxman (1980) 2 SCC 175, it was held that "if the act was done by one who by reason of a mistake of fact in good faith believes himself to be justified by law in doing it, then the exception operates, and the bona fide belief, although mistaken, eliminates the culpability. If the offender can irrefutably establish that he entertained a mistake of fact and in good faith believed that he was justified by law in committing the act, then the weapon of S.79 demolishes the prosecution."
5 In Kohu M.K. Ismail v. Mohammed K. Umma, AIR 1959 Ker 151, the accused was charged with bigamy under S.494 of the IPC for contracting a second marriage during the continuance of the first marriage. She was acquitted on the grounds that she honestly and on reasonable grounds believed that she had obtained a divorce from the complainant, although the divorce was unauthorised.
6 1977 Cri LJ 1725 (Ori).
operation of a provision is supposed to be independent of its being known to everybody. If this were not the case, great difficulty would be experienced in the enforcement of the law. The burden of proof to show the existence of a mistake lies on the defence, and it has been held that the defence must discharge such burden on a balance of probabilities.

Sections 76 and 79 require that any mistake of fact be made with due care. S.52 defines an act done in good faith as done with "due care and attention". The phrase "due care and attention" implies genuine effort to reach the truth and not the ready acceptance of an ill-natured belief.

When a question arises as to whether a person did an act in good faith, it devolves upon him to show not merely that he had a good intention, but also that he exercised such care and skill as the duty reasonably demanded for its due discharge. Moreover, the Courts have also held that reasonableness is a prerequisite of good faith. In this regard, it appears that a new element has been introduced. Reasonableness is a component of non-negligence. The implications of this inclusion would be that an honest mistake, negligently made, would not provide an excuse, in spite of the fact that there was no guilty mind on the part of the accused. The requirement of reasonableness has been dispensed within Common Law. It is therefore submitted that good faith is a level distinct from reasonableness. Therefore, to equate the two is, it is submitted, erroneous. Further proof of this is found in the definition of good faith that in the General Clauses Act, which states that an act is done in good faith if it is done honestly, whether done negligently or not.

THEORY OF MISTAKE

The question of mistake arises in the case of a conflict between objective existent facts and subjective impressions of those facts on the part of a person. Traditionally, mistakes have been classified into mistakes of fact and law, i.e.,
In common law, the law in this regard has been laid down by the decision of D.P.P. v. Morgan,20 which made it clear that where the offence required intention or recklessness as part of its ingredients, a mistake of fact which

13 Fletcher, Rethinking Criminal Law 687 (1978).

14 The first bases itself on the presumption that every offence requires a certain mens rea. Thus in the Indian context, murder requires an intention to cause death. If there exist a mistake which obviates such intention, a person cannot be punished for it.

15 In the second category, would fall mistakes such as those, which exempt the person only if they are reasonable. Thus, if we consider S. 304A of the IPC, it would require the accused to have made a mistake, which does not seem to be negligent. Only then can he claim exemption from culpability.

16 As regards the third kind of mistake, this kind has no exculpatory effect. Here no question of a defence arises, whether the mistake is reasonable or not.


18 Don Stuart, Mens Rea 15 Crim LQ 176 (1972-73).


20 [1975] 2 All ER 347.
precludes both states of mind will excuse, irrespective of whether the mistake is reasonable or not.

As regards mistake of law, it is submitted that here it would be appropriate to use reasonableness as a criterion. Thus, a person who had used all reasonable means to ascertain the law, and had still remained under a misconception, is certainly less culpable than an offender who, without any semblance of care, performs actions without ascertaining their legality. Such a limited use of mistake of law would serve the purpose. As regards the Indian law, the position reflected in the IPC (that of requiring mistakes to be performed in good faith) is ideal. This enables a compromise between reasonableness and reckless mistakes.

DISTINCTIONS BETWEEN MISTAKES OF FACT AND LAW

Considerable controversy has, of late, erupted over this area. The distinction between mistakes of fact and law lie primarily in their capacity as defences; As a result, there are often attempts to project a certain mistake as one of fact and not of law. In Thomas v. The King, it was held that "a mistake as to the existence of a compound event consisting of law and fact is in general one of fact and not one of law". This is also supported by Glanville Williams. However, in R. v. Cunningham, it was held that an accused who speeds cannot claim a defence of having misread the speed limit sign, as this was a mistake of law. It is submitted that this decision goes against the views expressed earlier.

The solution to this quandary lies in allowing a reasonable mistake of law as a defence. This would remove the necessity of distinguishing between mistakes of fact and law, for, in both the cases, if the mistake is reasonable, the defence exists. In the alternative, a much wider interpretation must be given to mistakes of fact so as to incorporate cases of mixed mistakes.

