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PRINCIPAL'S PAGE

I am indeed very glad to present the second volume of our annual publication – ILS Law Review to all of you.

The first volume was published in March 2008, which contained contributions by the scholars at the seminar and a public lecture by Professor Upendra Baxi during the first 'Remembering S.P. Sathe' event held in March 2007.

Following the similar pattern, the second volume contains the public lecture delivered by Smt. Medha Patkar, and contributions by scholars and students during 'Remembering S.P. Sathe' event held in March 2008 on the theme 'Human Rights and Development'. In addition, contributions by two faculty members of ILS Law College are also included in this volume.

ILS Law Review is a platform available to our students to articulate and express their thoughts on various legal issues. I am sure that our students will take maximum advantage of this opportunity.

I am thankful to all scholars and students for their enriching contributions to the law review. I thank Dr. Mrs. Sita Bhatia and her team for their hard work and patience while bringing out this volume. I am sure that this volume of the journal will be received very well.

Vaijayanti Joshi

EDITORIAL

The ILS Law Review, Vol. II, is another effort towards achieving the academic excellence by the Institution.

The major text of this annual law journal is based on the content of Prof. S.P.Sathe Foundation, i.e. 'Remembering S.P.Sathe' events held on 7th - 9th March 2008.

When I worked on the event of Prof. S.P.Sathe Foundation and, at present, on this volume, for me, it is like paying my heartfelt homage to Sathe Sir. The theme of 'Remembering S.P.Sathe' and this volume is 'Human Rights, Law and Development'. And this subject was very close to Sir's heart who dedicated his scholarship to its cause. He was a Human Rights icon and will be remembered so.

Prof. S.P.Sathe, always, was close to students from whom he acquired intellectual inspiration, even they participated enthusiastically in the Conference and have contributed to this review.

The Institution is very grateful to Ms. Medha Patkar for readily accepting our invitation to inaugurate and deliver the public lecture on 'Human Rights and Development. Prof. Sathe always commended the work and dedication of Ms. Medha Patkar.

Similarly, Prof. Amita Dhanda and Adv. Colin Gonsalves, who looked upon Prof. Sathe as their legal Guru, took no time to accept our invitation and contribute to the review.

Ms. Sathya Narayan and Mr. Sanjay Jain, who looked upon Prof. Sathe as their mentor, have also contributed to the volume and its theme in a special way.

Our effort has always been to deal with those issues of human rights which are at the margin, neglected and disregarded, but at the same time very crucial, pertinent and important to be dealt with.

Surely, such academic exercises will benefit the whole legal fraternity and civil society, at large.

Sita Bhatia
Reader, ILS Law College, Pune

ACKNOWLEGEMENTS

This Volume II is outcome of the contributions made by the contributors, students and others.

To begin with, I am immensely grateful to Ms. Medha Patkar, Ms. Sunitee S.R. and Shrikant for giving us all co-operation and support in sending the manuscript.

My special thanks goes to Prof. Amita Dhanda who responded to my urgency and sent the manuscript. I am also thankful to Adv. Colin Gonsalves who inspite of his busy schedule, responded very promptly and sent the manuscript.

Special acknowledgement of the time and efforts of Mr. Sanjay Jain, Ms. Shobhana Patil and Ms. Swati Kulkarni., in editing the volume cannot be forgotten.. Ms. Shubhangi Puranik and Ms. Aparna Tatake are also thanked for the computer work etc.

Kalyani Tulankar, student of IIIrd year BSL.LL.B. is also thanked for her assistance.

I am also very much thankful to Ms. Sathya Narayan and Mr. Sanjay Jain for their valuable contributions to the Review.

Lastly, I acknowledge and appreciate the Shree J. Printers Pvt. Ltd. and Aarti Sawale for making the publication of the Volume II in time.

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Human Rights And Development

Speech by Medha Patkar*

Respected Raosaheb Shindeji, Principal Joshiji, Members of faculty, very eminent activists and supporters of people's movements present, Prof. Arati Nene. Taher Poonawala, Rajan Anwar and others and dear Vijayatai Satheji; I take this opportunity to pay the most sincere tribute to the great humanitarian service rendered by late Satyaranjan Satheji. The juristic scholar, as he was known to you, was for all of us not just an expert on law in the wider legal regime, but also one of the most honest human beings with best of humanitarian values and principles, which he never compromised with. We also remember him with great love and respect as the closest supporter with all knowledge and commitment to the peoples' movements, be it the Narmada Bachao Aandolan or National Alliance of Peoples' movements and all of those who are fighting for equity and injustice were always in his close circle, who always presumed his support, unassuming and unquestioned. I could not really pay any formal tribute to him anywhere, but the relation was such that I could not but take this opportunity to really convey my feelings of loss not only to me as a person but to the movements fighting the law, judiciary, and also the organs of the State in order to promote what is known as truly equitable and sustainable development.

Having said this my young student friends and others, I think we are really touching the subject which is to be discussed and debated over the nook and corner of this country where movements are questioning the concept and conceptions of development on one hand and the law which is supposed to be within the constitutional and human rights framework on the other as something that one can resort to, take support of to protect our right to development. And while we question development, at the same time we assert the right to development of every citizen, one may get an impression that there may be something contradictory within, but it is not. As far as those who are contesting the present model and paradigm of development, we all feel that development cannot be devoid of justice. And it is not legal justice but human justice, which is above legal justice that we all try and seek. Development is invariably symbolized as something that really harnesses natural and human resources with efficiency and distributes or redistributes those resources amongst the majority people of the country.

It is not anything and everything that is done with the resources that would be considered as a developmental activity. While there is no doubt that

* Renowned Social Activist and Leader of Narmada Bachao Aandolan (NBA), inaugurated and gave the above stated memorial speech on the occasion of 'Remembering S.P. Sathe' Event on 7th March 2008.

development cannot be merely at a conceptual level or a paradigmatic level and it has to be operationalised, it really begins with a vision, a statement of goals and objectives. But vision itself needs to be rooted into a value framework and this value framework comes first from the society and later from the State. As far as human society is concerned, this building of the values has been a continuous exercise that we all know about it. When the human society has accepted equity and justice as basic values, you may ask anyone belonging to any sector, whether for growth or not, whether for justice or not, everyone would say that equality of human beings, not merely citizens but as human beings has to be the basic parameter of the society's vision and action, both. Hence, it is this value framework in the human society that we boast and use it as an indicator to define ourselves as different from and above other living beings. When we try and adopt certain norms, not one, but a cluster of norms with that value framework, we lead to something, which is called as law, as established and verifiable State that would guide not just our actions, but life, life patterns, life style and everything else. There is a great responsibility that falls on our shoulders to see whether this framework is indeed being operationalised through what is known as law.

Because it cannot be at a philosophical or ideological level that we keep on saying and reinforcing the fact that we have laws and hence we are working within a legal framework. We are legitimate citizens of this country and we really abide by the Constitution, the Fundamental Rights and Directive Principles of State Policy. What is indeed necessary is to see and assess whether all these frameworks are matching or not? Is there really a consensus or discord between these that is invariably leading to conflict in today's context? So while we are all for laws, we are all for the Constitution, we are all for the democratic process and the system that leads to law making and Constitution-abiding, while we are all for human rights and we are all for development, why is there a conflict in relation to these aspects of our life, our mission? There is conflict because the development paradigm in not really reflecting the human rights framework as many of us see it. Human rights which need to be defined in terms of not just rights of any and every human being, but also for specific sections of our population. Those are the sections of our population who are many a times known as disadvantaged. But they are made to be disadvantaged. Their way of life, the kind of resource capital that they carry forward, their way of economy and their way of politics, not necessarily limited to electoral, and their relationships with other sections and the rest of the society is something that make them face not just

disadvantage, but also deprivation and even destitution and that is the root cause of inequity, as all of us know.

Casteism that is very well rooted today in the country, that we will belong to, is one such inequity that is still sustaining and something that we still inherit and is still promoted in various forms and ways Dalits, the peripheralised castes, the so called lower castes have to fight for not just their development to get primacy and get reflected in the planning, policy and law making, but they also have to fight for their basic dignity, respect and integrity as human beings. The same is true about the indigenous communities and the adivasis who are not only literally; i.e. physically and topographically peripheralised but also economically and politically marginalised. The political and economic condition of minorities has been more than exposed by Justice Sachar Committee beyond anyone's imagination, debunking the vote-bank politics for decades. Having said this, one would say that this is the reason why each of these sections are really more concerned about the human rights and their own rights, even the legal rights and they define development in their own way and that's where our conception of human rights, laws and development must be brought together. We need to understand what these sections are demanding on one hand and to also contribute to that process which would take them closer to the goal of equity and justice.

What is happening today is exactly the opposite. While you all know that the Indian Constitution puts forth the fundamental rights, including the right to life i.e. the right to live with dignity and that in turn includes many rights such as the right to education which was brought forth through specific Supreme Court judgments, right to health, right to food, right to livelihood etc. the right to livelihood, though, in the case of 60% and more of Indian communities is necessarily based on the natural resources. So the agriculturists to the forest dwellers, forest produce gatherers, the fish workers, potters, boatsmen and all those natural resource based communities really have their livelihoods based on those natural resources. Part of the resources may be marketised, part of the resources may go through the value adding process but without those resources they cannot have their livelihoods ensured and protected. Then, when the policy or the law decides how would those resources be managed or manipulated, who would own these resources and how would these resources be distributed or when they make the technological choice in deciding how would these resources be harnessed, compelling which section to pay what cost and benefiting which section at whose cost, the right to livelihood is directly or indirectly impacted or affected. There are, therefore, conflicts and contests raised today by the

natural resource based communities, be in the valley of Narmada and Krishna, be on the sea shores and in the coastal regions in the whole country or by the riverine fish workers or the agriculturists *per se*. You find that land and everything that is attached to the land is grabbed by the State-corporate combine and this is what we have been discussing with Late Prof. Sathe time and again. Land and everything attached to the land, which is defined in the British days old Land Acquisition Act, 1894 is really a source of livelihood for majority of Indian population. It is not just the estate of so called real estate developers. And yet that land and the minerals underneath and the ground water underneath are not necessarily owned by the community. Beyond the concept of private property when the majority of our population that lives on or at least fulfills many of their basic needs with the common property resource, the community comes into the picture. But those community property resources that are in the hands of or possessed by or occupied by and used by the communities should at least be granted legal recognition of their customary and the traditional rights, but the State uses the principle of eminent domain to snatch away these resources from the people.

While on the one hand, we believe in human rights, law and the Constitution and seek to realize the goals of our life and development, it is significant to note why people like us give importance to struggles? Precisely because the struggles are grounded on the plank of not just the values of equity and justice, but are also well-within the framework of the Constitution. There is, however, many times a discord between various laws and the Constitution as well. While Art. 39(C) of the Directive Principles of the Constitution mandates that that the operation of the economic system should be such that there would be no concentration of economic wealth and resource and the fundamental rights to life and livelihood are crystal-clear, the laws and policies being enacted and formulated today are diametrically in contrast to these constitutional values and principles. The colonial Land Acquisition Act, 1894, with its latest proposed pro-corporate amendments, according to which the traditional lands of communities are snatched away, be they on the banks of river valley or right in the midst of big cities in Mumbai like Kolivada is the best example. This has been happening since independence but has now been accentuated with the SEZ Act, which goes against the very fabric of the Constitution.

After 1991, when India opened up its economy, and particularly post-2000, Government after Government, at the Centre and in the various states have been bringing about such anti-people and unconstitutional legislations and policies causing land or water grab or narrowing its welfare-State responsibility in the garb of 'fiscal management' and going further and

bringing about 'security legislations' to throw behind the bars those who oppose such policies. We are, therefore, constrained to oppose these policies, with all the more reason and urgency since this is only intensifying the concentration of wealth and resources.

Those who have had resources in their communities for generations are divested of them and these are being doled out to private corporations under the pretext of 'public purpose' and 'employment generation', using the principles of 'eminent domain' and 'state sovereignty'. Thus the resources and spaces of urban and rural communities from small farmers, forest dwellers, fish workers to small traders and hawker's are denied their right to life, while all of this is given a 'legal face' by the State. Not just huge doles of land, but even water, along with tax rebates, tax holidays and incentives, free or highly subsidised electricity and relaxing labour laws and violating every single human right that was born out of decades of people's struggles are all things which I think is necessary to contest and challenge and this is indeed happening in hundreds of pockets across India. Provisions like only 40% of acquired land needs to be utilized for the industry and the rest can go for real estate tourism, entertainment etc. is indeed grossly unjust. This is happening by virtually looting and killing the communities and carving foreign territory within India. Is this all in consonance with the Constitution of India?

It is, therefore, a matter of serious concern that while the resources of corporations are increasing, so is their economic and political clout. This is not just violating legal rights, but a whole life system of the people. Their lifestyle is being underestimated, undervalued and insulted and their right to live, in a democratic way is also being denied to them. We might be countered by people who might say that 'if people start deciding their development it will never happen and the State must decide development for the people'. But there is something called the Constitution and it describes and lays down how development planning must take place. But is it being implemented? No. The Planning Commission has been planning on behalf of the citizens of this democratic country since 1950. A mere statutory authority it dialogues not just on behalf of the entire country with the WTO and IFIs like the World Bank and ADB, but also brings their plans, polices and priorities and agenda into the national planning debate. How legal / legitimate is this on the part of the Planning Commission to override the constitutional planning processes through the Lok Sabha, what to speak of Gram Sabhas and basti sabha, which are in fact the true constitutional democratic planning units?

Through the 73rd and 74th Constitutional Amendments, we have brought in Art. 243, according to which the Gram Sabhas in the villages and

Ward Sabhas in the bastis have the first right of development planning. A true interpretation of the ideals of Gandhi, Ambedkar, Phule, Marx, Sahoo Maharaj would only mean this. But such constitutional provisions or even the Panchayat Extension to the Scheduled Areas (PESA) Act, which must be applicable to the adivasi areas are not referred to at all in our mainstream planning discourse. It indeed needs to be asked if the development plans for the adivasi areas, the tribal sub - plans are reflective of adivasi life style and their vision for democratic development? The answer is again, an emphatic no. Similarly, cannot the land in the hands of the villagers, be prioritized and reserved for food security and agriculture? But, do really villagers have that much of a say in whether they can retain their lands or must give it away, if the State wants them to?

It is only when we confront and dialogue with the Planning Commission for four hours, go to the Tihar Jail, convince some Committee members to raise a voice from within, based on law and facts, does Montek Singh Alhuwalia write to the Chief Secretaries of all the states to send their village development plans for the Eleventh 5-Year Plan and calls for lakhs of plans within a few weeks! Even with the polices that are posted on the Government website, they are mostly only in English, and only after we raise a hue and cry every time, it is posted in Hindi or some advertisement is published in the newspapers and in any case, there is no informed public debate on the same. This basic issue of the Planning Commission (a mere executive authority) above the Gram Sabha (a constitutional authority) is a question of grave import and pertinence for our democracy and those whose rights are violated are left with no other option, but struggle, which is by and large peacefully expressed.

Today, market values have taken precedence over human values and its negative impacts are being seen all over the place. It may sound clichéd, but the truth still remains that the corporates have the least regard for human rights and though they might wax eloquently about 'corporate social responsibility', the fundamentals of their social and political interests are very different. They are now in a position to able to influence policy making, be it environment or mining, health or education. The Prime Minister had recently announced a seemingly huge debt relief package of Rs. 60,000 crores for the farmers; while some of us are happy, this had led some to question the need for such a 'generous' relief package and fear that it might set a wrong precedent of debt evasion! While reservations may be a way of addressing the historical injustices done to the oppressed castes, there are others who see it as unnecessary and even being against the principles of equality. The ill-informed nationwide protest is an example of this.

Laws and policies today are only facilitating and boosting the market. The value of land that is acquired for a few thousands / lakhs by evicting slum communities, when comes to the hands of the corporates or real estate builders, spirals to crores of rupees. Thousands of crores have been allocated for the renewal and re-development of 63 cites and towns by inviting private investors and capital, creating a private-centric nature-devoid real-estate mode of development. I've said this many times before that when agriculture, pisciculture, horticulture is industry as per the SEZ Act, why not otherwise? Why are these livelihoods not respected by corporates and supported by the State when in the hands of the farmers and fish workers? The SEZ Act is a legislation which seeks to kill one (in fact many) kinds(s) of livelihoods and establishes another kind of industry which does not even guarantee enough livelihood security. The resultant inequity and inequality that exists; i.e. providing subsidy and supportive prices to one kind of industry (ex. agro-based corporates) and denial to the other (denial of minimum support price to the wheat or other food crops of small farmers) through 'open' markets and 'open' policies is infact indicative, not of openness, but of closeness, a closed and distorted perspective, according to which only machine-made production is more valuable.

Take water for example, which for generations has been, as the resource under the ground with the farming communities. There is no law to this day on the right to guarantee water rights to the Gram Sabha and even though some regulations on use of the ground water usage, it is more often than not made applicable to the farmers, and they are reminded of the 'law' if they dig a lengthier bore-well, while on the other hand, the companies are given a free hand to extract ground water (just as adivasis who are hounded for hunting a bird or animal for food even as the real poaching mafia or elite poachers roam scot-free). If it is not an assault on the human right to water, what else is it? What I am trying to say is, whether it is the city or village, or the issue of land or water, these new laws are only causing discrimination and exploitation, which is against the principle of democratic development and this is the reason why struggles are on. Debt relief in such a situation may be a temporary respite, but will our laws, policies and budgets be fashioned in such a way so as to extricate our farmers, adivasis, farmers and fish workers from the vicious debt and poverty cycle and trap is a question unanswered.

The Universal Declaration of Human Rights promulgated way back in 1948 laid out the basic human rights including the rights of women, children, disabled, dalits, adivasis and others sections, all of which is part of the right to life and livelihood through different socio-economic and cultural rights and

if identified rightly, many more rights, including the right to democratic development planning can be read from these.

If we really want to plan to ensure that no child is engaged in work, this might not be possible merely by law or policy alone. The right to development planning alone can guarantee this. The struggle against child labour cannot be successful if we only harp on 'abolition of child labour' alone without simultaneously not work towards and speaking for the right to work of the right wage and right to wage of the adults, a just price for their labour and produce. It is a harsh and cruel reality that while on the one hand Ambani earns Rs. 40 lakh per minute, 93% of the country's labour force is subsisting without any social security - pension, Provident Fund and they might find it difficult not to send their children to work. We must point out and address this discrimination that has been institutionalized, otherwise we may never be able to resolve the challenge of child labour, because, an average family in India does not have that much of economic security, whereby the incomes of parents alone will be sufficient to run the family without being supplemented. Therefore, every child is having to work and children are reared for that purpose.

This will not be eradicated by merely bringing in coercive population measures or Sanjay Gandhi style of family planning techniques. There is a basic framework of rights which lays down the rights of women against all kinds of violence. But as long as the right to property and right to planning - national to local to domestic, is not vested and guaranteed in the hands of women, until such time violence shall be inflicted on women, be it either in the form of commercialising or commodifying them or even by treating them as servants or equating them with 'Goddesses'. Only now is the issue of joint land holding coming into some policy domain, but we still do not have an overarching legislation guaranteeing the same. Existing statistics show that while more than 2/3rd of the labour is done by women, cutting across caste, class and sector, they are still not entitled to even less than 1/3rd of the property and resources.

Just as in the case of farmers, the right to decide the price for paddy, soya bean, cotton etc. must be in the farmer's hands, only then they can be saved from suicide and not just debt. Similarly, only when women will be able to directly take control of their local and domestic economies, and their entire families and not just produce and consume food, only when they will have enough economic security to cater to the educational, health and nutritional needs of their children will the situation change. Instead of guaranteeing this form of livelihood security, merely saying that there is nothing in the hands of farmers and therefore their lands must be acquired or

because they anyway commit suicides, they are shown the lolly pop example of meagre-employment generating industrialization, which neither absorbs the farmers nor labourers. This wrongful development planning model is violating the human rights of these nature-based communities and a fundamental systemic overhaul is needed to change this situation.

We had repeatedly met the Ministers along with a draft to provide social security for 93% of the unprotected work force and we had asked for Rs. 30,000 crores of the annual budget that would guarantee a basic social security to this 93%, but what to speak of Rs. 30,000/- crores, not even 1000/- crores came the way of these workers - the majority of the populace. The 93% of this workforce in this country would then raise the inevitable question as to why on the one hand companies are given crores worth tax rebates and incentives for achieving no ostensible public purpose, while they are denied a relatively far less annual budget of Rs. 30,000/- crores which would guarantee their basic social security including the right to food, health and education. This is the query that an old construction worker or a domestic worker has today and a concern that they are being deprived of social assistance in their difficult times. All this is only because development planning is not democratic in the true sense of the term and the Government's planning process are not informed by the guarantee of human rights.

It is another story altogether, that while asserting all these legal and constitutional rights, we approach the judicial system, to which topic I shall come in a while. The poor in the urban areas are aggrieved these days that there is no justice from the courts. The urban poor are in many cases actually displaced from their habitats or are forced to migrate from villages. They constitute at least 40% to 60% of the work force in every city; they clean, sweep, build, drive and run the city yet remain illegal and 'unauthorized' and are branded as 'encroachers'. They, whose sweat and blood, whose work and vote is legal, are themselves 'illegal citizens' and when after a days' hard work they want to return to their dwellings and spend their night with their kids are reminded of the cruel reality that the land underneath their feet is not 'theirs'!

Many middle class persons and I doubt, even some law students, might think that evicting and bull-dozing unauthorised colonies is totally justified, where most of the residents are poor dalits or belong to other backward classes and the minority communities coming not just from Bihar and Uttar Pradesh, but shockingly in the recent years from Satara, Sangli, Konkan, Vidarbha and other districts, within Maharashtra, thus debunking the parochial regionalism of Raj Thackeray. But these poor are denied their right over even that small piece of land even as Convention after Convention of the United Nations speaks high of the right to housing and right to shelter and

there are Special Rapporteurs to Commissions, but despite their voluminous reports, when 75000 bastis are razed to the ground with a dastardly stroke, the poor have to knock the doors of the High Court, taking the ground of legal violations and the Chief Justice, who also happens to be a good friend of Satheji passes a speaking order that, of course, everyone has the right to housing. But nowhere does the written order say that the ruthless bulldozing of these 75000 houses and slums by the State tantamount to violation of their basic human and constitutional rights and therefore, the State must be punished or if not that far, at least that they should be shown an alternative and resettled somewhere else. The learned Advocate General must know that the slum-dweller may as well be his car driver or domestic help or even law office assistant. Later, all the basti-women, along with their children and families took the initiative for struggle and occupied 78 acres of land in Mumbai at a time when the police were busy rescuing the flood-affected. Does not the State at least have a minimum duty of rehabilitating all those who are not just displaced but destitutionalised due to the bulldozing of their houses and communities? When the State behaves in such a way, the people have no other alternative, but to fight for their basic survival.

So where is the law, Constitution and the judicial system, when these lakhs of people scream for their rights but are denied the same? There are many petitions and many more judgements and only recently we concluded the Conference of the Campaign for Judicial Accountability and Reforms where we had discussed the changing role of he Judiciary, which has come to develop a dangerous position that the unauthorized slums must be bull dozed! There are lakhs and lakhs of people living in the unauthorised colonies in Delhi which the Supreme Court directed must be demolished! The MMRDA has, by law, grabbed 995 villages and neither were the Gram Sabhas of these villages consulted, nor were public hearings held and not just land, but everything attached to it, including people's livelihoods and resources, their dignity and identity.

Today's SEZ law is an attempt to replace the Gram Panchayat Development Commissioner with for which post high-ranking, yet low-thinking officials are queuing up and walking freely out of ministries and departments to become DCs and implement or rather not implement the environmental laws and labour laws, more on behalf of the developers, rather than on behalf of the people. At its sweet whim and fancy, the Government and ruling party, if confronted with a threat to its vote-bank, pretends to speak on behalf of the people, otherwise it goes ahead as in Ulhasnagar and umpteen 'unauthorized' colonies, with a population up to 30,000 in Delhi where the Government itself allowed people to settle, provided them, civic

amenities, even voter cards, took and used their votes and now is demolishing them. Today, corporates, who, we all know well are eyeing the land round the cities and are backed by the elite middle class, comprising those who want shopping malls and 'fresh' retail, the real estate developers and corporates are even trying to influence the judiciary

In the name of opening IT parks, instead of using waste land, these corporates are grabbing land and purchasing them for dirt-cheap prices, which the SC is as well permitting. Many of the shopping malls on the capital's border scape are illegal and it only dawned upon us later that the CJs's son had interests in these mall-lands and the Court had shockingly ruled that evicting these lakhs of people from their house for such elite infrastructure and using even police force to do so is not in any way a violation of their human rights or even legal rights!

The over-zealous attitude of the Courts, in pushing ahead the Inter Linking of Rivers Project, in comparison to their political counterparts is worth a mention. With no concrete information/assessment on what would be social, environmental and cultural impacts on the people and ecology and how many lakhs would be displaced. The SC dreams of linking Ganga, Brahmaputra, Yamuna and Kaveri, even a single Narmada dam is causing untold, continuing and impending misery and the same Courts are constrained to stop the dam after recording serious non-compliance and the Government is forced to stop after struggles and exposure of corruption and violation. Without considering such vital factor, the First Citizen of this country makes a public statement in support of this gigantic Project, which it is said cannot be contested as he is the President, but when we assess this on the plank of human and environmental costs, the pressing issues of water and larger national interest, we can't but dispute, disagree and debate this Project which lacks the basic eco-human vision and perspective and when someone goes to the Supreme Court praying for directions that the Project must be completed within 10 years not thinking where this 5,60,000 crores would come from; from the World Bank, ADB or other IFIs and corporate investment, then naturally they would demand the water rights leading to privatization of water, in a form worse than before and violating people's human right to water. So does this Project promote or end disparity? Without assessing the cost-benefit options and rejecting even scientific premises, the ignorance that the Court exhibits when it rules that the Project must be expedited within 10 years is violating not just legal but also constitutional rights and it is with great pain that we have to say this.

The role of the judiciary vis-a-vis displacement is an important issue and it is necessary to see what people from Narmada to Nandigram are saying

about the Court and how much or how little the Court in turn is respecting the rights of these communities. People, who challenge this whole model and not just beg for rehabilitation are saying that if planning of resources is carried out according to them, without corporate-State terror, this kind of displacement and dispossession would not have occurred. But this is not happening and displacement of 100-200 villages has becomes a common feature of today's rapid-takeover mode of development. But the Courts are merely interested in rehabilitation, that too not a true implementation of what is in the law or policy, leave alone concerning themselves with these deeper questions of democracy.

The issue is, the Judiciary is slowly moving away from its own earlier held position on human rights and justice and this is its challenge before us, the citizens to be able to get the court to ensure implementability of its own rulings. For example, sending Commissions of inquiry in cases of human rights violations, which was quite common earlier has become very restricted now. It is, therefore, an issue for movements also to think ten times before approaching Courts where major issues of large communities are involved, as even a single wrong judicial stroke may prove fatal for the people.

Our judicial system, which is primarily a British legacy maintains a distance between the judge and the people and our adivasis or basti-dwellers even today are not made comfortable to stand and speak before the judge. The Judiciary-PIL system, I feel should also be decentralized with minimum distance between the judges and the petitioners. This should have happened long ago, in all these years of independent India but has not materialized even today and we must speak in English in the High Courts and Supreme Court, even today we must say My Lord, even today the whole court atmosphere is very choking and alien to the ordinary Indian. I hope all you legal experts and professors, will ponder over this. Agreed, delivery of justice is very sacred, but that will not happen by merely propitiating the Goddess of Justice. That piousness can be associated with the true spirit of democracy if it can take the people's vision for the right kind of justice and decision. Those of you in legal circles will know how judges, ministers, big businessmen all meet in one club or gymkhana in the evening and are comfortable with the 'values' of each other. You might think I am proposing very radical issues from this dais, but all of this must be said and spoken because today the influence of the corporates and the powerful elite classes is not just on the executive and the legislature, which is no secret, but that influence is reached even on the judiciary, which you all law practitioners and teachers, publishers and students, and propitiators of law must question and pursue.

The legal and judicial system should in fact stand up and support the true pro-people development and oppose all unjust laws and policies which favour the haves and go against the Constitution, Directive Principles of State Policy and are violative of human rights and give undue and unjust power to the State, even as we must retain the right to comment on and the wrong judgements. In the name of the curbing terror, State is in fact spreading more terror and using the law as a tool; POTA, TADA, ULPA, CPSPA, AFSPA are all example of this, which grant undue powers with impunity to the beyond police and armed forces, as if the IPC and Cr.P.C. are not enough and these draconian legislations are invoked mostly against those who raise all the people's issues that I have put forth before you, i.e. democratic development, human rights, Constitution etc and question the high and mighty. Peaceful activists like Dr. Binayak Sen and Abhay Sahoo are examples of this who are given jail and denied bail.

All of you law students should raise a voice, knowing the Constitution. There is an entire breakdown of democracy in Chattisgarh. On the one hand we condemn violence by the Maoists, but in the name of countering Maoism, the State has armed private gangs and let loose the monster of Salwa Judum, displacing 60,000 adivasis from more than 300 villages who are now herded in tin camp and forced them to join the state armed force. Any organization working on the health, education or relief for these adivasis is branded as 'naxal' and put behind bars and their institutional registration is being cancelled, for questioning Chattisgarh's violent development policy. Such black laws are prevalent in different states in different ways just as anti-conversion legislations are used mostly to put the minorities behind bars, be it in Orissa or Chattisgarh. All such laws, in various ways trample the right of communities to propose alternatives and true development planning ways.

Terror being unleashed in the name of development, today, has reached its peak and we are staring face to face with a political system which is rooted in corporate, exploitative and capitalist forces, which seeks to nullify human rights and to combat this, it will not be sufficient for us to just wage a legal battle or knock the doors of the Courts, but we must enter the real battle fray and this need not be only the role and domain of social activists but also of lawyers like you. Satheji's message was this. He never hesitated to come and stand by the Narmada struggle even during the thick of repression. He, along with Neneji and Poonawalaji was always with the movement and he being in a respectable position of a Principal never felt that he was doing anything 'wrong', despite the fact that so many questions are raised about movements. He was never affected by the inhibitions that many people have; that their

careers and jobs would be affected by standing along with the struggles and movements.

Law and justice is a very wide regime and realization of human rights will not fully be attained by wearing black courts and fighting within the Courts alone. There are cases where lawyers walk up to us and say that despite all pleading, in the last minute the Judge himself says that he has his shares in that company, in Vedanta for instance, but he still sat in Judgement in that case. In Vedanta's case, for example, while the Judge had taken a position that the company had entered into all the agreements and contracts in a illegal way, but said that Sterilite, the parent company, can still execute the contract on behalf of Vedanta. One is at a loss of words to respond to such judicial pronouncements.

There are umpteen number of such examples and after such judgements, best of people's lawyers like Prashant Bushan, Sanjay Parikh, Shanti Bhushan, Kamini Jaiswal, Girish Patel, Anil Trivedi, Nitin Pradhan,Y.P. Singh are constrained to say, "we as lawyers alone cannot stand the might and unjust power of these builders and companies and cannot win cases even within the lawful framework". So from a time when social activists were dependent on lawyers appealing them to draft petitions, stand with them, explain the law to them, today we are in a situation where lawyers are needing active and conscientious activists to stand by them in the court of law. This is a not just a watershed in the people's movements but also indicative of declining judicial trends. How many more examples can I give? I can just recall Satheji and appeal that we all must live up to his legacy and your University and all his well-wishers and associates, stay with people's movements in our larger aim to achieve equity, peace, justice and true democracy.

