ISSN 2277-4017

Journal of National Law University, Delhi

Volume 1
2013

॥ न्यायस्तत्र प्रमाणं स्यात् ॥
NLU DELHI

NATIONAL LAW UNIVERSITY, DELHI

JOURNAL OF NATIONAL LAW UNIVERSITY, DELHI

Volume I **June 2013** **Number 1**

MODE OF CITATION
1 J. NLUD <pg. no.> (2013)

NATIONAL LAW UNIVERSITY, DELHI PRESS

Published by
National Law University, Delhi Press
Sector-14, Dwarka, New Delhi-110078
www.nludelhi.ac.in

Distributed by
M/s Mohan Law House
S#2 Subway, Supreme Court of India
Bahagwan Dass Road, New Delhi-110001
www.mohanlawhouse.com
email:customercare@mohanlawhouse.com

Journal of National Law University Delhi is published annually
Print subscription price: Rs. 200/-

ISSN: 2277-4017

Disclaimer:
Views expressed in the Journal of National Law University, Delhi are those of the contributors. The Editors and NLUD Press do not necessarily subscribe to the views expressed by the contributors. The Editors and NLUD Press disclaim all liability and responsibility for any error of omission in this publication. In the case of binding defect, misprint, missing pages etc., the publisher's liability is limited to replacement of the defective copy.

All enquiries regarding the journal should be addressed to:

Editor,
Journal of National Law University, Delhi,
National Law University Delhi,
Sector-14, Dwarka, New Delhi- 110075
www.nludelhi.ac.in
email: jnlud@nludelhi.ac.in
Tel. No : 011-28034255
Fax No:011- 28034254

ISSN 2277-4017

JOURNAL OF NATIONAL LAW UNIVERSITY, DELHI

Volume I | June 2013 | Number 1

CONTENTS

LAW AND UNMET SOCIAL NEEDS

*Upendra Baxi**

How does, and how should, social theory conceive of the basic human needs ("BHN") of the worst-off in society? How should these conceptions be translated into the language of constitutional law? The paper will investigate the analytical concerns of BHN and address six key concerns. First, how should social theory define 'needs'? Second, how should state officials identify, map, and respond to these needs? Third, how may transnational intergovernmental networks impinge on national spheres of public policy in regarding to meeting BHN? Fourth, on what basis may public power be distributed for meeting BHN? Fifth, should the appellate judiciary concern itself with the tasks of protection of rights rather than extend its powers to identification and meeting BHN? Sixth, when BHN remain unmet for long stretches of time, could violent social action represent itself as a long term agency for rectification of public indifference towards meeting unmet BHN?

---

* Emeritus Professor of Law, University of Warwick; Distinguished Professor, National Law University, Delhi; Former Vice Chancellor, University of Delhi (1990-1994) and South Gujarat (1982-1985); Visiting Professor, Global Law Program, New York University (1966-1999). This article is a modified version of the speech delivered at the 10th Annual Bodh Raj Sawhney Memorial Oration, at National Law University, Delhi on February 20, 2010.

I. Thinking Through the Notion of Unmet Social Needs with Mohandas

Let me start with an anecdote. Studying a long time ago in Dharmendra Singhji College at Rajkot, we all had to read a textbook on something called 'economics' - I think by two authors named Jathar and Beri - which began with the proposition that this so called 'dismal science' was still necessary and desirable because whereas resources were limited (finite) human wants were infinite (unlimited).[1] Their paradigmatic example concerned middle-class young parents who had to choose between having a baby or having a car! In the vast joint family that I was born to and lived with for first decade and half of my life at Rajkot, this was an unreal example simply because in that period not many middle class families aspired to have a car (the industry simply was not around!); so they, willy-nilly settled for having babies! Had my own parents had any real choice, then I may not have been born and you may in turn indeed have been spared of this oration!

A little later, I read Mohandas (Gandhi) who insisted in the early decades of 20th century CE that the 'Western' economists had got their basic theorem all wrong![2] The truth was the other way round: human 'needs' are finite and resources are infinite! In his usual aphoristic style Mohandas distinguished between 'need' and 'greed.' He obviously did not deny that being and remaining human entails satisfaction of certain basic needs but quested for a constitution of a just society (one way of understanding his protean notion of *Swaraj)* which was not driven by market forces but by the virtues of social cooperation based on the art and craft of *aparigraha*: non-covetousness, abstinence and frugality in consumption, best expressed by his aphorism of simple living and high thinking[3] - a motto that globalization-induced universal middle classes have now fully reversed into ostentatious living and little thinking! Today, we know this truth in some newly fangled languages of 'sustainable development' poignantly placed as we remain as custodians of whatever may be left of 'Nature' in the wake of our understanding of the destructive potential of global warming and climate change!

---

[1] G.B. Jathar & S.G. Beri, Indian Economics (1942).
[2] Mohandas Gandhi, Gandhi: *Hind Swaraj* and Other Writings (Anthony Parel ed., 1997).
[3] *Id.*

The author of the *Hind Swaraj* fully inveighed against free market capitalism in ways reminiscent of Karl Marx,[4] who a long while ago insisted that modern capitalism may not be simply understood as the multiplication of goods and services by market and industry; rather, the magic of capitalist production consists in the unending production of desires. Mohandas unerringly grasped this in terms of the ceaseless production of ethical evils in a market-driven economy, as not heralding human advancement and progress. He, unlike Marx, did not share the bourgeois Enlightenment notions of early industrial capitalism as heralding the idea of progress, ending feudal ways of domination and marking the advent of class struggle as a promise for emancipatory politics. This is a story for another day, obviously!

What Mohandas realized, *contra* Marx, was the fact that all human/social needs are *not* created by markets alone. The Mahatma recognized this in his movement against untouchability. The ritual distinctions and discriminations constituting untouchability, he recognized, produce systemic justifications for the production of social indifference towards the Unmet Social Needs ("USN") of untouchable peoples. As we all know, his response to this deprivation was via temple entry agitation, which has now blossomed into some judicial decisions allowing access even to the *sanctum sanctorum* or the Hindu temples.[5]

In contrast Bhim Rao Ambedkar - whom I fondly name the Aristotle of the *Atisudras,* the Indian social and economic proletariat as he named them - followed a different trajectory. In his classic work entitled *What Congress and Gandhi have done to the Untouchables,* Dr. Ambedkar pointed out with a profound insight that the USN of the *Atisudras* fully served the social needs of the dominant castes.[6] I have recalled elsewhere in my writings on

[4] KARL MARX, DAS KAPITAL (Regnery Publishing, 2000).

[5] This is not an appropriate occasion to offer any analysis of the decisions imposing reasonable regulations on freedom of conscience and religion otherwise guaranteed by Article 25 of the Constitution save noting with Marc Galanter's early prescient observation that these decisions, alongside with others, constitute a charter of reform of 'Hinduism.' I may add a further remark. Their Lordships even at the Supreme Court develop this jurisprudence as if Mohandas and his jurisprudence never ever existed! Indian justices thus form a part of the constitutional elite, united by a determined effort towards the constitutional erasure of the Mahatma.

[6] B.R. AMBEDKAR, WHAT CONGRESS AND GANDHI HAVE DONE TO THE UNTOUCHABLES (1945).

Ambedkar this striking difference.[7] Bhim Rao Ambedkar's response to Mohandas crystallized in the now not so well-known Mahad *Satyagraha* directed against lethal violence practiced by high caste Hindus against untouchables, involving preventing the latter from drawing water from a single village well. Ambedkar thus demonstrated, in my view at least, that USN are caused by the ends of caste domination going far beyond the Hindu 'spiritual' realm. He further demonstrated acutely the ways in which this form of slavery and servitude benefitted primarily the dominant castes and classes.