THE COMPARATIVE POSITIONS ABROAD

Common Law

The landmark decision of D.P.P. v. Morgan settled the law in this regard. A mistake, whether reasonable or not, will excuse criminal liability if it precludes the requisite state of mind. In case the law requires negligence alone, then only

21 Thus, in R v. Prue, R v. Basil, (1979) 46 CCC (2ed) 257, the court held that lack of knowledge as to the suspension of licenses constituted a defence to the charge, mens rea being an essential part of the offence. The majority held the mistake to be one of fact.
22 (1937) 59 CLR 279.
22a(1957) 2 All ER 412.
23 Glanville Williams, Criminal Law - The Second Part 568 (1961), where the author states that if a mistake contains any element of mistake of fact, then it must be governed by the rules as to mistake of fact and is none the less a defence on that ground because accompanied by an interwoven mistake of law.
24 [1975] 2 All ER 347.
a reasonable mistake will serve as an excuse. In case of a strict liability offence, no mistake would serve to excuse.

Mistake of law, however, is no excuse, for knowledge of the act being forbidden is not part of the mens rea but in case the mens rea requires a legal concept, then it may serve as an excuse. In the case of R v. Tolson, the court held that a woman who believed her husband was dead and therefore remarried was not guilty of bigamy, because her belief was reasonable. However, the decision in Morgan's case, settled the fact that a mistake in offences which do not demand non-negligence, does not necessarily need to be reasonable. It was held in Barrett and Barrett that an honest belief in a certain state of things does offer a defence, including an honest though mistaken belief about legal rights.

The applicability of the defence depends upon the mens rea required by the crime. A mistake negating mens rea as to some element in the actus reus is no defence if the law does not require mens rea as to that element. If the definition of actus reus contains some legal concept as to which a mistake has occurred, then the definition could operate. It has no application, however, if the law has fixed a standard different from that believed by the defendant.

In essence, English law is almost identical to the Indian position, except that the Indian law imposes a standard of reasonableness unlike Common law.

Australia

In He Kaw Teh v. The King it was summarised "either the accused has a guilty mind or not: and if an honest belief, whether reasonable or not, points to the absence of the required intention, then the prosecution fails to prove its case." It can be clearly seen from the above, that Australian criminal jurisprudence recognises mistake as a defence which negatives mens rea irrespective of its reasonableness.

As regards the question of burden of proof, He Kaw Teh is clear on the point, stating "the accused does not have the onus of proving honest and reasonable mistake, provided there is evidence raising the question, the prosecution must establish the absence of honest and reasonable mistake." A limitation to this was, however, placed in Proudman v. Dayman which held that defences like this must be a mistaken belief rather than a mere ignorance of facts. It is therefore

25 Smith, supra n. 17 at 216.
26 Id.
27 Id.
28 (1889) 23 QBD 168.
29 (1980) 72 Cr App Rep 121.
30 Smith supra n. 17 at 85.
32 (1941) 67 CLR 536.
clear that the factor that removes mens rea is not merely the absence of knowledge of facts, but a mistaken belief which precludes the very presence of such a mental element; i.e., it is a positive affirmation of the absence of mens rea. Proudman introduced a further aspect regarding mistake in the context of strict liability offences. "A statute which appears to impose strict responsibility may nevertheless be understood as allowing the defence that the accused held an honest and reasonable belief in the existence of circumstances that would make innocent the act with which he or she was charged."

In other words, mistake of fact has been recognised as a defence in even strict liability cases. It is submitted that this is the correct position. The presence of a mistake of fact negates the question of the accused intending to commit the act mentioned in the statute. Therefore, such an interpretation is in conformity with the rationale behind strict liability.

**MISTAKE AND STRICT LIABILITY**

Strict liability crimes have been defined as crimes which do not require intention, recklessness or even negligence as to one or more elements in the offences. Thus in regard to a certain element in the actus reus, no mens rea need be proved. If a certain element of an offence is described as falling within the ambit of strict liability, a reasonable mistake as to that particular fact is not a defence. A mistake as to other circumstances may well allow a defence. This was illustrated in *R. v. Prince*, where the accused was convicted under s.20 of the Sexual Offences Act, 1956, although he had made a reasonable mistake about the age of the girl he was taking. However, a substantial mental element was required - this was demonstrated when the majority stated that the accused must have intended to take the girl out of possession of the guardian - i.e., the mental element of intent. If a mistake had been made as to that particular element, it would have served as a defence.

Thus, an offence of strict liability only partially does away with the mental element. Again, in *State of Maharashtra v. M.H. George*, the Supreme Court stated that the accused was guilty because he intended to bring a particular item into India.

One of the prominent arguments brought forward by some authorities regarding the justification for dismissal of mistake as a defence in strict liability offences, is that wrongdoers take the risk of their act turning out worse then they

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33 Hogan *supra* n. 17 at 99.
35 (1875) LR 2 CCR 154.
36 AIR 1965 SC 722.
37 See, Fletcher, *supra* n. 13 at 723.
expect. Thus, in *U.S. v. Feola,*\(^38\) the Court reasoned that an offender takes the victim as he finds him and is correspondingly liable, even if circumstances of which he was ignorant, make his act more serious than he intended. In *Prince,* Bramwell, J, stated that the accused had committed a wrong by taking a girl of such tender years out of the possession of her father. The trouble with this argument is that it ignores the requirement of proportionality of punishment. Its application would cause a person who commits a statutory offence with full *mens rea* to be punished as much as one who by virtue of a mistake of fact committed a magnified offence, although his intent might have been to commit a much smaller offence.