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Disability, Health And Human Rights

Amita Dhanda[1]

This article is based on a lecture I delivered in honour of Prof.S.P.Sathe, as a part of the 2nd Prof. S.P.Sathe Memorial Event 2008 at ILS, Pune. It is ironical that my first major lecture at ILS, Pune was delivered in the absence of Prof. Sathe, when he as a mentor, friend and colleague was a substantial presence in my scholastic life. As we meet each year to celebrate this towering scholar, the number of people who knew him in person will keep coming down; I therefore think it is appropriate to recount what makes for star scholarship. This recounting is especially required because it is increasingly believed today that scholars should also make a show of their superior knowledge and thus aggressively sell themselves. It is this belief perhaps which causes many a young legal scholar to pretend to know more than they in fact do. Whilst arrogance is about flaunting what you know; modesty is about knowing what you do not. Similarly, whilst wit is something that you test on the other; humor is something you test on yourself. A good scholar needs both modesty and humor but most importantly needs to be a good human being who recognizes his own frailty, neediness and connection with the rest of humanity. Prof. Sathe was a scholar who epitomized each of these qualities[2]. I think ILS would be able to hold a Sathe Memorial Event for years to come because of the huge capital of goodwill that Prof.Sathe has left with the institution. Irrespective of their other commitments more and more people would keep coming back to ILS, Pune because they knew and learnt from Prof.Sathe, and the encounter made them that much the more worthy human beings.

I. Introduction

Whilst the right to health has been recognized as a vital socio-economic right, the contours of this right are far from settled[3]. Does the right guarantee a minimum quality of life or does it aspire for the ideal standard. When claims are made against the state to guarantee the right to health what is it that the state is required to do? Is the state required to thwart practices

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1 Professor of Law, National Academy of Legal Studies and Research, Hyderabad, Andhra Pradesh, India. Spoke on "Human Rights of People living with Disability" on 9th March, 2008, in the Conference on 'Human Rights, Law & Development' held under the auspices of Prof. S.P.Sathe Foundation, "Remembering S.P.Sathe"

2 For an analytical review of Prof Sathe's major writings see Amita Dhanda "Powering Responsibility, Conscience Keeping in Public Law : the Scholarship of S P Sathe" 1(1) The Indian Journal of Constitutional Law 1 (2007)

3 The Committee on Economic Social and Cultural Rights has attempted to address some of this formlessness in General Comment 14. This comment has to be looked at closely in order to understand the extent of State obligations under this right. Whilst this comment does not make reference to persons with disabilities, this enunciation holds relevance for persons with disabilities insofar as the Convention on the Rights of Persons with Disabilities has asserted equality and non discrimination for persons with disabilities.

that endanger health or is it only required to inform the populace of the harmful health consequences of certain kinds of behaviour? Should the State provide the opportunity to all persons to live as a healthy life as they deem fit? Or should it make health a functioning which is guaranteed to all whether or not they desire it[4]? The question with which I wish to begin this article is whether health is an objective standard of well being which can be made available to all or is health a subjective standard which would vary from person to person and therefore cannot be objectively guaranteed. If the right to health is perceived in subjective terms then what the state needs to do is to accord to all persons the opportunity to aspire for this right in accordance with their own perceptions. If health is viewed in objective terms then the state needs to weed out all such behaviours and practices which diminish the objective standard. Perhaps, the truth lies somewhere in between these polarized positions. The veracity of this contention can be demonstrated when we examine the right to health in the context of disability.

The right to health has been posited as one of the important social economic rights. It has often been asserted by the Indian Supreme Court that the right to life is not just a right to bare physical existence, instead the right is a right to a meaningful life and such a meaningful life can only happen for all people if the right to health is guaranteed to all[5]. Whilst the pre-eminence of right to health in the right to life discourse is unexceptionable, the contours of this right begin to alter when the question is raised in the context of disability. This alteration primarily happens when primacy is accorded to the health paradigm and disability is perceived as an aberration which needs to be corrected, alleviated or treated in order to restore the person with disabilities to health.

How should we forge the connection between health and disability from a human rights perspective? The answer to this query would differ depending upon whether we undertake our journey from health to disability or from disability to health. This article sets up an argument for looking at the right to health within the paradigm of disability along with elaborating on the reasons which make the examination of disability within the paradigm of health unacceptable.

[4] Martha Nussbaum makes the distinction between capability and functioning whereby the former signifies opportunity the latter means an on ground operationalization of the opportunity. Nussbaum in the main believes that all humans should be accorded the opportunity to grow and develop and the decision whether to avail or not to avail the provided opportunity should remain with the individual. The only capability for which she makes an exception is the right to education where she wants and laws and policies not to just create educational structures but to ensure that children in fact access education. In the case of health however she wants the choice of accessing health services to remain with the individual. See Martha Nussbaum *Frontiers of Justice Disability , Nationality, Species Membership*, New Delhi Oxford University Press, (2006)

[5] Maneka Gandhi vs Union of India (1978) 1 SCC 248; Francis Coralie Mullin vs Administration Union Territory of Delhi (1981) 1 SCC 608; Parmananand Katara vs Union of India (1995) 3 SCC 248; Vincent vs Union of India AIR 1987 SC 990.

The article proceeds in the following sequence. It firstly looks at disability from the lens of health and then proceeds to examine health from the perspective of disability. It next elaborates on how the right to health has been enunciated in the recently concluded United Nations Convention on the Rights of Persons with Disabilities(hereinafter CRPD) and indicates how Indian legislations on the health of persons with disabilities would need to be changed to make them consonant with the CRPD. The article concludes by underscoring how the explicit rights based approach of the new Convention could alter the relationship between health and disability.

II. Disability in the health paradigm

Health according to the World Health Organization is not just an absence of disease but a state of being which encompasses physical, mental, and emotional health. This holistic conception has often been criticized for setting up such a high standard of health that nobody can be termed healthy. I think that the definition is salutary to the extent that it alerts us to the fact that being healthy is a state of being that is more complex than being not ill. My difficulty with the definition and with the general medical discourse on health emanates from the prototypical terms in which it conceptualizes the human. There is a uniform universal standard of the healthy human being and every departure from the same is an abnormal unhealthy aberration. If you look at disability with such a perception of the healthy human, then you necessarily view disability as an aberration, which is pathological, hence needs to be fixed. When we speak of mental, physical, sensory, and intellectual disabilities we are evaluating persons with disabilities on the ideal standard of the perfect human being and finding them deficient.

If the connection between health and disability is forged in this manner, then what would be the role allocated to the health service provider? Necessarily the service provider would be asked to set matters right. This could be by corrective surgery, invasive treatment or through aids and appliances. Irrespective of their intrusive nature, the various remedies are seen as unproblematic because they claim to have been devised in the best interest of the person with disabilities. This perspective presumes that any departure from that prototypical standard of being human is not desirable; and hence any effort to bring the human close to the prototype would be necessarily wanted. There is therefore no need to explain or justify the intervention. An automatic consequence of this perspective is that it focuses attention on the particular disability to the exclusion of all else and thus objectifies persons with disabilities.

When you see disability as deficit you also see the person with disability as deficient. Such attribution of deficiency reduces the value of a life with disability hence the need to cherish nurture and develop such a life

for its own sake is not felt. Importantly, since the deficiency is perceived in the person rectification has also to be of the person. There is no need to examine the socio political context within which the person is functioning and determine how modifications in that context could assist individual function.

When disability is seen as deficit, the person with disability is viewed as an inadequate non contributing member of the society. Effort should be made to render the person functional, however if those efforts fail, then the philanthropic and welfare impulses of the non disabled should take over to make the best possible provision for persons with disabilities. This non contributory perspective on disability influenced the exclusion of disability from the original social contract charter and make provision for it only in subsequent social arrangements[6].

Another consequence of the medicalized perspective is the belief that disability can be prevented. Consequently, public policy planners are asked to invest in preventive strategies be they: invasive prenatal diagnostic techniques; safe working places or a healthy environment. Whilst the need to engage with creating a safe world is undeniable; such engagement will not oust disability from the human experience. If the ubiquity of disability is conceded then evidently disability needs to be perceived in other than deficit terms. The medical perspective on disability does not allow for the same to happen.

III. Health in the disability paradigm

If you approach the question of health from the disability paradigm, the first thing you accept is that the prototypical human is a myth. The reason why the myth persists is that a majority of human beings are able to fit into the social mould and pretend that their departures from the prototype are unimportant. Since the differences of persons with disabilities are more explicit and evident, they do not have the liberty of passing off, which is available to the rest of humanity. If disability is perceived as difference and not deficit then the approach to the health question alters. The question no longer is to how to fix the mind and body so that they can function in the subsisting world. The question rather becomes how to modify the world so that it can accommodate all kinds of bodies and minds. If there is wide diversity in human beings, then any effort at essentializing the human would necessarily exclude those who cannot fit the mould. If diversity is recognized then the mould would need to be more flexible. It is absence of flexibility in

[6] For a detailed critique of the social contract theorists on this count see Martha Nussbaum *Frontiers of Justice*, supra note 3. And for a review of Nussbaum's book see Amita Dhanda " The Jurisprudence of Inclusion" 7 *Journal of the National Human Rights Commission* (Dec 2008)

the mould and not the deficiency in the human which results in exclusion. Addressing questions of health from the disability perspective therefore would ask for social formations to be revisited and to be so constructed that they accommodate persons with disabilities. These accommodations would need to be undertaken in all parts of the social system, be it education, work, transportation, sports, leisure.

'Tare Zameen Par[7] struck a chord with so many of us because it asked the educational system to individuate and look at the learning capabilities of each child; instead of functioning on a uniform paradigm and beating every child into submission. This homogenization that we find at school level continues in college and university, when at every level there is a need for individuation and recognition of difference. A case is not being made against uniform policies. Rather a contention is being raised for recognition of the fact that such uniform policies may not cover all persons. Consequently such uniform policies should be so implemented that no person falls within the cracks. And this treating of each person as an end in herself is at the heart of human rights.

When we addressed disability in the health paradigm, we saw disability as aberration. But when we looked at health in the disability paradigm we see disability as difference. This movement underscores the humanness of the person with disability. With the recognition of this humanness comes the acceptance that a person with disability aspires for the same kind of life as everyone else. He or she has the same emotional, physical, sexual needs as everybody else, the same need for affiliation as everybody else. If the WHO definition of health is taken on board then it is essential that every human being be provided the opportunity to live a full life connected with the rest of humanity. It is this connection which makes an individual physically, mentally, emotionally and spiritually healthy and for this to happen it is extremely important that we recognize the personhood of persons with disabilities.

IV. The Right to Health in the CRPD

The CRPD it is often asserted does no more than guarantee to persons with disabilities, the same rights that have been made available to the rest of humanity. Evidence of such like assertions is strewn in the preparatory papers of CRPD[8]. Even as the veracity of this contention is not being questioned, it is important to appreciate that the convention in accepting

[7] Taare Zameen Par is a Hindi movie which explores the trials and tribulations of a young boy with dyslexia in the school system and asks for individuation of education techniques, compassion and humanism in the learning environment.

[8] These papers can be virtually accessed on the un enable website hosted by the department of economic and social affairs.

disability as a part of human difference reconstructs the human, and such reconstruction alters human rights discourse.

Since the CRPD celebrates disability as a part of human diversity[9], its primary concern is to provide space to persons with disabilities in current socio-political discourse. To that end, the CRPD adopts the social model of disability[10] which is concerned with modifying the world to accommodate disability and not to so rectify persons with disabilities that they can somehow fit into the subsisting world[11]. In the light of the above-mentioned analysis it can be contended that the CRPD examines the right to health from a disability paradigm and not the other way around.

The chapeau to Article 25 recognizes that persons with disabilities have the right to enjoyment of the highest attainable standard of health without discrimination on the basis of disability. This assertion questions the deficits based perspective on disability which diminishes the value of the life of persons with disabilities. Since it is a devalued life the obligation to nourish, nurture and save it is not seen as evident and obvious. Thus, even as persons with disabilities need to have greater access to healthcare facilities, such healthcare is often provided in a half- hearted manner. The loss of a disabled human life it is believed is not the same as the loss of a human life. The disability as difference perspective which the CRPD adopts underscores the humanity of persons with disabilities, restores value to disabled lives, and thus supports the assertion by persons with disabilities to the right to healthcare on an equal basis with others.

Article 25 of the CRPD elaborates upon the right to health. However, the CRPD's perspective on the health rights of persons with disabilities cannot be only deduced from this article. Rather the depth of the Article 25 commitment can be fully understood only by connecting it to the other articles of the convention which unequivocally stress that the value of a disabled human life is no less than any other. Article 10 requires state parties to take all necessary measures to ensure the effective enjoyment of the right to life by persons with disabilities on an equal basis with others. Article 11 obligates states to take necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and natural disasters. Whilst 25 (f) shows awareness of discriminatory social practices which devalue or extinguish the life of persons with disabilities. The clause therefore requires prevention of discriminatory denial of health care or health services or food and fluids on the basis of disability.

[9] See Article 3(d) which lays down "respect for difference and acceptance of persons with disabilities as part of human diversity and humanity" as one of the General Principles informing CRPD.

[10] See para (e) of the Preamble of CRPD

[11] See para (v) of the Preamble; articles 3(f) and 9 of CRPD

Clause (a) of Article 25 requires that persons with disabilities be provided with the same range quality and standard of free or affordable health care and programs as provided to other persons including in the area of sexual and reproductive health and population based public health programmes. This clause needs to be read along with Article 23 which mandates state parties to take effective and appropriate measures in all matters relating to marriage, family, parenthood on an equal basis with others. Article 23 recognizes that persons with disabilities have the right to decide freely and responsibly on the number and spacing of their children and to have access to reproductive and family planning education.

The need to recognize the right of persons with disabilities to sexual and reproductive health is especially important because of the ease with which sterilization of persons with intellectual and psychosocial disabilities is proposed and practiced[12]. This practice is often justified by the fact that persons with intellectual disabilities are special targets of sexual exploitation. Such like justifications seem almost oblivious of the fact that sterilization in no way prevents sexual exploitation; it only ensures that there are no embarrassing social consequences of the same. Further such like practices only perceive the bodies of persons with disabilities as objects of prey; that these bodies also house the hopes, desires, aspirations of persons with disabilities is beyond contemplation. The recognition of the right to sexual and reproductive health is important because only subsequent to such recognition a whole range of interventions which allow for the realization of the right would begin to be devised.

Article 25 (d) requires health professionals to provide care of the same quality to persons with disabilities as to others including on the basis of free and informed consent by inter alia raising awareness of the human rights dignity and autonomy of persons with disabilities. This commitment again needs to be read along with other articles of the convention which stress on the legal capacity, liberty and integrity of persons with disabilities. Thus, Article 12 reaffirms that persons with disabilities have the right to recognition everywhere as persons before the law and recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Article 14 (b) guarantees to persons with disabilities the right to liberty and security of person on an equal basis with others and bars the existence of a disability to be a justification for deprivation of liberty. And Article 17 provides that every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

[12] The question of sterilization of underage girls with intellectual disability at Shirur Hospital Pune is still hanging fire and under scrutiny of the Bombay High Court. For some of the constitutional questions around the procedures See Amita Dhanda " Womb Removal of Women with Mental Retardation: Constitutional Constraints on State Power" Samadhan News (March 1994)

The norm of informed consent is especially problematic for persons with psychosocial disabilities because the mental health laws of several countries permit interventions on the strength of surrogate consents[13]. In several personal testimonies, persons with psychosocial disabilities have interrogated such forced interventions and termed them anti health. Such interventions, they contend, which have been ostensibly made to protect their health cause severe damage to their sense of self, personhood, and dignity. Persons with psychosocial disabilities have also testified that they found it easier to recover from the so called illness than from the health intervention; consequently they sought an express prohibition on forced interventions in the CRPD[14]. The CRPD does not contain an article which expressly prohibits forced health interventions. However, the convention recognizes the physical and mental integrity of all persons with disabilities. It prohibits the use of disability to justify deprivation of liberty of persons with disabilities and it guarantees liberty rights to persons with disabilities on an equal basis with others. It further requires that all health interventions should be made respecting the norms of informed consent and confidentiality. In the face of these provisions it can be contended that the CRPD frowns upon forced interventions even if it does not expressly prohibit them. A conclusion which is further strengthened by the fact that the CRPD guarantees to all persons with disabilities the right to participate in their own health care decisions as an integral part of the right to health.

The recognition of the right to sexual and reproductive health of persons with disabilities was important because they are viewed as asexual beings. And recognition of the right of persons with disabilities to participate in their own health care decisions[15] is crucial because they are stereotyped as helpless uninformed and dependent. To offset this objectification, it is necessary to expressly articulate the rights of persons with disabilities to participate in their own health care decisions. This right to participation would require that persons with disabilities are informed of the proposed health care interventions and their consent for the same obtained. The obligation of obtaining informed consent would stand fulfilled only when information is provided in accessible formats to persons with disabilities, illustratively: the use of Braille for blind persons; sign language for the deaf; and plain language for persons with intellectual disability.

[13] Peter Bartlett and Ralph Sandland Mental Health Law and Practice Oxford University Press (2nd Edn 2003)

[14] Forced Interventions First Person Narratives (Bapu Trust Pune 2005)

[15] This assertion is being made with awareness of the fact that the health care system in India is not very sensitive to patient rights. Consequently, the participation of patients in decisions surrounding their own health care is more prompted by individual personality than systemic facilitation.

Whilst critiquing the medical model on disability, I had questioned the "the fix it" perspective of the model. How the model operates on the belief that every person with disability would necessarily wish for correction, alleviation or treatment of their impairment; hence every effort should be made to undertake such procedures. If the procedures succeed then well and good if not persons with disabilities should continue to live their devalued life on the sufferance of others. Even as I disagree with this perspective of the medical model, I do not deny that the impairments of persons with disabilities do contribute to enhancing their life difficulties. In such a situation, healthcare interventions which prevent the onset of secondary impairments or mitigate the limitations of the primary impairment would be an integral component of right to health for persons with disabilities. The difference between the medical model and this rights based intervention is that the choice to opt for the preventive intervention resides with persons with disabilities. It is not presumed that such intervention would be necessarily desired or not desired. As there are advantages and disadvantages in both approaches, it is only appropriate that public policy should let persons with disabilities decide. It is this perspective which has found inclusion in article 25(b) of CRPD.

V. Modifying Health Laws in the Light of Disability Human Rights

India has both signed and ratified the CRPD without any reservations or interpretative declarations. We have therefore undertaken to modify domestic law to bring it in consonance with CRPD. In this last segment, I wish to flag the changes that would need to be brought into domestic law to fulfil this international obligation.

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter PWDA) makes no mention of the health rights of persons with disabilities, though it requires schemes to provide aids and appliances to persons with disabilities[16]. In fact, the only statutory provision which may seem to have some health related focus is the section which deals with prevention and early detection of disabilities[17]. This section makes an unproblematic adoption of the medical model of disability and hence provides for screening of "at risk" cases and measures for prenatal and peri-natal and post natal care of mother and child along with awareness campaigns highlighting the procedures for preventing disability.

The PWDA was enacted to recognize the rights of persons with disabilities. Whilst the title of the statute promises full participation, the

[16] Section 42 PWDA

[17] Id section 23.

section on prevention reinforces the diminishing outlook on disability. It is true that Government need to adopt strategies that protect life and prevent disability. These strategies are of interest to humanity at large but cannot be presented as policies that are protecting the rights of persons with disabilities. The inclusion of this section in PWDA means that the budgetary allocations for persons with disabilities stand diverted to concerns which in no way promote their rights. It is for this reason that the CRPD does not have an article which speaks about the prevention of disabilities but allows for initiatives that minimize existing disability and prevent secondary ones. Insofar as Section 23 of PWDA cuts at the very root of disability human rights, it is only appropriate that this section is deleted from the Act. In order to recognize the health rights of persons with disabilities, a provision drawing inspiration from Article 25 of the CRPD needs to be included.

The Mental Health Act of 1987 regulates the admission and discharge of persons living with mental illness in psychiatric hospitals and nursing homes. The statute primarily regulates the compulsory provision of institutionalized services to persons living with mental illness; even though there is a provision which allows persons living with mental illness to voluntarily access psychiatric services[18]. The coercive import of the act is borne out by the fact that whilst there is a provision by which voluntary institutional treatment can be provided compulsorily[19]; there is no provision which permits the reverse process.

The definition of disability in the CRPD includes both mental and intellectual disability. The use of the terms intellectual and mental shows that the CRPD extends to both persons living with mental retardation and mental illness. Article 12 of the CRPD recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. The use of the phrase all aspects recognizes that persons with disabilities possess the capacity to take their own healthcare decisions and this capacity is not lost even if persons with disabilities require support to exercise this capacity[20].

Article 14 of the CRPD, guarantees to all persons with disabilities the right to liberty and security of person on an equal basis with others. This article also states that persons with disabilities shall not be deprived of their liberty unlawfully or arbitrarily and that the existence of disability shall in no case justify a deprivation of liberty. The cumulative effect of the disability prohibition and the recognition of the norm of equality and non-

18 Section 15 MHA

19 Id section 18 (3).

20 For a detailed analysis of the legal capacity provision in CRPD see Amita Dhanda "Legal Capacity in the Disabilities Rights Convention : Stranglehold of the Past or Lodestar of the Future" 34(2) Syracuse Journal of International Law and Commerce 429 (Spring 2007)

discrimination render the validity of mental health treatment laws questionable. This interrogation is strengthened by Article 17 which provides that every person with disabilities has a right to respect for his or her physical or mental integrity on an equal basis with others. General comment 14 on the right to health has included acceptability as one of the standards to which healthcare services need to conform. Acceptable health facilities goods and services are those which are in conformity with human rights and medical ethics. The need to fulfill this criterion also finds expression in Clause (d) of Article 25 which requires health professionals to provide care to persons with disabilities on the basis of free and informed consent.

The CRPD has not explicitly prohibited forced interventions; but neither has it permitted them. Further, in the manner in which it has dealt with right to liberty, integrity, health and legal capacity, it is not possible to continue with forced interventions. Thus, the rights recognized by CRPD have de-legitimatized legal, social and medical practices whereby persons living with illness are provided compulsory treatment. In order to bring the Mental Health Act in conformity with the CRPD, it would be necessary to dismantle the compulsory care provisions in the statute. On a more positive note provisions which mandate the state to provide available, accessible, acceptable and quality health services for persons living with mental illness would need to be incorporated.

The National Trust for the Welfare of Persons with Autism Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (hereinafter NTA) is a statute which primarily concerns itself with setting up protective regimes for the disabilities brought within its purview. The statute is not directly concerned with health related questions and hence it may be irrelevant to examine its provisions in this exposition on the right to health of persons with disabilities. However, since it is the only legislation by which certain disabilities namely autism and multiple disabilities have been recognized it would be necessary to consider where to provide the health rights of these disabilities. These segregated regimes of disability rights make for a situation where some persons with disabilities are denied some of their human rights. This question of differential protection would need to be addressed in the exercise to harmonize national disability laws with the CRPD.

VI. Conclusion

The above exposition showed how the construction of disability changed depending upon whether it was addressed in the health or the disability rights paradigm. It demonstrated that the CRPD has opted for the disability as diversity approach propounded by the disability rights paradigm. And lastly deliberated upon the ways in which Indian disability laws would

need to alter to be in accord with the CRPD. The CRPD regime has altered the interplay between health and disability and set up a more subjective standard of human well-being. Insofar as the CRPD is the latest inclusion in the pantheon of Human Rights Conventions, the modification is not only of relevance to persons with disabilities. In this concluding segment, I wish to address the significance of this change to human rights jurisprudence.

I think the single most important change that has been ushered in by the CRPD is that it has made the individual person and not the health service provider central to the discourse on health. It sets up a dialogue between the providers and recipients of health services, whereby, the providers are being asked to customize their knowledge and skills in accordance with the needs of individual recipients. The principle of reasonable accommodation cannot operate without a thorough knowledge of the needs of the individual person with disabilities. The movement of patient rights has been an effort to remedy the power asymmetry between doctor and patient. Despite some gains the movement has enjoyed limited success because it has at no point questioned the fundamental premise of the health care system that the human body is meant to function in a certain manner and any departures from the same need to be set right. The Disability Rights movement has shaken this belief in the human prototype; the destabilization of this belief has the potential of altering the power symmetry between health service providers and recipients. This is because in the disability rights model the health service provider cannot undertake his tasks without the information provided by the recipient. This relationship of parity that the CRPD needs to set up between provider and the recipient provides a paradigm which is worthy of emulation in all health settings. The CRPD in providing a precedent of respectful interaction between health service providers and recipients inaugurates a mode of communication in the realm of health services which has relevance for all and not just to persons with disabilities. It would be therefore appropriate to contend that the interplay between health and disability has deepened the human rights content of the right to health for all. Consequently all those concerned with furthering the right to health need to engage with this model.

The Tragic Decline Of Criminal Jurisprudence[1]

Colin Gonsalves*, Dhairyasheel Patil, & Robert Rothkopf

The police have made shrewd use of the media. In concert, they have propagated the notion that the law and the judiciary are too lame to curb crime or deal with hardened criminals. Rather than identify the real weaknesses (shoddy police work and backward methods), the criminal justice system has yielded to the media's blind criticism and responded by boosting the conviction rate. This has been achieved at the expense of crucial Supreme Court precedents that once safeguarded the fundamental right to a fair trial.

In this article we analyse recent Supreme Court judgements that have vandalised criminal jurisprudence and overturned long-established principles. From condonation of torture, to admissibility of confessions made to police officers, the damage is widespread.

Background

Over the last 15 years, criminal law protection of the accused has been steadily dismantled. It began with the misconceived perception within the highest levels of the judiciary that the rights of the accused were too extensive and in need of review.

This was fuelled in large part by a systematic media campaign conducted by senior police officers: They made national television-appearances to coincide with high-profile cases and capitalised on the public's frustration with the criminal justice system. In their statements, they relentlessly berated the judiciary claiming that having captured dreaded criminals and terrorists, the judiciary's hyper-technical application of human rights simply let them off at the drop of a hat. They claimed that the judiciary's tendency to grant bail or acquit criminals because of dogged adherence to notions of fairness further punished the victims of crime.

The police frequently presented false information to the public on various TV programmes. For example, they claimed that the rate of conviction in Indian Penal Code (IPC) cases was only 10%, the true figure being closer to 50%. They also misrepresented convictions in TADA (The Terrorist and Disruptive Activities (Prevention) Act 1987) cases, claiming that the conviction rate was a mere 5%. They neglected to mention that the

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1 This article is updated and rewritten with the other two co-authors as stated above. Adv. Colin Gonsalves had presented a talk on "Human Rights Audit of the IPC" on 9th March 2008 in the Conference on 'Human Rights, Law and Development' held under the auspices of Prof. S.P.Sathe Foundation, "Remembering S.P.Sathe."

vast majority of those accused under TADA are detained as "undertrials" for 5 years or more before their trials even begin. The low conviction rate actually reflects police propensity to misapply TADA to normal criminal cases, and innocent people.

The police successfully shook the confidence of the higher judiciary and consequently initiated the destruction of crucial safeguards within the criminal justice system.

Of course, judges would not appear on primetime TV and point out that most acquittals arise due to police corruption and their appalling standards of criminal investigation. The police's view prevailed, unanswered, and their ideological campaign had the intended effect: Judges held public perception, rather than principles of criminal justice, uppermost in their minds. Embarrassed by the low conviction rate, this supposedly independent judiciary has irresponsibly and arbitrarily accelerated convictions, in a bid to appear tough on crime. Without regard to the rule of law or criminal jurisprudence, the judiciary did whatever was necessary to be seen putting criminals behind bars, denying bail and awarding the stiffest sentences. Judges were afraid to entertain reasonable doubt as to the guilt of the accused for fear of seeming weak.

The Judiciary never considered that the Constitutional rights of the accused could be preserved whilst repairing their image. Their hasty public relations exercise rallied to satisfy the upper-middle classes. The vast majority of the poor see the criminal justice system as a great engine of oppression where widespread torture is condoned by the judiciary and innocent people are roped in while the rich get away scot-free. The Judiciary do not have the backbone to uphold the Constitution in respect of poor and working class people.

The Dilution of Criminal Law

India has a common law system. The principle of binding precedent (stare decisis) demands that decisions of higher courts, and within them, of larger benches be adhered to and followed by lower courts and smaller benches respectively. It serves to limit the arbitrary power of the judiciary and increase legal certainty, thereby strengthening the rule of law.

In India, frequent decisions made by small benches of the Supreme Court have defied those of larger, even Constitutional (5 judges of more), benches. Subsequently, their decision is followed in a series of cases in the lower courts, setting aside the earlier binding precedent. The smaller benches claim that the decision they ignore is "technical" or "only a rule of prudence" or "merely a rule of caution".

However, criminal law is, at its core, a set of technical rules and procedures that require a judge to be prudent and cautious. Criminal jurisprudence lays down the path by which a judge is able to determine what constitutes "reasonable doubt". Once these rules are discarded a judge's discretion becomes unfettered. The "beyond reasonable doubt" criminal standard is discarded and a judge does what he likes. He is able to convict or acquit on the basis of gut feeling. The rule of law crumbles. The Indian judiciary has indeed set out on this treacherous course. See below for a survey of their most dangerous decisions.

Vandalism of Criminal Jurisprudence – A Selection of Irresponsible Supreme Court Decisions

In this section, we survey the Supreme-Court-sponsored decay of standards in criminal trials. The criminal law reports are rife with examples of the negligent reduction in the quality of evidence expected from the police and prosecution.

The analysis deals with the following:

- Condonation of Torture
- Blood Tests
- Dying Declarations
- Confessions
- Lying Witnesses
- Sealing of Articles Associated With The Crime
- The First Information Report (FIR)
- Arrest of Females
- Chance Witnesses
- Standard of Proof Lowered

▪ Condonation of Torture

There is something seriously wrong when the highest court of the land, the Supreme Court of India, approves the use of torture by the police.

In **Kamalanantha vs. State of Tamil Nadu (2005)**[2] the Supreme Court did not even whisper criticism of police who beat prosecution witnesses. This matter related to an unpleasant case of sexual assault on Ashram girls. The disgraceful dictum begins at paragraph 44 where the Supreme Court decided that the failure of the police to follow s160 CrPC was permissible. That section stipulates that a policeman may require attendance of witnesses at a police station for questioning, but that women must be questioned in their place of residence. The Ashram girls were taken to the police station for

[2] 2005 5 SCC 194

questioning, in breach of that section. At first glance, this seems reasonable, as it was held that:

> At paragraph 44: "the Ashram cannot be the place for the purposes of Section 160 Cr.P.C. and the victim girls were rightly examined and interrogated in women police stations. They were removed from the Ashram to erase the fear psychosis from them. It was for the safety and to serve the interest of justice, they were removed from the clutches of A-1."

However, the girls' safety interests are hardly served if they are subsequently beaten by police in the station during the interrogation.