For Mohandas, the 'rights' languages remained ethically unviable; in contrast, Ambedkar constantly strove to convert the USN of *Atisudras* in the distinctive languages of Indian human rights. I believe that this contrasting style of discourse and action remain pressingly pertinent even today in some of our collectively mindless 'celebration' of the sixty years of the Indian Republic

Allow me then, and thus, at the outset that Unmet Social Needs remain a province and function of not just of economics (market-driven) but also mark the realms of social, religious and cultural dominance. Allow me also to add a further remark: the Indian constitutional architecture remains fully complicit with the creation and sustenance of vast arenas of USN.

II. Some Basic Analytic Concerns

The Ambedkar-Mohandas debate itself suggests a range of analytic concerns that we ought to fully bear in mind while considering the problem of Unmet Social Needs. Several questions underlie the analytic concerns. *First,* what may we - here meaning social theory-makers - signify by the expression 'needs'? *Second,* how may the elected representatives and state officials proceed to identify, map, classify, and respond to these needs? In this respect, *third,* how may transnational intergovernmental networks impinge on national spheres of public policy and action? *Fourth,* on what basis may 'jurisdictions' - spheres of public power - be distributed for 'meeting' social needs? *Fifth,* should the appellate judiciary concern itself

[7] Upendra Baxi, *Justice as Emancipation: The Legacy of Babasaheb Ambedkar, in* Crisis And Change in Contemporary India (Upendra Baxi & Bhikhu Parekh eds., 1995).

with the tasks of protection of rights rather than extend its powers to the identification and meeting social needs? *Sixth,* when social needs remain wantonly unmet for long stretches of constitutional time, could violent social action represent itself as a long term agency for rectification of public indifference towards meeting USN? Each one of these questions is related but also distinct and needs to be further nuanced. In this conversation, I will briefly respond to some of these concerns.

III. The Conception of Needs

It is a well-known truth that human beings everywhere experience needs, wants and desires, have aspirations and interests, and claim rights. Yet, 'needs' differ from all these related categories. One may 'want' many things that one may not actually need; one may desire things beyond one's needs; one's aspirations may be higher than one's wants, needs and desires; even so, not all wants and desires correspond to having needs or claiming rights. We may want or desire to be billionaires, or be among the world's first travelers to the moon; yet this may hardly be spoken of in terms of needs, interests, or rights. The relationship between needs, rights, and interests is rather complex, both in terms of sociological jurisprudence and of human rights theory and movement.

As concerns 'needs' contrasted with desires and wants, Roscoe Pound suggested (and here summarily put) the importance of the category of 'interests;' interests are social demands made by groups of peoples on the law and state.[8] The demands thus made may be based on needs, wants, desires or even aspirations; what is decisive is not the subjective source of demands but the objective status of their articulation.

Pound insisted that the fact that a demand is made constitutes an interest and all demands thus made, no matter their ethical content, ought to be regarded as valid just because these are articulated. Obviously, some demands may be outside the existing law and may even be framed against it (the very essence of legal transformation and law reform); other demands may be made in terms that Hannah Arendt made famous via the expression "the right to have rights"[9] (the province and function of human rights

[8] III Roscoe Pound, Jurisprudence 3-324 (1959).
[9] Hannah Arendt, The Origins of Totalitarianism (1986).

movement everywhere). Because demands are actually held interests that individuals, collectivities, and even peoples make on the state and law, these will not merely vary enormously but conflict *inter se.* The task of law - both as legislation and as adjudication - is to provide arenas and mechanisms for *serial* and *ad hoc* adjustment and settlement of conflicting interests. 'Adjustment' means that some demands will be recognized and met and some others will be sacrificed for the time being. No legislative or adjudicative adjustment of conflicting interests would be in any sense a final settlement; Pound suggested that the difficult and delicate task of justices (and I add legislators as well) is to pursue adjustment in ways that avoid or minimize social "friction and loss."[10]

If, however, some interests are disarticulated at the threshold, the law itself becomes (as Harold Laski once put this) merely a "beatification of the *status quo.*"[11] In this event, the law becomes a near complete means of domination or repression, leading at times to advocacy of violence as a just program for social transformation.

Julius Stone in a critique of Pound further suggested that for the theory of interests to work well, certain demands have to acquire the status of near-absolutes.[12] Put another way, freedom of speech and expression, movement and association are interests that inhibit, and even prevent, disarticulation of demands and no adjustment of conflicting demands may ever be legitimate when these near-absolute demands stand compromised. Put still another way, certain demands acquire the status of inviolable fundamental human rights with their accompanying freedoms.[13]

Specifically referring to the Nehruvian phase of Indian development, Julius Stone suggested that the tasks of law, politics, and state in timespaces

[10] Roscoe Pound, *Law and Liberty, in* LECTURES ON THE HARVARD CLASSICS 364-368 (William Allan Nelson ed., 2004).

[11] HAROLD J. LASKI, AUTHORITY IN THE MODERN STATE 283 (1919).

[12] Julius Stone, *A Critique of Pound's Theory of Justice*, 20 IOWA L. REV. 531-50 (1935).

[13] Incidentally, in my Julius Stone Memorial Lecture at Sydney Law School, I was able to stress affinities between Pound-Stone legacy on the one hand and Martha Nussbaum and Amartya Sen notions of capabilities and flourishing. Indeed the list of capabilities that Nussbaum offers is of a piece with the Pound-Stone analytic of modern law. I mention this in the hope that Indian lawpersons may find this genealogy of thought useful. Upendra Baxi, Human Rights as Human Flourishings: From Julius Stone to Amartya Sen and Beyond, Julius Stone Address at the Julius Stone Institute of Jurisprudence, Sydney Law School (2001).

of the postcolony lie not just in responding to social demands (interest) but rather in provoking articulation of these.[14] I think that a major constitutional process achievement of India thus remains insightfully articulated here. Even so, we may surely ask both in the contexts of the planned economy of the yesteryear, and the unplanned economy of Indian globalization, whether this demand-formation triggered by state, politics and law has ended up only creating and nurturing 'wants' and 'desires' of the middle classes while failing fully to attend to the actually experienced basic needs of the worst-off Indian impoverished humanity. I must leave today this enormous question 'hanging in the air' as it were.

In contrast, human rights theory and movement more frontally address the difficult relationship between human needs and human rights naming in particular the problematic of democratic deliberation. Proponents of basic minimum needs ["BMN"] rightly, in my view, suggest that contemporary human rights discourse ignores overall the poignant urgency of meeting BMN of the worst-off peoples or constitutional have-nots. In sum, they identify BMN in terms of the survival needs of individuals and social collectivities systematically denied *roti, kapada* and *makan* (food, clothing, and shelter).[15] Further, some BMN proponents include opportunities of livelihood, access to public healthcare, literacy and access to elementary and primary education, and basic gender equality. In this sense, they encompass an entire range of BMN articulated in the human rights instruments starting their itineraries from the Covenant on Social, Economic, and Cultural Rights.[16]

Human rights movements across the world insist thus on converting BMN into the languages of enforceable human rights. To be sure, this process is made possible by a conjoint insistence on a set of basic immaterial needs (BIN). The BIN are said to be 'immaterial' in the sense that they set out the spacetime of rights and freedoms, even for those who may not have access to BMN here and now. As Amartya Sen has always and often with deep insight maintained, the BIN remain indispensable often for

---

[14] JULIUS STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE (1971).
[15] Upendra Baxi, *From Human Rights to the Right to be Human: Some Heresies*, 13(3/4) INDIA INT'L CENTER Q. 185-200 (1986).
[16] International Covenant on Social, Economic and Cultural Rights, 993 U.N.T.S. 3 (Dec. 19, 1966).

the articulation of the BMN.[17] At any rate, no society may deny either the BMN or the BIN and yet claim to be a morally decent society. This remark remains especially pertinent to Indian constitutional device of Part III and Part IV.[18] I speak to this briefly a little later.