**STRICT LIABILITY AND MISTAKES OF LAW**

It is now well settled that ignorance of the law is not an excuse. As a result, there is occasioned an occurrence of strict liability, in that whenever there is a mistake as to law, regardless of culpability, the offender is punished. The issue was examined in *Hopkins v. State*\(^39\) where a person was convicted for an offence although he had been advised by the Attorney General that his actions did not constitute an offence. The question is whether it is just to convict a person who acts reasonably and yet suffers from a mistake of law. Maintaining a policy that every person is presumed to know the law, may be appropriate for natural offences like murder, rape, etc. but with regard to areas where laws are complex and subject to change such a presumption would not be just.

It has been argued\(^40\) that in the absence of the presumption, ignorance of the law would be encouraged and it is in the larger interests of justice must be sacrificed. Such an argument, however, detracts from the principle of not punishing any innocent person, even if guilty ones may escape. The utilitarian principle advocated by Justice Holmes would go against this. Moreover, these arguments ignore the fact that no culpability can be attached to a person who has made a reasonable mistake of law. Law seeks to punish those who are accountable for their offences but in the case of a person who has made a reasonable mistake of law, the person can no longer be held liable.

In view of the above, it is submitted that the imposition of strict liability, in the context of mistake of law, especially those which are reasonable, is not justified.

**MISTAKE OF LAW AND THE DEFENCE OF OFFICIALLY INDUCED ERROR**

The defence of officially induced error is of relatively recent origin, and it is necessary to identify its constituents. The beginning of this defence can be

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\(^38\) 420 US 671.

\(^39\) 193 Md 489.

\(^40\) Justice Holmes, *c.f.* Fletcher, *supra* n.13 at 732.
traced to the considerable confusion prevailing over the distinction between mistakes of fact and law. The hardship that often resulted because of the absence of any defence in mistake of law has played an important role in the development of this defence.41 Its beginnings can be seen in an Ontario decision, where the Court held that if a public official charged with responsibility in a matter led a defendant to believe that the act was lawful, the defendant may have a defence if he was subsequently charged with doing that act.42 Further, in R v. Macdougall,43 the Supreme Court of Canada left this defence open, to an extent approving the decision of the Court of Appeal, which had stated that while it had yet to be expressly sanctioned, it was in accordance with the needs of society. In the dissenting opinion, however, it was stated that ignorance of the law cannot be an excuse, no matter how induced.

This defence has been subjected to a number of restrictions most of which were laid down in R v. Robertson.44 These requirements would serve to ensure the absence of any form of mal-intent on the part of the accused. As a result, they would allow the defence of mistake of law to operate under controlled circumstances and within reasonable limits.

There are other unresolved issues as well, as for example, what if the erroneous advice of a lawyer is relied upon by his clients? And what if people rely on judicial decisions that are later held to be erroneous?45 In England, mistake of law is still not regarded as an excuse.46 In America, however, mistake of law is a defence when the defendant was assured by the Government agency having general jurisdiction in the matter that his act was legal, and it later emerges that this advice was wrong.47 The American Law Institute, in its Model Penal Code proposes a mistake of law if the mistake negatives mens rea, or the law specifically provides for such a defence.

It is submitted that this particular defence would serve the purpose of providing a limited defence of mistake of law, in situations where a citizen has

43 (1981) 60 CCC (2d) 137.
44 (1984) 43 CR (3d) 39. The court laid down the following conditions: The actor must advert to his legal position; The actor must seek advice from an official; The official must be one who is involved in the administration of the law in question; The official must give erroneous advice; The erroneous advice must be apparently reasonable; The error of law must arise out of the erroneous advice; The actor must act in good faith and without reason to believe that the advice is erroneous; The actor's error of law must be apparently reasonable; The actor must, while seeking advice, act in good faith and take reasonable care to give accurate information to the official whose advice he solicits.
47 Williams, supra n. 23 at 151.
behaved perfectly and in accordance with rules. Punishment in these cases would be pointless and against all principles of justice.

**CONCLUSION**

It is clear from the above discussion, that the present jurisprudence relating to mistake tends to give a great deal more importance to a mistake of fact than to a mistake of law. This is to the extent that a mistake of fact, whether reasonable or not, acts as an excuse, while a mistake of law does not amount to one under any circumstances. While the rationale behind this seems to be, simply, that every man is expected to know the law, it is submitted that such an assumption is too broad. The reason for which mistake as a defence is simply that it does away with the *mens rea* necessary for the offence. However, it is submitted that the same is applicable to a mistake of law as well. There too, the offender does not intend to commit the offence. The maxim "*ignorantia juris non excusat*" should not operate when the person does not even know that his actions constitute an offence.