> At paragraph 58: "In the Police Station, we were enquired about the character of Premananda Swami. Since Premananda has already kept us under threat, myself and others did not reveal anything to the police. After the police beat us, myself and other girls informed that we were raped by Premananda. Only at that time I came to know that Premananda Swami was having sexual relationship with other girls."

The Supreme Court, however, had no problem with this:

> Paragraph 58 continued: "It is in that context the High Court holds that **so called beating could have meant to shake-off their inhibition and fear, to make them free to say what they wanted to say**. In the given facts and circumstances of this case, **beating will mean to remove the fear psychosis and to come out with truth**. We do not find any infirmity in the concurrent findings recorded by both the Courts below on this count."

- **Blood Tests**

In a long line of decisions, the Supreme Court has prudently acquitted the accused when the police investigation is found to be grossly deficient. For example, the failure of the police to show that blood, found on articles obtained from the accused, actually belonged to the deceased has rightly been excluded from the evidence.

In **Kansa Behera vs. State of Orissa (1987)**[3], the Supreme Court gave a solid ruling, overturning a life sentence and conviction of murder that was based on circumstantial evidence:

> At paragraph 12: "As regards the recovery of a shirt or a dhoti [garment worn around the waist] with blood stains which according to the serologist report were stained with human blood

[3] 1987 (3) SCC 480

> but there is no evidence in the report of the serologist about the group of the blood and therefore it could not positively be connected with the deceased. In the evidence of the Investigating Officer or in the report, it is not clearly mentioned as to what were the dimensions of the stains of blood. Few small blood stains on the cloths of a person may even be of his own blood especially if it is a villager putting on these clothes and living in villages. The evidence about the blood group is only conclusive to connect the blood stains with the deceased. That evidence is absent and in this view of the matter, in our opinion, even this is not a circumstance on the basis of which any inference could be drawn."
>
> At paragraph 13: "It is a settled rule of circumstantial evidence that each one of the circumstances have to be established beyond doubt and all the circumstances put together must lead to the only one inference and that is of the guilt of the accused. As discussed above the only circumstance which could be said to have been established is of his being with the deceased in the evening and on that circumstance alone the inference of guilt could not be drawn."

However, in a shocking display of naivety, a three-judge bench of the Supreme Court in **Subramani vs. State by Inspector of Police (2003)**[4] upheld a conviction of rape and murder of a teenaged girl based purely on circumstantial evidence. Blood stains found on the accused's lungi (a garment worn around the waist) was found to be human but its blood group could not be matched to that of the deceased. The Supreme Court held at paragraph 8:

> "...[the] deceased had suffered bleeding injuries and the lungis seized by the investigating agency from the accused contained bloodstains. The serologist has opined that the bloodstains are of a human being but was not able to establish the blood group. **As noted above, learned counsel for the appellant had contended that in the absence of such identification of the blood group the stains found on the lungi would not in any manner inculpate the accused in the crime. We do not think this argument can be accepted**. The accused has admitted that the lungis belong to him and were seized from him, for that matter he says he gave the lungis to the investigating officer but

[4] 2003 (10) SCC 185

> he has not explained how the bloodstains which are at least proved to be human blood came to be there on the lungis. The absence of any explanation in this regard would only strengthen the prosecution case that blood must have stained the lungis at the time of the attack on the deceased... These factors coupled with the fact that the appellant has failed to give any explanation as to how and when he parted company with the deceased, in our considered opinion leads to the one and the only conclusion that the charged of rape and murder of Vaishavi levelled against the appellant stands proved."

- **Dying Declarations**

Dying declarations are admitted in evidence on the contraversial legal maxim "nemo moriturus proesumitur mentiri – a man will not meet his maker with a lie in his mouth". The evidentiary weight assigned by the Courts to dying declarations is heavy. In **Dasrath @ Champa vs State of Madhya Pradesh (2007)**[5]:

> At paragraph 12: "Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no scope of cross-examination. Such a scope is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that **the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness**. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration."

The conditions required to "inspire full confidence of the Court" in the veracity of dying declarations has been progressively and outrageously degraded by a series of Supreme Court decisions.

Until recently, dying declarations were accepted on a cautious basis: A magistrate may record a dying declaration if a doctor is present and certifies that the injured was both: (1) conscious; and (2) in a fit state of mind, at the time the declaration was made.

5 2007 (12) SCALE

In **Maniram vs State of Madhya Pradesh (1994)**[6] the Supreme Court held:

> At paragraph 3: "...in a case of this nature, particularly when the declarant was in the hospital itself, it was the duty of the person who recorded the dying declaration to do so in the presence of the doctor after duly being certified by the doctor that the declarant was conscious and in senses and was in a fit condition to make the declaration. These are some of the important requirements which have to be observed".

In **Paparambaka Rosamma vs State of Andhra Pradesh (1999)**[7], the Supreme Court stressed that it was the doctor, not the magistrate, who is the competent judge of both consciousness and fitness of mind. The distinction between those two elements was also emphasised:

> At paragraph 8: "In our opinion, in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making a declaration."
>
> At paragraph 9: "In medical science two stages namely conscious and a fit state of mind are distinct and are not synonymous. One may be conscious but not necessarily in a fit state of mind. This distinction was overlooked by the courts below."

Both decisions were made by a three-judge bench. Both were departed from by another three-judge bench of the Supreme Court in **Koli Chunilal Savji vs State of Gujarat (1999)**[8]:

> At paragraph 7: "In the case of Maniram vs State of M.P. no doubt this Court has held that when the declarant was in the hospital itself, it was the duty of the person who recorded the dying declaration to do so in the presence of the doctor and after being duly certified by the doctor that the declarant was conscious and in his senses and was in a fit condition to make the declaration. In the said case the Court also thought it unsafe to rely upon the dying declaration on account of the aforesaid infirmity and interfered with the judgment of the High Court. But the aforesaid requirements are **a mere rule of prudence** and the ultimate test is whether the dying declaration can be held to be truthful one and voluntarily given."

6 1994 (Supp) 2 SCC 539
7 1999 (7) SCC 695
8 1999 (9) SCC 562

The Supreme Court thus upheld a conviction for murder based solely upon a dying declaration given without a medical certification that the injured person was in a fit state to make it.

Ultimately, a Constitutional Bench of the Supreme Court in **Laxman vs State of Maharashtra (2002)**[9] clarified the law governing admissibility of dying declarations with astonishing carelessness. Referring to its decision in Paparambaka's case, the Constitutional bench decided that the requirement for a doctor's certification that the injured person was in a fit state of mind to make his declaration was a view "too broadly stated and is not the correct enunciation of law" (paragraph 5). They deemed the distinction between consciousness and fitness of mind as a "hyper-technical view" and affirmed Koli Chunilal's case.

▪ Confessions

A confession is a statement which is wholly or partly adverse to the person who made it.

1. Confessions made to Police Officers are admissible under S15 Tada[10]

Kartar Singh vs State of Punjab[11] - a Constitutional Bench Decision, decided the constitutionality of various provisions of TADA, enacted to deal with terrorism within India. The Act was passed against a backdrop of Punjab insurgency. It was allowed to lapse in May 1995 after intense criticism by human rights groups and ubiquitous evidence of abuse. However, cases instigated prior to that date continue to hold legal validity. The huge backlog of cases keep the issue of TADA alive in the judicial system today. TADA jurisprudence started with the Supreme Court in Kartar Singh's case, where it disregarded its duty as a Constitutional Court and took an executive-like stance on terrorism. The Supreme Court neglected its intended role as a check and balance to executive power that all too readily

[9] 2002(6) SCC 710

[10] **(THE) TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1987 (TADA)**

Section 15. Certain confessions made to police officers to be taken into consideration.-

(1) Nothwithstanding anything in the Code or in the Indian Evidence Act, 1872, but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or rules made thereunder:

(2) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily.

[11] 1994(3) SCC 569

crushes fundamental human rights when faced with issues of national security.

Elements of the judgment fall roughly into two equally unacceptable categories: Category A: decisions that significantly undermine the rights of the accused; and Category B: decisions that take a clear stand to protect those rights but have been so consistently ignored by inferior benches in subsequent judgements that they have had no positive precedential impact.

Category A: Section 15 TADA

There is no more striking an application of defunct logic than the Learned Judges' ruling on Section 15 of TADA, which makes confessions made to high-rank police officers admissible in evidence, regardless of provisions in the Evidence Act and the Code of Criminal Procedure which excludes them. The mere potential for abuse by police is sufficient to rule out the admissibility of confessions made solely to police officers. Such confessions have been held inadmissible throughout the period of British rule and up to the enactment of TADA. The judges' thought- process involved frank admissions that torture of the accused by the police is widespread in India:

At paragraph 251: "... we cannot avoid but saying that we – with the years of experience both at the Bar and on the Bench – have frequently dealt with cases of atrocity and brutality practised by some overzealous police officers resorting to inhuman, barbaric, archaic and drastic methods of treating the suspects in their anxiety to collect evidence by hook or by crook and wrenching a decision in their favour. We remorsefully like to state that on a few occasions even custodial deaths caused during interrogation are brought to our notice. We are very much distressed and deeply concerned about the oppressive behaviour and the most degrading and despicable practice adopted by some of the police officers."

At paragraph 365: "It is heart-rending to note that day in and day out we come across with the news of blood-curdling incidents of police brutality and atrocities, alleged to have been committed, in utter disregard and in all breaches of humanitarian law and universal human rights as well as in total negation of the constitutional guarantees and human decency."

However, at paragraph 254, the Supreme Court held:

> "In view of the legal position vesting authority on higher police officer[s] to record the confession hitherto enjoyed by the judicial officer in the normal procedure, we state that there should be no breach of procedure and the accepted norms of recording the confession which should reflect only the true and voluntary statement..."
>
> The combination of (1) the Supreme Court's recognition that torture is the principle forensic tool of the police; and (2) their concurrent confirmation of the power of senior police officers to take admissible confessions, is absurd. To overturn such a deeply entrenched principle, significant evidence that showed senior police were less inclined to torture the accused would surely be required. No such evidence was presented to the Supreme Court and in fact, their own recent decisions demonstrate an increase in the use of torture and custodial violence.
>
> Justice K. Ramaswamy and Justice Sahai both made valiant and apt dissents:

Justice K. Ramaswamy

> At paragraph 383: "Section 25 [of the Evidence Act, which excludes confessions made to police officers] rests upon the principle that it is dangerous to depend upon a confession made to a police officer which cannot extricate itself from the suspicion that it might have been produced by the exercise of coercion." (page 724).
>
> At paragraph 399: "While the Code [the Code of Criminal Procedure] and Evidence Act seek to avoid inherent suspicion of a police officer obtaining confession from the accused, does the same dust not cloud the vision of superior police officer? Does such a procedure not shock the conscience of a conscientious man and smell of unfairness? Would it be just and fair to entrust the same duty by employing non obstante clause Section 15(1)? Whether mere incantation by employing non-obstante clause cures the vice of afore enumeration and becomes valid under Articles 14 and 21? My answer is "NO", "absolute no no"....Conferment of judicial powers on the police will erode public confidence in the administration of justice... It not only sullies the stream of justice at its source but also chills the

> confidence of the general public and erodes the efficacy of the rule of law."
>
> At paragraph 406: It would, therefore, be clear that any officer not below the rank of the Superintendent of Police, being the head of the District Police Administration responsible to maintain law and order is expected to be keen on cracking down the crime and would take all tough steps to put down the crime to create terror in the heart of the criminals. It is not the hierarchy of officers but the source and for removal of suspicion from the mind of the suspect and the object assessor that built-in procedural safeguards have to be scrupulously adhered to in recording the confession and trace of the taint must be absent. It is, therefore, obnoxious to confer power on police officer to record confession under Section 15(1). If he is entrusted with the solemn power to record a confession, the appearance of objectivity in the discharge of the statutory duty would be seemingly suspect and inspire no public confidence. If the exercise of the power is allowed to be done once, may be conferred with judicial powers in a lesser crisis and be normalised in grave crisis, such an erosion is anathema to rule of law, spirit of judicial review and a clear negation of Article 50 of the Constitution and the constitutional creases. It is, therefore, unfair, unjust and unconscionable, offending Articles 14 and 21 of the Constitution." (page 734).

Justice Sahai also dissented, saying:

> At paragraph 442: "Killing of democracy by gun and bomb should not be permitted by a State but in doing so the State has to be vigilant not to use methods which may be counter-productive. Care must be taken to distinguish between the terrorist and the innocent. If the State adopts indiscriminate measures of repression resulting in obliterating the distinction between the offender and the innocent and its measures are repressive to such an extent where it might not be easy to decipher one from the other, it would be totally incompatible with liberal values of humanity, equality, liberty and justice. ... Measures adopted by the State should be to create confidence and faith in the Government and democratic accountability should be so maintained that every action of the Government be weighed in the scale of rule of law."
>
> At paragraph 453: "A police officer is trained to achieve the result irrespective of means and method which is employed to

achieve it. So long the goal is achieved the means are irrelevant and this philosophy does not change by hierarchy of the officers. A Sub-Inspector of the Police may be uncouth in his approach and harsh in his behaviour as compared to a Superintendent of Police or Additional Superintendent of police or any higher officer. But the basic philosophy of the two remains the same. The Inspector of police is as much interested in achieving the result by securing confession of an accused person as the Superintendent of Police. By their training and approach they are different. Procedural fairness does not have much meaning for them...Dignity of the individual and liberty of person – the basic philosophy of Constitution – has still not percolated and reached the bottom of the hierarchy as the constabulary is still not accountable to public and unlike British police it is highly centralized administrative instrumentality meant to wield its stick and spread awe by harsh voice more for the executive than for the law and society."

At paragraph 454: "The defect lies not in the personnel but in the culture. In a country where few are under law and there is no accountability, the cultural climate was not conducive for such a drastic change. Even when there was no Article 21, Article 20(3) and Article 14 of the Constitution any confession to police officer was inadmissible. It has been the established procedure for more than a century and an essential part of criminal jurisprudence..."

At paragraph 455: "...Section 15 of the TADA throws all established norms only because it is recorded by a high police officer. In my opinion our social environment was not mature for such a drastic change as has been effected by Section 15. It is destructive of basic values of the constitutional guarantee."

Sadly, Justices Ramaswamy and Sahai were overruled by a 3:2 majority. As such, the Supreme Court, swept away a rule of law that governed criminal trials for over 100 years.

Category B: Rule 15 of TADA (Prevention) Rules

Rule 15 of the Terrorists and Disruptive Activities (Prevention) Rules, 1987 lays down in detail the method for taking and recording confessions, namely: the police officer must certify in writing that the confession was taken in his presence and that the record contains a full and true account of the confession and that it was voluntarily made.

Referring to the Acts and Rules regarding confessions, the Supreme Court in Kartar Singh's case held at paragraph 257:

"We strongly feel that there must be some **severe safeguards** which should be **scrupulously observed** while recording a confession under Section 15(1) so that the possibility of extorting any false confession can be prevented to some appreciable extent".

At paragraph 263, those "severe safeguards" were set out. The guidelines assign a significant scrutinising role to the Chief Metropolitan Magistrate (CMM) or the Chief Judicial Magistrate (CJM):

"...we would like to lay down following guidelines so as to ensure that the confession obtained in the pre-indictment interrogation by a police officer not lower in rank than a Superintendent of Police is not tainted with any vice but is in strict conformity with the well-recognised and accepted aesthetic principles and fundamental fairness.

(1) The confession should be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him;

(2) The person from whom a confession has been recorded under Section 15(1) of the Act, should be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sen[t] under Rule 15(5) along with the original statement of confession...without unreasonable delay;

(3) The CMM or CJM should scrupulously record the statement, if any, made by the accused so produced and get his signature and in case of any complaint of torture, the person should be directed to be produced for medical examination before a Medical Officer..."

Not only do the CMM or CJM have to "scrupulously record the statement" and "get his signature", they also offer the accused a crucial chance to make a complaint if torture has been used to obtain the confession.

However, the admirable stance of the Constitutional Bench plunges into irrelevance. Their unequivocal ruling has been ignored by smaller benches of the Supreme Court claiming that the safeguards and guidelines are merely directory, not mandatory. One such example is **Jameel Ahmed vs State of Rajasthan**[12]. Here, a two-judge Bench of the Supreme Court reanalysed the admissibility of confessions under s15 TADA. The appellants

[12] 2003(9) SCC 673

rightly argued that a confession that had not been sent before the CMM or CJM was not admissible, as this obviated a mandatory step in Rule 15(5) of the TADA Rules. Without reference to the guidelines laid down above by the Constitutional Bench in Kartar Singh's case, the inferior bench held at paragraph 34:

> "Rule 15(5) does not ascribe any role to the CMM or the CJM of either perusing the said statement or making any endorsement or applying his mind to these statements. **It merely converts the said courts into a post office for further transmission to the Designated Court concerned**, therefore, the object of the rule is to see that the statement recorded under Section 15 of the Act leaves the custody of the recorder of the statement at the earliest so that the statement has a safer probative value. **In our opinion transmission of the recorded confessional statement under Section 15 of the Act to the CMM or the CJM under Rule 15(5) is only directory and not mandatory**."

The lower bench thereby downgraded the role of the CMM and CJM explicitly established by the Constitutional bench in Kartar Singh.

2. *Confessions made to Police Officers are admissible under S32 Pota*

Following the attacks on New York and Washington on 11 September 2001, rushed anti-terrorism legislation was enacted all over the world. India responded with the Prevention of Terrorism Act 2002 (POTA).

In Kartar Singh's case, the Supreme Court decided the constitutional validity of TADA 1987. Even though TADA was permitted to lapse in May 1995, due to widespread abuse by the police and security forces, the ratio of Kartar Singh's case still informed the Supreme Court's analysis of POTA 2002 in the case of **Peoples Union for Civil Liberties (PUCL) vs Union of India (2004)**[13]. The judgment was handed down on 16 December 2003 in the midst of strong protests against the misuse of TADA and POTA and their persistent application to innocent people.

Like s15 TADA, s32 POTA makes confessions given to senior police officers admissible in evidence. We have already dealt with the absurdity of such a law above, in Justice Ramaswamy and Justice Sahai's articulate dissents in Kartar Singh's case. Nevertheless, POTA does give a statutory footing to the guidelines laid down by the Constitutional Bench in Kartar Singh's case regarding the role of the Magistrate. Section 32(4) and (5)

[13] 2004 (9) SCC 580

POTA requires the maker of the confession to be sent before a Magistrate. The Supreme Court in PUCL held:

> At paragraph 63: "While enacting this Section Parliament has taken into account of all the guidelines, which were suggested by this Court in Kartar Singh's case (supra)...In our considered opinion the provision that requires producing such a person before the Magistrate is an additional safeguard. It gives that person an opportunity to rethink over his confession. Moreover, the Magistrate's responsibility to record the statement and the enquiry about the torture and provision for subsequent medical treatment makes the provision safer."

So, the Supreme Court has applauded the guidelines laid down in Kartar Singh's case, recognising the Magistrate's role as a valuable safeguard in relation to s32 POTA. And yet, in relation to an almost identical provision (s15 TADA), two-judge benches of the Supreme Court have decided that those same guidelines were merely "directory and not mandatory"(Note 12 supra). That such different rulings should apply to largely identical police powers illustrates the chaos of criminal law jurisprudence.

The Supreme Court noted at the beginning of the hearing that:

> At paragraph 15: "The protection and promotion of human rights under the rule of law is essential in the prevention of terrorism. Here comes the role of law and Court's responsibility. If human rights are violated in the process of combating terrorism, it will be self-defeating."
>
> At paragraph 22:"Another issue that the petitioners have raised at the threshold is the **alleged misuse of TADA and the large number of acquittals of the accused charged under TADA**. Here we would like to point out that this Court cannot go into and examine the "need" of POTA. It is a matter of policy. Once legislation is passed the Government has an obligation to exercise all available options to prevent terrorism within the bounds of the Constitution. Moreover, we would like to point out that **this Court has repeatedly held that mere possibility of abuse cannot be counted as a ground for denying the vesting of powers or for declaring a statute unconstitutional.**" (page 598)

Just as in Kartar Singh's case, the Supreme Court chose to ignore the well-known reality of police practice in India. The PUCL decision was not made in the context of a "mere possibility of abuse". Documented and indisputable evidence of persistent and rampant abuse by police flowed from

the rising number of TADA and POTA acquittals and newspaper reports. The Supreme Court knew that human rights were indeed being violated in the process of combating terrorism.

The petitioners demonstrated that the statute and its abusive application were so intrinsically interwoven that it was impossible for the Court to deal with one and not the other. Was it permissible for the Supreme Court to dismiss the challenge and ignore the blatant evidence of widespread misuse of the statute in such a summary manner? Ultimately, the Government of India itself accepted that POTA was widely misused and recognised public dissatisfaction with the Act. The Act was repealed. POTA was banished, as was TADA, to a black period of criminal law jurisprudence. Yet the Supreme Court, in regard to both oppressive statutes, awarded constitutional approval. And, criminal cases initiated under these statutes continue to be heard today.

3. *S15 Tada contaminates the rules of confession in Normal Criminal Law*

Section 15(1) TADA clearly states that confessions made under that section "**shall be admissible in the trial of such person for an offence under this Act**".

The legislation does not widen the admissibility of s15 TADA confessions to criminal charges under other Acts, as correctly interpreted by the Supreme Court in **Bilal Ahmed Kaloo vs. State of AP**[14]. In that case, Mr. Kaloo was prosecuted under both TADA and the Indian Penal Code (IPC). The Designated Court acquitted Mr. Kaloo of the TADA charges but found him guilty of sedition under the IPC. The confessional statement given by Mr. Kaloo under s15 TADA was correctly held to be inadmissible in relation to the IPC charge.

However, the wisdom of the Supreme Court in Bilal Ahmed Kaloo was overruled in the **Rajiv Ghandi assassination case - State vs. Nalini**[15]. At paragraph 83, the three-Judge bench held:

> "Section 15 of the TADA enables the confessional statement of an accused made to a police officer specified therein to become admissible "**in the trial of such a person**". It means, if there was a trial of any offence under TADA together with any other offence under any other law, the admissibility of the confessional statement would continue to hold good even if the accused is acquitted under TADA offences."

[14] (1997) 7 SCC 431
[15] (1999) 5 SCC 253

Distracted by public thirst for convictions in the wake of a national tragedy, the Judges in Nalini's case were evidently unable to read to the end of the sentence in s15 TADA, to cover the words "for an offence under this Act".

After Nalini's case, a three-judge bench of the Supreme Court doubted the correctness of the decision:

> "We are, however, constrained to **record our doubt as regards the state of law as declared by the 3-judge bench of this Court in Nalini (supra).**
>
> The issue, therefore, is whether the confessional statement would continue to hold good even if the accused is acquitted under TADA offences and there is a clear finding that TADA Act has been wrongly taken recourse to or the confession loses its legal efficacy under the Act and thus rendering itself to an ordinary confessional statement before the Police under the general law of the land. Nalini (supra), however, answers this as noticed above, in positive terms but we have some doubts pertaining thereto since the entire justice delivery system is dependent upon the concept of fairness. It is the interest of justice which has a pre-dominant role in the criminal jurisprudence of the country. The hallmark of justice is the requirement of the day and the need of the hour. **Once the court comes to a definite finding that invocation of TADA Act is wholly unjustified or there is utter frivolity to implicate under TADA, would it be justified that Section 15 be made applicable with equal force as in TADA cases to book the offenders even under the general law of the land. There is thus doubt as noticed above!!"**

The matter was transferred eventually to a five judge constitutional bench in **Prakash Kumar vs. State of Gujarat**[16]. They irresponsibly upheld the ratio of Nalini's case through exquisitely poor construction of the TADA legislation.

Confessions to a police officer were only made admissible in evidence under TADA to meet the exigencies of terrorism in India. This shocking interpretation of law upheld in Prakash Kumar's case has established a critically unjust state of affairs in the criminal justice system: Even if TADA offences are not substantiated, the associated confessional statements continue to be admissible in evidence for prosecution under normal criminal

[16] (2005) 2 SCC 409

law. Had TADA not been applied, such evidence would have remained inadmissible under the Code and the Evidence Act.

This judgment has an obvious effect: It encourages the police to apply TADA to ordinary criminal law matters and indulge in dispensations from procedural safeguards. This much was forewarned in Kartar Singh's case:

> At paragraph 352: "It is true that on many occasions, we have come across cases wherein the prosecution unjustifiably invokes the provisions of the TADA Act with an oblique motive of depriving the accused persons from getting bail and in some occasions when the courts are inclined to grant bail in cases registered under ordinary criminal law, the investigating officers in order to circumvent the authority of the courts invoke the provisions of the TADA Act. This kind of invocation of the provisions of TADA in cases, the facts of which do not warrant, is nothing but sheer misuse and abuse of the Act by the police."

This passage was indeed noted in Prakash Kumar's case, but naively dismissed at paragraph 44:

> "In our view the above observation [in Kartar Singh's case] is eloquently sufficient to caution police officials as well as the Presiding Officers of the Designated Courts from misusing the Act and to enforce the Act effectively and inconsonance with the legislative intendment..."

4. *Confessions used against the Co-Accused*

Imagine the following scenario: X and Y are accused of murder. X confesses to the murder and also implicates Y as an accomplice. Y does not confess and maintains his innocence. To what degree should X's confession be relied on in evidence supporting the prosecution's case for Y's conviction?

In the three-judge bench decision of the Supreme Court in **Kashmira Singh vs State of Madhya Pradesh (1952)**[17], it was noted that a confession against a co-accused was "obviously evidence of a very weak type" (paragraph 8) and "such a confession cannot be made the foundation of a conviction and can only be used in "support of other evidence"" (paragraph 9).

This was followed by three-judge benches in **Nathu vs State of U.P. (1956)**[18] and in **Ram Chandra vs State of U.P. (1957)**[19] where the Court

[17] AIR 1952 SC 159
[18] AIR 1956 SC 56
[19] AIR 1957 SC 381

held that "confession of a co-accused can only be taken into consideration but is not in itself substantive evidence".

All of these cases were approved and their ratios re-iterated by the Constitutional Bench of the Supreme Court in **Haricharan Kurmi vs State of Bihar (1964)**[20] where it was held:

> At paragraph 13: "...in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilty which the judicial mind is about to reach on the said other evidence."
>
> At paragraph 17: "it has been a recognised principle of the administration of criminal law in this country for over half a century that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence".

Directly contrary to this line of binding precedent stands an outrageous decision of a two-judge bench in **K. Hashim vs State of Tamil Nadu**[21] where the Supreme Court held:

> At paragraph 25: "If it is found credible and cogent, **the court can record a conviction even on the uncorroborated testimony of an accomplice.**"

5. *Recording of Confessions*

In normal criminal law, in other words, non-TADA and non-POTA offences, ss164, 281 and 463 of the Code of Criminal Procedure (CrPC) govern the recording of confessions. Section 164 CrPC stipulates that confessions must be recorded in a specific manner by a Magistrate. Amongst various safeguards is s164(2) which stipulates that the Magistrate shall explain to the person making the confession that he is under no compulsion to make it, and that if he does make a confession, it may be used against him. The Magistrate must also believe that the confession is voluntarily made. All dialogue between the Magistrate and the maker of the confession must be

[20] AIR 1964 SC 1184
[21] 2005(1) SCC 237

recorded by the Magistrate at the time, pursuant to s281(2), which applies by virtue of s164(4). This means that when the Magistrate warns the confession maker under s164(2), a record of the questions and answers which (a) constitute that warning; and (b) substantiate the Magistrate's belief that the confession is voluntary, must be made. S463 applies when ss164 and 281 have not been complied with. It cures defects in the procedure used by the Magistrate and permits admission of the confession in evidence if "such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded".

In the case of **Nazir Ahmed vs. King Emperor (1936)**[22] the Privy Council held that confessions recorded in any way other than those specified by s164 of the Code were not admissible. This was on the administrative principle that statutory powers were to be exercised in the manner prescribed by statute, or not at all. In that case, the Magistrate had not recorded the confession as required by law and instead tendered his oral evidence of the confession made by the accused. The confession was held inadmissible and the accused was acquitted. This decision was followed by the three-judge bench in **State of U.P vs. Singhara Singh (1964)**[23].

In **Tulsi Singh vs. State of Punjab(1996)**[24], a Magistrate recorded a confession without any record of fulfilment of the two steps of s164(2), other than his oral evidence at the trial. The two-judge bench of the Supreme Court admirably rejected the validity of the confessional statement holding:

> At paragraph 5: "Though the learned Magistrate testified that before recording the confession he satisfied himself that the accused (appellant) was making a voluntary statement and that after giving due caution he recorded it, the confession does not anywhere indicate as to whether before recording the same he gave him the requisite caution and put questions to satisfy himself that it was being made voluntarily. These are the basic pre-requisites for recording a confession under Sub-section (2) of **Section 164 Cr.P.C.** and a mere endorsement in accordance with Sub-section (4) after recording it would not fulfil the requirements of the former sub-section. Since none of the two requirements of **Section 164(2) Cr.P.C.** has been complied with we are left with no other alternative to hold that the Special Court was not at all justified in entertaining the confession as a voluntary one."

[22] AIR 1936 PC 253
[23] AIR 1964 SC 358
[24] 1996 (6) SCC 63

However, recent smaller benches of the Supreme Court have disregarded the precedent set in Nazir Ahmed's case and Tulsi Singh's case to a such a degree that the safeguards of s164 CrPC may as well be repealed. These slack judgements have relied on a wide application of s463 CrPC, using it to cure extensive defects in the confession recording procedure. The very purpose of such a procedure is to increase the likelihood that confessions are voluntarily made and can therefore be relied upon.

For example, the two-judge bench of the Supreme Court in **Ram Singh v Sonia (2007)**[25] admitted a confession in evidence when the Magistrate had failed to record that he had asked the maker of the confession whether she was "under any pressure, threat or fear" to make the confession. Instead, the Magistrate gave oral evidence in court stating that he had asked her and had only taken the statement once satisfied that the confession was voluntary.

> At paragraph 20: "Of course, he failed to record the question that was put by him to the accused whether there was any pressure on her to give a statement, but PW.62 [the Magistrate] having stated in his evidence before the Court that he had asked the accused orally whether she was under any pressure, threat or fear and he was satisfied that A- 1 [the maker of the confession] was not under any pressure from any corner."
>
> At paragraph 21: In our view, Nazir [supra] has no application to the facts of the present case as the failure of PW.62 [the Magistrate] to record the question put and the answer given in the confessional statement has not caused prejudice to the accused in her defence and is a defect that is curable under Section 463.

This finding directly contradicts the clear ratios in Tulsi Singh's and Nazir's case. Yet the bench held:

> At paragraph 23: "...decisions relied upon by the learned Counsel for the accused in the cases of Nazir (supra),...and Tulsi (supra) are of no help to the accused."

6. *Extra-Judicial Confessions*

How much weight should be given to a statement from a prosecution witness claiming that the accused confessed to him that they had committed the crime? Such a confession, in the absence of a magistrate or any other ostensibly independent party, is not a solid foundation for a conviction.

[25] 2007 (3) SCC 1

A long line of binding precedents from the Supreme Court has held, as in the two-judge bench of **Rahim Beg vs. State of UP (1972)**[26] that, "the evidence of extra judicial confession is a weak piece of evidence" (Paragraph 18).