IV. Mapping and Meeting Social Needs

Identification and mapping of social needs is a continuing and complex process. I say 'continuing' because addressing social needs remains an intergenerational affair; I say 'complex' because mapping social needs remains at once a political process and an epistemic affair - indirect governance by 'experts.' Expert knowledge remains constrained by the politics of resourcing basic needs that figures in their analysis as an unavoidable constraint. As far as I know, no serious attempt has been made to cost the project of comprehensive India-wide poverty alleviation; all we have are fluctuating demarcations of the ways of the definitions of the poverty line and the regime based programs of governmental largesse. Please also examine the literature in publicly-owned banks and public finance institutions whose lending policies to the impoverished rest on the distinction between 'consumption' and 'production' needs: under this rationality neither category extends to needs such as health, schooling and education. The simple point I am making is this: we do not have as yet a full mapping of social needs (including of course the legal needs) of the constitutionally worst-off and therefore no sense of how much it may cost the nation to meaningfully advance overall towards meeting identified social needs. In this sense the ways in which the experts proceed with their task often condition and even determine the modes of responding to these needs. As Kishen Mahajan once put it, in this situation all that remains at hand are the practices of "unconstitutional economics!"

The Indian Constitution itself creates methods of mapping and meeting needs via its differentiation between 'rights' in Part III (fundamental rights) and Part IV (Directive Principles of State Policy.) Part III assigns the difficult custodianship of civil and political rights to the Indian appellate judiciary; in contrast, the task of responding to social needs is consigned to

[17] Amartya K. Sen, Commodities and Capabilities (1985).

[18] Part III of the Indian Constitution deals with 'Fundamental Rights.' Part IV deals with 'Directive Principles of State Policy.'

the leisurely and constitutionally insincere modes of legislative and executive action via Part IV.[19]

There were many voices in the constituent assembly debates ("CAD") that insisted that basic human needs ("BHN") should form a part of the fundamental rights; after all, they said, the making of a new constitution of India meant a certain end to systemic denial of the basic needs of the most impoverished future citizens of India. For the most part, the Nehruvian CAD chorus drowned these voices; Jawaharlal Nehru[20] believed in Parliamentary *supremacy,* if not *sovereignty.* Accordingly, experiments in planned Indian development should be beyond any strict judicial scrutiny, even in terms of monitoring steps that Part IV of the Constitution requires to be taken as a paramount obligation of Indian constitutional governance. Strict scrutiny of some agrarian reform legislation triggered Nehru, in the First Amendment of the Constitution, to place judicial surveillance of economic policies into the Ninth Schedule: the specified laws included therein were sought to be protected from any kind of constitutional judicial review. This is not an occasion to review constitutional developments that followed save reminding ourselves of a withering remark of Justice Gajendragadkar who said: "[o]urs in the only Constitution [in the world] that needs protection against itself."[21] I shortly note some changing stances of adjudicatory policy that seek a determined reversal of the practices of 'unconstitutional economics.'

For the moment, it needs noting that some activist CAD voices registered some remarkable normative triumphs, notably via the Article 17 abolition of 'untouchability' and further especially via fundamental rights against exploitation enshrined in Articles 23 and 24.

Note fully, please, the aspects of normative achievement. Never before in the world constitution-making history, had a constitution proclaimed

---

[19] To be sure, as I have been saying for some time this constitutional arrangement fully anticipates the division of contemporary human rights into civil and political rights on the one hand and on the other the rights compendiously named as economic and social human right;. I wonder though whether we ought to remain the least bit proud of this inaugural innovation!

[20] Perhaps the truest embodiment of what Antonio Gramsci named as a 'Modern Prince'!.

[21] GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE 85 (1999).

fundamental rights as extending to human rights violation in civil society and by non-state actors. Never before also had any constitution proceeded to thus constitutionally criminalize social conduct as a constitutional offence. Nor, as far as I know, has any modern or postmodern federation (such as the EU) suspended the federal principle by investing the Indian Parliament with the powers to override legislative competence otherwise solely in the province of state legislature.[22] I do not here reiterate the related unique normative accomplishment of legislative reservations for SC/ST communities in education, civil services and legislatures. With some significant others, I have frequently critiqued the ways in which hegemonic constitutional elites have fully betrayed this normative potential. Yet stressing this sort of normative achievement is my way of celebrating the sixty years of the Indian Republic!

V. Jurisdictional Spheres for Meeting Social Needs

Further, we need to note that for the most part the principle and design of Indian 'federalism' distributes and invests law-making and executive competence on states within the Indian federation. No doubt, New Delhi possesses enormous leverage in terms of framing national economic policy planning; it distributes some enormous federal largesse via the Planning Commission and the Finance Commission mandated distribution of public revenues. Important as all this remains, as some recent debates concerning the National Rural Employment Guarantee Act suggest,[23] the existing distribution of jurisdictional spheres remains, at least from the worm's eye, a part of the problem rather than of any solution. One may only fondly hope that the Panchayati Raj constitutional amendments may make an eventual and decisive difference.[24] I must apologize instantly for the brevity of these remarks save highlighting that any distribution of jurisdictional spheres remains constitutionally 'just' only in the proportion that it services the needs of India's worst-off peoples. From this perspective, we need to reinvent the design and detail of the Indian federalism.

---

[22] *See* India Const. art. 35.
[23] The Mahatma Gandhi National Rural Employment Guarantee Act, No. 42 of 2005.
[24] India Const. *amended by* The Constitution (Seventy Third Amendment) Act, 1992 & The Constitution (Seventy Fourth Amendment) Act, 1992.

VI. The Influence and Power of Transnational Intergovernmental Networks

Increasingly governance remains shot through by the enormous proliferation of transnational intergovernmental networks. On the one side, it includes the global international financial institutions (the World Bank and the International Monetary Fund, and also their regional cohorts) and on the other these include the EU and the United Nations System agencies such as the UNDP, UNICEF, WHO, related UN Human Rights Treaty-Bodies and yet further the UN industry named as the MDG - Millenium Development Goals[25] - here inclusive of a wide variety of state and NGO actors/activists.) These networks make an important contribution indeed in terms of identifying benchmarks and indicators for meeting BHN. The time available for this presentation does not unfortunately allow any further elaboration of how far these networks remain instruments of Northern foreign policy and how far these constitute an authentic commitment towards meeting BMN of the "wretched of the earth"[26] with optimal respect for *their human rights.*

VII. Role of the Indian Judiciary in Meeting BHN

There is no question that the Indian Supreme Court in particular has begun the process of converting 'human needs' into the languages of 'human rights.' In the main, this has been made possible by social action litigation (SAL) still miscalled 'public interest litigation' (PIL).[27] As one privileged to help inaugurate SAL and nurture it for about two decades, I may insist, shorn of any further elaboration, on saying that that overall the process of this conversion has been human-rights friendly for the Indian constitutional have-nots and the worst-off peoples. Indeed, the normative judicial achievements are rather immense and I have celebrated these in my writing in the companionship of many significant others.

---

[25] United Nations Millennium Declaration, U.N. Doc. A/RES/55/2 (Sept. 8, 2000) .

[26] Frantz Fanon, The Wretched of the Earth (Richard Philcox trans., rep. ed. 2005).

[27] *See* Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 Third World Legal Stud. 107, 108-11 (1985).

The question here is different and not at all constructively posed in terms of judicial will to power. Rather, the concern here remains at least threefold. First, because justices may neither command the power of the purse or the sword, the question is how far the normative constitutional leadership of activist justices may translate into willed and determinate political response. Second, and despite this limitation, how far the worst-off may still be said to have benefited by acts of symbolic judicial leadership? These two issues require empirical analyses and I hope that National Law University, Delhi will pursue these in a far more determined manner than its sister institutions.