No doubt, doing away entirely with the ongoing presumption of every man knowing the law would act as an incentive to develop ignorance; however, if a person has used all possible means to ascertain the law, and still operates under a mistake of law, it would be manifest injustice to punish him. He cannot be held responsible for not knowing the law. It is in these cases that mistake of law must operate as a defence. If an unreasonable mistake of fact is accepted as a defence, it is implicit that the person is being excused for his stupidity and/or negligence. In the case of a reasonable mistake of law, a person has fulfilled the criteria demanded by law, i.e. he has behaved like a reasonable man. Nor does he have any culpable mental element. It is submitted that the focus must always be whether the mental element of the accused corresponds to the mental element envisaged by the offence. If it matches, as must the *actus reus*, then no doubt he is liable, and must be punished. But if it does not, then irrespective of whether it is a mistake of fact or law, it must exonerate the accused.

An unreasonable mistake of law, however, need not be an excuse. This is not because the guilty mind is present, but because, if a person is reckless or negligent in determining what the law is, he cannot claim this as an excuse to commit the crime.

In conclusion, therefore, the recommended position is as follows. In the Indian context, any mistake of fact, in order to operate as an exculpation, must conform to the requirement of good faith. Mistakes of law, however, must be allowed as a defence only if reasonable. The above arrangement, it is submitted, would best serve the ends of justice.
ARTICLES

TOWARDS A BETTER LEGAL EDUCATION FOR
THE NEW CENTURY - A STUDENT'S
PERSPECTIVE

Arvind Narrain*

Lawyers are all right, I guess - but it doesn't appeal to me... I mean they're all right if they go around saving innocent guy's lives all the time, and all that, but you don't do that kind of stuff if you're a lawyer. All you do is make a lot of dough and play golf and play bridge and buy cars and drink martinis and look like a hot shot.

- Holden Caulfield¹

Lucky Pierino, because he can speak, unlucky because he speaks too much. He who has nothing important to say. He who repeats only things read in books written by others just like him. He who is locked up in a refined little circle, cut off from history and geography.

- School Children of Barbiana²

A strength of our profession for 100's of years, is that lawyers have been leaders in government and society. This peculiarity marks our profession. Good lawyers are persons, whose intelligence, broad liberal education combined with a lawyer's direction, specially equip them for leadership at every level of society. I do not want to lose or diminish their capacity or inclination for this kind of service.

- William Stoebuck³

At the close of the 20th century, perception of law and lawyers, remain as conflicting as ever before. There is the in-house view of lawyers as belonging to a noble profession, but to those outside the charmed circle, the view is different.

If Holden Caulfield, or the children of the school of Barbiana, are taken as a barometer of public opinion, all is not well with the legal profession. Those within the charmed circle of lawyers, judges and law teachers, might congratulate themselves on their public calling, but it does not match to the outside perception. If there is a crisis in legal education, it would trace itself to this fundamental, conflicting world view. The 21st century is not about how to improve the skills

* V Year, B.A., LL.B. (Hons.), National Law School of India University.
1 J.D. Salinger, The Catcher in the Rye.
2 School Children of Barbiana, Letter to a Teacher (1992). Though the children are not talking about a law student in particular, what they describe bears a remarkable accuracy to the public perception of a lawyer.
of those yet to be initiated into the arcane of mysteries of the law, it is about restoring some credibility to a profession mired in self aggrandizement masquerading as intelligence.

What is being articulated here, is a student view. A student, not yet a part of the profession, has multiple subjectivities. He or she is not an expression of the objective law. There still exists some measure of ambivalence, some bit of Holden Caulfield. Students would still harbour those romantic notions of lawyers as people, "who go around saving innocent guys lives all the time." There would still be a deep dissatisfaction at seeing yourself make a lot of dough, and playing golf and buying cars and drinking martinis and looking like a hot shot. A student would still have a problem with people "who speak too much and repeat things read in books". He would, in some sense, be outside the sphere of positive law.

Peter Gabel analyses this phenomenon beautifully in what he calls the reifying nature of legal reasoning. As he puts it, students learning "that they are all abstract citizens of an abstract United States of America, that there exists liberty and justice for all and so forth - not from the content of the words, but from the ritual which forbids any rebellion." Gradually they will come to accept these abstractions as descriptive of a concrete truth, because of the repressive and conspiratorial way, that these ideas have been communicated (each senses that all the others "believe in" the words and therefore they must be true). once this acceptance occurs, any access to the paradoxically forgotten memory, that these are mere abstractions will be sealed off. And once these abstractions are reified, they can no longer be criticised because they signify a false concrete.4

The outsider to the law would be the best critic, helping law to be self-reflexive. Hard core insiders, who have been reified by legal reasoning, can only mouth platitudes about it being a noble profession. A student is in a unique position, being both insider and outsider, to be reflexive about the role of legal reasoning, in constituting him or her as a subject. Furthermore, a student has access to that "paradoxically forgotten memory", with which he or she entered law school. Thus a student is placed in a unique position wherein, he or she is personally trying to resolve these conflicts, the conflict between what the law as a profession demands of him or her and of what he or she feels about the law. It is out of this conflict that this essay is written.

THE CONTEXT - THE DOMINANT AND SUBORDINATE ASPECTS OF LEGAL EDUCATION

Law as a profession to which Indians could aspire, originated in the context of colonial India. To a certain class of people, who could aspire to imitate the lifestyles of the colonisers, it became a means to move up the social and educational hierarchy. It is in this context that legal education should be problematised.