However, the rapid regression of this prudent standard can be traced through the following judgements.

A two-judge bench in **Piara Singh v State of Punjab (1977)**[27] held that

> At paragraph 10: "The learned Sessions Judge regarded the extra-judicial confession to be a very weak type of evidence and therefore refused to rely on the same. Here the learned Sessions Judge committed a clear error of law. Law does not require that the evidence of an extra judicial confession should in all cases be corroborated."

The potential injustice and room for abuse of uncorroborated extra-judicial confessions is obvious. Nevertheless, in **Ram Singh vs. Sonia (2007)**[28], the Supreme Court cited **Madan Gopal Kakkad v. Naval Dubey (1992)**[29], and interpreted it as holding that:

> At paragraph 42: "the extra-judicial confession which is not obtained by coercion, promise of favour or false hope and is plenary in character and voluntary in nature can be made the basis for conviction even without corroboration."

The judges did not consider how difficult it is to actually establish, beyond reasonable doubt, the absence of coercion in its many forms. The alarming tendency of the superior courts to upgrade the weighting of extra-judicial confessions to that of substantive evidence in criminal convictions has further undermined the rights of the accused.

▪ Lying Witnesses

In case after case, the Supreme Court has rightly held that if a witness is found to be lying, then placing any reliance on his evidence, while at the same time rejecting the discredited part, would be very hazardous. This follows the well-regarded legal maxim: "falsus in uno, falsus in omnibus". The notion of separating the wheat from the chaff is alien to criminal law jurisprudence. It cannot be used in the context of lying or exaggerating witnesses and certainly not in the case of witnesses whose testimony has been found to be substantially false. This used to be the Supreme Court's position.

[26] 1972 3 SCC 759
[27] 1977 (4) SCC 452
[28] 2007 (3) SCC 1
[29] 1992 (3) SCC 204

In the case of **R.P. Thakur vs State of Bihar (1974)**[30] the Supreme Court took the admirably sceptical approach to a witness found to be lying:

> At paragraph 6: "If Nakuldeo could involve one person falsely, one has to find a strong reason for accepting his testimony implicating the others."

Similarly in **Suraj Mal vs State (Delhi Administration) (1979)**[31], the Supreme Court held:

> At paragraph 2: "It is well-settled that where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witnesses...In other words, the evidence of witnesses against Ram Narain and the appellant was inseparable and indivisible."

This approach mirrors that of most democratic jurisdictions, where the evidence of untrustworthy witnesses would never form the basis of a conviction. It would be discarded in its entirety.

However, not in modern India. In their desire to boost conviction rates, the Supreme Court has negligently increased the law's tolerance of lies and embellishments in witness statements. In their view, such defects no longer taint the admissibility of witness statements brought against the accused in criminal trials.

In **S.A. Gaffar Khan vs V.R. Dhoble (2003)**[32] the Supreme Court held:

> At paragraph 26: "The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liars...It is **merely a rule of caution**... The doctrine is a dangerous one especially in India for if a whole body of the testimony were to be rejected, because the witness was evidently **speaking an untruth** in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. **Witnesses just cannot help in giving embroidery to a story, however true in the main**... The aforesaid dictum is not a sound rule for the reason that **one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate an exaggeration, embroideries or embellishment.**" (Page 764).

[30] 1974 (3) SCC 664
[31] 1979 (4) SCC 725
[32] 2003 (7) SCC 749

In **Gangadhar Behera & Ors vs. State of Orissa (2002)**[33], the Supreme Court held that:

> At paragraph 16: "**Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused**, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained."

▪ **Sealing of articles associated with the Crime**

Historically, the Supreme Court has applied common sense when setting the standards required for sealing weapons and other articles recovered at crime scenes. For instance, in **Amarjit Singh vs State of Punjab (1995)**[34] a three-Judge bench of the Supreme Court decided that sealing of weapons must be done on the spot by the investigating officer, otherwise it cannot be relied upon in evidence. The Supreme Court overturned a conviction under s5 TADA:

> "the conviction was reversed on the ground that the non-sealing of the revolver at the spot is a serious infirmity because the possibility of tampering with the weapon, which was crucial evidence, cannot be ruled out."

This well-established rule was discarded by a two-Judge bench of the Supreme Court in **State of Maharashtra vs. Bharat Chaganlal Raghani & Ors. (2001)**[35]. Once again, a long line of conflicting judgments were ignored. The case dealt with a contract killing of two prominent businessmen in Mumbai. Pistols and AK assault rifles allegedly recovered from the accused were displayed, unsealed, at a press conference. The Supreme Court criticised the Trial Court's wise approach as "technical":

> At paragraph 61: "Holding that the only seized weapons were shown to the press, the trial court committed a mistake and it has unnecessarily tried to make a **mountain out of a molehill on such a frivolous ground**."

Thereafter in **Ganesh Lal vs State of Rajasthan (2002)**[36]— a similar observation of law is recorded:

> At paragraph 8: "In such a situation, merely because the articles were not sealed at the places of seizure but were sealed at the police station, the recovery and seizure do not become doubtful."

[33] 2002 (8) SCC 381
[34] 1995 (Supp) 3 SCC 217
[35] 2001 (9) SCC 1
[36] 2002(1) SCC 731

Similarly in **Rajendra Kumar vs. State of Rajasthan (2003)**[37], where a submission was made by counsel for the accused that bangles allegedly recovered were not sealed, the Court held:

> At paragraph 7: "We do not think much importance can be attached to the fact that these bangles were not sealed at the time when recovery was made."

▪ **The First Information Report (Fir)**

An FIR is produced when a complaint is made at a police station regarding the commission of an offence. It is the first step in initiating criminal proceedings and a vital part of prosecution evidence. Procedural safeguards are required to prevent abuse of FIRs.

1. Slackening of the S157 CrPC procedural safeguard

When an officer in charge of a police station receives information regarding the commission of an offence and records an FIR, Section 157 CrPC requires him to "forthwith send a report" to the Magistrate. This is designed to safeguard against the police creating a false FIR in retrospect, after deliberation and consultation. The Supreme Court has consistently recognised that a suspicion of retrospective FIRs arises when there is delay in dispatch of the report to the Magistrate[38].

In **Meharaj Singh vs. State of U.P.**[39] the Supreme Court dealt with a suspicion that the FIR had been "ante-timed" to artificially frame the accused:

> At paragraph 12: "FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eye witnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an after thought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR, was lodged at the time it is alleged to have been recorded, the courts generally look for

[37] 2003 (10) SCC 21
[38] AIR 1976 SC 2423; AIR 1980 SC 638
[39] 1994 (5) SCC 188

> certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate."

However, in **State of J&K vs. S. Mohan Singh (2006)**[40] the police have been given unreasonable benefit of the doubt. In that case, the crime is said to have occurred on 23.07.1985 at 6 p.m. The FIR was lodged at 7.20 p.m. and a copy of the FIR was received by the Magistrate on the next day at 12.45 p.m. The Supreme Court held:

> At paragraph 10: "In our view, copy of the first information report was sent to the Magistrate at the earliest on the next day in the court and there was no delay, much less inordinate one, in sending the same to the Magistrate."

Similarly in **Anil Rai vs State of Bihar (2001)**[41] the Supreme Court introduced a new concept of "extraordinary delay". Without reference to the previous case law, the Court altered the law surrounding s157 CrPC in the following way:

> At page 3174: "Extraordinary delay in sending the copy of the FIR to the Magistrate can be a circumstance to provide a legitimate basis for suspecting that the first information report was recorded at much later day than the stated day affording sufficient time to the prosecution to introduce improvements and embellishment by setting up a distorted version of the occurrence. The delay contemplated under S. 157 of the Code of Criminal Procedure for doubting the authenticity of the FIR is not every delay but only extraordinary and unexplained delay. However, in the absence of prejudice to the accused the omission by the police to submit the report does not vitiate the trial."

2. Names of witnesses omitted in the FIR

The Supreme Court has held repeatedly that if the name of the witnesses are omitted in the FIR, unless a plausible explanation is given, the omission could be treated as a ground to doubt the evidence.

[40] 2006 (9) SCC 272
[41] AIR 2001 SC 3173

In **Marudanal Augusti vs State of Kerala (1980)**[42], the Supreme Court acquitted the accused because, though it was submitted in Court that prosecution witnesses had seen the assault, they were not mentioned at all in the FIR.

> "The F.I.R. contains graphic details of the entire occurrence and care has been taken not to omit even the minutest detail. The names of P.Ws. 4, 5 and 6 as having witnessed the assault are not mentioned at all in the F.I.R....any number of witnesses could be added without there being anything to check the authenticity of their evidence."

However, in **Rajkishore Jha vs. State of Bihar (2003)**[43], the Supreme Court held:

> At paragraph 10: "The High Court has noted that the names of witnesses do not appear in the first information report. That by itself cannot be a ground to doubt their evidence."

- **Arrest of females**

Traditionally, women cannot be arrested at night, nor in the absence of a female constable. The object of these safeguards is clearly to protect the woman from abuse at the hands of male policemen. In another staggering gift of power to the police at the expense of the accused, the Supreme Court in **State of Maharashtra vs Christian Community Welfare Council of India (2003)**[44] withdrew these restrictions:

> At paragraph 9: "Herein we notice that the mandate issued by the High Court prevents the police from arresting a lady without the presence of a lady constable. The said direction also prohibits the arrest of a lady after sunset and before sunrise under any circumstances. While we do agree with the object behind the direction issued by the High Court in sub-para (vii) of the operative part of its judgment, **we think a strict compliance with the said direction, in a given circumstance, would cause practical difficulties to the investigating agency** and might even give room for evading the process of law by unscrupulous accused. While it is necessary to protect the female sought to be arrested by the police from police misdeeds, it may not be always possible and practical to have the presence of a lady constable when the necessity for such

[42] 1980 (4) SCC 425
[43] 2003 11 SCC 519
[44] 2003 (8) SCC 546

arrest arises, therefore, we think this direction issued requires some modification without disturbing the object behind the same. We think the object will be served if a direction is issued to the arresting authority that while arresting a female person, all efforts should be made to keep a lady constable present but in the circumstances where the arresting officers are reasonably satisfied that such presence of a lady constable is not available or possible and/or the delay in arresting caused by securing the presence of a lady constable would impede the course of investigation, such arresting officer for reasons to be recorded either before the arrest or immediately after the arrest be permitted to arrest a female person for lawful reasons at any time of the day or night depending on the circumstances of the case even without the presence of a lady constable."

▪ **Chance Witnesses**

A witness who just happens to be present at a crime scene, but has no other apparent connection, is known as a "chance witness". Ever since the Supreme Court decision of **Puran vs. State of Punjab**[45], testimony from chance witnesses has been viewed with caution, due to the frequent discovery that they have either been recruited by the accused, or have vested interests in the outcome of the case. In Puran, a three-judge bench held, at paragraph 4:

> "In cross-examination he [the chance witness] admitted that there was a dispute between him and the accused's father about a wall built by him on a site claimed by the father of the accused...In these circumstances it could not be said that the Sessions Judge was in error when he rejected the evidence of this witness and described him as a chance witness. Such witnesses have the habit of appearing suddenly on the scene when something is happening and then of disappearing after noticing the occurrence about which they are called later on to give evidence."

In **State of UP vs Farid Khan**[46], a two-judge bench of the Supreme Court took the contrary view, neglected preceding case law and accepted the evidence of a chance witness. They focused more on the fact the witness had a criminal record, and held that if his evidence was corroborated by other witnesses, that criminal background was not important. The Supreme Court made their startling reversal at paragraph 4:

[45] AIR 1953 SC 459
[46] 2005 (9) SCC 103

> "...the High Court disbelieved his evidence on two counts – firstly on the ground that he was previously convicted in a criminal case and was sentenced to four years' imprisonment. This, according to the High Court, was a valid ground to discard his evidence. Another ground to disbelieve the evidence of PW 2 Sharif was that he must have been a **chance witness** and his explanation that he was going to the shop of Safi may not have been true as there were several other "beedi" manufacturers in that locality nearest to his house. Of course, the evidence of a witness, who has got a criminal background, is to be viewed with caution. But if such an evidence gets sufficient corroboration from the evidence of other witnesses, there is nothing wrong in accepting such evidence. Whether this witness was really an eye witness or not is the crucial question. If his presence could not be doubted and if he deposed that he had seen the incident, the court shall not feel shy of accepting his evidence."

▪ **Standard of Proof Lowered**

The Constitutional Bench in **Haricharan Kurmi vs. State of Bihar (1964)**[47] categorically upheld the standard of proof in criminal law:

> **"In criminal trials, there is no scope for applying the principle of moral conviction."** (Page 1184)

In a disturbing departure from the entrenched and internationally recognised standard of proof of "beyond reasonable doubt" for criminal cases, the Delhi High Court lowered it to that of "moral certainty". A two-judge bench of the Supreme Court noted this outrageous dictum but refrained from comment when it had the chance in **Alamgir vs. State (2003)**[48]:

> At paragraph 11: "Incidentally, the High Court did emphasize on the true and correct meaning of the phraseology "reasonable doubt" to be attributed thereon and it is on this score, the High Court records:
>
> 'Modern thinking is in favour of the view that proof beyond a reasonable doubt is the same as proof which affords **moral** certainty to the judge'."
>
> At paragraph 12: "We are, however, not expressing any opinion with regard thereto."

[47] AIR 1964 SC 1184
[48] 2003 1 SCC 21

Conclusion

India's criminal justice system is in dire need of reform. Reform requires transparency, consultation and deliberation. It is not up to individual judges to depart from decades of well established law and procedure. Their sloppiness brings about change in an arbitrary and ad hoc fashion that undermines criminal law jurisprudence itself.

Reform of the criminal justice system should not mean a slackening of standards. It demands a higher quality of police and public prosecutors that are able to meet the criteria set by the Supreme Court in its earlier judgments. Sadly, the judiciary seems resigned to the fact that the police and public prosecutors will continue to be inept and corrupt. They have accepted that police standards of investigation will remain appallingly low and have merely focussed on speeding up the system and increasing the rate of convictions nonetheless. The judiciary has lost a marvellous opportunity to radically reform the quality of police investigations. Instead, the high standards of criminal law jurisprudence have simply been downgraded to meet those set by the police.

Such regression has endangered both the accused and the public at large. The risk of indiscriminate arrests, misplaced prosecutions and wrongful convictions using coercive methods is higher than ever. Whatever little desire there was within the police force to increase their professionalism has dissipated in this climate, free from judicial pressure.

The Indian Judiciary must urgently recall its constitutional role. It must uphold the rule of law, provide a check and balance on the executive and protect human rights. The Indian Government must urgently initiate the legislative agenda required to reform the criminal justice system, in a responsible and consultative manner. This must include legislative repair of the damage done by the judiciary to criminal jurisprudence as demonstrated in this article. The people of India deserve nothing less.

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The Baby Business In India: "Is India The Cradle Of The World"?

Sathya Narayan*

The author in the following paragraphs of this article has attempted to examine the truthfulness about this announcement. An attempt is also made in this article, to identify certain predicaments that arise post-surrogacy arrangements.

Men and women have the right to marry and set up a family. To have a family of their own is nurtured by most people who assume that they too will form their own family, now or later. It is more or less a social expectation, reinforced by family, friends, and society. Significance of family is also highlighted in Article 23 of the International Covenant on Civil and Political Rights which states "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State". This is based on the United Nations Charter and Universal Declaration of Human Rights. Notwithstanding a choice for a childless life is chosen by some, most couples experience a profound sense of loss, if they are childless. Some couple cannot bear children due to biological reasons like infertility or some do not bear children because they evade having children due to peripheral reasons. Infertility is defined as "the inability of a couple to conceive after 12 months of intercourse without contraception" and has also been extended to include "the incapacity of a man, woman or couple to participate in reproduction...the production of a live child"[1] Peripheral reasons like both of them are either engaged in pursuing their career or involved in higher education or the couples have no time for child bearing. Such evasion for a long period becomes a hindrance, in most of them, in bearing genetic children.

These reasons have lead to the discovery of several non-traditional methods of reproduction collectively referred to as Assisted Reproductive technologies (ART). The term ***assisted reproductive technologies*** (ARTs) refers to a variety of procedures that enable people to reproduce without engaging in sexual intercourse. **Assisted reproductive technology (ART)** is a general term referring to methods used to achieve pregnancy by artificial or partially artificial means. ART includes a range of technologies, some used to initiate pregnancy, and others more specifically used to increase likelihood of pregnancy and/or to test for the presence of certain genes so prospective parents can choose which embryos to implant after in vitro fertilization. This

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1 World Health Organization 1975 cited NBCC 1991a p. 5

reproductive technology is used primarily in infertility treatments. Most people who use ART do so because they are infertile and other methods of treating their infertility have proven unsuccessful. The two primary means of initiating pregnancy are the alternative insemination (AI) and in vitro fertilization (IVF). While there are a number of other assisted reproductive technologies (ART) available to infertile couples, in vitro fertilization (IVF) is by far the most utilized of these methods. In fact, IVF accounts for more than 95% of all ART procedures.

For couples who have been trying in vain to conceive for a year or more, science has brought hope in the form of ***in vitro fertilization*** or IVF. In vitro fertilization simply means the fertilization of egg, a process made to occur outside the biological body, in an artificial environment, in a laboratory and not inside the mother's womb. It is a process by which egg cells are fertilized by sperm outside the womb. The process involves hormonally controlling the ovulatory process, removing ova (eggs) from the woman's ovaries and letting sperm fertilise them in a fluid medium. The fertilised egg (zygote)) is then transferred to the patient's uterus with the intent to establish a successful pregnancy. In vitro literally means 'in glass'. IVF was successfully attempted for the first time in 1978 in England.

IVF can be operative in two ways. One method is where the biological mother becomes pregnant via embryo transfer with a child of which she is the natural mother. But the other method is when the biological mother is unable to be impregnated with the embryo, due to medical reasons; the embryo is transferred to another woman's uterus, who agrees to "lend her womb". This arrangement in medical science is referred to as "Surrogacy". Surrogacy is a method of reproduction whereby a woman agrees to become pregnant and deliver a child for a contracted party. "Surrogacy" arrangements are primarily to facilitate couple – who are unable to bear their own child - to get a child which is genetically their own... This is an arrangement wherein genetic material is donated by the couple themselves or by donors and the resultant embryo is nurtured by some other woman for them. Through this treatment, couples who are unable to conceive, but are able to donate egg and sperm samples, can have a child with their genetic traits by renting a womb of another woman[2]. Surrogacy is defined as follows: "One woman (host mother or surrogate mother) carries a child for another as the result of an agreement which is made before conception that the child should be handed over after birth. The couple wishing to have the child is called the commissioning couple."

[2] http://www.sukh-dukh.com/forums/viewtopic

There are two types of Surrogacy – a) Straight Surrogacy; b) Gestational Surrogacy.

In straight surrogacy, the host mother uses her own egg and is artificially inseminated with the sperm of the intended father. The baby then has a biological connection to the surrogate mother. In gestational surrogacy also known as full or Host surrogacy, the embryo is created by using the egg of the intended mother and the sperm of the intended father generally or an egg or sperm donor if necessary. The embryo is then implanted into the womb of the surrogate mother using IVF. There is, in this case, no biological tie between the surrogate mother and the baby. In gestational surrogacy the surrogate remains merely a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. Gestational Surrogacy provides a unique option for infertile couples and it differs from adoption because it offers the couple a genetic link to their child, either from both parents or at least from one. Gestational Surrogacy is the most preferred method out of all other types of ART.

At this point of time one need to look into what are the types of gestational surrogacy which is practiced around the world. **Altruistic surrogacy** is where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child, except the expenses related to the pregnancy and birth which are paid by the intended parents. Expenses such as medical expenses, maternity clothing, and other related expenses. **Commercial surrogacy** is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by the commissioning parents, who can afford the cost. Commercial surrogacy is prohibited in most of the countries like Canada[3], UK[4] , Netherlands and many of the States in US. This procedure is legal in very few countries like India and France. Commercial surrogacy is sometimes referred to by the emotionally charged with potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms". The process of making **babies** has today grown into a full time business, particularly in India, which is a matter of great concern.

The business of gestational surrogacy, the volume of this trade is estimated to be around $ 500 million and the numbers of cases of surrogacy are alleged to be increasing at galloping rate. The statement **The Baby Business in India: "Is India The Cradle of the World"?** is related to the flourishing trade in India of "making babies by women who rent their

[3] Commercial surrogacy arrangements were prohibited in 2004 by the Assisted Human Reproduction Act. Altruistic surrogacy remains legal

[4] Commercial surrogacy arrangements are illegal in the UK. It is illegal in the UK to pay more than expenses for a surrogacy,

womb". It is related to the burgeoning industry behind reproductive science and its associated network of legal, scientific and commercial interests and issues. **Lending a womb** is a trade that has flourished in India to a great extent in contrast with the other countries. This trade in babies is inevitable and is here to stay. The horse has bolted, and there is no going back to the stable now. One must live with the new reproductive technologies, and their inevitable commercialization.

Surrogacy in India can cost anywhere from $2,000 to $12,000 (1,00,000 (1 Lakh) to 6,00,000 (6 Lakhs) INR approximately) including all medical expenses. The same procedure in the US can range from $10,000 to $70,000 (5,00,000 (5 Lakh) to 35,00,000 (35 Lakhs) INR approximately) given that the insurance companies do not cover the cost. It is about one half to one fifth the price - a good bargain. Besides this India has a number of successful IVF clinics; there are a lot of women who are willing to be surrogates. This practice of renting a womb and getting a child is comparable to any other sort of outsourcing. Outsourcing babies sounds immodest. Sushma Mehta, a woman activist from Ahmedabad who is involved with Woman and Child Development project says:

After IT services, it seems it's now the turn of babies to be outsourced from India.

It is now Outsourcing IT Services: Outsourcing legal support services; It is also now outsourcing pregnancy. And under the current scenario where the trend is towards market-driven economies, there is considerable demand for the outsourcing service of pregnancy.

Thus the title of this article gets accuracy with India's flourishing trade in so-called reproductive tourism - where foreigners come to India for infertility treatments such as in vitro fertilization and with an add on surrogacy arrangements with local women who agree to bear babies for the foreigners. Couples from abroad prefer to come to India for IVF treatment as Indian Medical fraternity constantly upgrades their technology and knowledge in reproductive medicine. Second reason for India to have become the hub of outsourcing pregnancy is the waiting period. In most developed countries seeking doctor's appointment is itself a challenging task. It takes a minimum of six to eight months for couples to start the procedure from the day they decide to have a baby through IVF. However, in India, within a month of arriving, couples are already into the process of conception of an embryo. The third reason is the communication between doctor and patient. Indian hospitals provide complete transparency throughout the procedure. Lastly foreign couples opt for India to treat infertility as the rules for the procedure in their own country are very stringent. India being the land for less costlier and less regulated surrogacy is now the most preferred, most

favoured destination for the reproductive tourists who opt for surrogacy to fulfil their dreams of parenthood. The global meltdown has given a boost to the surrogacy industry. Being a surrogate mother is considered to be a job, a service one gets paid for. Young executives whose earnings are reduced due to global recession are opting to be surrogate mothers. The surrogate mother gets money and people who want children, get babies. It is a win-win situation. But where would this demand and supply lead to in absence of a law? The government has to accelerate on making a law to monitor surrogate pregnancies as the trend shows that **rent-a-womb** industry is running out of control in India.

With all said and done, as the end product of this trade is a human baby, the chief concern is can one really just speak about this trade only in financial terms. The anxiety with this trade is that it deals with the commoditization of children and the manufacture of life. Should one not examine the consequential predicaments?

Surrogacy in India: is it legal?

In principle, all methods of artificial reproduction/assisted reproduction, developed by modern science aim at creating life, making babies. As each type of assisted reproductive technology brings with it a range of ethical and legal issues, surrogacy is no exception. There are legal implications to surrogacy and there are also ethical implications. It is a very complex issue and deserves focus. The only question is whether the **baby market** as practiced in India, should be allowed to bloom as it is, or whether some sort of regulatory scheme should be put in place.

In spite of absence of a comprehensive legislation on surrogacy, surrogacy agenda in India is very active and provides wide-ranging services related to Surrogacy and Egg Donation programs. IVF Clinics in India – offer all facilities that fulfill dreams of many couples, fertile and infertile, to enjoy parenthood. The only guidelines that govern surrogacy arrangements are those that are declared by Indian Council of Medical Research (ICMR). These guidelines though do not have the force of law, were probably framed and intended to guide states until there is a specific legislation to that effect. The Indian Council for Medical Research in its guidelines support commercial surrogacy, which is assumed by all, intended parents, medical fraternity and surrogate mothers to be legal. The ICMR guidelines provide a very encouraging picture for the reproductive tourists. ICMR guidelines amongst others specifically recommend surrogacy only in the following circumstances:

- Surrogacy should be resorted to only if medically certified as the only solution to Infertility or any other medical bar on pregnancy by the intending mother.

But the IVF clinics in India do not appear to adhere to these guidelines strictly and thus India is gaining popularity as the hub of surrogacy. Moreover, the Supreme Court of India, recently in the Manji case (2008) has held Commercial Surrogacy to be legal in India. In 2008 in ***Baby Manji Yamada vs. Union of India & Anr***[5], the Supreme Court of India issued a landmark ruling declaring surrogacy contracts legal in India. The facts of the case in brief are as under:

> Dr. Yuki Yamada and Dr. Ikufumi Yamada (biological parents) came to India in 2007 and had chosen a surrogate mother in Anand, Gujarat and a surrogacy agreement was entered into between the biological father and biological mother on one side and the surrogate mother on the other side. Even before the child was born there were matrimonial discords between the biological parents. The baby, Baby Manji was born on 25th July, 2008. The baby born in July, however, was stuck in India as Japan, which does not recognise surrogacy, refused to issue a passport to the infant[6]. The only option for Manji's father Emiko, was to apply for travel documents that would allow him to take the baby back to Japan. While Emiko was making efforts to arrange for travel documents for Baby Manji, a public interest petition was filed by "Satya", an NGO from Ahmedabad, before Rajasthan High Court, seeking directions from the court, to prohibit the 'baby born' in India through surrogacy from being taken out of India as there was no law governing surrogacy in India. It was also the contention of the NGO that there were a lot of irregularities that are being committed, in the name of surrogacy in India. According to it, in the name of surrogacy money making racket is being perpetuated.
>
> "Satya" had raised questions about the legal propriety of surrogacy and the child's nationality. The Supreme Court gave its decision on 29 September 2008.[7] The Court in effect allowed the baby to leave India with her Japanese grandmother. The Supreme Court cleverly avoided the issue of status of the child

5 (2008) 13 SCC 518

6 Recently it is in the news that the Japan Government has decided to issue Japan Passport to Baby Manji

7 Ibid, p.523

> and stated that any concerns relating to the rights of the baby should be raised before the commission constituted under the Commissions for Protection of Child Rights Act, 2005, and noted that no complaint had been made before this Commission.

The Supreme Court decision is very inadequate. It appears that the Court was keen to let the baby leave India. The apex court in its enthusiasm to do justice to the child overlooked the fact that there was no statute governing surrogacy. It also ignored the fact that a bill is pending before Parliament on the same issue.[8] The apex court while declaring surrogacy legal in India also endorsed the poverty prevalent in India and appeared very casual about the trade angle of surrogacy and the burgeoning business. The apex court observed that:

> This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions.

Baby Manji's case, in fact presented a stalemate with the Supreme Court judges asking "which law prohibits surrogacy" and the NGO countering it with "which law permits surrogacy". Kelsen in his book on **Pure Theory of Law**[9] discusses what behavior is prohibited and what behavior is permitted in the following words, which is appropriate in this situation.

> ...the law regulates human behavior in two ways: in a positive sense, commanding such behavior and thereby prohibiting the opposite behavior: and, negatively by not attaching a coercive act to a certain behavior, therefore not prohibiting this behavior...Behavior that legally is not prohibited is legally permitted in this negative sense. ...In so far as the behavior of an individual is permitted by the legal order in the negative sense – and that means not prohibited – the individual is legally free.

By application of this principle of Jurisprudence one can wrap up the discussion that as surrogacy is not prohibited expressly or impliedly by any of the statutes in force in India, nor by any judicial decision, it is to be regarded as permitted.

8 The Assisted Reproductive Technology (Regulation) Bill 2008

9 Kelsen, Hans. Pure Theory of Law

Reallocation of Parenthood Rights after the Delivery of the Child

The fact remains that even in the absence of a proper legislation legalising surrogacy in India, the business of surrogacy is practised in full swing. The only dilemma is about post-delivery status of child born out of such surrogacy arrangements. ICMR guidelines make no distinction between an 'Indian Intended Parents' and 'intended parents from other countries'. Parents from other countries can also avail the facilities of surrogacy in India. Few questions that remain unresolved –Will the child born to an Indian surrogate mother be a citizen of this country? Who arranges for the birth certificate and passport that will be required by the foreign couple at the time of immigration?

ICMR guidelines have also taken care to avoid post-delivery complications about the status of the child born out of surrogacy arrangements by providing the following guidelines:

- Surrogacy should be resorted to only when it is coupled with authorized adoption wherever applicable.
- The intending parents should have a preferential right to adopt the child subject to six week's postpartum delay for necessary maternal consent.
- Genetic parent's claim for the custody of the child in its best interest through adoption would be, to establish that the child is theirs through genetic (DNA) fingerprinting, of which the records will be maintained in the clinic.

ICMR guideline that the child born through surrogacy must be adopted by genetic (biological) parents is to establish legitimacy to the child. ICMR guidelines for adoption of the child born out of surrogacy, in spite of the fact that the child is genetically related to the parents is to avoid any status problems regard to the child so born. This situation is ideal if **the intending parents are from India**. There is a specific legislation[10] applicable to Hindus which controls adoption and for others there are CARA guidelines which help to take children in adoption.

The dilemma remains unsolved with regard to **intending parents from other countries**. The usual problems faced by the reproductive tourist are with regard to the post delivery complications in taking the child back to their own nation. The matters concern mostly with the issue of reallocation of parenthood rights over the child after its birth. Problems are about the paternity and nationality of the child born to an Indian surrogate at the request of parents from other countries. Almost every intended parent wants his/her child to be a national of that country where they belong. The

[10] Hindu Adoptions and Maintenance Act, 1956

surrogacy issue raises questions of citizenship, which mother's name will go on the birth certificate, problems of immigration, and more specifically about the status of the child. Whose child? Which nationality? Which Citizenship? Etc... Frequently asked questions are whether the country to which the intending parents belong would or would not recognize the adoption procedure as suggested by ICMR guidelines.

Some countries insist that the intending parents / commissioning parents should go through the procedure, as provided in their own law, for registering as foster parents for their child even though genetically it is their own child. Some countries do not have any rules regarding conferring parenthood on such children at all. Few embassies in India, for example Australian Embassy demand an order from the Indian Courts stating that one of the parents to the child is genetically related to the child, or that he/she is the natural parent of the child.