The third concern is indeed perplexing. While the Indian Supreme Court has set wise limits on the plenary powers of Parliament to amend the essential features or the Basic structure of the Constitution,[28] the Court does not conduct *itself* as bound by this discipline. Their Lordships may give with one hand today what they may blithely take away tomorrow. I have for example fully in view the determined reversal of labour rights jurisprudence since the 1990s; fortunately as it happens. Justices G.S. Singhvi and A.K. Ganguly have recently lamented this reversal in a 2010 judgment.[29] Lest a larger Bench of the Court may be propelled to describe this articulation as an act of judicial indiscipline, it must be fully recalled that that the accelerated demolition of the constitutional protection of labour rights has been thus far achieved by similar gestures of judicial indiscipline: smaller benches have overruled otherwise binding decisions concerning the rights of workers!

VIII. Violence as a Way Towards Articulating BMN and Fundamental Human Rights

If the 24/7 mass media pundits have helped create a climate instantly de-legitimating organized political violence that indiscriminately kills, or hurts and harms innocent lives in the process, those inclined to portray such violence as violence for equality remain constantly asked to condemn it in the name of the nation and its democracy. This is a contested terrain which I may today only briefly suggest as worthy of all your serious deliberation.

---

[28] Keshvananda Bharti v. State of Kerala, (1973) 4 S.C.C. 225.
[29] Harjinder Singh v. Punjab State Warehousing Corporation, (2010) 3 S.C.C. 192.

Most human rights and social activists, while condemning indiscriminate violence, still insist that we understand it as a signal of the multiple failure of the practices of the Indian plebiscitary democracy; most holders of public power suggest that collectively organized states of social peace is a superior way of meeting the demands of even thus far neglected tasks of social justice. How may we begin to respond to these distress signals and the newly formed political summons?

This indeed remains a sovereign question, entailing differentiation between practices of organized collective political violence. There is, in my view, no other response imaginable than saying that some of these practices have been overall democracy-reinforcing. Take for example the practices of political violence that generated the linguistic reorganization of the states within the Indian federation, or those of worker's violence via strikes and *gheraos,* or the Mandal-type violence that shook and reconfigured the national agenda of doing politics. Further, an enormous amount of politically organized symbolic violence remains fully well tolerated by the managers and agents of the Indian state: destruction of public property in the wake of politically organized protest violence remains the norm rather than an exception. On another register, parliamentary debates over Gujarat 2002, Delhi 1984, and other critical events organized fully by state, regimes, and party leaders and cadres suggest the growth and development of the politics of immunity and impunity.

The question for mature democratic reflection thus stands posed differently at least. I may do no better here than to invite your close attention to Antonio Negri's classic work entitled *Insurgencies,* which traces for Europe the itineraries of popular sovereignties pitted against some forms of articulations of state sovereignty.[30] Reading Negri educates us fully into tasks of responsive and responsible (and with Jacques Derrida phrase-regime[31]) the unending tasks of political '*response-ability.*'

Even so, one may tentatively at least proceed to draw some bright lines between constitutional insurgencies and peoples wars against the State

[30] ANTONIO NEGRI, INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE (Maurizia Boscagli trans., 1999).
[31] JACQUES DERRIDA, MARGINS OF PHILOSOPHY 17 (Alan Bass trans., 1982). *See also* JEAN

directed to its full overthrow. These bright lines do at least enable us to distinguish the project of violence for equality from the revolutionary project of establishing a new state-formation. The question concerns not just the response-ability to those who kill, hurt, harm innocent lives and the survivors future life-projects; the question also concerns how may we develop an ethical (human rights based) policy in the wars of terror, Indian-style. If peoples war groups remain unresponsive to violence directed towards the hapless impoverished and worst-off impoverished peoples, is the only possible alternative left to state managers to replicate and reproduce this form of violence? If the answer may be in the affirmative, this fully imperils, and often in a savage measure, the future of human rights and constitutionalism in and for India. All I may say here, bereft necessarily of any further refinement, is just this: the state managers and agents ought to demonstrate a finer solicitude for constitutional values than those who declare a 'war' against them; in sum, we need urgently to device ethical and human rights-based 'counter-terror' policy regime.

FRANÇOIS LYOTARD, THE DIFFEREND: PHRASES IN DISPUTE (Georges Van Den Abbeele trans., 1991).

THE DECLARATION ON THE RIGHT TO DEVELOPMENT REVISITED

*Koen De Feyter**

This paper takes a fresh look at the Declaration on the Right to Development adopted more than twenty five years ago at the United Nations. The Declaration remains valid, but a number of its provisions require evolutionary interpretation, taking into account international and regional legal developments subsequent to the adoption of the text, and changes in the global economic and social environment. The paper engages with ideas put forward by Arjun Sengupta, the former UN Independent Expert on the Right to Development, and one of the strongest advocates of the right to development in the Global South.

I. INTRODUCTION: ARJUN SENGUPTA AND THE DECLARATION ON THE RIGHT TO DEVELOPMENT

Arjun Sengupta served as Independent Expert on the Right to Development to the Intergovernmental Working Group on the Right to Development at the UN Human Rights Commission in Geneva from 1998 to 2004. He remained a major voice in the global debate on the right to development until his untimely death in 2010.

*Chair of International Law, Law and Development Research Group, Faculty of Law, University of Antwerp (Belgium).

Arjun Sengupta came to the United Nations Human Rights system after having served as an Executive Director of the International Monetary Fund. It was not an obvious move: the global financial and trade institutions are often criticized for their denial of any legal responsibility under human rights law and their complicity in human rights violations. On the other hand, the push from the Global South for the recognition of the right to development as a human right was based on the argument that greater justice in the global political economy was required to assist developing countries in the realization of human rights. Arjun Sengupta's professional track record prepared him for a task that required facilitating a dialogue between development economists and human rights lawyers. Here is what he wrote in 2002:

> A country, it may be noted, can develop by many different processes ….There may be an impressive growth of the export industries with increased access to global markets, but without integrating the economic hinterland into the process of growth and not breaking the structure of a dual economy. All these may be regarded as development in the conventional sense. However, they will not be regarded as a process of development, as objects of claim as human rights, so long as these are not accompanied by a process where equal opportunities were provided. Economic growth, attended by increased inequalities or disparities and rising concentrations of wealth and economic power, and without any improvement in indicators of social development, education, health, gender balance and environmental protection respecting the human rights standards and, what is most important, if such growth is associated with any violation of civil and political rights, it cannot fulfill the human right to development.[1]

According to the Declaration on the Right to Development,[2] the right to development entitles every human person and all peoples to participate in, contribute to, and enjoy development, in which all human rights can be fully realized.[3]

---

[1] Arjun Sengupta, *On the Theory and Practice of the Right to Development,* 24 HUM. RTS. Q. 848 (2002).

[2] G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec.4, 1986) [hereinafter Declaration]. The resolution was adopted by a majority of 146 to 1 (United States) with 8 abstentions.

[3] Declaration, art. 1(1).

Each State has the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits there from.[4] States should take steps to eliminate obstacles to development resulting from the failure to observe human rights.[5]

In addition to their domestic responsibility, States also have a duty to cooperate for the realization of the right to development. Effective international cooperation should act as a complement to the efforts of developing countries.[6] States have the duty to take steps to formulate international development policies, both individually and collectively.[7] Arguably, the duty to cooperate thus consists of two dimensions, which for the purposes of this paper, are called the unilateral and mutual dimensions.[8] The unilateral dimension of the duty to cooperate impacts on individual State decisions targeting or affecting other States (e.g. a decision to extend official development assistance). The mutual dimension of the duty to cooperate affects bilateral, regional and multilateral partnership agreements, and activities of intergovernmental organizations.

Except for one reference to duties of individuals, [9] the Declaration only perceives of States acting separately or jointly as duty bearers. Intergovernmental organizations are not addressed, and neither are private actors.