As C.S. Dias put it, "In social terms, colonial societies were often characterised by a marked dichotomy between a small urban centred, western acculturated population and the mass of unschooled people. Lawyers were recruited from educational systems which replicated that of the colonial power... Their status derived in part from their unique familiarity with the language culture and institutions which had been imposed by that power and retained after independence. In part law was attractive because it was one of the most lucrative private occupations". So law as a profession, was one of the continuity, between the time of the British and post independence India. Lawyers were part of the modernising elite, who were supposed to take India out of the darkness of colonialism into a new society. These were the aspirations of the founding fathers. However it proved to be difficult if not impossible to transcend the discourse of caste and class. Indian lawyers proved to be status quoist in the extreme.

As Lynch observed in the colonial context, "Most Colombian lawyers come from the upper middle class. Their legal education is based on the values of social stability, the protection of private property, the sanctity of contract, formal equality before the law. The market for legal services has fostered a set career pattern which channel the most capable individual to the highest paying clientele in the corporate sector." What goes for Colombia, goes for India too. By and large, the legal profession has a status quoist mindset, and strives religiously to protect its interests. The fact that law has not been an effective instrument to effect land reforms stands testament to the fact that, by and large the Indian legal profession has stood behind the doctrines of social stability, private property and the sanctity of contract.

Historically the legal profession has always gone, where there have been financial rewards. There has been no change at the end of the 20th century. To give just one example, India Today featured an article on Legal Eagles, subtitled "The post liberalisation years belong to a new pack of super achievers, who are young, argue cases of national importance and yes, command astronomical fees". This Article went on in much the same vein, featuring the opinions, interests etc., of some of India's best known lawyers.

The point being that the self image of lawyers is that of people on the fast track, on the way to quick money and fame. The author seems to feel no need to explain, how one can celebrate self aggrandisement on such a scale except for

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5 C.J. Dias et al. (Eds.), Lawyers in the Third World: Comparative and Developmental Perspectives 343 (1981).
6 Cited in ibid.
7 Land reforms are essential in a society where inequality exists. In such a context, since independence, just a little over 1% of total cultivable area has been redistributed. That is, of 45 million acres, only 4.5 million have been redistributed among the poor. See, P. Sainath, Everybody loves a good drought, 422.
noting that "they work hard for their money". In a country where poverty is a major problem, a profession which is so divorced from the other realities, and can exist in a make-believe world of cocktail circuits and holidays in Scotland is living in a dream.

At the end of the 20th century, it is this which makes one deeply uncomfortable with the legal profession; the fact that it is built on self interest and completely ignores the context in which the large majority of the Indian people exist. The legal profession is a guild which constructs a different world abstracted from the other worlds.

There is an effort at constructing an individual insensitive to suffering. It is this problem that legal education must address. Law is a powerful discourse which constructs realities. Lawyers see as problems to be solved only issues which are integrated within the market. Thus legal problems are those which have financial rewards!

It is this power of the law to construct realities which must be questioned. Dias puts forward this point powerfully when he notes, "few studies of lawyers have examined the legal profession from the perspective of victims of the gaps, notably the vast number of people in rural areas living in conditions, approximating absolute poverty. Histories and surveys of lawyers may tell us about the principle markets for professional legal services, about economic activities which generate work for lawyers, about the clientele and interests served by different groupings within the profession, but they tell us little about the needs and interests of people who don't employ lawyers, because poverty, ignorance and the demographic distribution and social distribution of professions makes it difficult or impossible to do so."

Legal education, as training for a profession, is a powerful system of exclusion. Very important questions like the real needs of the people are not questions within the market framework. So if the majority of people are poor, then legal education is complicit in structures, which invisibilise and silence the poor. It is this aspect of legal education which needs to be questioned. The other question is, does the legal education we "receive" give scope for expression of multiple subjectivities? Or are we all forced to adopt a regimented way of thinking. While it is difficult to agree that legal education is about creating robots, one cannot deny dominant ideological biases in legal education. Legal education is supposed to make you think like a lawyer. We are taught "the skill of parsing cases, spotting issues, separating the holding from the dictum, the relevant from the irrelevant and the law from the policy." A lot of debate on what legal education should be, revolves around the best way to inculcate legal skills in the

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9 C.J. Dias, supra n. 5 at 319.
10 Carrie Menkel, Narrowing the gap, by Narrowing the field: what's missing from the Mac Crate report - of skills, legal science and being a human being, 69 Wash L Rev 616 (1994).
student. We had the shift from the lecture method to the Langdellian case method; we had the introduction of clinicals to really learn the law.