The law, which deals with the reallocation of parenthood rights, is complex and it is far from being uniform in the global context. Their parental rights are far from being certain. This also becomes problem for the child, when the child's birth certificate or passport is necessary when the intended parents/commissioning parents would like to go back to their country with the child. United Kingdom, Israel, Greece, and the States of Florida, Virginia and New Hampshire in the United States, have enacted specific legislation as regards parenthood rights over children born out of surrogacy arrangements. Some legal systems mandates for adoption as per the law of their country. Some are silent. In 2002, Greece introduced unique legislation, which allocates full parental rights to any couple, which desires to have a child with the help of the surrogacy arrangements process. Many other countries do not have any kind of legislation, which has anything to do with this issue. The only conclusion, which is possible in the situation like this is that all these areas are in great need of reformation.

But the questions remains unanswered – India has legitimized commercial surrogacy whereas there are many countries where commercial surrogacy is penal.This is a conflict of law situation, resulting in inconsistent status of the baby born out of surrogacy arrangements. Child is considered as the genetic child /legitimate child of the intended/commissioning parents in India while the child may not be so in their own nation.

The main issues which commissioning parents who opt for surrogacy facilities from India should bear in mind prior to such arrangements is brought into effect are:

- **What are the laws of the land of the Intended Parent from other countries, governing surrogacy, reallocation of parenthood on**

children born out surrogacy arrangements in other countries, like India?

- **Whether surrogacy, commercial or altruistic, is legal in the country of the intended parent?**
- **Whether there are any legislations or arrangements in countries of intended parents regarding reallocation of parenthood rights over child born out of surrogacy arrangements in India?**
- **Whether the laws of the land of the intended parents are enforceable in India?**

These questions are essential as gay and lesbian couples are visiting India for taking the benefit of lenient rules regarding surrogacy in India. The question is whether a certificate issued in India establishing the parenthood of a baby born in this country to a surrogate mother, would be accepted for registration in countries which do not recognize surrogacy or do not have legislations validating surrogacy. While some countries, accept surrogate pregnancy among permitted techniques of assisted reproduction, some countries consider it illegal. Some countries consider commercial surrogacy an offence, whereas commercial surrogacy is legal in India.

> To illustrate one can take the position of Spain where any sort of surrogacy is illegal. Then the question that would arise is whether a child born to an Indian surrogate mother at the request of a Spanish Couple with the gametes contributed by them would be recognized as the legitimate child of such couple in Spain? If the answer to this question is no: then the next question that would arise is what will be nationality of the child? The baby would not have Spanish nationality and as per the ICMR guidelines the baby would have to be adopted by the Spanish couple as per their law or Indian law. Question remains to be answered are whether under the circumstances the child will have Indian nationality or would it be the natural child of the commissioning parents, but without being able to follow their nationality. Can there be a stalemate as such children might remain stateless?

Surrogacy contracts and public policy

Another predicament which crops up time and again is about the enforceability of gestational surrogacy contracts in India, which has yet to be tested. The question that remains unresolved is that whether such agreement that amounts to "a purported contract for the sale and purchase of a child is against public policy? By application of ICMR guidelines and also in view of

the Supreme Court decision, no public policy seems to be violated when a gestational-surrogacy contract is in question. However, gestational surrogacy contracts may be enforceable, even when one of the terms of the contract requires the gestational surrogate not to assert parental rights regarding the child she bears as such a child is created from an embryo which bears genetic material which does not belong to the surrogate. How about the contracts with similar terms when the child contains the genetic material of the surrogate mother? Would such contracts still remain enforceable?

The dissent pointed out in this regard is that there is no correct identification of the real issue which is whether the surrogacy contract in fact violates public policy or not. The courts in India while deciding the factor whether surrogacy contracts are against public policy or not will have to bear in mind that it is the policy of state to safeguard the interests of children and would not allow the establishment of parental rights as an act of commerce. For example, the Indian Law of Adoption (both personal as well as secular) disallows payment for the relinquishment of parental rights in an adoption proceeding, evidencing the policy against surrender of children by a parent for compensation. Since gestational surrogacy agreements compensate the surrogate mother for her involvement in creating children for profit, would it not prima facie be against public policy? Since gestational surrogacy agreements are entered into to create children and establish parentage in a commercial transaction would they not be in violation of public policy. The sale of children, human trafficking and sale of body parts are illegal activities as is evident in the laws for trafficking and human organ transplant. Yet commercial surrogacy is being promoted. It is also the state's public policy to act against gender exploitation, but gender-based economic and social exploitation is built deeply into present surrogacy practice.

The courts might have to settle this issue of public policy by using the normal contract law principles. The concept of what is public good or what is in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. Thus it would be responsibility of the courts to identify the real issue as to whether the contract of surrogacy in fact violates public policy or not or merely and modestly be party to the default acceptance theory, which is based upon the long journey of nonexistence of any articulated public policy.

This is particularly relevant in the light of the Supreme Court pronouncement[11] which reads as under:

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[11] *State of Rajasthan v. Basant Nahata*, (2005) 12 SCC 77

> "[p]ublic policy connotes some matter which concerns the public good and the public interest." Therefore the concept of public policy itself is not static but is capable of changing with time.

However, as long as what is public policy or what is opposed to public policy does exist on the statute book, it is a powerful tool in the hands of the court to validly refuse to recognize surrogacy arrangements.

Assisted Reproductive Technologies and Eugenics

Another disturbing facet of Assisted Reproductive Technology, particularly when one refers to surrogacy, is the freedom of the parents to choose the genetic material for the wished-for child. Humans' ability to select and apply desired characteristics into the embryo goes to the very right to survival of babies born out of ART whether disabled or is one member of a multiple pregnancy. The babies born out of ART methods are not treated at par with other babies but depend upon the whims of their commissioning parents for survival. The eugenics implication of screening technology applied in ART methods is not very different from the violent eugenics laws that were enacted during the Nazi regime. The modern screening technology for embryo selection and screening aims at perfecting human being more subtly and graciously. With embryo donation and surrogacy, racial experimentation can take place endeavoring to resolve the problems of racism and violence by whitening the population. Are we not by mutely observing the fantasies of science, be a party to the idea?

To conclude the author takes help of a quote from a famous book on BIOETHICS where the author of the book speaks about all methods of Assisted Reproductive Technologies are nothing but:

> "a massive social experiment" and children are being born from this experiment. These children will not be children forever, but will be adults with definite opinions about the ethics of reproductive technology.[12]

[12] BIOETHICS, An Anthology by Helga Kuhse , Peter Singer Edition: reprint, Published by Wiley-Blackwell, 1999

United Nations Enabled: Marching Towards A New International Multicultural Human Rights Order With Special Reference To Work And Employment Of Persons With Disability

Sanjay S. Jain*

Although we are at the fag end of completing the first decade of the new millennium, there is no end to the plight and ignominious treatment of Persons with disabilities all over the world. Even at present persons with disabilities (hereinafter 'PWDs') are perceived as objects of charity, pity and sympathy. Particularly from the sphere of employment they are completely excluded and isolated by the so called able bodied, because they are perceived to be unproductive and untalented. But is it true? Upon a little introspection, the answer would be clear no. PWDs are equal human beings and as members of civil society expect to play a given role to the best of their capacity and reach. Fortunately at normative level, their aspiration to be equal citizens and worthy of Basic human rights has been finally materialized by UN with the adoption and enforcement of Convention on rights of Persons with disabilities (CRPD). A close look at the drafting process of this convention also brings home the fact that UN has paid a sufficient heed to the contemporary clarion call of disability rights movement, "nothing about us without us" by giving ample representation to the disability sector of civil society. Indeed the efforts of the UN signifies transformation in the status of PWDs and it is a movement towards recognizing them as subjects rather than the objects of the Human rights by recognizing their diversity and by allowing them to celebrate the same at least on the normative plane. Therefore, I call this movement of UN as a march towards evolving a new International Multicultural Human rights order for PWDs.

In this paper an attempt is made to critically analyze employment rights of persons with disabilities mainly by looking in to the work done within United Nations (hereinafter UN) system. In order to keep the discussion focused and systematic, the paper is divided into IV Sections. In Section one I would briefly survey key international human rights standards, reflected in International Bill of Human rights and Thematic UN Conventions. In section Two, I would focus on Disability specific Human rights Law standards evolved by UN prior to the adoption and entry into force of Convention on the Rights of Persons with Disabilities (hereinafter CRPD). Of course the discussion would by and large touch aspects mainly dealing with employment rights. Section Three then would go on to critically analyze relevant provisions of CRPD and would also offer there comparison

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with other UN conventions. In the forth section I would briefly trace aftermath of CRPD.

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SECTION ONE

Non Disability specific employment related International Human rights standards

At the very outset I would like to celebrate the decision of community of nations for adopting and ratifying an enforceable international convention on rights of persons with disabilities[1] (CRPD 2006). This convention is a milestone in the history of Disability rights jurisprudence and would go a long way in taking forward the march of justice of PWDs.

In many respects this convention is unique. Firstly, it seriously problematizes the so called conception of generations of rights by treating 'civil and political rights' (Rights of first generation), 'socio economic and cultural rights' (Rights of second generation) and 'group rights' (Rights of third generation) at par. Secondly, for the first time, it also recognizes and enforces certain special rights specific to disabilities. Thirdly, unlike the drafting process of many other UN conventions, during the negotiations which took place for finalizing the text of this convention, a large number of Nongovernmental organizations even without consultative status with UN were allowed to have their point of view heard before the Ad Hoc Committee of the UN established to consider proposals for "a comprehensive and integral international convention to protect and promote the rights and dignity of persons with disabilities."[2] Last but not the least the convention has firmly fore- grounded principles of non discrimination, Human dignity, participative Justice, establishment of Nonhandicapping and barrier free environment and reasonable accommodation[3] as the core of basic human rights of persons with disabilities. It would be in fact not exaggerating to state that with the adoption of this convention human rights of disabled would be considered as the theme of mainstream jurisprudence/ legal theory.

1 See Convention on rights of persons with disabilities, 2006 (CRPD). G.A. Res. 61/106, 61st Sess., U.N. Doc. A/RES/61/106 (Jan. 24, 2007)

2 See The Secretary-General, Note by the Secretary-General on the Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, P 10, submitted following the conclusion of the deliberations of the Ad Hoc Committee, U.N. Doc. A/57/357 (Aug. 27, 2002).,

3 See article 3,4 and 5 supra note 1

In following pages I would briefly survey the non disability specific key human right standards evolved by community of nations for upholding human rights of persons with disability. My main focus however would be on employment rights. In order to facilitate the discussion the standards may be divided into following categories-

a) International Bill of Human rights.

b) Thematic UN Conventions

A close look on all these standards would make it clear that International bill of Human rights and certain specialized UN conventions like Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 does not explicitly refer PWDs, whereas there are other conventions like CEDAW wherein its monitoring committee has come out with an exclusive general recommendation[4] addressing the special needs of Women with disability and clearly enjoins the discrimination inter alia on ground of disability. Similarly, Convention on rights of Children[5] [hereinafter CRC] also explicitly refers to disability. What follows is a brief discussion of all these instruments with special focus on Right to Employment of PWDs.

a. International Bill of Human rights.

So far as these standards are concerned, reference must be made to three important international instruments viz. Universal declaration of human rights (UDHR)[6], International Covenant on civil and political rights, 1966 (ICCPR)[7] International Covenant on economic social and cultural rights (ICESCR)[8]. These three instruments taken together constitute what is popularly known as international bill of human rights (hereinafter the bill). Unfortunately texts of none of these instruments explicitly refer to the term disability. The omission of this term is surprising for the simple reason that during the two world wars along with hundreds and thousands of soldiers a large number of civilians also acquired variety of disabilities and yet their cause was not thought to be worthy of explicit mention by international community in its principal human rights instruments. A question therefore,

4 See "Convention on the Elimination of All Forms of Discrimination against Women" adopted by general assembly on 18th December 1979 and entered into force 3rd September 1981. India signed the same on 30th July 1980 and ratified 13 years latter on 9th July 1993. General Recommendation No. 18 of CEDAW, General Recommendation No. 18 (tenth session, 1991)

5 Convention on the Rights of the Child, G.A. Res. 44/25, at 23, U.N. Doc. A/RES/44/25 (Nov. 20, 1989)

6 Universal Declaration of Human Rights, G.A. Res. 217A, at 25, U.N. GAOR, 3d Sess., 1st plen. Mtg. U.N. Doc. A/810 (Dec. 12, 1948)

7 ICCPR G.A. Res. 2200 (XXI), at 2, 26, U.N. Doc A/6316 (Dec. 16, 1966)

8 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), at 2(2), U.N. Doc. A/6316 (Dec. 16, 1966) General Assembly resolution 2200A (XXI) of 16 December 1966 *entry into force* 3 January 1976,

arises as to how the bill is significant for promoting the human rights of the PWDs. While answering the above question reference may be made to some of the relevant provisions of these instruments.

So far as UDHR is concerned articles 1 and 2 are extremely significant. Article 1 lays down that, "all human beings are born free and equal in dignity and rights.[9]" Similarly, Article 2 apart from specifically identifying certain grounds of non discrimination viz. race, sex, language, religion, political or other opinion, national or social origin, property, birth, etc. also clearly enjoins discrimination/ distinction on the ground of 'other status[10]'. It also contains several important articles pertaining to employment rights. Notably Article 23, on the right to work, free choice of employment, just and favorable conditions of work, and protection against unemployment, the right to equal pay for equal work[11], and the right to *"just and [favorable] remuneration... ensuring for self and family an existence worthy of human dignity."*

Similarly, the term 'other status' is also explicitly used in non discrimination provisions of articles 2 (1) and Article 26 of the ICCPR. Again Article 2 which is a non discrimination provision of ICESCR in Para (2) refers to the same term. Over the years while interpreting this all encompassing terminology, along with U N General assembly, all other U N Bodies have consistently proceeded on the assumption that discrimination on the ground of disability is covered by the ambit of the phrase 'other status'[12]. It is also evident from various international instruments[13] adopted by UN General Assembly that International Bill of Human Rights is clearly applicable to PWDs and implicitly addresses their human rights. Although ICCCPR does not contains any specific provision guaranteeing either right to work or employment, it certainly enjoins discrimination inter alia on ground

9 See article 1 Supra note 6

10 See article 2 supra note 6

11 See article 23 supra note 6

12 See generally, 'the current use and future potential of United Nations human rights instruments in the context of disability, Gerard Quinn and Theresia Degener. 2002, Geneva available at http://www.iadb.org/sds/doc/soc-UNHumanRightsDisability- See particularly Chapters 4 and 5. See also Leandro Despouy, Human Rights and Disabled Persons, P 3, in Human Rights Studies Series No. 6, U.N. Sales No. E.92.XIV.4 (1992), available at http://www.un.org/esa/socdiv/enable/dispaperdes5.htm Although the Report did not recommend the creation of a disability-specific convention, it drew attention to the inconsistency between the position of disabled people and that of other groups which did enjoy the benefit of thematic conventions. It was pointed out, "Persons with disabilities are going to find themselves at a legal disadvantage in relation to other vulnerable groups such as refugees, women, migrant workers, etc. It can be said that persons with disabilities are equally as protected as others by general norms, international covenants, regional conventions, etc. But although this is true, it is also true that, unlike the other vulnerable groups, they do not have an international control body to provide them with particular and specific protection"

13 See Convention on rights of persons with disabilities, 2006 (CRPD). G.A. Res. 61/106, 61st Sess., U.N. Doc. A/RES/61/106 (Jan. 24, 2007) See also, The Declaration on the Rights of Disabled Persons, 1975.

of disability in public sphere, which of course is inclusive of employment sector and to this extent letter and spirit of article 2 is bound to provide vibrancy to the disability right jurisprudence. It is disappointing to find that Human Rights committee has not come out with an exclusive general comment enjoining discriminatory treatment to PWDs[14]. Nevertheless, certain general comments adopted by it clarifying the concept of discrimination may be usefully relied upon.[15]

Thus, to refer to general comment no.31.[16] Observations of the committee under this comment may be effectively employed by state parties against those member states found wanting in their endeavors to comply with their obligation under the covenant. The committee notes that, "rules concerning the basic rights of the human person" are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms."[17] These observations are equally applicable to employment rights of PWDs. Although, they are not specifically mentioned in ICCPR, the author ventures to argue that stereotyping of image of PWDs to be unproductive and fit for only few jobs should be interpreted to amount to violation of right to Human dignity as envisaged by Preamble and Article 10 of the covenant[18]. In my humble submission, securing right to inherent dignity to PWDs is clearly an erga omnes obligation. Without availing this right they cannot enjoy right to employment. The present author also submits that provisions of CRPD must be read with provisions of ICCPR and general comments adopted by the HRC to strengthen the mandate of the former.[19]

Having briefly dealt into the provisions of ICCPR and the work of HRC let us now briefly analyze provisions of International Covenant on

14 Theresa Degeiner points out "that none of the twelve general comments adopted by the HRC during the United Nations Decade of Disabled Persons (1982-1993) refers specifically to the rights of disabled persons." See Gerald Quinn 2002, supra note 12 Id. at pp.62.

15 See for example General comment No. 18: Non-discrimination Thirty seventh session (1989) of HRC (2004) in "compilation of general comments and General recommendations adopted by human rights treaty bodies" HRI/ GEN/1/ Rev.7, PP 146-148. See also General comment No. 28: On Article 3 (The equality of rights between men and women) Sixty-eighth session (2000).

16 See general comment no. 31 "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" adopted in Eightieth session of HRC (2004) id at PP 192 et seq.

17 Id at PP 192,Para 2,

18 See Para 1 of preamble and article 10. Supra note 7.

19 The HRC has also evolved jurisprudence in accordance with Optional Protocol I and has rendered a no. of decisions implicitly dealing with the rights of the disabled. However, the cases mainly focus on rights of persons with intellectual disabilities. Hamilton v. Jamaica (1999), Communication No. 333/1988 : Jamaica. 23/03/94. CCPR/C/50/D/333/1988; Clement Francis v Jamaica (communication No. 606/1994); Communication No. 832/1998, Australia; C. v. Australia(1999)(discussed at http://www.un.org/disabilities/default.asp?id=229).
For a fuller analysis of overall work of HRC with regard to Human Rights of the disabled *see* PP. 65 *et seq. Supra Note12*

Economic, Social and Cultural Rights(hereinafter ICESCR) [20]and the work carried out by Committee on economic ,social and cultural rights (hereinafter 'CESCR'). So far as employment rights are concerned, Articles 6 and 7 are relevant. Article 6 provides,

Art. 6

1. *The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*
2. *The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training [programs], policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.*

Article 7 reads:

Art.7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and [favorable] conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays [21]

20 See supra note 8

21 See Infra fn 101-105 and accompanying text for its comparison with article 27 of CRPD.

As has been pointed out earlier the covenant does not explicitly mention disability but unlike HRC, CESCR has come out with a specific general comment[22] exclusively dealing with obligations of the state parties for promoting, upholding and safeguarding human rights of PWDs. Against the backdrop of adoption of UN Standard Rules on Equalization of Opportunities for Persons with Disabilities (the Standard Rules)[23] CESCR linked disabled people with the existing ICESCR covenant for the first time at its Eleventh Session in 1994 by adopting general comment no. 5. It found that "in most countries, the unemployment rate among persons with disabilities is two to three times higher than the unemployment rate for persons without disabilities" and "where persons with disabilities are employed, they are mostly engaged in low-paid jobs with little social and legal security and are often segregated from the mainstream of the market."[24] The Committee also expresses the belief that it is "through neglect, ignorance, prejudice and false assumptions, as well as through exclusion, distinction or separation, persons with disabilities have very often been prevented from exercising their economic, social or cultural rights on an equal basis with persons without disabilities".. and contributed to "the effects of disability-based discrimination [that] have been particularly severe in the field of ... employment."[25]

The committee also went on to articulate the concept of disability based discrimination. It observed, "*disability-based discrimination may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.*"[26]

The committee also recommended to interpret the provisions of ICESCR in the light of UN Standard Rules. It observed, "The Standard Rules are of major importance and constitute a particularly valuable reference guide in identifying more precisely the relevant obligations of State parties under the Covenant."[27]

22 See 'General Comment 5: Persons with disabilities' adopted by HRC in its 11th session in 1994, U.N. Doc. E/1995/22 (Dec. 9, 1994). PP 25-34, supra note15
For its critical analysis see, Chapter 5, supra note 6. See also, Eric G Zhang "Employment of people with disabilities: international standards and domestic legislation and practices in china?, 2007 Syracuse Journal of International Law and Commerce, 34 Syracuse J. Int'l L. & Com. 517.

23 See Standard Rules on the Equalization of Opportunities for Persons with Disabilities, G.A. Res. 48/96, Annex, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/Res/48/96/Annex (Dec. 20, 1993), *See also* supplement to these rules adopted by UNGA in 2004, E/CN.5/2000/3 See infra Fn 58-61 and accompanying text for analysis of Rule 7.

24 Id at Para 22, PP 30, *Supra note 22*

25 Id at Para 16 , PP 28,

26 Id, Para 15,PP 28

27 Id, Para 7, PP 26

Committee also emphasized on a remedial measures with a view to undo past and present discrimination, and to provide disincentive for future discrimination by observing, "Comprehensive anti-discrimination legislation in relation to disability would seem to be indispensable in virtually all States Parties."[28] The Committee further highlighted this point by pointing out "anti-discrimination measures should be based on the principle of equal rights for persons with disabilities and the non-disabled, which ... implies that the needs of each and every individual are of equal importance, that these needs must be made the basis for the planning of societies, and that all resources must be employed in such a way as to ensure, for every individual, equal opportunity for participation. [29]

b. Thematic UN Conventions

Having briefly analysed the key International Human rights standards for PWDs as reflected through International Bill of Human rights, it would be appropriate now to briefly deal with Thematic UN conventions.

I. The convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[30]

Unfortunately, this convention does not make it explicit that torture on the ground of physical or mental disability is unlawful. Nevertheless if this convention is read in the light of letter and spirit of CRPD, it goes without saying that state parties are under obligations to prevent torture of PWDs on the ground of their disabilities.

In the context of employment rights also the convention assumes lot of significance, if harassment on the ground of disability of an employee is perceived as one of the species of the genus Torture. Eg. More often than not, employees with disability are exposed to a hostile work environment and are often subjected to surreptitious and secretive surveillance. Their disability is openly targeted by use of abusive language and degrading gestures. The same may certainly be characterized as 'disability based discrimination' and squarely captures the phrase 'mental torture'. The above position is clearly articulated in Article 1 of the convention, which reads inter alia, " For the purposes of this Convention, the term "torture" means any act by which

28 Id at, Para 16, PP 29
29 Id at ,Para 17, PP 29
30 See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/46 (1984) (entered into force June 26, 1987)

severe pain suffering, whether physical or mental, is intentionally inflicted on a person---------- for any reason based on discrimination of any kind,..."[31]

II. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

As the CEDAW protections cover all women, they apply equally to women with disabilities and able-bodied women.[32] As has been rightly observed, "When a woman with a disability is exposed to discrimination, it is not always clear whether the discriminatory practice is attributable to her gender or her disability...Discrimination against disabled women takes various forms and the standard of comparison differs accordingly. Disabled women may experience discrimination vis à- vis non-disabled women. They may share the discrimination experienced by other women vis-à-vis men. And they may experience discrimination vis-à-vis disabled men."[33] In this connection, General Recommendation No. 25 also assumes special significance wherein, highlighting the principle of intersectionality[34], the CEDAW committee very aptly observes, "Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them."[35]

Significantly, CEDAW does not contain any specific provision addressing special needs of women with disability. However, if its Article 3 (which inter alia imposes obligation on State Parties to take all appropriate measures including legislation particularly in economic field .....to en sure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men) is read with Articles 1 and 11, it is plausible to make out a case against disability based discrimination of women with disabilities. So far as Employment rights of

31 Id at article 1 .See for critical analysis of the convention in the context of disability PP 148 et seq. supra note 12
32 See for definition of discrimination, article 1 of CEDAW, Supra note 4, there use of the term 'Material status' is clearly demonstrative of prohibition of disability based discrimination against women.
33 Id at PP 172, Para 7.2 Supra note 12
34 See for excellent analysis Kimberle' Williams Crenshaw " intersectionality, Identity Politics, and violence against women of color"- available at www.hsph.harvard.edu/Organizations
35 See General recommendation No 25 adopted by CEDAW Committee at its 20th session, 1999 for effective implementation of Article 4 Para (1) [calling the State Parties to initiate temporary and special measures in favour of women for eliminating discrimination against them]. Id at Para 12

Women with Disabilities are concerned, Article 11[36] of the Convention stipulates on all the States parties to eradicate discrimination against women in employment. In this connection it is imperative to observe that the standard comparator while assessing the discrimination is disabled men and not the non disabled men or women because members of latter groups usually do not need inclusive vocational rehabilitation in an open and non handicapping and barrier free environment .

The same is also highlighted by the committee with the adoption of General Recommendation No 18[37], which inter alia mentions the need to take measures (including special measures) in the areas of employment..... health services[38] and social security [39]. It also makes it incumbent on States parties to provide information on the situation of women with disabilities in their reports. Similarly General recommendation No 19[40] is most noteworthy which inter alia defines Sexual harassment[41]. The Committee notes, "Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace."[42]

Our apex Court did in fact specifically recognize that Sexual Harassment of women at workplace constitutes infraction of rights to human dignity, equality of opportunities in Public - private sectors of employment and freedom to choose avocation and profession by explicitly referring to aforesaid recommendation[43]. It also instituted an ad hoc complaint mechanism to safeguard the interests of women during the pendency of legislation[44] by Indian Parliament. It is submitted that women with disabilities

36 See infra fn 106-110 and accompanying the text for its comparison with article 27 of CRPD.

37 See General recommendation no. 18 'Disabled women' adopted by committee at its 10th session 1991. The recommendation recalls paragraph 296 of the Nairobi Forward-looking Strategies for the Advancement of Women, in which disabled women are considered as a vulnerable group under the heading "areas of special concern". It also affirms its support for the World Programme of Action concerning Disabled Persons (1982).

38 See article 12 of CEDAW. See also Para 6 of general recommendation No. 24,,"women and health' adopted by committee at its 20th session 1999. " special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups such as ... women with physical or mental disabilities"

39 See general recommendation no. 18, see also article 13 of CEDAW. Supra note 4.

40 See general recommendation no 19 'violence against women' adopted by committee at its 11th session 1992.

41 See General recommendation no. 19, Para No. 18 of CEDA. See also, The Discrimination (Employment and Occupation) Convention, 1958 (No. 111), which addresses discrimination in employment on a number of grounds, including sex, and requires that ILO member States to declare and pursue a national policy designed to promote equality of opportunity and treatment with a view to eliminating discrimination. Much earlier to adoption of relevant recommendation issued by CEDAW committee dealing with SH, ILO had taken a lead to recognize SH as a species of sex discrimination at work.

42 Id at Para 17. Also See Para 3. See also General Recommendation No. 12,' Violence against women' adopted by committee at its 8th session 1989. Id at Para 1.

43 Vishaka vs. State of Rajasthan AIR 1997 SC 3011, Apparel Export Promotion Council v. A.K. Chopra AIR 1999 SC 625, Medha Kotwal Lele and Others. v. Union of India and Ors W.P. (Crl.) No.173-177/1999 dated 26.4.2004,. Punjab National Bank v. Astamija Dash 2008 (7) SCALE 26

44 At present, the bill [The Sexual Harassment of Women at the Workplace (Prevention and Redressal) Bill, 2004] is pending before the Rajya Sabha

stand at a far lower pedestal in comparison to able bodied women and therefore the complaint mechanism should addressed the same. In our humble opinion, whenever there is a complaint filed by woman with disability, the enquiry committee constituted to hear the same must invariably have a member representing PWDs. To this date there is hardly any guidance available even from UN to secure freedom of women with disabilities at workplaces against sexual harassment.

III. Convention on the Rights of the Child (CRC) 1989

This convention[45] principally is a magna carta of Human rights of children and as such has no direct bearing on employment rights of PWDs[46]; nevertheless it is worth mentioning that it has dedicated a whole article to the cause of children with disabilities and it mentions inter alia, "Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, ...to ensure that the disabled child has effective access to and receives education, training, ... Rehabilitation services, preparation for employment .....in a manner conducive to the child's achieving the fullest possible social integration and individual development including his or her cultural and spiritual development"[47]. Thus, preparing the children with disabilities as the productive units of the civil society in general and of employment sector in particular seems to be the objective behind this provision.

However, it is also to be emphasized that the relevant article is couched in a very compromising language and although it talks about the human rights of children with disabilities, with regard to laying down obligations on state parties, it virtually says nothing and as a matter of fact affords lower standards to the cause of human rights of children with disabilities.[48] Of course the above proposition may be contested, if article 23 of CRC is read with article 4.[49]

IV. International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

This convention[50] has immense significance at least on two levels, firstly, from the standpoint of legal theory, if it is assumed that the

45 See supra note 5.This convention is ratified by India in

46 See article 23, supra note 5.

47 Id at Para 2 and 3 .

48 Compare Article 23 with Article 19 (protection form abuse) and 22 (Care of Refugee children) of CRC.

49 For a fuller analysis of this convention from the standpoint of disability perspective, see chapter 8 Supra Note 12.

50 See G.A. Res. 2106 (XX), at 1, P 4, U.N. Doc. A/9464 (Dec. 21, 1965).Ratification by India

Convention's principle objective is to create space for difference and to confront attitudes and practices that use difference as a ground for exclusion or discrimination, it would appear logical to extend the grounds on which it is deemed to be applicable beyond those directly related to the idea of race, such as ethnicity and language, to include, for example, disability. Secondly, in the light of principle of intersectionality and in keeping with its basic rationale of skirmishing discrimination based on race, it is obviously relevant to people with disabilities who suffer discrimination as members of a racial group or minority, i.e. double discrimination based on race and disability. In the light of General Recommendation 25 on gender-related dimensions of Racial discrimination, adopted by the committee established under this convention in 2000, it becomes evidence that to secure employment rights of PWDs, a mechanism has to be evolved to protect them against multiple discrimination which may be practiced on them by combining race with disability, sex with disability etc.[51]

V. Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CPRMW) 1990.

At a time when globalization is the writing on the wall and Migration of workers including workers with disability from one country to another in search of employment is such a common phenomenon, it is a very important convention[52] and it safeguards rights of those workers, who go abroad for employment. The convention refers such workers inter alia as migrant workers.[53] Unlike CRC, this convention does not explicitly refer to disability. However, article 1 dealing with its applicability and article 7 referring to grounds of nondiscrimination enjoins discriminatory treatment against migrant workers inter alia on the ground of other status and the same is bound to encapsulate Disability based discrimination in the light of interpretation of ICCPR and ICESCR and Opinio juris. So far as, nondiscrimination in the field of employment is concerned, article 25 is most relevant, which inter alia lays down "Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of"[54] all employment related aspects.

Thus far having briefly surveyed the thematic UN conventions let me now analyse disability specific human rights standards evolved by UN.

51 For a fuller analysis of this convention form the standpoint of disability perspective, see chapter 9 Supra Note 12 See also Yanghee Lee, "Expanding human rights to persons with disabilities: laying the groundwork for a twenty-first century movement' Pacific Rim Law & Policy Association Pacific Rim Law & Policy Journal January, 2009 18 Pac. Rim L. & Pol'y 283. See PP 287 et seq.