---

[4] Declaration, art. 2(3).
[5] Declaration, art. 6(3).
[6] Declaration, art. 4(2). The UN Millennium Declaration includes a largely rhetorical commitment by all governments recognising that "in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. As leaders we have a duty therefore to all the world's people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs." *See* UN General Assembly Resolution 55/2 ¶2, 8 September 2000 (adopted without a vote).
[7] Declaration, art. 4(1).
[8] Article 4(1) of the Declaration speaks of an individual and collective duty to cooperate – but the terms 'individual' and 'collective' may cause confusion as they are also used to identify the holders of the right to development, i.e. individuals and peoples.
[9] Declaration, art. 2(2).

The Declaration identifies both individuals and peoples as the holders of the right to development. The human person is the central subject of development, and therefore the active participant and beneficiary of the right to development.[10] As per the Declaration, popular participation in all spheres of development should be encouraged, and effective measures should be undertaken to ensure that women have an active role in the development process.[11]

As Sengupta explains, the aim of the people's right to development in the Declaration was to stress the need to move from an economic to a human development approach. Development as a process was to center on raising the living standards of the majority of the population in developing countries who are poor and deprived, leading to the improvement of the well-being of the entire population.[12] However, entitlements of sub-national groups within States to specific development policies reflecting their separate identity were not incorporated in the text of the Declaration. No references to indigenous peoples are included.

At the Working Group on the Right to Development, Arjun Sengupta was succeeded by an expert body, the High-Level Task Force (2004-2010). The Working Group continues until today,[13] but little progress has been achieved in upgrading the soft law status of the right to development. The Non-Aligned Movement favors a treaty on the right to development. The European Union prefers the elaboration of benchmarks and indicators for States to empower individuals as active agents in the development process. The United States – due to its negative vote on the Declaration – is largely a bystander in the global debate on the right to development, and opposes the collective dimension of the right. China stresses the need for dialogue and consultation.

In its consolidated findings, the High Level Task Force argued sensibly that the national and international dimensions of the right to development

---

[10] Declaration, art. 2(1).
[11] Declaration, art. 8.
[12] Arjun Sengupta, *supra* note 1.
[13] For an excellent history, *see* STEPHEN MARKS, THE POLITICS OF THE POSSIBLE: THE WAY AHEAD FOR THE RIGHT TO DEVELOPMENT (Friedrich Ebert Stiftung, 2011).

should be seen as complementary:

> Those with political reasons for favoring the international dimension and a collective understanding of the right must seek adjustments in their national policies and take the individual rights involved seriously. Similarly, those that stress that this right is essentially a right of individuals through human rights-based national policies must do their part to ensure greater justice in the global political economy by agreeing to and achieving outcomes of the various development agendas consistent with the (…) Declaration.[14]

Elsewhere, I have suggested that a framework convention approach to the right to development may offer a way out of the deadlock at the Working Group.[15]

This contribution, however, focuses on the Declaration on the Right to Development. More than twenty-five years after the adoption of the Declaration on the Right to Development, some of its provisions and concepts deserve to be reinterpreted in light of subsequent legal developments and the actual global context. As the Inter-American Court of Human Rights has stated, human rights instruments are live instruments whose interpretation must adapt to the evolution of the times, and, specifically, to current living conditions.[16] Some of the provisions and concepts in the Declaration that stand to benefit from evolutionary interpretation include: the definition of peoples (Article 1(1)), the dimensions of development, (Article 1(1)), the reference to the new international economic order (Article 3(3)) and the succinct reference to an active role for women in the national development process (Article 8(1)). I expand on these issues below. In the final section I return to the writings of Arjun Sengupta and engage in the contemporary debate on two of his proposals.

---

[14] A/HRC/15/WG.2/TF/2/Add.1 ¶82.

[15] KOEN DE FEYTER, TOWARDS A FRAMEWORK CONVENTION ON THE RIGHT TO DEVELOPMENT (Friedrich Ebert Stiftung, 2013).

[16] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, C79 IACtHR ¶146 (2001). *See similarly* Tyrer v. UK, (1978) 2 EHRR 1¶31.

II. The Definition of Peoples

In the UN Declaration on the Right to Development, both individuals and peoples hold the right to development. Clearly the individual dimension should remain, and poses little conceptual difficulty. The notion of peoples in the UN Declaration, however, should be interpreted today as including indigenous peoples, taking into account the landmark *Endorois* decision on the right to development of the African Commission on Human and Peoples Rights,[17] rulings on indigenous rights by the Inter-American Commission and Court of Human Rights,[18] and international legal documents attributing the right to development to indigenous peoples.[19]

---

[17] Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of the Endorois Welfare Council v The Republic of Kenya 276/2003 ACHPR (2009).

[18] Consider a string of judgments by the Inter-American Court of Human Rights that are not based on the right to development, but that recognize extensive rights of indigenous peoples with regard to development, such as Mayagna (Sumo) Awas Tingni Community v. Nicaragua, C/66, 21 August 2001; Yakye Axa Indigenous Community v. Paraguay, C/125, 17 June 2005; Sawhoyamaxa Indigenous Community v. Paraguay, C/146 29 March 2006. Consider also Moiwana Community v. Suriname, C/124, 15 June 2005.

[19] *Cf.* Article 7(1) ILO Convention 169, Indigenous and Tribal Peoples' Convention, 27 June 1989, providing that indigenous peoples have the right to decide their own priorities for the process of development and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly. *See also* Article 23, United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, 13 September 2007:

> Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

According to the Declaration, the State is under a duty to obtain the free, prior and informed consent of the representative institution of the indigenous people before adopting and implementing legislative and administrative measures that may affect them (Article 20). This duty applies to the development or use of indigenous lands (Article 32), particularly in connection with the development, utilization or exploitation of mineral, water or other resources. In a recent case (not dealing with the right the development) concerning oil exploration by a foreign company on indigenous land, the Inter-American Court held that

> [I]n order to ensure the effective participation of the members of an indigenous community or people in development or investment plans within their territory, the State has the obligation to consult the said community in an active and informed manner, in accordance with its customs and traditions, within the framework of continuing communication between the parties. Furthermore, the consultations must be undertaken in good faith, using culturally-appropriate procedures and must be aimed at reaching an agreement.

In addition, there are strong arguments for encompassing local communities in the definition of peoples in the context of the UN Declaration. The reasoning in *Endorois* – that the right to development protects groups that are not accommodated by dominating development paradigms and are victimized by mainstream development policies – can be used to support the inclusion of local communities. Local communities can be understood as sub-state groups that share 'particular values': they come together around a concept of common good and are structured in some way, in the sense that they are isolated from other communities that share similar values.[20]

A number of global legal instruments treat indigenous peoples and local communities equally with respect to their rights in development issues.[21] One example is the requirements on stakeholder engagement in the UN-REDD program (the UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries). The UN REDD-program systematically refers to 'indigenous peoples and other forest-dependent peoples.' The program seeks to help ensure the protection of the rights of indigenous and forest-dwelling people and the active involvement of local communities and relevant institutions in the design and implementation of REDD plans.[22]

See Kichwa Indigenous People of Sarayaku v. Ecuador, C245 IACtHR ¶ 177 (2012).

[20] *See* DWIGHT NEWMAN, COMMUNITY AND COLLECTIVE RIGHTS 44 (Hart Publishers, 2011).

[21] Principle 22 of the Rio Declaration on Environment and Development, 14 June 1992 provides that indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. The Rio Declaration requires that States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development. Treaties following up on the Rio Declaration's principle include the Convention on Biological Diversity, 5 June 1992, 1760 UNTS 9 (No. 30619) art. 8 (j) ('Each Contracting Party shall, as far as possible and as appropriate…Subject to its national legislation, respect, preserve and maintain knowledge innovations and practices 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'); the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity, 29 October 2010 art. 6; the African Convention on the Conservation of Nature and Natural resources (1969, amended 11 July 2003) art. 17.