In a sense what is missing is a self consciousness of where all this skill training is to be put to use. This placing of education in a context and understanding of the use to which your skill is going to be put, should be an emphasised area. Once again, we have to stand outside law to see what we are being trained to do. What the children of the school of Barbiana had to say, provides some kind of clue so as to further self reflexivity. "I try to understand you. You look so civilized. Not a link of the criminal in you. Perhaps though something of the Nazi criminal. That superhonest, loyal citizen who checked the number of soap boxes. He would take great care not to make a mistake in figures (four, less than four), but he does not question whether the soap is made from human fat." 11

What the children are saying, is that the most horrifying creation of the 20th century is not the serial killer, but what Noam Chomsky calls the New Mandarins. A breed of people who can speak a technical language and justify and legitimise any activity on the basis of that technical language.

As Chomsky notes, "the formulation of values and ideals, the production of articulate and suggestive thinking has not, in their education kept pace to any extent whatever with their technical aptitude.... (Dewey's) disciples have learned all too literally, the instrumental attitude towards life, and being immensely intelligent and energetic, they are making themselves efficient instruments of the war technique, accepting with little question, the ends as announced from above." 12 Though Chomsky is talking in the specific context of the Vietnam genocide, the argument of an intelligent group of people, who can technicalise anything is extremely valid. Legal education is about teaching us a language, within which we would then function. Communication is unimportant, performance is. 13

To give the example of the Bhopal gas tragedy in 1984, all of India's top lawyers, lined up to represent Union Carbide. There is no basis for critiquing them in the language of the law as "every person deserves a fair trial". Ethics thus plays a limited role in legal education. It is true that there is a course on professional ethics in the National Law School, but substantive political questions are not raised. Furthermore the course is constructed as a final year, finishing course. The issues raised by each and every subject are ignored, and pushed into a course, which is widely perceived as unimportant.

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11 School Children of Barbiana, supra n. 2 at 67.
13 For a further elaboration see, Habermas who argues that discourses like the law, are a spread of instrumental reason, as opposed to communicative reason. Hence, law is never about human beings, and therefore depersonalising. William Outhwaite, Habermas: a Critical Introduction (1994).
LEGAL EDUCATION AS CLASS ROOM POLITICS

Legal education, as has been contended here, is not about skill inculcation alone. It should probe more deeply into societal relations of power. It should be about recognising an understanding difference. The reason why the classroom becomes important is because power has been reconceptualised. Power is not seen as a thing which vests in one authority, but is seen as diffuse and present throughout society. Therefore any kind of social change, has to take into account, the fact that power operates in different institutions in civil society. One such institution is the class room. In short, the class room is a terrain on which different kinds of struggles are being waged, whether acknowledged or not. This kind of view flows directly from the notion that power is polycentric, and the realisation that there is an intricate process of dominance and silencing, going on in the class room.14

Feminists have been especially sensitive to this entire process of silencing. As Torrey notes, "In discussing language, Mackinnon asserts that power constructs the appearance of reality by silencing the voice of the powerless by excluding them from access to authoritative discourse... While they are not the only arenas of authoritative discourse, the law school classroom and legal forums serve as places to establish and use personal power. When we are not allowed to speak in the class room, or when that speech is rejected because of the speaker's gender, we cannot acquire personal power. Legal education can and should have the concept of empowerment as a goal. Once sorted out in the classroom, women's (and other minorities) stories of oppression and inequality and their proposed legal remedies can then be brought to court".15

The feminist argument seems to be that some issues are never raised in the public forum, or are deemed legitimate in public forum. As a result, these issues are invisibilised. They remain as problems for women, but there is no chance of the issue reaching the court because the issue never had a public sphere to articulate itself in. Here the classroom is conceptualised as a public sphere, where issues of substantive equality are raised. The classroom is seen as a significant arena, from which public issues emerge.

The importance of the classroom, in forming a political identity is captured by Prabha, a student at the National Law School of India University. "When I react on women's issues, I have been jeered as well as cheered. Sometimes I realise my statements are being reduced to a joke, and others resent what they think is feminist ramble. This trivialization has silenced me, and until sometime back, I would think twice before raising a feminist concern in class. I realize that male approval does seem important to me. I have felt stifled and guilty. I have wanted to speak out and at the same time I feared that I would be laughed at. By

14 See the works of Michel Foucault on power. Paul Rabinow (Ed.), The Foucault Reader (1984).
THE TWENTY FIRST CENTURY - SOME ALTERNATIVES

The twenty first century will be a time of further concentration of wealth in fewer hands, through the new legal entity called the Transnational Corporation. There will be greater marginalisation of the already disempowered. At the same time, as India Today puts it, salaries will be up, up and away. In terms of law as a profession, it will undoubtedly be more lucrative. In this context, what should be the role of legal education?

a. Theory in Legal Education

So far, the study of the law has been seen as the study of various legal doctrines. If law is to be democratized, if in some sense it is to reflect broader societal concerns, then the legal curriculum should be restructured.

One of the more important perceptions, with which students enter Law School is, that this is the place which will help me make a decent living. There also exists in some amorphous form, the notion that I should be able to do something "good". However by the time a person passes out of Law School, that amorphous memory is quickly rendered inaccessible, by a virtual deluge of case law and statutes. This burial is also a burial of the last remnant of self consciousness, with the public person taking over from that point. The lawyer is an "image", a technical man who is "apolitical". He can argue out the most passionate issues in technical terms. The lawyer functions as an instrument of the status quo. The status quoist nature of law is attributable in some measure, to the kind of education we receive, when we perceive law to be merely legal argumentation. Hence the most important change would be to introduce theory at all levels of study. Theory, which critiques the role of law in society, so that one knows exactly what one's position is in the larger political context.