52 G.A. Res. 45/158, at 11, U.N. Doc. A/Res/45/158 (Dec. 18, 1990).,

53 For various definitions see its article 2 (1)

54 Id at paragraph 1 article 25.

SECTION TWO

An Outline of Pre CRPD Disability specific employment related International Human rights standards

Having briefly surveyed the International human rights standards reflected in International bill of Human rights, UN thematic conventions , it would be appropriate to embark upon the analysis of those standards which are evolved by the community of Nations exclusively for protection and enforcement of Human rights of PWDs. A careful look on these standards reveals that they are mainly of two types- a. soft law standards (Legally non binding) and hard law standards (legally Binding). In order to make the discussion systematic we propose to analyse these standards in following chronology.

I Pre CRPD Disability specific Human rights Law standards.

II CRPD

III. Post CRPD

In this section I will discuss Pre CRPD standards and in Sections three and Four CRPD and Post CRPD Scenario would be examined.

Although UN has adopted a number of instruments to safeguard Human rights of PWDs[55], its initiative in the form of U.N. Standard Rules on Equalization of Opportunities for Persons with Disabilities[56], deserves special mention owing to its influence on further revolutionary developments finally reaching the culmination with the adoption of CRPD[57] by UN.

55 See for a brief account of these standards 'Charles D. Siegal- fifty years of disability law: the relevance of the universal declaration' ILSA Journal of International & Comparative Law Spring, 1999 5 ILSA J Int'l & Comp L 267. The most prominent instruments are 1975 Declaration on the Rights of Disabled Persons G.A. Res. 2433, U.N. GAOR, 30th Sess., 2433rd mtg., U.N. Doc. 20.7.1 (i)-(vi) (1975), 1983: G.A. Res. 36/77, at 176, U.N. GAOR, 36th Sess., Supp. No. 77, U.N. Doc. A/RES/36/77 (Dec. 8, 1981){To Celebrate International Year of Disabled Persons}, {As a part of international decade of disabled person from 1982-1991. It is subject to periodical review and recently secretary general of UN has submitted Fifth quinquennial review and appraisal of the World Programme of Action concerning Disabled Persons A/62/183 pursuant to Para 16 (a), General Assembly resolution 62/127 dated 18th December 2007} International World Programme of Action Concerning Disabled Persons, G.A. Res., U.N. GAOR, 37th Sess., Supp. No. 51 (1982), 1989: Tallinn Guidelines for Action on Human Resources Development in the Field of Disability See generally G.A. Res. 38/28.
At regional level also there are number of Initiatives. See African Decade of Disabled Persons (1999-2009), The Asian and Pacific Decades of Disabled Persons (1993-2002) and (2003-2012), Arab Decade of Disabled Persons (2004-2013), Council of Europe Disability Action Plan (2006-2015), Decade of the Americas for the Rights and Dignity of Persons with Disabilities (2006-2016). See for brief analysis of these regional initiatives' Fifth quinquennial review and appraisal of the World Programme of Action concerning Disabled Persons of UN secretary general, Sixty third session of UN general assembly, A/63/183, Paras 15-25.

56 See supra note 23,.

57 See supra note 13

1. U.N. Standard Rules on Equalization of Opportunities for Persons with Disabilities

On December 20, 1993, the United Nations General Assembly adopted the Standard Rules on Equalization of Opportunities for Persons with Disabilities (the Standard Rules) by resolution 48/96 while concluding the International decade of disabled Persons [1982-1993]. Though not legally binding, these rules have a considerable impact on policy-making and actions concerning persons with disabilities in many parts of the world[58] and they are monitored by special Rapporteur[59]. Rule 7 is a graphic exposition of various aspects of the right to work for persons with disabilities it reads:

States should recognize the principle that persons with disabilities must be empowered to exercise their human rights, particularly in the field of employment. In both rural and urban areas they must have equal opportunities for productive and gainful employment in the labour market.

- Laws and regulations in the employment field must not discriminate against persons with disabilities and must not raise obstacles to their employment.
- States should actively support the integration of persons with disabilities into open employment. This active support could occur through a variety of measures, such as vocational training, incentive-oriented quota schemes, reserved or designated employment, loans or grants for small business, exclusive contracts or priority production rights, tax concessions, contract compliance or other technical or financial assistance to enterprises employing workers with disabilities. States should also encourage employers to make reasonable adjustments to accommodate persons with disabilities.
- States' action programmes should include:
    - Measures to design and adapt workplaces and work premises in such a way that they become accessible to persons with different disabilities;

[58] The Standard Rules are of major importance and constitute a particularly valuable reference guide in identifying more precisely the relevant obligations of States parties under the Covenant." See supra text accompanying Fn 23-29 , See also World Health Organization, The U.N. Standard Rules on the Equalizations of Opportunities for Persons with Disabilities: Government responses to the implementation of the rules on medical care, rehabilitation, support services and personnel training,

[59] See for example "Monitoring the implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities [E/CN.5/2002/4 Report on Third Mandate of the Special Rapporteur] It also proposed a supplement to the Standard Rule. See also Part IV of the Standard Rules supra note 23.

    - Support for the use of new technologies and the development and production of assistive devices, tools and equipment and measures to facilitate access to such devices and equipment for persons with disabilities to enable them to gain and maintain employment;
    - Provision of appropriate training and placement and ongoing support such as personal assistance and interpreter services.
- States should initiate and support public awareness-raising campaigns designed to overcome negative attitudes and prejudices concerning workers with disabilities.
- In their capacity as employers, States should create favourable conditions for the employment of persons with disabilities in the public sector.
- States, workers' organizations and employers should cooperate to ensure equitable recruitment and promotion policies, employment conditions, rates of pay, measures to improve the work environment in order to prevent injuries and impairments and measures for the rehabilitation of employees who have sustained employment-related injuries.
- The aim should always be for persons with disabilities to obtain employment in the open labour market. For persons with disabilities whose needs cannot be met in open employment, small units of sheltered or supported employment may be an alternative. It is important that the quality of such programmes be assessed in terms of their relevance and sufficiency in providing opportunities for persons with disabilities to gain employment in the labour market.
- Measures should be taken to include persons with disabilities in training and employment programmes in the private and informal sectors.[60]

States, workers' organizations and employers should cooperate with organizations of persons with disabilities concerning all measures to create training and employment opportunities, including flexible hours, part-time work, job-sharing, self-employment and attendant care for persons with disabilities.[61].

[60] See Rule 7 Para 1. Supra note 23

[61] Id at Para 2 Supra note 23. see infra 111-112 for comparison of rule 7 with article 27 of CRPD

2. Appointment of Special Rapporteur for Disability

In order to fully mainstream the human rights of PWDs, UN decided to appoint special Rapporteur.[62] After assuming the office, he commissioned a Global Survey on Government Action on Disability Policy. Of the eighty-three responding states, only thirty-nine had enacted new disability legislation since the 1992 Report, which the Rapporteur found surprising. He lamented that only a few states had rights-based legislation, as opposed to welfare based legislation.[63] The office of the Special Rapporteur also launched full-fledged media awareness-raising campaign The Right to Education and Employment (2005)[64], which received worldwide attention. Although this production was designed to target a predominantly Arab audience and featured Arab persons with disabilities, it has been in demand in a number of African and European countries and has been used by organizations of persons with disabilities in the United States of America. This production has won a number of awards over the past three years at international theme-driven film festivals.

At this juncture, it would also be apt to briefly analyse the standards evolved by ILO, which is a vital Institution for streamlining employment related human rights of workers including workers with disability.

Standards evolved by ILO

The ILO has adopted a set of conventions together with recommendations and has evolved extensive jurisprudence for safeguarding employment related human rights of workers with disability. In the Discrimination (Employment and Occupation) Convention of 1958 (No.111)[65], the ILO provides an prominent definition of "discrimination" in the workplace, in which it elaborates: "any distinction, exclusion or preference made on" any of the grounds specified in the Convention itself or specified by the State concerned "which has the effect of nullifying or

62 The first Special Rapporteur for Disability, Bengt Lindquivist of Sweden, was appointed in 1994, and had his commission renewed in 1997 and in 2000. See United Nations Enable, The Special Rapporteur on Disability of the Commission for Social Development, http://www.un.org/esa/socdev/enable/rapporteur.htm. The current Special Rapporteur for Disability is Sheikha Hissa Al Thani of Qatar. See also For an insider's perspective on the role of the Special Rapporteur, see Bengt Lindqvist, Standard Rules in the Disability Field - A New United Nations Instrument, in Human Rights and Disabled Persons, in Human Rights and Disabled Persons 69 (Theresia Degener & Yolan Koster-Dreese eds., 1995), at PP 63.

63 See Bengt Lindqvist, Government Action on Disability Policy, A Global Survey (1997)Para 16

64 See Para 26 of "Report of the Special Rapporteur on Disability of the Commission for Social Development on monitoring of the implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 2003-2008, E/CN.5/2009/1.

65 Available at http://www.ilo.org/ilolex/cgi-lex/convde

impairing equality of opportunity or treatment in employment or occupation.[66]

Again article 5 clarifies that affirmative actions and other special measures may not be considered as discrimination under the Convention. It inter alia provides "Any member may, after consultation with representative employers' and workers' [organizations], where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as .....disablement, ..., are generally [recognized] to require special protection or assistance, shall not be deemed to be discrimination.[67]"

Taking a leaf from the full participation and equality theme of the International Year of Disabled Persons declared by the United Nations, the ILO adopted Vocational Rehabilitation and Employment (Disabled Persons) Convention No. 159[68] and Recommendation No. 168 in 1983. It defines a "Persons with disability" as "an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly [recognized] physical or mental impairment."[69] It obliges member states to take measures consistent with national conditions and national practice, "to formulate, implement and periodically review a national policy on vocational rehabilitation and employment" of disabled persons.[70] It further stipulates that such policy "shall aim at promoting employment opportunities for disabled persons in the open [labor] market."[71] Finally, the Convention requires that such policies "shall be based on the principle of equal opportunity between disabled workers and workers generally" and reiterates that "special positive measures aimed at [ensuring] equality of opportunity and treatment between disabled workers and other workers shall not be regarded as discriminating against other [non-disabled] workers."[72]

At this place it is also important to have a brief look at a Code of Practice[73] evolved by ILO. "The objective of this code is to provide practical guidance on the management of disability issues in the workplace with a view to:

(a) ensuring that people with disabilities have equal opportunities in the workplace;

66 Id at article 1(a) and (b)

67 Id at Para 2 of article 5

68 available at http://www.ilo.org/ilolex/cgi-lex/convde

69 Id at article 1(1)

70 Id at article 2

71 Id at article 3

72 Id at article 4, see infra text accompanying fn 72-85

73 See "ILO *managing disability in* the *workplace.' ILO code of practice* Geneva, International Labour Office, 2002 Code of practice, disabled worker, rights of the disabled, human resources management. 15.04.3

(b) improving employment prospects for persons with disabilities by facilitating recruitment, return to work, job retention and opportunities for advancement;

(c) promoting a safe, accessible and healthy workplace;

(d) assuring that employer costs associated with disability among employees are minimized – including health care and insurance payments, in some instances;

(e) maximizing the contribution which workers with disabilities can make to the enterprise"[74]

The Code also defines number of important concepts-

Thus , Adjustment or accommodation is defined as "- Adaptation of the job, including adjustment and modification of machinery and equipment and/or modification Managing disability in the workplace of the job content, working time and work organization, and the adaptation of the work environment to provide access to the place of work, to facilitate the employment of individuals with disabilities."[75]

Disability management is defined as "A process in the workplace designed to facilitate the employment of persons with a disability through a coordinated effort and taking into account individual needs, work environment, enterprise needs and legal responsibilities."[76]

While defining discrimination, the code inter alia provides, ".....Distinction or preferences that may result from application of special measures of protection and assistance taken to meet the particular requirements of disabled persons are not considered discriminatory"[77]

Impairment is defined as "Any loss or abnormality of a psychological, physiological or physical function."[78]

Mainstreaming is defined as Including people with disabilities in employment, education, training and all sectors of society.[79]

The code also lays down in detail General duties of employers and workers' representatives, and responsibilities of competent authorities[80], and

74 Id at Para 1.1 PP 1.
75 Id at Para 1.3 PP 3
76 Id at PP 4
77 Id at PP 5
78 Id at pp 6
79 Id at Pp 7
80 See PP 10 -16

provides Framework for the management of disability issues in the workplace.[81]

The code also deals with various employment related aspects like recruitment[82], promotion[83], Job retention[84], Adjustments[85] and Confidentiality of information[86]. However, a detail discussion of the same is beyond the scope of this paper. It is also to be noted that although the code is not legally binding, the state parties may use the same while formulating strategies for managing employees with disability at workplaces. Courts may also employ this code while interpreting the relevant laws.

Movement towards adoption of CRPD

Within the U.N., the adoption of a disability-specific convention was first suggested in 1987, by Sweden and Italy. However, the idea was resisted by member states. Some States (including the U.K. and Japan) raised objections based on cost, while others (including Germany and Norway) considered that the existing conventions provided adequate protection. Two years later, Sweden again proposed the drafting of such an instrument. This too was rejected and, in 1993, the General Assembly decided to adopt the non-binding Standard Rules rather than a mandatory treaty, which have already been analysed. Gradually the efforts of disability rights organizations intensified, resulting in holding of first World Non-Governmental Organization Summit on Disability, attended by disability organizations from all over the world, including those with consultative status at the U.N and its positive outcome was the securing of Beijing Declaration on the Rights of Persons with Disabilities in March 2000.[87]

The message of the Beijing Declaration was clear: "We share the conviction that the full inclusion of people with disabilities in society requires our solidarity in working towards an international convention that legally binds nations ..."[88]. We hereby send out a call to action ... to ensure the adoption of an international convention on the rights of all people with disabilities."[89]

In 2000, the U.N. Commission on Human Rights adopted a resolution which urged the High Commissioner for Human Rights (in conjunction with

81 See PP 17-19
82 See PP 20-25
83 See PP 26- 28
84 See PP 29-32
85 See PP 33
86 See PP 34-35
87 Beijing Declaration on the Rights of People with Disabilities in the New Century, http://www.icdri.org/News/beijing declaration on the right.htm
88 Id Para 5
89 Id Para9

the Special Rapporteur on Disability) "to examine measures to strengthen the protection and monitoring of the human rights of persons with disabilities and to solicit input and proposals from interested parties[90]. Responding to the same, the High commissioner commissioned a comprehensive study into the treatment of disability in the existing treaty system. This study was published in 2002 as the Quinn and Degener review.[91]

On December 19, 2001, the Third Committee of the U.N. General Assembly adopted a resolution calling for the establishment of an Ad Hoc Committee of the U.N. to consider proposals for "a comprehensive and integral international convention to protect and promote the rights and dignity of persons with disabilities.[92]" However, soon the mandate of the Committee was expanded to cover the drafting of a convention and it actually commenced the work in its Third Session in May 2004. It had the benefit of a draft text compiled by its Working Group[93]. On August 25, 2006, the Committee concluded its five year long task by reaching agreement on the substance of a draft International Convention on the Rights of Persons with Disabilities (CRPD). The agreed text, having been revised by a drafting group, was approved by the Ad Hoc Committee on December 5th and adopted by the General Assembly on December 13th 2006. This new human rights treaty, the first of the 21st Century, was opened for signature on March 30, 2007 and entered into force on 3may 2008.This marked a major milestone in the effort to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms of persons with disabilities, and to promote respect for their inherent dignity[94].

Thus, having briefly dealt with the background to the convention, now we will turn to analyse its 'employment specific Provisions'.

SECTION THREE

Right to work and Employment in CRPD

It is beyond the scope of this paper to delve in to the Jurisprudential foundations of CRPD. Nevertheless, it is plausible to argue that this convention has made a Philosophical dent into International Human rights Law and legal theory. It is one of those few hard law instruments, affording equal status to first and second generation of Human rights for securing full realization of Human rights of PWDs. It has also made enforceable what is

90 C.H.R. Res. 2000/51, P 30 (Apr. 25, 2000), available at http://www.internationaldisabilityalliance.org/
91 See Gerald Quinn 2002, supra note 12
92 G.A. Res. 58/168, U.N. Doc. A/RES/56/168 (Feb. 26, 2002)
93 See G.A. Res. 58/246, P 3, U.N. Doc. A/RES/58/246 (Mar. 11, 2004).
94 U.N. Enable, Promoting the Rights of Persons with Disabilities, http://www/un.org/esa/socdev/enable/rights/adhoccon.htm see also Anna Lawson,' The United Nations Convention on Rights of Persons with disabilities, new era or falls dawn?' in 34 Syracuse J. Int'l L. & Com. 563, spring 2007. Fn 120-146 with accompanying text.

referred to as Third generation Human rights viz. right to development. It is clearly informed by the principles of participatory justice, human dignity, right to equal opportunities and considerations and reasonable accommodations. I submit that in order to fully realize the cherished objectives of this convention, it should be construed by adopting disability human rights paradigm[95].

Obviously, with the entry into force of this convention, state parties have to abandon medical model[96] of disability and also considerably transform[97] the social model[98], so as to empower PWDs with human rights. For the same, the disability human rights paradigm[99] is extremely significant, which combines the best aspects of the social model of disability, the human right to development, and the capabilities approach[100], to create a holistic and comprehensive rights theory.

In the light of these prefatory observations, let me examine and analyse guarantee of human right to employment to PWDs as enshrined in CRPD.

The Convention has dedicated an exclusive article to human rights to work and employment:

95 See for excellent jurisprudential analysis Michael Ashley Stein+," Disability Human rights'95 Calif. L. Rev. 75, Feb 2007. See also Michael Ashley Stein* and Penelope J.S. Stein "Beyond disability civil rights'58 Hastings L.J. 1203, June 2007;, Michael Ashley Stein* & Janet E. Lord "Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities, 13 Tex. J. on C.L. & C.R. 167, Spring 2007. ;Michael Ashley Stein & Janet E. Lord, The United Nations Convention on the Rights of Persons with Disabilities as a Vehicle for Social . Transformation, in National Monitoring Mechanisms of the Convention on the Rights of Persons with Disabilities (Comision Nacional de los Derechos Humanos de Mexico, Network of the Americas & Office of the United Nations High Commissioner for Human Rights eds., 2008); Michael Ashley Stein & Janet E. Lord, The Normative Value of a Treaty as Opposed to a Declaration: Reflections from the Convention on the Rights of Persons with Disabilities, in Implementing the Right to Development 27-32 (Stephen P. Marks ed., 2008)
96 This model that considered "handicapped" individuals as naturally excluded from mainstream culture. Due to this medical based pathology disabled persons have been either systemically excluded from social opportunities, as in the case of receiving social welfare benefits in lieu of employment, or have been accorded limited participation in those opportunities, for example by having their education circumscribed to separate schools. See Michael and Penelope , June 2007 id at PP 1207
97 For limitations of social model see Michael feb 2007, Fn 89-96 and accompanying text.
98 In contrast to a medical model, disability rights advocates have argued for a social model of disability. According to this view, the constructed environment and the attitudes that it reflects play a central role in creating what society labels as "disability." Thus, factors external to a person's impairments determine how disabled that individual will be from functioning in a given society. A blunt version of the social model is that of feminist disability rights advocate Susan Wendell, who avers that "the entire physical and social organization of life" has been created with the able-bodied in mind. A more nuanced description is by philosopher and disability rights commentator Anita Silvers. She argues that being biologically anomalous is only viewed as abnormal due to unjust social arrangements, most notably the existence of a hostile environment that is "artificial and remediable" as opposed to "natural and immutable." Id at PP 1207-08, See Fn 17-21 and accompanying text,
99 For excellent exposition of this paradigm see, Michael Ashley Stein+, Feb 2007. Fn 162-182 and accompanying text See also Michael Ashley Stein* and Penelope J.S. Stein, June 2007 Fn 93-99 and accompanying text.
100 For excellent critique Michael 2007,, fn 123 -161 and accompanying text.

It reads, Article 27 - Work and Employment

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a [labor] market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those *who acquire a disability during the course of employment*, by taking appropriate steps, including through legislation, to, inter alia:

   (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

   (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and [favorable] conditions of work, including equal opportunities and equal remuneration for work of equal value, to safe and healthy working conditions, *including protection from harassment, and the redress of grievances;*

   (c) Ensure that persons with disabilities are able to exercise their [labor] and trade union rights on an equal basis with others;

   (d) Enable persons with disabilities to have *effective access* to general technical and vocational guidance [programs], placement services and vocational and continuing training;

   (e) Promote employment opportunities and career advancement for persons with disabilities in the [labor] market, *as well as assistance in finding, obtaining, maintaining and returning to employment*;

   (f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

   (g) Employ persons with disabilities in the public sector;

   (h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include *affirmative action [programs], incentives and other measures*;

   (i) Ensure that *reasonable accommodation* is provided to persons with disabilities in the workplace;

   (j) Promote the acquisition by persons with disabilities of work experience in the open [labor] market;

   (k) Promote *vocational and professional rehabilitation, job retention and return-to-work [programs]* for persons with disabilities.

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory [labor].

A careful analysis of the above provision demonstrates that by emphasizing on a "work environment that is open, inclusive and accessible to persons with disabilities", it has problematize the so called hierarchy of first and second generations of rights, thereby signaling a paradigmatic shift in disability rights Jurisprudence. Moreover the need for the environment to change and not the person with a disability, is a clear expression of the transformation of social model of disability and demonstrates a move towards Disability Human rights archetype and to this extent it is an advancement over earlier relevant U.N. documents. In order to fully bring home the pros and cons of this provision, it would be edifying to compare and contrast this important provision with its counterparts in other important UN conventions.

Icescr And Article 27

Its comparison with relevant provisions of the ICESCR[101] reveals that unlike latter it does not treat the right to work (Article 6 in ICESCR) and the right to just and favorable conditions of work (Article 7 in ICESCR) as two separate rights; rather it merges both these rights into a common hole as has been done in article 11 of CEDAW. Clearly, article 27 views these two rights as interdependent and inextricably linked social right. As a matter of fact, right to employment may be said to be the species of the genus, right to work.

Evidently, article 27 has carefully tailored the contents of this significant human right to special needs of PWDs and does also echo disability human rights paradigm[102] and to this extent; it is advancement over relevant provisions of ICESCR. As a matter of fact the provision provides much needed visibility to the PWDs in the open labor market and it also reflects specificity by adapting the contents of these rights to the special needs of PWDs. It also implicitly emphasize on a Nonhandicapping and

[101] See supra Fn 20-22 and accompanying text.
[102] See italicized portion of article 27 of CRPD in the Text.

barrier free environment. However, in some respects, article 27 appears to be halfhearted in comparison with relevant provisions of ICESCR.

Thus, its articulation of principle of' equal remuneration for work of equal value'[103] is rather feeble compare to the treatment of the same in ICESCR. The latter not only calls for, "equal remuneration for work of equal value without distinction of any kind," but it also particularly highlights, " women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;104'. The article also does not talk about fair wages.[105]

In sharp contrast to the article 6 (2) of ICESCR article 27 of CRPD does not adequately link right to employment with right to development and fails to amplify the value of Productive employment. The former provides, "The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right (right to work) shall include..... policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."

Cedaw And Article 27

Article 27 also clearly misses Gender dimension, fails to reflect the principle of Intersectionality[106] and does not at all concretize the contents of Employment rights of Women with disabilities. In this context it would be instructive to compare this article with article 11 of CEDAW. Although text of the CEDAW does not make any explicit reference to Women with disabilities, its article 11 articulating right to employment for women highlights certain women specific aspects for full realization of this right and in my humble submission, these aspects should have been also embraced by article 27 of CRPD. Article 11 clearly recognizes inalienability of right to work for all human beings;[107] equality of treatment in the evaluation of the quality of work[108]; The right to protection ....and safeguarding of the function of reproduction[109] and similarly in Para 2 of Article 11, need to make the right to work effective is further strengthen by enjoining discriminatory treatment against women on the grounds of marriage and pregnancy. Besides, right to maternity leave with pay and other comparable social benefits are also secured. Again clause 3 is significant because it imposes

103 See Article 27 clause 1 (b) Supra note 1.
104 See Article 7 (a) (i), supra note 8
105 The same may be countered by interpreting this article in the light of article 28 (1) supra note 1
106 The same may of course be countered by arguing that it should be interpreted in the light of article 6 para 2.
107 See Article 11 clause 1 (a) supra note 4
108 See Article 11 clause 1 (d) supra note 4
109 See Article 11 clause 1 (f) supra note 4

obligation on member states for periodical review of the legislation enacted by them in the light of scientific and technological knowledge. In my humble submission, article 27 of CRPD being an exclusive article dealing with human right of employment of both Men and women with disabilities could have certainly drawn the above mentioned values form article 11 of CEDAW. At substantive level also not explicitly recognizing inalienability of right to work of both men and women with disabilities is deeply problematic and is incongruous with the letter and spirit of article 11 of CEDAW and article 6 of ICESCR and article 23 of UDHR. Moreover, explicit incorporation of above values in article 27 would have facilitated the effective enforcement of Human rights of Women with disabilities in those state parties which have ratified CRPD but not CEDAW.[110]

UN Standard Ruls of Equilization and Article 27

At this place it is also vital to examine whether article 27 of CRPD is in line with Rule 7 of UN Standard Rules of Equalization.[111] When the two are compared, we find that by and large, article 27 of CRPD reflects all the values but one enshrined in rule 7. Unlike, the latter, it fails to highlight the obligation on the State parties to take "steps to combat and eliminate prejudices and stereotypes about persons with disabilities;"[112]

In addition, it is also possible to argue that the provision in question does not fully reflect the plurality (Disability specific) of lived experiences of PWDs. It tends to construe disability as a monolith. It also to be pointed out that discrimination faced by persons with intellectual disability and severely disabled in other categories of disabilities[113] are not properly arrested by this provision by way of suggesting policy measures and good practices[114]. It does not take even an empirical research to demonstrate that Persons with multiple / severe disabilities (whose disability is 100% or more) are being pushed at the bottom of margin of employment sphere all over the world. Last but not least, considering the universal enforceability of this convention, social, economical, political, cultural and geographical diversities will also have to be kept in mind, while evolving a new international multicultural human rights order for PWDs.

110 See eg. Cook Islands, Oman, Qatar, Sudan.
111 See Supra note 56
112 See supra Fn 60-61 and accompanying text. The same is also emphasize in article 5 of CEDAW
113 In India Parliament has shown awareness for the same by devoting an exclusive chapter (see chapter 11 of the PWD Act) in the 'Persons with Disabilities (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995, Albeit in different context.
114 Michael has usefully identified a number of good practices examples viz. State sponsored inclusive Vocational Training, effective employment services, Identification of appropriate jobs and quota regimes, positive cultural and attitudinal change, self employment initiatives, Preferentially Reserved Occupations, real collaboration with civil society. See Michael and Penelope 2007, supra note 95, fn 103-182 and accompanying text

A more fuller analysis of this rather significant provision is beyond the scope of this short paper, nevertheless while rapping up this section I would take a clear and categorical view that obligations arising out of this article on member states are not merely aspirational statements[115] i.e. not requiring any specific degree of legal compliance. Rather the attention should be focused to identify minimum core of such obligations and their compliance should not be made totally dependent on economic capacity and development.[116]

It is hoped that committee constituted for monitoring this convention would take note of the above concerns while evolving its jurisprudence.

Thus, having briefly examined and critically analysed the relevant provisions of CRPD, I would take a cursory look at the aftermath of CRPD.

SECTION FOUR
Post CRPD Scenario

At the outset of this section it is to be noted that right to work and employment for PWDs is vital and as a matter of fact effective enjoyment by them of a number of other human rights viz. Right to life with human dignity[117], Equal recognition before law[118] Liberty of movement[119] living independently and being included in the community[120] Respect for home and family[121] right to health [122] Habilitation and rehabilitation[123] adequate

[115] See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997. See also The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights [UN doc. E/CN.4/1987/17, Annex; and *Human Rights Quarterly*, Vol. 9 (1987), pp. 122–135]

[116] For articulation of nature of obligations arising out of article 27 on member states, see Eric zhang Supra note 20. He takes note of CESCR General Comments 12 (right to food), 13 (right to education) and 16 (the equal right of man and women to the enjoyment of all economic, social and cultural rights) and argues "Article 27 may also include three levels of specific obligations on States Parties: namely, the obligations to respect, protection, and fulfillment." He further breaks down obligation to fulfill into the obligation to facilitate, promote and provide. He also suggests that certain obligations viz., "guaranteeing the right be exercised without discrimination of any kind and taking all appropriate steps towards the full realization of the article" are of immediate effect. See fn 71-91 and accompanying text for fuller discussion.
In my humble opinion, the aforesaid views are extremely contentious to the extent they mirror the perspective of *Limburg Principles and Maastricht Guidelines* because the same dent to suggest that the legal regime envisaged by CRPD is analogous to that of; as a matter of fact , however, CRPD radically differs from CESCR because along with problematizing the so called prospective of generations of Human rights, it integrates and treats all human rights at their face value, thereby giving a go bye to so called hierarchical structure to human rights. We submit that for a proper articulation of obligations arising out of article 27 of CRPD, reliance must be placed on General Comment 5 of CESCR. Similarly, in the light of article 13 (right to access to justice) and article 33 (establishment of national focal point for monitoring and implementation of CRPD) a collaborative action is envisaged on behalf of all the organs of States i.e. Legislature, executive and Judiciary. Reference may also be made to article 4 (General Obligations) Supra note 1.

[117] See article 10 supra note 1
[118] See article 12 supra note 1
[119] See article 18 supra note 1
[120] See article 19 supra note 1
[121] See article 23 supra note 1
[122] See article 25 supra note 1

standard of Living and social protection[124] Participation in Public life[125] squarely depends upon the meaningful enforcement of the former. Therefore it may be possible to argue that this right must be interpreted as "a preferred and prioritized right". On the other hand for effective and full realization of right to employment, PWDs must be secure as prerequisite rights to reasonable accommodation,[126] accessibility[127] , personal mobility[128]and education[129] .

Against this general note, I would now briefly examine the Post CRPD initiatives within the UN. Let me first take the bird's eye view of certain developments.

- First Meeting of the Conference of States Parties, was held on 31 October - 3 November 2008,[130]
- After the elections of the members, the high power Committee has been constituted to secure effective monitoring of the CRPD in accordance with article 34.
- The committee has successfully met in its first session form 23-27th Feb 2009.[131]
- By its recent resolution general assembly has requested the secretary general of UN to take effective steps to persuade more and more states to ratify this convention. It also calls for recruitment of PWDS within UN.[132]

Having noted these recent developments let me now discuss some of the most important major initiatives of Human rights Council, which is a constituent part of office of High Commissioner of Human rights.

Initiatives of Human rights council

In March 2008 at its 7th session, the Human Rights Council adopted resolution 7/9[133] entitled "Human Rights of Persons with Disabilities". In this

[123] See article 26 supra note 1
[124] See article 28 supra note 1
[125] See article 29 supra note 1
[126] See Article 2 supra note 1
[127] See article 9 supra note 1
[128] See article 20 supra note 1
[129] See article 26 supra note 1
[130] Till the writing of this article I could not the proceedings of the same on the website of UN.
[131] The proceedings of the same are not available on website of UN
[132] See A/RES/63/192*,18 December 2008, United Nations General Assembly Sixty-third session Third Committee Agenda item 64 (e) -Promotion and protection of human rights: Convention A on the Rights of Persons with Disabilities, see also Fifth quinquennial review and appraisal of the World Programme of Action concerning Disabled Persons Report of the Secretary-General 28th July 2008..
[133] Adopted by Human Rights Council on 27th March 2008, available at www.un.org/disabilities/default

resolution, the Council committed to hold an annual interactive dialogue, in one of its regular sessions, on the rights of persons with disabilities. The first of such debate took place in the course of its 10th session[134], focusing on key legal measures for ratification and effective implementation of the Convention.