[22] FAO, UNDP, UNEP, UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation on Developing Countries (UN-REDD) Framework Document, 20 June 2008, http://www.un-redd.org/Portals/15/documents/publications/UN-

In a contemporary interpretation, not merely 'the entire population' but all peoples as thus defined should enjoy the right provided for in Article 2(3) to active, free and meaningful participation in development and to the fair distribution of the benefits resulting there from.

It is conceivable to include an even broader range of collectives as potential holders of the right to development, namely social groups, understood as any form of open organization based on the identification of a common need or interest. These social groups may, and often will be geographically located, but could also be rooted in a common experience,[23] such as the sharing of a similar status within society (e.g. the exercise of an occupation that is culturally considered as impure). The Rio+20 Outcome Document recognizes the need to involve a wide variety of social groups in the development process:

> We underscore that broad public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development. Sustainable development requires the meaningful involvement and active participation of regional, national and sub-national legislatures and judiciaries, and all major groups: women, children and youth, indigenous peoples, non-governmental organizations, local authorities, workers and trade unions, business and industry, the scientific and technological community, and farmers, as well as other stakeholders, including local communities, volunteer groups and foundations, migrants and families as well as older persons and persons with disabilities. In this regard, we agree to work more closely with the major groups and other stakeholders and encourage their active participation, as appropriate, in processes that contribute to decision-making, planning and implementation of policies and programmes for sustainable development at all levels.[24]

Nevertheless, it may to be too far a stretch to interpret the concept of peoples in the Declaration on the Right to Development in such a way as to

---

REDD_FrameworkDocument.PDF.

[23] *Cf.* ROGER COTTERRELL, LAW, CULTURE AND SOCIETY (Ashgate, 2006).

[24] General Assembly Resolution 66/288 Annex ¶ 43, A/RES/66/288, 27 July 2012.

encompass groups that have no territorial delimitation. In international law, the term 'people' may require some connection between a relevant group and a territory. The less controversial approach may be to acknowledge the need to include a wide variety of stakeholders under the requirement in Article 2(3) of the UN Declaration on the Right to Development to ensure meaningful participation.

The *Endorois* decision suggests that there is a particular need to protect vulnerable and marginalized groups under the right to development. The Rio+20 Outcome document also promotes support for developing countries "in their efforts to eradicate poverty and promote empowerment of the poor and people in vulnerable situations."[25] Circumstances of vulnerability or marginalization establish a priority: the likelihood of violations of the right to development of peoples in vulnerable situations is higher. As Okafor has argued, such sub-state groups are 'often forced by circumstances' to struggle against their own state for the development of their communities.[26]

Finally, the inclusion of indigenous peoples and local communities in the definition of peoples in the Declaration on the Right to Development may require spelling out the matching responsibilities of sub-national government authorities. Local authorities include local governments and their administration, lawmakers (on the assumption that a degree of regulatory power was devolved), judges and human rights institutions. In principle (although perhaps not always in practice), local public authorities are ideally placed to act as brokers between local human rights claimants and the international human rights regime. The Rio+20 Outcome document reaffirms

> …the key role of all levels of government and legislative bodies in promoting sustainable development. [They] further acknowledge efforts and progress made at the local and sub-national levels, and recognize the important role that such authorities and communities can play in implementing sustainable development, including by engaging citizens and stakeholders and providing

[25] *Id.* at ¶ 23.
[26] Obiara Okafor, *"Righting" the Right to Development: A Socio-Legal Analysis of Article 22 of the African Charter on Human and Peoples' Rights, in* IMPLEMENTING THE RIGHT TO DEVELOPMENT: THE ROLE OF INTERNATIONAL LAW 58 (Stephen Marks ed., 2008).

> them with relevant information, as appropriate, on the three dimensions of sustainable development. [They] further acknowledge the importance of involving all relevant decision makers in the planning and implementation of sustainable development policies.[27]

III. The Environmental Dimension of Development

The Declaration on the Right to Development conceives of the right to development as a right to 'economic, social, cultural and political' development (Article 1(1)).

Perhaps the Declaration's greatest achievement was to ensure the integration of human rights into the international development effort. Later milestones in constructing a holistic approach to development included the publication of the UNDP Human Development Reports (starts 1990) that strengthened the social justice component of development, and the Rio Declaration on Environment and Development perceiving of environmental protection as an integral part of the development process.[28] The Rio Declaration adds an intergenerational aspect to the right to development: The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.[29] The resolution also declares that in order to achieve sustainable development and a higher quality of life, "[s]tates should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies."[30]

There can be little doubt that if the Declaration on the Right to Development were written today, it would include the environmental dimension of the right to development. The Rio+20 Outcome Document offers ample evidence of the current consensus that there is a need for a balanced integration of the economic, social and environmental dimensions

---

[27] General Assembly Resolution 66/288 Annex ¶ 42, A/RES/66/288, 27 July 2012.
[28] Principle 4, Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26, 14 June 1992.
[29] *Id.* principle 3.
[30] *Id.* principle 8.

of sustainable development. The very first operational paragraph speaks of the need to ensure the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations.[31]

The clarification that in the notion of 'development' includes an environmental dimension has an impact similar to Article 6(3) of the Declaration on the Right to Development, namely to ensure that States take steps to eliminate obstacles to development resulting from the failure to respect environmental commitments. As Orellana has argued, the right to development is not a right to pollute, as it has sometimes been construed in climate change discussions.[32] Instead, a right to development approach can highlight the need for technology transfers that "can bypass the destructive environmental impacts of industrialization."[33]

IV. The Not So New International Economic Order

Article 3(3) of the Declaration on the Right to Development provides that in co-operating for development, "States should realize their rights and fulfill their duties in such a manner as to promote a new international economic order…"

---

[31] General Assembly Resolution 66/288 Annex ¶1, A/RES/66/288, 27 July 2012. *See also id.* ¶3 ("We therefore acknowledge the need to further mainstream sustainable development at all levels, integrating economic, social and environmental aspects and recognizing their interlinkages, so as to achieve sustainable development in all its dimensions"). A reference to the right to development appears in paragraph 8 of the Rio+20 Outcome document.

[32] In the Climate Change Framework Convention, the right to development makes an unhelpful appearance as a right of States:

> The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.

Article 3(4), UN Framework Convention on Climate Change, 9 May 1992.
The final sentence of the article may be invoked by States to construe an argument that they are entitled to postpone climate change measures until after economic development has been attained. Such a reading of the article is not compatible with the balanced approach advocated in the Rio+20 Outcome Document, and care should be taken that the right to development is not instrumentalized for this purpose.

[33] Orellana, Climate Change and The Right to Development 4 (2011), http://www.ciel.org/ Publications/CC_RightDev_Feb11.pdf.

The reference to the new international economic order serves as a reminder of the historical context in which the UN Commission on Human Rights started its work on the right to development. The UN General Assembly first recognized the right to development as a human right[34] only five years after the adoption of the Declaration on the Establishment of a New International Economic Order (NIEO).[35]

Although the NIEO Declaration was adopted without a vote, its provisions "were never fully accepted or implemented by developed nations,"[36] and the terminology of the new international economic order has largely fallen into disuse. The Rio Declaration on Environment and Development refers to "a supportive and open international economic system that would lead to economic growth and sustainable development in all countries."[37]

This is not to say, however that the concerns of developing countries about global obstacles beyond the responsibility of domestic States to the realization of the right to development have been alleviated. In recent discussions on the right to development, the Non-Aligned Movement argued that such obstacles lie in the malfunctioning of the international economic, financial and political systems, including the lack of democracy in global decision-making.[38] What was required was "a more fair and just system governing trade, foreign direct investment, migration, intellectual property, flow of capital and labor." The High-Level Task Force referred to the unjust structures of the global economy that must be addressed through

---

[34] *See* UN General Assembly Resolution 34/36 art.8, 23 November 1979. References to the need to create a global enabling environment for human rights predate the new international economic order, as is evident from art. 28 of the Universal Declaration of Human Rights: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

[35] UN General Assembly Resolution 3201 (S-VI), A/RES/S-6/3201, 1 May 1974.