Thus theory as here conceived, involves the self conscious scrutiny of the choice and selection of concepts, the forms of argument, and the standpoints and perspectives adopted. Theory thus conceived should suffuse legal education. Theory should enable you to say, "this whole body of implicit messages is nonsense. Teachers teach nonsense, when they persuade students that legal reasoning is distinct, as a method for reaching correct results from ethical and political discourse in general (i.e., from policy analysis)." Status quo's, which

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17 See, Fredric F. Clairmont, The Transnational Gulag, 32 EPW, Nos. 9 and 10.
18 The salaries paid by multinational firms like Arthur Anderson, show how lucrative law has become.
20 Duncan Kennedy, The ideological content of legal education cited in M.D.A. Freeman, supra n. 4 at 1022.
are oppressive, operate because it is understood as natural and hence incapable of change. What theory does, is expose the value premises and interest hidden behind the objective law. It is an effort at bringing about radical change, by shaking the foundations of an oppressive order. Once students are conscious of the way law operates, an important space for reconceptualising and reworking law is opened up. Change which is progressive is enabled, by theory.

Of course, one is aware that this call for theory at the end of the 20th century is coming at a moment when movements, which are about change like the critical studies movement, are under increasing attack. Harry T. Edwards, singles out CLS and interdisciplinary scholars as purveyors of impractical writing. He says, "much writing in law journals is useless to the legal profession and to judges. He divides scholarship into that which is practical, i.e. prescriptive and doctrinal, directed towards the profession, and that which is impractical, which is wholly theoretical and ignores the applicable source of law." What Edwards is doing, is mounting a frontal attack on theory. It is important to disagree with him because any kind of change is premised upon a new theoretical understanding. CLS scholars are concerned with progressive social change, and if theory is the route through which they operate, they should be encouraged.

The point, which Edwards misses, is that theory is premised on a challenge to the ideology on which law teaching is based. It is an effort at changing mindsets of those, who will become lawyers, judges and law teachers. In short, legal education becomes a space from which change is progressively generated. Thus it is important to change the nature of legal education, to make the point that "the universe of legal scholarship is not bounded by the concerns of the legal profession."22

b. Practise in Legal Education

The two areas, which would give scope for radical intervention, would be,

1. Clinical legal education
2. Law Reform projects

Clinical legal education is in some ways an experience with the sheer practicality of the world outside the academy. Law in the book is seen as law in action. In clinical legal education, the student confronts difference in all its myriad connotations. The first thing that clinical students encounter is difference. They then try to grapple with it. Everything and everybody is different from what they have ever encountered, at least in law school; the clients, the neighbourhoods, the courthouses, the jail and even the teachers are different...23
It is this confrontation with difference that promotes self reflexivity, that questions what it means to be a professional. As has been noted before, lawyers live in a world which is different from the world of poverty. Hence the important thing is to make the law student, with all his or her budding professional certainties, confront poverty. This is one of the few points of attack of the intimate link between law and capital. As Kessler put it, "The uncertainties which beset the poor cannot be rendered predictable by law as can the uncertainties of capital. It is only selectively that the law can deal with the problems of the poor. It can deal in general with the problems of capital. And the reason for this is that the law has either constituted or recognised the modes of existence of capital. What capital is at a point in time and what the law is, are the same. There is an integral relationship between law and capital brought about by lawyers. But there is no such relationship of reciprocal constitution between law and poverty. The being of poverty lies elsewhere." It is this relationship with capital that law students must be reflexive about, and it is the alienation from poverty, which is a condition of the majority of the world's population, which they must confront. Clinical legal education is one small tool, which can be used to chip away at the massive edifice called ruthless pursuit of self interest.

The other space, from which radical intervention can be made, in a practical sense is the Law Reform Competition. This has been pioneered by the National Law School of India University. In this effort, students are expected to stay with a marginalised community for a period of three months and based on their experience of the problems of the community, come up with a law reform proposal. In this case, law is seen as a remedy for the real problems facing the people. The starting point is the problems of the people, and law emerging as a response to it. The topic for 1996-97 was "Law Reform to offset/mitigate the adverse impacts of globalisation on rural/vulnerable groups." The team from the National Law School has decided to look into the effects of mega-industrialisation in the Mangalore area. The immediate consequences have been a direct questioning of the very concept of development. Development for whom and at whose cost? Thus the small space given by the topic is converted into a radical critique of development itself.

CONCLUSION

Thus legal education for the 21st century must be about critique - both practical and theoretical. It should be about changing the image into which the law student is fitted. The only way in which we will have lawyers who will make law meaningful to a large majority of the world's population, is by constantly confronting law students with the present limitations of their own profession. If the future is to be meaningful, the present must be critiqued.