In order to make this debate fruitful, the Office of the High Commissioner for Human Rights (OHCHR) was requested to prepare a thematic study [135]aimed at enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities, in consultation with states, civil society organizations, including organizations of persons with disabilities, and national human rights institutions. [136]

The study inter alia focuses on right to work and Employment and concretizing the obligations of the member States, notes, "In the spirit of the Convention, any legislation on employment of persons with disabilities needs to protect against any form of discrimination, direct and indirect, in all sectors, forms and levels of employment. The prohibition of discrimination shall apply to all phases of employment, including conditions for access to employment, to self-employment or occupation, including selection criteria and recruitment conditions, vocational guidance, vocational training, practical work experience, employment and working conditions, including dismissal and pay, membership of, and involvement in, an organization of workers or employers, or any organization whose members carry on a particular profession, including the benefits provided for by such organizations. National legislation shall impose the duty to provide reasonable accommodation, clarify the elements of such conduct and the factors upon which to assess the reasonableness of the accommodation, and unequivocally link a denial of reasonable accommodation to an act of discrimination. It should be noted that article 27, paragraph 1 (a), prohibits discrimination on the basis of disability on all matters concerning all forms of employment and is not limited to prohibiting discrimination against persons with disabilities."[137]

An analysis of the above observations would make it clear that UN now has institutionally accepted the need to mainstream the Disability in its

134 A/HRC/10/48, , 26ht January 2009 Agenda item 2.

135 See Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities, The OHCHR study is available at: http://www2.ohchr.org/english/issues/disability/docs/A.HRC.10.48AUV.doc

136 All submissions received for the study and the informal summary of discussion of the open-ended consultation that OHCHR organized on 24 October 2008 are available http://www2.ohchr.org/english/issues/disability/HRCResolution79.htm

137 Id at Para 55 supra note 135

development agenda. Therefore it is actively insisting and pursuing disability perspective in all its activities.[138]

We may conclude this section on a positive note by excerpting a passage from Fifth quinquennial review and appraisal of the World Programme of Action concerning Disabled Persons of UN secretary general. "While the millennium report directs special attention to gender as a cross-cutting issue and to the situation of the estimated 36 million persons living with HIV/AIDS in 2000,[139] there is no reference to the situation of persons with disabilities, an estimated 650 million persons, a population 15 times larger than that of persons living with HIV/AIDS. (Estimates of the global population of persons with disabilities are based on national data, which are not internationally comparable at this time.) All of the Millennium Development Goals, including poverty eradication, universal primary education, reducing child mortality, improving maternal health, combating HIV/AIDS, are relevant to the goals of the World Programme of Action, as well as to the Standard Rules and the Convention. There is an urgent need to address the absence of more than 10 per cent of the world's population in the implementation, review and evaluation of the Goals and their targets, evaluation mechanisms and indicators. The lack of a disability perspective is undermining the objective of the Goals, which is to measure human development benchmarks on the way to more inclusive and equitable global development."[140]

Thus to cut the discussion to short, all post CRPD initiatives are aimed at percolating the ends and goals articulated in CRPD deep down within the institutional structure of United Nations. It has to be appreciated that CRPD being an ambitious effort calling for radical transformation in political and social consciousness requires a reasonable time for attaining its avowed object. After all enculturing of law is a complexed process and requires fair amount of churning.

Conclusion

We have seen during the course of this article that Disability rights jurisprudence has undergone a metamorphosis with the entering in to force of CRPD. This convention is one of those rare Human rights instruments which seek to enforce all human rights including the human rights of second and third generations at par. Clearly, this is a radical shift and would go a long way in strengthening a new International Multicultural Human rights order for PWDs.

138 See 'Mainstreaming disability on development agenda, E/CN.5/2008/623th November 2007, 46th session of economic and social council.

139 Ibid. chapter III, Para. 119 and 120.

140 Id at Para 4 supra note 121

So far as right to employment and work is concerned, a modest progress has been made. Indeed this important human right now stands enforceable with the entry into force of CRPD. In my humble submission in order to make CRPD Universally acceptable and enforceable, disability human rights paradigm would have to be adopted. Equally, it would also demand a very positive role from civil society for eliminating socio-cultural stereotypes and other discriminatory practices. It is hoped that committee constituted by UN for monitoring this convention would strive and call for International community to recognize the plurality of voices in disability rights movement, rather than preferring disability as a monolith construct.

As far as developing country like India is concerned a way ahead is extremely challenging. I believe that unless and until disability rights groups do not organize themselves systematically, ratification of CRPD would be nothing more than the lip service for the cause of PWDs. At the same time it is also emphasized that state parties must show active willingness in recognizing their disabled citizens as productive units in the open labor market. They will have to not only allocate adequate financial resources for giving a concrete shape to the policies and initiatives envisaged by the letter and spirit of CRPD but will also have show zero tolerance for attitudinal deficit and discriminatory and dehumanizing treatment against PWDs. With the entry in to force of CRPD, it has to be realize that disability is not merely medically determined phenomenon rather it is a social construct and therefore civil society must take the responsibility to provide reasonable space to that section of polity which has suffered and continuously suffering from lingering discrimination and bias.

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Sustainable Development: Environmental Issues

The Forest Rights Act: Being Politically Correct

Dwarakesh Prabhakaran*

Keeping in mind the broad theme of this session, the paper will primarily focus on The Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act, 2006, [hereinafter the Forest Rights Act]. The Act was brought into effect in December 2007.[1] This paper will focus on the importance of local communities and the role of the Forest Rights Act in conserving forest ecosystems.

Fallacious Assumptions

The debate on protecting the tigers in our country brought forth the indelible link between forest conservation, tiger protection and tribal rights. The Tiger Task Force's 2005 report has revealed that the right balance between government intervention and local communities is necessary for any conservation effort. [2] Also, excessive emphasis on extracting all kinds of human activity from threatened forests has blurred the distinction between *encroachers* and sustainable forest dwellers. The Report states:[3]

> "Conservation policy in India, which aims to exclude (remove) people from protected area, is based on the premise that all human use is detrimental to conservation. It is also built on the assumption that people's knowledge is irrelevant in the management of protected areas. But again, given the reality of the Indian situation where people live within the protected reserves, it is important to revisit these assumptions to look for answers beyond."

The Wildlife Protection Act 1972, the Indian Forest Act 1927 and the Forest Conservation Act, 1980 focus on protecting various aspects of the ecosystem but do not recognise that local communities are *not* biotic pressures. Their livelihood does not bleed the forests; their consumption of forest resources accommodates the needs of future generations as well. The Convention on Biological Diversity requires our nation to protect the traditions of such indigenous communities:[4] India being a party to the convention it imposes obligations on us.

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1 Ministry of Tribal Affairs, http://tribal.nic.in/.

2 "Joining the Dots", http://envfor.nic.in/pt/TTF2005/index.html

3 Ibid page 109.

4 http://www.cbd.int/.

Article 8 (j) is most relevant, which reads:

Article 8: Each Contracting Party shall as far as possible and as appropriate;

> (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practises of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.

Till date, the refusal to recognise tribal rights and the haphazard mechanisms provided in previous legislation has resulted in innumerable disputes over rights which could never be proved due to the complete breakdown of land records maintenance.[5] Jurisdictional disputes between the Revenue Department and the Forest Department are a continuing disaster. On considering the kinds of human activity prohibited by the above Acts, it becomes clear that the livelihood of tribals and traditional forest dwellers is dominantly perceived as a threat to the ecosystem. The Tiger Task Force opined that subjectively prohibiting all types of human activity dreadfully harms the conservation regime:[6]

> "They cannot collect minor forest produce because it is interpreted to be illegal in the permit system that operates and they cannot graze animals or even practice agriculture in many cases. But because they live there, they engage in all these activities. It is done illegally. It is done under tremendous harassment and it leads to corruption. It is also completely unsustainable as illicit use only makes the use more destructive."

A Role Model for Sustainable Development?

One must now examine if the Forest Rights Act will succeed as model legislation for sustainable development. In the context of conserving the biological diversity of our nation, the Forest Rights Act gains supreme significance. In the statement of objects and reasons, the Act concedes that the goal of protecting tribal rights is integral to protecting ecosystems. It reads:

[5] Madhu Sarin, *Scheduled Tribes Bill*, Economic and Political Weekly, May 21, 2005, http://www.epw.org.in/epw/uploads/articles/637.pdf.

[6] Ibid n.3 at page 109.

> WHEREAS the forest rights on ancestral lands and their habitat were not adequately recognised in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to the forest dwelling Scheduled Tribes and other traditional forest dwellers who are integral to the very survival and sustainability of the forest ecosystem;

The political upside of the law is that it seeks to undo *historical injustices*. The Act vests *forest rights* in the tribals and other traditional forest dwellers. To claim these rights, a traditional forest dweller must prove that she has resided for *bona fide* livelihood needs for at least three generations or 75 years prior to 13th December 2005. Section 3 offers unprecedented legal guarantees for:

- Rights to hold forest land.
- Rights to use minor forest produce.
- Customary rights.
- Community rights to intellectual property and traditional knowledge, and
- Right to rehabilitation if evicted by the State without compensation.

However, hunting or trapping wild animals is expressly excluded from these rights. Thus far, the Act symbolises the first legislative acceptance of the factual realties of tribal rights. Before venturing upon a discussion on whether these forest rights will boost conservation measures and thereby break the stranglehold of disastrous forest management, some *obstacles* in the Act must be considered.

Administrative Reshuffling and Directional Malfunction

It is a historical fact that the Ministry of Environment and Forests was horribly insensitive to local communities in the task of protecting forests. In its framework, all human activity was considered antithetical to forest protection. The ministry's sustainable development models were thoughtless. Hence the Ministry of Tribal Affairs ["MTA"] was entrusted with drafting the Forest Rights Act. Further, the MTA has been made the nodal agency for implementing the Act. But there is cause for concern.

The Act provides for the creation of Critical Wildlife Habitats ["Habitats"]. These Habitats remind us of sanctuaries, national parks, reserved or protected forests provided in earlier legislation. It is also interesting to note that Section 2(b) reveals that these habitats may be created by the Ministry of Environment and Forests, not the MTA. In these Habitats,

Section 4 provides for the resettlement of tribals and forest dwellers. Consequently, the proclaimed forest rights are not available in these Habitats. The Act states that these Habitats can be created if the local communities cause irreversible damage to or cannot co-exist with the wildlife. Was this reaction, *sine causa,* or was there a valid basis for such extreme measures? Yes, human activity is the dominant threat to forest ecosystems. But, it is important to remember that the agricultural or pastoral practices of certain indigenous communities blend coherently with the life cycle of forests. This is why the right to use and dispose of *minor forest produce* has been granted to the beneficiaries of this law. As far as these non-hostile communities are concerned, any threat of irreversibly damaging the ecosystem has to be considered as insignificant. Then what, if any, threats do the Habitats militate against? The provisions have ignored the distinction between sustainable forest populations and *encroachers*. Encroachers include a wide variety of individuals ranging from the timber mafia to migrant populations who are the actual rotten apples. This diverse range of *encroachment* is the actual, clear and present danger to our national environmental wealth. Until the law refuses to take these forces head on, the problem will not be fully addressed. So, why make the tribals and the traditional forest dwellers look like the spanner in the works? These apprehensions are logically unsound as the tribals and forest dwellers are not the real menace.

Being Legalistic and Bureaucratic

The Act also seems to take satirical pleasure in legal conundrums. Section 4 vests forest rights "notwithstanding any other law in force". The Forest Rights Act would thereby reign supreme in its scope of operation. To claim forest rights, one must apply to the gram sabha, which comprises all adult members of the village. The gram sabha shall, after following a quasi-judicial procedure, make a resolution and forward this to a sub-divisional level committee, which is yet to be constituted by the state governments. This committee shall then forward the resolution with its opinion to a district level committee, which is also yet to be constituted by the state governments. The Act has graciously granted a right of appeal at each level to an "aggrieved person." Also, a scheduled tribe member or a traditional forest dweller must complete Form A, Annexure I to the Forest Rights Act after reading Rules 6(1) and 11(1)(a) of the rules to the Act. Obviously, the rules are available in one's weekly copy of the Official Gazette. In addition, the tribals must attach all relevant documentary evidence such as government certificates, research studies, voter identity card, maps, records, affidavits, satellite imagery, etc!

The Act is fraught with bureaucratic riddling. The forest and revenue departments are currently plagued with an infinite number of disputed claims over lands, settlement and rights. The two departments are also at

loggerheads with each other with respect to innumerable jurisdictional conflicts. Section 3's proud declaration that rights in disputed lands shall now vest in tribals and forest dwellers is like screaming in a vacuum. How can the rights vest without settling the ongoing disputes? Does this Act put an end to all the claims under the Wildlife Protection Act, Environment Protection Act, the Indian Forests Act and the Forest Conservation Act? Hardly so and in its own turn has willingly contributed a three level administrative nightmare for vesting rights in the beneficiaries. The task of remedying historical injustices must surely address the nature of the problem it seeks to rectify. It will take generations before the sub divisional level committees and district level committees are formed and the title deed for Forest Land is granted after obtaining the signatures of the Divisional Forest Officer, the District Tribal Welfare Officer and the District Collector.

A Hesitant Clap: Fitting Square Pegs in Round Holes

The Forest Rights Act must be applauded and decried simultaneously. The customary rights of tribals and traditional forest dwellers have now been given statutory recognition. In principle, legislative enactment should provide greater enforcement and protection.

However, legal intervention is bound to be ridden with enforcement challenges considering the nature of these communities. A more subtle issue has been ignored in the midst of our rambling on remedying historical injustices. Statutory enforcement brings its own set of culprits. Rule based administration in traditional communities is a radical conversion of their social practices and customs. Legal intervention itself is a form of political interference no matter how noble the purposes may be. This is further substantiated by the fact that these communities will now have to rely on bureaucrats for the recognition of age-old traditions.

Nigel Simmonds's observations on the lack of publicly ascertainable rules in traditional communities are pertinent: [7]

> "Typically, (the) members...will find it hard to distinguish between binding rules and settled patterns of conduct: the rules will be implicit in the way of life, rather than being discrete objects of reflection. Settled practice will assume a normative character to the extent that it becomes the framework for communal trust and mutual reliance."

His observations were made in the context of H.L.A. Hart's propositions on how communities jump from a pre-legal to a legal world. [8]

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7 At page 183 of *Law as a Moral Idea,* Oxford University Press, 2008. Nigel Simmonds is Reader in Jurisprudence at the University of Cambridge.

Simmonds points out that the institution of law and its ensuing domains of liberty and entitlement to rights can be a product of systematic reaction to problems like "bad blood and lack of trust" *within* a community based on mutual trust and reliance. His remarks are fascinating for the instant debate. The legal intervention through the Forest Rights Act is not a response to a problem which is *internal* to these communities but to one which is *external* to their practices and livelihood. Destruction by others and not self-destruction is the problem. But the Forest Rights Act has confused both and has therefore set the ship to sail without a working compass. The practices of these communities are being externally transformed through the Act for a threat which is majorly independent of their own traditions. The legal transition is not one where the community itself invents the additional protection but has become a subject of coercive legalisation.

The transition into "law" will also have inevitable effects on the community's intra-mutual perspectives:[9]

> "It may have given great power to those members of the community who have come to be acknowledged as repositories for the knowledge of rules, and in this way may have disrupted the greater equality of power that was a feature of the older forms of dispute settlement."

The Act's brute imposition of bureaucratic hierarchy resembles this redistribution of power and dependence within the communities to an agency that is hardly renowned for its swift reaction or gentle touch. This may not pose a dilemma for many but the nature of the forces at play may indicate just how far we can go with statutory regulation of the communities, instead of the *external* factors, without defiling their traditions.

Legal Cross-Wiring

The chaotic structure of the Forest Rights Act may be what triggered Harish Salve, the former Solicitor General of India to comment "It is an unabashed attempt to put politics over environment."[10] The central government can now claim a moral victory by having laid down the rights of tribals and then cry foul over the typical meandering of the state governments to constitute the necessary committees for implementation. This law is merely a declaration of possibilities. The cost of rehabilitating tribals from

8 *The Concept of Law*, Oxford University Press, 1961. H.L.A. Hart held the Chair of Jurisprudence at the University of Oxford. He argued that the establishment of a legal system is to be found in the acceptance of a rule of recognition that what 'X enacts is law' and that neither this acceptance nor its persistence involves necessary normative or moral conclusions. Nigel Simmonds responded that the acceptance of this 'rule of recognition' is a highly normative process and its continued maintenance involves necessary moral commitments.

9 Above n.7 at page 186.

10 http://www.indianexpress.com/news/tribal-act-puts-politics-over-environment-harish-salve/274150/.

the Habitats will run into thousands of crores going by the Tiger Task Force's estimates. Financial difficulties should not be allowed to permit grotesque disregard for statutory mandates. But we are probably going to end up strangling ourselves with the legal cross-wiring of these traditional communities.

In conclusion, the Forest Rights Act appears to be 'a work of art'; priceless for its shine, but only worth hanging up. The truth is that no form or scale of resettlement can ever plausibly achieve complete rehabilitation of traditional communities. Their livelihood is incompatible with any environment other than the one in which it was historically cultivated. Sustainable consumption of our forests is impossible without preserving the role of tribals and traditional forest dwellers. Legal intervention itself comes at a price and the dilemma of this choice must not be brushed off lightly. As the worth of this law lies at the mercy of the state governments, we have achieved no more than accept that our past record is deplorable and that it probably will remain so for a long time.

A Human Rights Audit Of The Indian Penal Code

Prateek S. Awasthi*

Introduction and Background

The Indian Penal Code (Act 45 of 1860 hereinafter referred to as "the Code") lays down the general penal law for India. It was drafted by Lord Thomas Babington Macaulay and is universally acknowledged to be a monument of codification and an everlasting memorial to the high juristic attainments of its distinguished author. Passed by the British Parliament in 1860 and continued in force in India after Independence in 1947, the Code retains much of its original content and form even today despite regular amendments.

Although the Code has changed little since 1860, the world's understanding of human rights and fundamental freedoms has undergone a monumental metamorphosis since the Victorian times of its enactment. The past century and a half has seen the emergence and development of the concept of human rights, the liberation and independence of former colonies, the women's movement, the labour movement, two world wars, the establishment of the League of Nations and its successor, the United Nations, the Universal Declaration of Human Rights and a multitude of international human rights instruments and treaty bodies. In the Indian context, the last century and a half saw India become a *Sovereign Socialist Secular Democratic Republic*[1] with a constitution that embodies this global experience and guarantees all its citizens universal, inalienable and indivisible fundamental rights.[2]

The continuance in force of the Code and the drastic changes in our understanding of human rights bring into focus the need to examine the provisions of the Code and examine their compatibility with internationally recognised human rights.

Human Rights Commitments by India

When we refer to human rights, we refer specifically to the rights enumerated in the Universal Declaration of Human Rights, 1948 and subsequent international treaties, covenants and conventions that India is a party to. India has ratified the following human rights covenants and conventions: They are

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1 Constitution of India, Preamble

2 Constitution of India, Part III

- Convention on the Elimination of All Forms of Discrimination against Women[3]
- International Convention on the Elimination of All Forms of Racial Discrimination[4]
- Convention on the Rights of Persons with Disabilities[5]

Ratification defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. Ratification means that states have sought the required approval for the treaty on the domestic level and have enacted the necessary legislation to give domestic effect to that treaty.[6]

India has acceded to the following human rights conventions:

- International Covenant on Civil and Political Rights[7]
- International Covenant on Economic, Social and Cultural Rights[8]
- Convention on the Rights of the Child[9]

Accession is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification but accession usually occurs after the treaty has entered into force.[10]

India has also signed but not yet ratified the following human rights conventions:

- Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment [11]
- Convention for the Protection of All Persons from Enforced Disappearance[12]

A signature by a State expresses the willingness of the signatory state to continue the treaty-making process. It does not automatically bind the

3 G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981.

4 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.

5 India has ratified it on 1st October 2007

6 Articles 2 (1) (b), 14 (1) and 16, Vienna Convention on the Law of Treaties 1969

7 G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

8 G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976

9 G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990.

10 Articles 2 (1) (b) and 15, Vienna Convention on the Law of Treaties 1969

11 G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987.

12 G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006), adopted Dec. 20, 2006.

state, but it creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.[13]

Further, India has also reaffirmed its commitment to human rights by way of voluntary pledges and commitments.[14]

Scope of the Paper

Each of these treaties established a "treaty body", a committee of independent experts, to monitor the implementation of the human rights provisions contained in those treaties. When a State ratifies an international treaty, it assumes the obligation to implement the provisions of the treaty at the national level. It also assumes the obligation to submit reports periodically to the treaty bodies on the measures it has taken to ensure the enjoyment of the rights provided in the treaties. Reports of the States parties are examined by the treaty bodies, along with information from a variety of sources, in the presence of a delegation from the reporting State. The examination of a report culminates in the adoption of "concluding observations/comments", in which the treaty body presents its concerns and makes specific recommendations to the State party for future action. The State party is expected to undertake the necessary measures to implement the recommendations of the treaty bodies.[15]

This paper examines the provisions of the Code that have been criticised by such treaty bodies established under the United Nations to be in violation of India's international commitments. Specifically, it limits itself to the comments and observations of the Committee on Civil and Political Rights (hereinafter "the CCPR"), the Committee on Economic, Social and Cultural Rights (hereinafter "the CESCR"), the Committee on the Rights of the Child (hereinafter "the CRC"), the Committee on the Elimination of All Forms of Discrimination Against Women (hereinafter "the CEDAW") and the Committee on the Elimination of All Forms of Racial Discrimination (hereinafter "the CERD").

In certain instances, these treaty bodies have specifically criticised infringing provisions of the Code. In other instances, they have pointed out lacunae in the Code. This paper analyses both.

13 Articles 10 and 18, Vienna Convention on the Law of Treaties 1969

14 A/61/718 - General Assembly 29 January 2007 Sixty-first session "Elections to fill vacancies in subsidiary organs and other elections: election of fourteen members of the Human Rights Council Note verbale dated 1 December 2006 from the Permanent Mission of India to the United Nations addressed to the Secretariat

15 Office of the United Nations High Commissioner on Human Rights *Leaflet on Treaty Bodies*, OHCHR, 14.02.02 http://www.unhchr.ch/pdf/leafletontreatybodies.pdf (Accessed 1 March 2008)

Death Penalty

The provisions of the Code that prescribe the death penalty have been subject to wide criticism internationally. Such provisions are found in the Code as punishments for murder, gang robbery with murder, abetting the suicide of a child or insane person, waging war against the government and abetting mutiny by a member of the armed forces.

In its concluding observations and comments, the CCPR noted in 1991:

"20. The Committee expresses concern at the lack of compliance of the Penal Code with article 6, paragraphs 2 and 5, of the Covenant. Therefore: the Committee recommends that the State party abolish by law the imposition of the death penalty on minors and limit the number of offences carrying the death penalty to the most serious crimes, with a view to its ultimate abolition."[16]

The relevant provisions of article 6 of the Covenant being referred to are as below:

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

...

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

With reference to paragraph 2, the Code contains no guidance on when the death penalty should be awarded but according to a ruling by the Supreme Court, this can be done so only in the *rarest of rare cases*.[17] This phrase has not always been interpreted consistently is still a cause of ambiguity. Interpretations of what constitutes *a rarest of the rare* case are also highly subjective and practically any act can be classified as belonging to that category. A statutory clause limiting the application of the death penalty to certain specified objective cases would be a positive step in the right direction.

16 CCPR/C/79/Add.81 dated 4 August 1997, Concluding observations of the Human Rights Committee: India. 04/08/97. CCPR/C/79/Add.81. (Concluding Observations/Comments)

17 *Macchi Singh v. State of Punjab*, [1983] 3 SCC 470

With reference to paragraph 5, there is no specific provision in the Code which prohibits the punishment of minors with the death penalty or pregnant women. On this point, the CRC in 2000 had recommended that India abolish by law the imposition of the death penalty to persons below the age of 18.[18] In accordance with this recommendation, the Juvenile Justice (Care and Protection of Children) Act, 2000 was passed to disallow the imposition of the death penalty to those below 18.[19] Further, although a pregnant woman has never been sentenced to death and executed in India, it would be a good practice to insert an explanation in the Code prohibiting the punishment of pregnant women with the death penalty.

Penal Liability of Children

The Juvenile Justice Act prevented the imposition of the death penalty on children but it did not however make any provision increasing the minimum age of criminal responsibility – which is 7 under the Code. This attracted the attention of the CRC in its subsequent session in 2004 where the Committee noted:

78. The Committee notes the enactment of the Juvenile Justice (Care and Protection of Children) Act, 2000 but remains concerned that no minimum age of criminal responsibility is fixed in the new Act and that the minimum age of 7 years found in the Penal Code is still in force. The Committee is further concerned that the Supreme Court has decided that the date of the commission of one offence is irrelevant for determining whether the alleged offender is a juvenile (CRC/C/93/Add.5, box 8.7).

Accordingly, the CRC recommended as follows:

80. In addition, the Committee recommends that the State party: (a) Amend the Juvenile Justice (Care and Protection of Children) Act, 2000 to set a minimum age of criminal responsibility that shall be higher than that fixed in the Penal Code and reflect internationally accepted norms, and consider this age as the age when the offence was committed; [20]

The Code declares that nothing done by a child below the age of 7 is an offence and that all children above the age of 7 are presumed to have the mental capacity that makes a person liable for commission of an offence.[21] This is in contrast with international standards. Globally, minimum ages of criminal liability vary from 7 to 18 but most countries accept 14 or 15 as the

18 HR/CRC/00/23 dated 28 January 2000 Committee On Rights Of Child Concludes Twenty-Third Session

19 Sections 15 and 16 of the Act.

20 CRC/C/15/Add.228 Dated 26 February 2004 Committee On The Rights Of The Child Thirty-Fifth Session Consideration Of Reports Submitted By States Parties Concluding observations: India

21 Section 82 of the Code

minimum age.[22] The minimum age of criminal liability under the International Criminal Court is 18.[23] It is submitted that the minimum age for initiating criminal proceedings should be increased by amendment to 14 at the least. Further, the age considered should be that on the date of commission of the offence.

Even if such an amendment is made, it will be important to ensure that it is implemented properly. It is often difficult to prove in court that the person in question was below the age of 18 on the date of the event. In the absence of documentary proof or conflicting documents, a medical examination may be sought to determine the age but it can at best provide only an approximate age within the range of 6 months.

The case of *Ramdeo Chauhan* is a stark and horrific reminder of what can go wrong. In this case, the Supreme Court refused to determine the age of the accused on the basis of entries in the school register or medical evidence, both of which indicated him to be a child on the date of the offence, and confirmed the death penalty for the offence of murder even though one judge expressed a doubt as to whether the boy was a child on the date of commission of offence.[24] It was fortunate that the governor later commuted his sentence to life imprisonment on the recommendation of the National Human Rights Commission.[25]

The Supreme Court later re-examined its position and held a year later that in case there is a doubt whether the accused was a child or not on the date of offence, the benefit of doubt should be given to the accused child.[26] Further, in a recent decision, the Supreme Court has directed trial courts to examine the age of the accused on the date of commission of the offence.[27] Thus, although some progress has been made on this front, there remain several challenges in the implementation of the Juvenile Justice Act.

Rape and Sexual Abuse

The law relating to rape has been criticised internationally due to several glaring lacunae. The first time the provisions of the Code relating to rape attracted the attention of human rights treaty bodies was in 1997 when the CCPR noted in its concluding remarks and observations as follows:

16. ... The Committee further notes that rape in marriage is not an offence and that rape committed by a husband separated from his wife incurs

22 Maher, Gerry "*Age and Criminal Responsibility*" 2005 Vol 2. Ohio State Journal of Criminal Law 493

23 Statute of the International Criminal Court, Article 26

24 [2001] 5 SCC 714

25 Kumari, Ved *Children and the Criminal Justice System,* Infochange India News and Features, June 2007 http://infochangeindia.org/agenda8_19.jsp (Accessed 1 March 2008)

26 *Rajinder Chandra v State of Chhattisgarh* [2002] 2 SCC 287

27 Bakthavatchalu v. State Tamil Nadu

a lesser penalty than for other rapists. The Committee therefore recommends: that the Government take further measures to overcome these problems and to protect women from all discriminatory practices, including violence.[28]

The provision that the observation refers to is section 376 of the Code that prescribes the punishment for rape. According to this provision, the ordinary punishment is of imprisonment for a *minimum* term of seven years and a fine. However, if a man rapes his own wife and if her age is less than 12 years, or if she is living separately from him under a decree of judicial separation or under a custom or usage, then subject to a lesser imprisonment for a *maximum* term of two years. (A fine may be imposed additionally or even *alternatively*).

There is no acceptable justification for reducing the severity of the punishment in such cases. It sends the wrong message that in some way committing rape on one's wife is more acceptable by making it a lesser offence. The above provisions are in stark contrast with other provisions under section 376(2) where there are an aggravated punishment of imprisonment for a minimum term of ten years if prescribed in situations where rape accompanies a breach of trust, for example in cases of rape by police officer or a superintendent of a jail or a public servant or a person on the management or staff of a hospital on a woman under his custody. One may make the case that rape within marriage also accompanies a similar breach of trust and deserves a similar aggravated punishment.

The argument that penalising marital rape constitutes an "excessive interference with the marital relationship" as forwarded by the Law Commission of India[29] is unsubstantiated and will not be accepted by any treaty body. We need to do away with the antiquated hesitancy to intervene in and protect the rights of parties in a marriage. The law has moved on in other spheres – most notably with the recent enactment of the Protection of Women from Domestic Violence Act, 2005 – and there is no reason why rape within marriage cannot be recognised as an offence.

Presumably in response to these and other criticisms, the Government of India initiated discussions and consultations over the last few years on amending the law relating to rape. Taking note of these processes, the CEDAW commented with caution in January 2008 during its Thirty Seventh session as follows:

22. While noting that consultations are under way to amend relevant legislation relating to rape, the Committee is concerned about the narrow

[28] CCPR/C/79/Add.81 dated 4 August 1997 Concluding observations of the Human Rights Committee: India. 04/08/97. CCPR/C/79/Add.81. (Concluding Observations/Comments)

[29] 172nd Report of the Law Commission of India, 25 March 2000, para 3.1.2.1

definition of rape in the current Penal Code and its failure to criminalize marital rape and other forms of sexual assault, including child sexual abuse.