[36] RUMU SARKAR, INTERNATIONAL DEVELOPMENT LAW 214 (2009).

[37] Rio Declaration on the Environment and Development principle 12, June 14, 1992, 31 I.L.M. 874.

[38] Submission in follow-up to HRC Resolution 25/15, The Right to Development, by Egypt on behalf of the Non-Aligned Movement, http://www.ohchr.org/EN/Issues/Development/Pages/12thSession.aspx. *Cf.* Rio+20 Summit Outcome Document, calling for "the full and effective participation of all countries, in particular developing countries, in global decision-making." *See* General Assembly Resolution 66/288 Annex ¶19, A/RES/66/288, 27 July 2012.

genuine development agendas, that is, negotiated and agreed modifications in terms of trade, investment and aid.[39]

Recent attempts at the Human Rights Council to address aspects of a global enabling environment conducive to the right to development include the Guiding Principles on Foreign Debt and Human Rights[40] and the Guiding Principles on Human Rights Impact Assessments of Trade and Investment.[41] UNCTAD has also produced useful work dealing with the impact of the global economic system on developing countries, although the human rights dimension is largely absent or implicit at best. In 2010, UNCTAD proposed a 'new international development architecture' for the least development countries.[42] The concept refers to the need for "a new set of formal and informal institutions, rules and norms, including incentives, standards and processes, which would shape international economic relations in a way that is conducive to sustained and inclusive development" in least developed countries.[43] In order to achieve this objective, the report proposes reforms in the international financial architecture, the multilateral trade regime, the international commodity policy, the international knowledge architecture, and in the regime on climate change.

In 2012 UNCTAD launched an Investment Policy Framework for Sustainable Development in order to support "new-generation investment policies that focus on inclusive growth and sustainable development."[44] The purpose of such investment policies is "to create synergies with wider economic development aims or industrial policies and integration in development strategies; foster responsible investor behavior and incorporate principles of corporate social responsibility (CSR); and ensure policy effectiveness in the design, implementation and institutional environment within which investment policies operate."[45]

---

[39] A/HRC/15/WG.2/TF/2/Add.1, 25 March 2010, ¶ 82.
[40] A/HRC/20/23, 10 April 2011, ¶ 9-20. The Guiding Principles were endorsed by the Human Rights Council, but opposed by developed States. *See* Human Rights Council Resolution A/HRC/RES/20/10, 5 July 2012, adopted by a recorded vote of 31 to 11, with 5 abstentions.
[41] A/HRC/19/59/Add.5, 19 December 2011.
[42] UNCTAD, THE LEAST DEVELOPED COUNTRIES REPORT: TOWARDS A NEW INTERNATIONAL DEVELOPMENT ARCHITECTURE FOR LDCS (2010).
[43] *Id.*
[44] UNCTAD, INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT (2012) http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf.
[45] *Id.* at iii.

The report promotes a balanced approach between investment liberalization and promotion and "the need to protect people and the environment."[46] Efforts to improve the investment climate should not lead to a lowering of regulatory standards on social or environmental issues.[47] The concern is expressed that international investment agreements should not unduly constrain "national economic development policymaking."[48] In the context of the UN Declaration, international investment agreements should by analogy leave sufficient national policy space open to allow the domestic of realization of the right to development.

V. Gender Equality and the Empowerment of Women

Art. 8(1) of the Declaration on the Right to Development calls for effective measures to ensure that women have an active role in the development process. Subsequent general international instruments,[49] such as the Millennium Declaration[50] and the Rio+20 Outcome Document[51] use the more specific formula of promoting gender equality and empowerment of women. Gender refers to the socially constructed roles between men and women. As these roles tend to be unequal, empowerment of women through women's rights is vital to achieve equality.

Article 19 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[52] contains a women's right to

---

[46] *Id*. at 8.
[47] *Id*. at 13.
[48] *Id*. at 7.
[49] Numerous UN documents specifically target the rights of women and girls, including their rights in development. Key documents include the Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979; General Assembly Resolution 34/180, Declaration on the Elimination of Violence against Women, A/RES/48/104, 20 December 1993; Beijing Declaration and Platform of Action adopted at the Fourth World Conference on Women, A/CONF.177/20, 15 September 1995.
[50] Millennium Development Goal 3 is "to promote gender equality and empower women." *See* http://www.undp.org/content/undp/en/home/mdgoverview/mdg_goals/mdg3. The Millennium Declaration targets education as the key driver to achieve these aims. *See* UN General Assembly Resolution 55/2 ¶19, 8 September 2000.
[51] General Assembly Resolution 66/288 Annex ¶¶31, 45, A/RES/66/288, 27 July 2012 (on the leadership role of women).
[52] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003.

sustainable development that may serve as a source of inspiration for a current interpretation of the Declaration's provision. The article requires that States introduce the gender perspective in national development planning procedures; ensure participation of women at all levels and stages of development policies and programs; promote women's access to and control over productive resources such as land and guarantee their right to property; promote women's access to credit, training, skills development and extension services; take into account indicators of human development specifically relating to women in the elaboration of development policies and programs; and ensure that the negative effects of globalization and any adverse effects of the implementation of trade and economic policies and programs are reduced to the minimum for women. An information note by the Office of the High Commissioner for Human Rights on the right to development and gender perceives of the right to development as

> [A] holistic concept, involving not just economic development, but also: improvement in the well-being of all women, including the realization of human rights and promotion of gender equality more broadly; absence of violence against women (all forms of violence, including structural and economic); and inclusion and participation of women in all aspects of the development process from planning to outcome.[53]

VI. Issues on The Horizon

Some of the more innovative aspects of the writings of Arjun Sengupta on the right to development have not been taken up fully in subsequent legislative and policy debates. These aspects include, first, the emphasis on mutuality of obligations, and, secondly, the notion of shared responsibility by a variety of agents for the implementation of the right to development.

Arjun Sengupta proposed giving meaning to the international dimension of the right to development through the conclusion of development compacts. Development compacts would consist of mutual commitments by developing countries and donors, supported by

[53] *See* OHCHR, The Right to Development and Gender, http://www.ohchr.org/Documents/Issues/Development/Infonote_RtD_and_Gender.pdf.

international institutions, to achieve aspects of the right to development. In Sengupta's view, the monitoring of the obligations entered into by the developing countries as part of the development compact should be undertaken primarily by the developing countries themselves through the establishment in each country of an independent national human rights commission.[54]

The idea of development compacts for the right to development, although inherently attractive, was not taken up in practice. The emphasis on mutuality of State obligations in the context of the right to development nevertheless remains important. Mutual accountability is one of the five core pillars in the OECD Paris Declaration on Aid Effectiveness.[55] The concept was included in the Paris Declaration in order to signal a move away from the traditional one-way donor to recipient accountability towards a contractual approach, where each party is understood to have obligations, and where mutual progress is jointly assessed. Mutual accountability also has a broader significance, as:

> [A] process through which commitment to, and ownership of, shared agendas is created and reinforced by: building trust and understanding; shifting incentives towards results in achievement of shared objectives; embedding common values; deepening responsibilities and strengthening partnership; and openness to external scrutiny for assessing results in relation to goals.[56]

The emphasis on mutual obligations creates a bias in favor of joint action. It suggests that the measures needed to realize the right to development are of the type that normally requires international cooperation. Bi- or multi- lateral solutions based on international cooperation and consensus are the most effective way to tackle a problem of a global nature, such as development. In any case, the implication is that States should refrain from unilateral economic, financial or trade measures

---

[54] Arjun Sengupta, *supra* note 1 at 880-82.