THE CONSTITUTION ON THE COFFEE TABLE

Vineet Subramani*

Bhattacharjee AM., Equality, Liberty and Property under the Constitution of India, Eastern Law House, Calcutta, 1997, Pages 172, Rs. 200/-.

The author was a distinguished Judge who needs no introduction. Among his many achievements are his tenures as the Chief Justice of the Sikkim (acting), Calcutta and the Bombay High Courts, and his other publications. Also, he is a Visiting Professor at the National Law School and he holds as many as three other titles. The back flap provides the interested reader with a brief history of the author's achievements.

As the title suggests, the work consists of three propositions forming the major premises on which the rest of the work relies. The areas of concern are the interpretation of the Constitution with respect to the nature and meaning of the Equality Clause, Personal Liberty vis a vis Life under Art. 21 and the effect (or the lack of it) of the Amendment to deny the Right to Private Property as a Fundamental Right under Part Three of the Constitution. The work also contains comments on "some miscellaneous topics relating to various provisions of the Constitution." Many of these excursions are to areas unconnected to the main purposes of the work but they are not uninteresting to read.

The Equality Clause: This chapter can be ignored by those who have read other works on the subject, while those who have not will find a good précis of the major issues regarding Art. 14. There is very little to say about this chapter except for pointing out that while the author claims to "have all along regretted my (the author's) unfortunate inability to appreciate the forensic adventure" that recognised the 'brooding omnipresence' of reasonableness pervading the Equality Clause, he has also declared that "Art. 14 has been enthroned with spectacular activist magnitude commanding all laws to be reasonable on pain of invalidation" in his other literary works with no indication of disapproval.

Life and Personal Liberty: In an interesting thesis, the author has suggested that "the strenuous endeavour to locate or squeeze in the Rights to Livelihood,

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1 Dharma Desikaratna, Nyaya Bharati and Smriti Sudhakar; see back flap.
3 It must be noted that he has done so quite daringly in his decision in West Bengal Power Development Corporation, AIR 1990 Cal 125 at p. 128.
Education, Work, Shelter, Reputation and all that, which are obviously Personal Liberties, in and within the Right to Life, was unnecessary forensic exertion” (emphasis added).

This astonishing revelation is the result of the combination of 2 rules. First, the rule that an unnamed right cannot be read into a named right unless it “is an integral part of a named right or partakes of the same basic nature and character as that fundamental right. Thus the exercise of such right is in reality and substance nothing but an instance of the exercise of the named Fundamental Right”.

The second rule being, as postulated in Kharak Singh, followed in Satwant Singh and reiterated in Maneka, that “while Art. 19(1) deals with particular species or attributes of ... freedom, personal liberty in Art. 21 takes in and comprises the residue”. The argument is that the Rights to Education, Work, Livelihood, Shelter, Reputation and all that, are particular attributes of freedom and do not share the same basic nature and character of the right to life and so cannot be included therein. The author therefore suggests that an easier and more appropriate route to secure these rights would be to declare them as a part of the right to personal liberty, as residual liberties.

The main objections to this theory are that the word ‘personal’ has been totally ignored both by the Courts as well as by the author. There is a distinction between Personal Liberty and Liberty, per se. For example, as used in the US Constitution, it lies in the fact that personal liberty is merely one of the many civil liberties, just the same as the Right to Life. Another objection lies in the fact that though the Courts have declared these unnamed rights to be a necessary constituent of the right to life, they have to be understood in light of the interpretation by the Courts of the word ‘life’. Life has been described to ‘mean more than mere animal existence’ and if this is correct then, the expansion of the right to life seems more acceptable than rendering obsolete the knowledge base attached to the notion of personal liberty. Finally, this theory would render Arts. 19, 25, etc. superfluous as the protection of the liberties therein could be dealt with under personal liberty in Art. 21 itself.

**Fundamental Right To Property:** Having made out a case for a new understanding of ‘personal liberty’, the author goes on to tender the right to property, the status of a personal liberty. This argument is quite simply a fallout of the earlier chapter and is a restatement of an earlier publication. If one accepts that the right to property is a personal liberty, then the repeal of Art. 19(1)(f) has if anything placed the right to property on a higher plane because Art. 21 recognises no limitations on personal liberties.

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5 AIR 1978 SC 597 at p. 640.
6 The distinction has been made out in AK Gopalan, AIR 1950 SC 27.
7 The writ of habeas corpus, is only used to secure personal liberty. If one accepts the authors arguments it may be used to secure the right to education etc., ludicrous though it may seem.
8 AIR 1982 Jour 52.
The introduction to the book is devoted to miscellaneous comments on various aspects of the Constitution and general comments on the frailty of the law and language of the law. On the whole, the book makes for interesting reading and would have been better if only more attention had been paid in editorial and publishing assistance. The text is rampant with spelling and punctuation errors and the incorrect footnotes are innumerable. One of the major problems in reading the book is the lack of continuity. The preface is a brief summary of the book at first glimpse, but contains many contradictions of the text. The articulation could have been better, but I recommend the book for all those interested in the consequences of judicial blundering, for that, I suspect, was its purpose.