23. The Committee urges the State party to widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception for marital rape from the definition of rape. It also calls upon the State party to criminalize all other forms of sexual abuse, including child sexual abuse. It recommends that the State party consult widely with women's groups in its process of reform of laws and procedures relating to rape and sexual abuse.[30]

There is little confusion as to what changes need to be brought about. In 1997, the non-governmental organization *Sakshi* and others moved the Supreme Court with a view to insist reforms in rape law by impugning the constitutional validity of S. 376. Although Supreme court appreciated and commended the arguments of the petitioner, it ultimately dismissed the petition by evoking the principle of constitutional community and thereby throwing the ball into the court of the parliament of India. The author submits that arguments made by Sakshi and others in the relevant petition needs to be urgently addressed by the parliament of India in order to fulfil our commitment to the letter and spirit of international human rights standards having a bearing on gender equality.[31]

The comments referred to above also draw our attention to the lack of any legislation concerning sexual abuse and harassment of women. Sections 376B, 376C and 376D of the Code penalise coerced intercourse that does not amount to rape, but this is hardly adequate considering the realities of abuse and harassment experienced by women.

The Supreme Court in *Vishaka v. State of Rajasthan*[32] legally defined sexual harassment as *an unwelcome sexual gesture or behaviour whether made directly or indirectly* and laid down unprecedented guidelines to prevent such harassment. It is regrettable that these guidelines have not yet been enacted into law.

Sexual Abuse and Trafficking of Children

In January 2000, the CRC took note of the prevalence of sexual abuse and trafficking of children and the absence of adequate protection in the Code

[30] CEDAW/C/IND/CO/3 Committee on the Elimination of Discrimination against Women Thirty-seventh session 15 January-2 February 2007 Concluding comments of the Committee on the Elimination of Discrimination against Women: India

[31] Sakshi v. Union of India and ors., (2004) 5 SCC 518, Writ Petition (Crl.) No.33 of 1997

[32] AIR 1997 SC 3011

to criminalize such practices. The CRC recommended among other things that the Code should contain provisions against kidnapping and abduction.[33]

This criticism seems slightly excessive since sections 359 to 373 of the Code already contain several provisions that deal with kidnapping, abduction, kidnapping with the intent of coercing children into begging, kidnapping with the intent of ransom or murder and even kidnapping with the intent of forcing children into prostitution. It is clear however that these provisions need to be revised to take into account prevalent practices of trafficking that escape the law.

A study commissioned recently by the Ministry of Women and Child Development and conducted across 13 states in India found that more than 53% of children in India are subjected to sexual abuse, but most don't report these assaults.[34] The grave findings of this study highlight the need to address the rampant sexual abuse of children taking place within the home.

Communal Violence

The communal carnage that took place in Gujarat in 2002 did not escape the attention of international human rights treaty bodies and neither did the rampant and horrific sexual and gender based crimes against women perpetrated in its midst. The CEDAW expressed its concern in its thirty-seventh session that several lacunae existed in the Code and the proposed Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005 and the Code:

24. The Committee is concerned that [the Bill], does not include sexual and gender-based crimes against women perpetrated during communal violence or create a system of reparations for victims of such crimes, as these elements are not covered effectively by the Indian Penal Code or other relevant legislation. In addition, the Committee remains concerned that this Bill does not adequately address abuse of power by State officials in failing to take action or being complicit in communal violence.[35]

There is a need to end to the impunity that many of the perpetrators of such violence enjoy even today and for there to be greater protection against gender based violence in communal conflicts. This should be a priority in its last year in power at the centre for the United Progressive Alliance which stated in its Common Minimum Programme the aims of *making complete*

33 HR/CRC/00/23 dated 28 January 2000 COMMITTEE ON RIGHTS OF CHILD CONCLUDES TWENTY-THIRD SESSION

34 India Country Annual Report 2006, Country Programme 2008-2012 and Board Members report, E/ICEF/2006/CRP.15, 14 July 2006

35 CEDAW/C/IND/CO/3 Committee on the Elimination of Discrimination against Women Thirty-seventh session 15 January-2 February 2007 Concluding comments of the Committee on the Elimination of Discrimination against Women: India

legal equality for women in all spheres a practical reality, enacting legislation on domestic violence and against gender discrimination and enforcing the law without fear or favour to deal with all obscurantist and fundamentalist elements who seek to disturb social amity and peace.[36]

Some Observations

The comments and remarks quoted above constitute almost entirely all the attention that the Code has received from international human rights treaty bodies – but the frequency and the intensity of this scrutiny is increasing and seems likely to increase even further. There is undeniably a need to reform Macaulay's Code so that it adequately protects human rights as they are understood today.

What seems to be common in many of the suggested recommendations is that individual rights require greater protection from those within the institutions of marriage and the family. Increasingly, instances of violence and abuse are coming to light – most often on women and children but also the elderly. There is a need to put in place mechanisms that can protect individuals from the institutions that were assumed to protect them.

It is interesting to note that no international human rights treaty body has commented on section 377 of the Code that punishes *carnal intercourse against the order of nature with any man, woman or animal* with imprisonment for a maximum term of 14 years and has the effect of criminalizing homosexual acts.

The lack of any comment probably points to an increased need of international advocacy on the part of human rights groups that advocate its removal or may point to the hesitancy of the international community to address an issue that is so politically contentious today.

Both these factors are changing today and that this provision may draw increased international attention in the time to come. There is now increased international advocacy on the removal of this section both nationally and internationally. In a series of decisions, the European Court of Human Rights has consistently ruled that criminalization of homosexual acts constitutes a violation of the right to privacy and that any penal law should exclude sexual intercourse between consenting adults.[37] The Law Commission of India in its 172nd report on reviewing rape laws has recommended the repeal of section 377. It is therefore likely that this provision will soon attract international criticism.

36 National Common Minimum Programme of the Government Of India, May 2004

37 *Dudgeon v United Kingdom* (1982). 4 E.H.R.R. 149; *Silva Mouta v. Portugal*, Eur. Ct. H.R. (1999), 416; *Frette v. France*, 13 H.R.C.D. (2002). 91; *Karner v. Austria*, 11 No. 1 Hum. Rts. Brief 28 (2003).

Conclusion

Looking at the near future, the Human Rights Council, which was recently established by General Assembly in resolution 60/251 of 15 March 2006, will regularly conduct a Universal Periodic Review of the human rights situations of all United Nations member states.[38] India is scheduled to appear before the Council in its First Session from 7 – 18 April 2008 in what will become a regular occurrence.

The increased international scrutiny provided by the Human Rights Council will bring further criticism of the aforementioned provisions of the Code and it is therefore in India's best interests to undertake a sincere and comprehensive reform of the Code that adequately protects the human rights of its people as outlined above. It goes without saying that such a reform must be undertaken with the active participation and partnerships of all stakeholders including civil society organizations and the legal community.

In most comments and observations, human rights treaty bodies have commended India for its constructive approach and frank dialogue. This approach will continue to be required when international scrutiny increases – especially taking into account India's ambitions to play a greater role in international politics and institutions.

[38] Resolution A/HRC/RES/5/1 of the Human Rights Council, *Institution-building of the United Nations Human Rights Council*

Corporate Social Responsibility Vis-à-vis Human Rights: The Indian Perspective

Ranjana Adhikari*

"No success or achievement in material terms is worthwhile unless it serves the needs or interests of the country and its people."

- J.R.D. Tata

I. The Growing Relevance of Corporate Social Responsibility:

Business is facing challenging times world-wide and the increasing relevance of Corporate Social Responsibility (**"CSR"**) is undisputed. With the accelerating pace of globalization and increasing competition, it becomes inevitable for companies to have clearly defined business practices with a sound focus on public interest. Companies are now expected to act responsibly, be accountable and benefit society as a whole. This is certainly the new agenda of corporate social and environmental responsibility

The primary drive for ethical business and CSR came from the USA and Europe in the '80s and '90s, from campaigns run by pressure groups such as Greenpeace and Friends of the Earth. Consumer boycotts, direct action, shareholder action, ethical shopping guides, ethical product labelling schemes, media campaigns and ethical competitors became increasingly effective in changing corporate perspectives.[1] CSR in a developed country context would perhaps relate to issues of governance, business ethics, environment and human rights but in developing countries like India, CSR would also extend to processes in nation building and socio-economic development spheres such as regional development, rural development, employment, education, human rights and healthcare services.[2]

In the past, a company's merit was solely based on its financial performance. But in the new millennium there is increased pressure from investors, consumers, and employees to consider social and environmental criteria in the way a company carries out its business. Astute business leaders have been quick to embrace this new ethos spotting its potential for triple bottom line benefits: profit for the economic bottom line, the social bottom line and the environmental bottom line. In an information-driven economy, it

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1 See, John Samuel & Anil Saari, *"Corporate Social Responsibility : Background & Perspective"*, http://infochangeindia.org/200210045934/Corporate-Responsibility/Backgrounder/Corporate-Social-Responsibility-Background-Perspective.html as visited on 31/1/08.

2 *See*, http://www.ciisocialcouncil.org/csr/default.htm, as visited on 31/1/08.

is no longer optional for a company to communicate its environmental and social impacts, rather stakeholders, regulators, and NGO's demand such information. Therefore, CSR embraces two main concepts - accountability and transparency.

II. Corporate Social Responsibility: The Concept

The ideal definition of CSR has been given by Lord Holme and Richard Watts in their report on Making Good Business Sense published by the World Business Council for Sustained Development which says, "Corporate Social Responsibility is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large".[3] CSR carries a twofold meaning. On one hand, it engulfs the ethical behavior that the company demonstrates towards its internal and external stakeholders (customers as well as employees) and on the other hand, it denotes the responsibility the company has towards the environment and society in which it operates. These obligations are seen to extend beyond the various statutory obligations and require organizations voluntarily taking further steps to improve the quality of life for employees and their families as well as for the local community and society at large.

Moreover, from the stand point of human rights, the position of Amnesty International is worth taking cognizance. It states:

> *"Companies have a direct responsibility to ensure the protection of human rights in their own operations. They also have a responsibility to use their influence to mitigate the violation of human rights by governments, the forces of law and order or opposition groups in the countries in which they operate."*[4]

The United Nations Organisation defines the scope of CSR through the nine principles of the Global Compact announced by the UN Secretary General, Kofi Annan, at the World Economic Summit in January 1999 and formally launched at the UN Headquarters in July 2000. The United Nations Global Compact (**"UNGC"**) is an initiative to encourage businesses worldwide to adopt sustainable and socially responsible policies, and to report on them. Under the UNGC, companies are brought together with UN agencies, labour groups and civil society. The UNGC calls on companies to

[3] See, Ülle Übius, *"The Impact Of Corporate Social Responsibility, And Organisational And Individual Factors On The Innovation Climate"*, http://www.ebs.ee/public/_lle_bius.The_Impact_of_Corporate_Social_Responsibility_and_Organisational_and_Individual_Factors_on_the_Innovation_Climate.pdf at p. 44.

[4] See, Sandeep K. Krishnan & Rakesh Balachandran, *"Corporate Social Responsibility As A Determinant Of Market Success: An Exploratory Analysis With Special Reference To MNCs In Emerging Markets"*, http://stdwww.iimahd.ernet.in/~sandeepk/CSR.pdf.

embrace nine universal principles in the areas of human rights, labor standards, and the environment. Out of these nine principles, the two principles specifically relating to human rights are

- Principle 1: to give support and respect the protection of internationally proclaimed human rights and
- Principle 2: to make sure that they are not complicit in human rights abuses.

Global corporations are under constant pressure by the media, governments, workers, environmentalists, human rights groups and NGOs to incorporate basic CSR standards and sustainability strategies into their worldwide operations - and to disclose and report on those strategies. It is beyond doubt that the approaches of corporate culture post 80's and 90's have changed drastically. In modern day business practice CSR is entwined within all MNC's strategic planning process. Preventive action and precautionary approach in rectifying environmental damage at source, use of environmental friendly technologies, preservation of biodiversity, judicious use of energy, material and water, proper management of emissions, effluents and waste are some of the important components of CSR.

III. CSR in Developing Economies Like India: Philanthropy or Beyond?

CSR has been one of global business' preferred strategies for quelling popular discontent with corporate power. The pedagogical objective is to scrutinize whether multinational corporations in developing countries use CSR initiatives as a tool for its sustainability or only as a green washing effort.

Many researchers have hypothesized that CSR in emerging economies is still in a very nascent stage and suitable mechanisms do not exist to ensure that companies practice CSR with anything other than a charitable outlook. A number of large companies including some MNCs are engaged in health-care, education, rural development, sanitation, micro-credit and women empowerment, arts, heritage, culture, and conservation of wildlife and nature, etc. Some of them have created their own trusts and foundations while others are generous towards their favourite NGOs. For example Save the Children: The 'Magic Box' program, an In – Flight charity collection, was started by Jet Airways in 1997 to support the efforts of Save the Children India (STCI). TATA Motors provides desks, benches, chairs, tables cupboards, electrical fittings and educational and sports material to various primary schools in Singur.

No doubt these are exemplary instances of the philanthropic commitment of the corporate sector in India; however, they have confused corporate *philanthropy* aimed at social welfare and community development with Corporate *Social Responsibility*, which has failed to become a part of the core business process. The corporate philanthropy is basically the part of their business tradition rather than a reflection of their social obligation. Possibly due to their indulgence in corporate philanthropy, there is not much demand for policy-formulation and implementation of CSR in the country.

A common understanding of CSR is still in an evolving stage in India. Much emphasis in the country is on value aspect while operational aspects are generally neglected. Besides, there is a remarkable gap between corporate policies and practices. Large MNCs may indulge in charitable actions but they generally fail to ensure compliance of norms related to CSR in their supply-chains.[5]

A joint survey conducted in 2003 by Consultancy and Research for Environmental Management (The Netherlands) and Partners in Change (India) indicated that the MNCs do not monitor implementation of CSR policy by their local partners/subsidiary companies or suppliers and usually do not follow up if the production in sub-contracting chain follow the internationally agreed labour and other human rights and environmental standards. . Some of the bottlenecks in the growth of CSR in India as identified by Centre of Social Markets are unclear policy of the government, ineffective bureaucracy, poor monitoring record, complicated tax systems, and poor infrastructure provide further leverage to the MNCs and their Indian subsidiaries to evade Corporate Social Responsibility.[6]

However, the reasons for Corporates' enthusiasm towards human and environmental responsibility is questionable. Critics argue that the Companies cherry-pick and hype the good activities a company is involved with , thus 'greenwashing' their image as a socially or environmentally responsible company. Some CSR critics argue that the only reason corporations put in place social projects is for the commercial benefit they see in raising their reputation with the public or with government. They suggest a number of reasons why self-interested corporations, solely seeking to maximize profits, are unable to advance the interests of society as a whole. Companies may have spent a lot of time promoting CSR policies and committing to Sustainable Development, but there may be damaging revelations about business practices which can shock one's conscience.

5 *See*, Dr Srirang Jha, Chairman, Human Resources Development Trust, *"Corporate Social Responsibility"*, http://www. indiabschools.com/general_022.htm as visited on March 26, 2009.

6 *Ibid.*

In India, the world's largest beverage maker Coca-Cola Inc was engaged in a number of community-focused CSR initiatives. Coke engaged itself in a number of environment-focused CSR initiatives, like executing the ₑKO management system in 2003, under which it preserved local water resources. It also adopted measures to reduce water consumption in its production processes.[7] Around the same time, Coke faced allegations of presence of pesticide residues in its beverages and water resource contamination issues. Some critics viewed their efforts as a desperate attempt to rebuild its tarnished brand image in India.

IV. The Bhopal Gas Tragedy: A Mockery of CSR In India

The Bhopal Gas tragedy in 1984 is a classic example of gross violation of human rights by a MNC. This case reflects how principles of CSR are grossly violated in India by the MNCs. It was in the wee morning hours of December 3, 1984, a poisonous grey cloud (forty tons of toxic gases) from Union Carbide India Limited (**"UCIL"**) pesticide plant at Bhopal infected the city. Water carrying catalytic material had entered Methyl Isocyanate (**"MIC"**) storage tank No. 610. What followed was a nightmare. The killer gas spread through the city, sending residents scurrying through the dark streets. There was not even a warning by way of alarm, etc. And no evacuation plan was in place to negotiate the subsequent human tragedy. When victims arrived at hospitals breathless and blind, doctors were ill equipped to treat the victims. It was only when the sun rose the next morning that the magnitude of the devastation was clear. Dead bodies of humans and animals blocked the streets, leaves turned black, and the smell of burning chilli peppers lingered in the air. Estimates suggested that as many as 10,000 may have died immediately and 30,000 to 50,000 were too ill to ever return to their jobs.

The catastrophe raised some serious ethical issues. The pesticide factory was built in the midst of densely populated settlements where UCIL chose to store and produce MIC, one of the most deadly chemicals. The MIC plant was not designed to handle a runaway reaction. Vital gauges and indicators in the MIC tank were defective. Further as a part of UCC's drive to cut costs, the work force in the Bhopal factory was brought down by half from 1980 to 1984. This had serious consequences on safety and maintenance. The size of the work crew for the MIC plant was cut in half from twelve to six workers. The maintenance supervisor position had been done away with and there was no maintenance supervisor to handle the situation.

7 *See*, Ananthi R, Doris Rajakumari John, *"Coca-Cola's Corporate Social Responsibility in India"* http://www.ibscdc.org/Case_Studies/Corporate%20Social%20Responsibility/CSR0050C.htm as visited on March 30, 2009

It was as a classic instance of corporate double-standards: Union Carbide should have installed the same state-of-the-art technology in its plant at Bhopal like they had in US, instead it used inferior and unproven technology and employed lax operating procedures and maintenance safety standards compared to those used in its US 'sister-plant'. The motive was not simply profit, but also control. The company saved $8 million, and through this deliberate under-investment managed to retain a majority share of its Indian subsidiary. It should have come as no surprise to Carbide's management when its factory began to pose a chronic threat to its own workers and to the people living nearby.

Litigation has been tortuous and compensation woefully inadequate. Eventually, in an out-of-court settlement reached in 1989, Union Carbide agreed to pay US$470 million for damages caused in the Bhopal disaster, 15% of the original $3 billion claimed in the lawsuit. By the end of October 2003, according to the Bhopal Gas Tragedy Relief and Rehabilitation Department, compensation had been awarded to 554,895 people for injuries received and 15,310 survivors of those killed.[8] The average amount to families of the dead was $2,200. Although Union Carbide claimed this was "a lot of money for India," it actually amounts to less per victim than the Indian railroad pays its employees for loss of life or injury. For Union Carbide, the settlement cost 43 cents per share. In the community right opposite the factory, 91% of settlement survivors received Rs 25,000 (US $552) as compensation. Stockholders were delighted at the settlement and share value surged, but the irony is that many Indian families had to sell all their resources and go into debt to cover medical costs for lifelong illnesses.

After the gas leak, Union Carbide's factory was closed and for all practical purposes virtually abandoned by the company. To this day you can see piles of dangerous chemicals lying in the open air with warehouses full of sacks of poisons, many of which have split open. The monsoons of two decades have washed the chemicals deep into the soil and into the underground aquifers which feed wells and boreholes contaminating the drinking water leading to cancers and birth-defects. Even after almost 25years since the tragedy, the rehabilitation plan and compensation structure chalked out have only been partially implemented.

The gross neglect to meet safety norms and the lax approach of the concerned corporate entities led to one of the worst disasters known to mankind. Responsibility begins from the activities the corporate already indulges in. This disaster could have been avoided or its effects substantially mitigated if only UCILhad exuded a more responsible approach at the very

[8] See, Sanjay Kumar, *"Victims of gas leak in Bhopal seek redress on compensation"* http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=509368 as visited on April 7, 2009.

inception of the plant's activities. "Prevention is better that cure", though an age old adage it still holds true.

Conclusion

While the victims of Bhopal Gas Tragedy have not received a fair compensation even after years of ensuing legal battle, Indian subsidiary of another MNC –Nike has set records in flouting the international labor standards. Both Indian companies and the MNCs have little regard for well-being of the communities where they operate. Thus, while an independent research agency comes up with a report of presence of pesticides in the cold-drinks, the concerned companies start questioning the veracity of the report and competence of the laboratory instead of introspecting and initiating enquiries within their own work-systems. There is a need to develop a more coherent and ethically-driven discourse on corporate social responsibility. CSR is not a "green wash" to clean the sins of pollution. It is often seen as old wine in a new bottle -- just another trendy name for good old philanthropic initiatives by companies. There is need to move beyond such transitory illusions about CSR.

Every company involved in CSR needs to understand that there are various facets to CSR. Planting trees and adopting schools are not the be all and end all of CSR. What separates the wheat from the chaff is commitment to the cause; commitment to action. The best companies are those who actually let their words progress to action and associate with socially relevant causes worthy of communication.

■

A New Rehabilitation Paradigm For SAP's[1]

Prachi Manekar*

Till date nearly 75,000 hectares of land has been acquired for SEZ development. With the average size of landholding being 0.5 hectares, it will roughly displace nearly 150,000 families. Thus, there is an urgent need to find a viable solution for the rehabilitation of SEZ Affected People (SAP's). This research paper proposes a model which will avoid most of the negative effects of rehabilitation. It contemplates rehabilitation as a tool to empower people instead of impoverishing them.

Past experiences

History offers very few instances of successful rehabilitation. Limited success was achieved in the rehabilitation of Three Gorges Dam in China which is proposed to be the one of the largest dams. In India, most rehabilitation experiences have been bitter. Projects like Sardar Sarovar Dam give a brief glimpse into the untold miseries of the displaced. This is however the history of rehabilitation done by the government. The performance of the government on other fronts is equally appalling. This is primarily attributable to the corrupt bureaucratic setup and high handedness of the government officials.

SEZ rehabilitation is distinct from the rehabilitation of the past as here the task is entrusted to corporate houses. Today the corporate world has willing accepted its corporate social responsibility[2]. The social initiatives undertaken by companies Infosys and TATA's have become benchmarks. Initiatives like e-choupal[3] by ITC evidences the fact that companies can play a major role in empowering the poor. Magarpatta city is another celebrated example of a SEZ owned by farmers but managed professionally. It is considered to be one of the finest examples of inclusive growth. Thus, SEZ induced displacement, we can there is a ray of hope that given a good rehabilitation model, the rehabilitation can be done in an ideal way benefiting

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1 Abbreviation for SEZ Affected People i.e. people who are displaced by SEZ projects.

2 A voluntary approach that a business enterprise takes to meet or exceed stakeholder expectations by integrating social, ethical, and environmental concerns together with the usual measures of revenue, profit, and legal obligation.

3 ITC eliminated the greedy middlemen by starting direct procurement programme from the farmers. The farmers were paid at international prices for their produce. Information systems were installed to enable the farmer to analyze for himself the time and price to sell. It helped transform the lives of millions of people in the villages.

both the displaced and the developer. This research paper attempts to find such a win-win rehabilitation model.

Background of SEZ act

SEZ Act[4] was enacted in 2005 and came in force in February 2006. The act contemplates creation of large townships with world class infrastructure. Any SEZ is divided in two parts. One is the processing area in which all the industrial activity takes place. The other area is the non processing area in which we have residential, recreational, and other facilities.

The Proposed Rehabilitation model for SAP's

The paper contemplates creation of a compact township known as the rehabilitation zone within the non-processing area[5] of SEZ with limited infrastructure. It will be divided into two areas viz. residential and corporate farming. The two components of the model are as follows:

Residential zones

Rehabilitating SAP's in a new location has multiple social and cultural risks. The model contemplates rehabilitation inside the SEZ which will mitigate these risks. In case of SEZ the size of an SEZ can be enlarged upto 5000 hectares with no downside risk. Thus the developer can easily create a compact township within the SEZ with essential but limited infrastructure like community water taps, community latrines and hospitals. The developer can also develop a training centre to meet future workforce requirement of the SEZ. This will on one hand enable the farmer to carry on his conventional occupation and also provide him opportunity to be gradually absorbed in the industrial workforce. They can also be absorbed to provide services in the residential area created by the developer for household services in the residential area and shop floor agents in the commercial complexes. Such a zone will enable the developer to comply with the requirement of National Relief and Rehabilitation Policy, 2007 on one hand and with its own social objectives on the other.

4 Special Economic Zones Act, 2005

5 Non-processing area is a part of SEZ where residential and commercial activities can be carried out and which is distinct from the area where industries are set up. The SEZ act gives certain tax benefits to developers even for this area.

Corporate farming: the farming zone

A producer company may be formed under the Companies Act, 1956.[6] The developer may provide the company with a contiguous piece of land which is chosen in consultation with the farmers. Agriculture has got tremendous economies of scale and even a small piece of land if scientifically cultivated can have produce comparable to a large area of fragmented holding. This land may be used for the agricultural operations and other activities. The farmer may be involved with the company in two capacities viz. employees and shareholders. The shares may be given to them in proportion to their original landholding. The company may be professionally managed with support of agricultural scientist. The developer might either tie the company with the retail giant[7] or companies like ITC which are involved in agri-business. They can be entrusted with the task of professionally managing the company. In the alternative, financial and technical expertise may be provided by the developer to enable it to carry on agricultural business in a cost effective and high productivity manner.

Legal Issues in Developing Rehabilitation Zone:

Various legal issues are encountered while creating rehabilitation zone within SEZ. They have been analysed to ensure that this model in legally permissible.

Creating Rehabilitation Zone within SEZ

Any person is allowed to reside within the non-processing area of the SEZ. Further there are no restrictions on what activities can be carried out in non processing area. Thus, farming operation can be carried out in their. Thus, farmers can be relocated in a compact township inside the SEZ.

Is the developer entitled to tax sops?

If the developer has to rehabilitate displaced outside the SEZ, he will have to pay all taxes and duties incidental to the construction and rehabilitation. The SEZ Act provides exemption to the developers from various indirect taxes like customs duty, excise duty, sales tax and many other local taxes like octroi for construction activities inside the SEZ. Thus, the developer will be able to rehabilitate the displaced in cost effective

[6] It is a new type of company with the objects mentioned in Section 581B of the Companies Act which include agricultural and related activities. It has numerous provisions that facilitate carry on agri-business in a cost effective manner.

[7] Large retail chains like Reliance Fresh.

manner. It can save as least one fifth of rehabilitation cost which will otherwise be incurred for rehabilitating people outside the SEZ.

Permissibility of Corporate farming:

The Companies act has been amended to include the concept of Producer companies. These companies are permitted to carry on production o agricultural operations. The land brought for the purpose of SEZ gets a Non agriculture land status. There is no bar on use of non agricultural land for the purpose of agriculture. Thus, the land inside the SEZ can be used for the purpose of agriculture.

Sale of Agricultural Produce in DTA[8]:

Whatever goes from processing area of SEZ to the DTA is considered as import into the DTA. If the farming zone is located in the processing zone then heavy import duty as is applicable would be applicable. Thus, the model suggests that the farming zone be located in the non-processing area.

Efficient Land Allocation:

A question arises whether the developer will have enough space for other more profitable activities in the non processing zone. In case of a multi product SEZ an area as high as 50% can be used for the purpose of creating non processing zone. Thus, the act is quite liberal allowing enough space for the developer space to create non processing zones. Experiences show that developers are not creating such large tracts of Non-processing areas. Thus the developer has enough space for creating rehabilitation zones for the displaced. Further, the upper limit for an SEZ is 5000 hectares. Thus, rehabilitation zones will create no impediments in scaling up SEZ operations.

Thus, it is reasonable to conclude that there are no legal hassles for creating rehabilitation zone.

Key features of the Rehabilitation Model

This model proposes to create a sustainable ecosystem for the farmers which can empower them. Corporate Agriculture can avoid most of the disadvantages faced by individual farmer carrying on subsistence farming with poor marketing channels and rampant corruption and exploitation at each stage. The corporate farming entity being professionally managed will lead to carrying on agriculture as a business and thus the small piece of land can give sizable returns to the farmers. This model is an answer to ensure

[8] Abbreviation for Domestic Tariff Area. Any area in India which is not notified as SEZ is called DTA.

that rehabilitation should recognise and mitigate the risk involved in any rehabilitation.

Past experiences with rehabilitation have found that rehabilitation impoverishes the displaced and leads to many other vices. Michael Cernea, a leading authority on management of rehabilitation, succinctly identified the major problems associated with displacement and rehabilitation. This model if implemented can avoid following problems.

Landlessness

The farmer is provided with residential accommodation in say a flat. He further receives shares in the producer company which own the land and carries on agricultural and other operation.

Joblessness

By rehabilitating the farmer inside the SEZ, the developer ensures that the farmer is not cut off for all the business opportunities and thus he is near a mini version of a city. Further, some of the farmer will be working on the farmland as employee cum shareholders on the farmland. Some of the younger farmers can be trained as per the requirement of the SEZ. As the SEZ grows the incremental workforce can be sourced from the village from amongst the trained pool of people. Thus, the farmers will not become jobless and penniless.

Homelessness

The farmer being rehabilitated in the vicinity will face minimum cultural and social issues. Consultations with the farmer while choosing residential spaces will ensure that social structure remain intact. This will mitigate the negative physical and psychological impact of rehabilitation on the displaced.

Marginalised

Corporatization of farming will reduce the bottlenecks in production and marketing. It will result in consolidation of holding which will enable them to reap benefits of economies of scale. Thus, this model will empower the farmers.

Mortality and Morbidity

Appropriate healthcare facilities in SEZ will reduce morbidity. This risk will be mitigated by sensitive, timely and careful rehabilitation.

Employment opportunities

There are numerous employment opportunities in SEZ's. Firstly, by being near the source of buzzing industrial and commercial activity the farmer will have abundant business opportunity. His basic skill in farming shall be optimally employed in corporate farming zone. The next generation can hone their skill in other areas and can gradually be absorbed into the industrial workforce.

Food Security

This issue has got two dimensions. One in the food security of the farmer and other is the food security of the country. The cultivation of food crops in a scientific manner in one contiguous area will allay all food security concerns.

Benefits for the Developers

Cost of rehabilitation will come down significantly instead of paying compensation they are creating an ecosystem for them which can be cheaply created inside the SEZ because of the exemptions.

With the growing awareness amongst the farmers and the dynamic NGOs, the cost in time and money term of not providing adequate rehabilitation is higher.

Rehabilitation is not only ethically correct, it also makes good economic sense as it is cost effective and will provide the necessary manpower for the SEZ.

Disgruntled farmer create real danger of sabotage to the property and person in SEZ. It makes it less attractive. Creating a stake for the affected people in the project will enable them to play a positive role in ensuring the success of the SEZ.

Superior over other Compensation Packages:

Though paying cash compensation is allowed in the scheme of NRRP 2007, it is undesirable.[9] When a lum-sum payment is made there is a strong likelihood of money being spent on wasteful expenditure and it also has a power to corrupt the social life of the farmer. It may render him vulnerable to be cheated by profit-hungry brokers. The money if lost in any of the above

[9] National Relief and Rehabilitation Policy, 2007 provides alternatives in which the farmers can be compensated. It inter alia allows payment of cash compensation to the people whose land has been acquired.

will cause unimaginable misery and result into state of long term impoverishment of the farmer and his posterity. It can also cause intense socio-economic and cultural distraction for the displaced and can abruptly break social continuity which can have serious repercussion on the peace and safety of the country and also of the SEZ and its inhabitants. Paying a major part of the compensation by shares will tie the fate of farmers to the success of SEZ is uncertain. Further, development has a long gestation period and farmer will not be able to reap its benefits in the near future.

Conclusion

Land-based rehabilitation inside SEZ, if handled scrupulously may turn out to be the most hassle free and inexpensive modes of compensation.

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I, Principal, Vaijayanti Joshi, hereby declare that the particulars given above are true to the best of my knowledge and belief.

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