[55] Paris Declaration on Aid Effectiveness ¶¶ 47-50, March 2, 2005, http://www.oecd.org/dac/effectiveness/parisdeclarationandaccraagendaforaction.htm

[56] Droop, Isenman & Mlalazi, OECD Paris Declaration on Aid Effectiveness: Study of Existing Mechanisms to Promote Mutual Accountability between Donor and Partner Countries at the International Level 10 (2008), http://www.oecd.org/dac/effectiveness/ 43163465.pdf.

that impede the full achievement of the right to development.

Joint action by States for the realization of shared objectives belongs to the realm of classic (i.e. non-human rights) public international law. From a human rights perspective, the acknowledgment of the relevance of traditional inter-State reciprocal mutual obligations for the realization of human rights is a novelty that adds value to the current international human rights regime. However, since the purpose of such inter-State obligations is the realization of the right to development, mutual obligations need to be complemented by a mechanism for ensuring accountability of the partnership bound by mutual obligations *to the holders* of the right to development, i.e. to individuals and peoples.

In his writings, Arjun Sengupta also looked beyond the horizon of State responsibility. In his view, recognizing the right to development as a human right implied that this was a "norm of action for the people, the institution or the state and international community on which the claim for the right is made."[57] Multiple agents could have different kinds of obligations related to the right to development.[58] When the idea of a human right to development was originally launched in the seventies,[59] Karel Vasak and Keba M'Baye already emphasized the need for the involvement of a variety of actors in the realization of the right to development. In Vasak's view, the active holders of the right to development were individuals, States and also sub-national groups such as local collectivities and national, ethnic and linguistic communities. The duty bearers included not only territorially responsible States but the international community as a whole. The desired effect was to humanise the international economic order. Only if all actors on the social scene participated both as holders and duty bearers would the objective be realised.

Today, adequate human rights protection in a context of economic globalization requires that 'every organ of society' that is involved in human rights abuses should accept accountability – an idea that can be traced back to the preamble of the Universal Declaration of Human Rights.

[57] Arjun Sengupta, *supra note* 1 at 845.
[58] Arjun Sengupta, *supra note* 1 at 856.
[59] Karel Vasak, *Le droit international des droits de l'homme*. 51 REVUE DES DROITS DE L'HOMME 43-51 (1972), Keba M'Baye, *Le droit au développement comme un droit de l'homme*. 51 REVUE DES DROITS DE L'HOMME 505-534 (1972).

International development efforts have for a long time not been the sole province of States; a variety of agents have contributed to the global development effort. Consequently, a holistic approach to the right to development requires the involvement of non-State actors.

In this context, it may be useful to conceive of the realization of the right to development as a common concern of humanity. As Kiss and Shelton explain, the international concept of common concern does not connote specific rules and obligations, but establishes the general legal basis for the concerned community to act.[60] Designating the right to development as a common concern of humanity implies that the realization of the right is not only a concern of the primarily responsible State exercising jurisdiction, but of the international community as a whole, i.e. of all States and non-State actors that together make up humanity. States and non-State actors are conceived of as a community that strives towards the realization of common aims that go beyond the minimum consensus that can be achieved through the "accidental" ad hoc convergence of national interests of States.

In conclusion, a potential, but largely unchartered value of the right to development is to complement the current human rights regime by rules going beyond individual State responsibility, and taking inspiration from principles derived from international development efforts, such as mutual accountability (donors and partners are accountable for development results), alignment of policies among partner countries (donor countries align behind policy objectives set by developing countries), and inclusive partnerships (full participation of State and non-State actors). The focus on individual State responsibility in current human rights treaty law prevents the integration of human rights into the international development effort. It also prevents international human rights law from delivering on its promise of protection to those adversely affected by globalization.

[60] ALEXANDRE KISS & DINAH SHELTON, GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW 14 (2007).

MORAL AND ETHICAL ISSUES CONFRONTING STUDENTS' LEGAL AID CLINICS IN THE OUTREACH OF LEGAL SERVICES TO THE RESOURCES-LESS AND THE POOR

*B.B. Pande**

Right of access to justice and legal aid is a constitutionally recognized right in India. However, this right remains woefully under-enforced. Various impediments have marred the successful implementation of this right for the benefit of resource-less access-seeking sections of the society. How can the legal academia respond to this challenge? Legal Aid Clinics located in law schools and law faculties offer one solution. This article explores concerns, challenges and opportunities in setting up and delivering legal aid services though law school legal aid clinics. The article offers insights on these issues by drawing upon the personal experiences of the author at the Delhi University Law Faculty Legal Aid Clinic.

* Visiting Professor of Law, Dr. Ram Manohar Lohiya National Law University, Lucknow.

INTRODUCTION

Though the Indian legal system formally recognizes a right to access to justice, legal aid to all, and a special deal for access seekers who are poor, in reality such a well-meaning 'right' means very little to the large bulk of the resource-less and poor population. This is because of diverse reasons: first, the inadequate and inappropriately organized government legal service delivery regime at the National, State, District and Taluka levels is hardly geared to cope with the challenges of the vast legal service need; second, even where some kind of organizational set-up is in place, the manipulative design of the large army of 'access blockers' and lack of initiative on the part of access seekers keeps many out of the legal access net; third, there is a lack of genuine NGO/CSO support for the cause of legal services delivery; and fourth, despite a much better appreciation of the theoretical basis of the right of access to justice amongst law teachers and students, the structuring of legal education is hardly conducive to a meaningful deliberation on the actual delivery of this 'right.' Furthermore, legal academicians still remain insufficiently motivated to be partners in the delivery of justice to the resource-less and the poor.

These reasons pose irreconcilable riddles especially for academicians - law teachers and students - who read, teach and learn in the classroom about the nuances of the right to legal access, while remaining constantly unaware of 'right less' reality prevailing 'outside.' What are the moral and ethical justifications for theorizing about a 'right' that scarcely exists at the level of reality? How do those responsible for the delivery of this 'right' actually respond to this disjuncture? Should law teachers and students remain neutral and detached from this crisis within the system? Can the idealism and energies of law teachers and students be utilized to strengthen the existing legal service delivery system? How would the law teacher and student justice delivery initiatives impact the overall legal system? How can the law teacher and student initiatives be best integrated in the legal education structure?[1] In the following pages, an effort is made to address the

[1] *See* Legal Services Authority Act, 1987 § 4(k) (This section has given the responsibility of guiding and supervising the establishment and working of legal services clinics in Universities, law colleges and other institutions to the Central Legal Services Authority); National Legal Services Authority (Legal Aid Clinics) Regulations, 2011 (The Regulation envisages the integration of law schools into the legal services mainstream. But it is not clear whether the model of integration proposed by the Regulation would be able to achieve the required breakthrough).

aforesaid riddles in light of five decades of working of legal aid clinics in some of the leading law faculties/law schools of India. The focus is mainly on the Law Faculty Legal Aid Clinic, Delhi University on the basis of over four decades of personal experience of the author.

I. Two Ideas Underlying the Creation of Legal Aid Clinics

Legal Aid Clinics in law schools are inspired by two distinct yet overlapping ideas, namely, (a) clinical legal education; and (b) legal aid. The clinical legal education idea relates to a method of law teaching that lays emphasis on experiential learning of law by observing it in action. Clinical legal education is defined by Dr. Uphoff "as a teaching methodology by competent and experienced educators who attempt through lectures, discussions, exercises and real experiences to help students learn about interplay between theory and practice and gain the skills and values they need if they are to become competent lawyers."[2] The idea of clinical legal education was introduced in Indian legal education in the 1960s through the case method of law teaching along the lines of some of the leading U.S. law schools. The clinical legal education method was neither particularly law-subject-centric nor specifically client oriented. Almost all law subjects such as Criminal Law, Matrimonial Law, Rent Control Law, Company Law, Contract Law, Tort Law, etc., can be taught clinically. Similarly, clinical legal education teaches students to share the experiences of the clients involved in commercial, matrimonial disputes, accused and complainants/victims subject to criminal cases, etc. Such a neutral and skill-oriented perception ideally suited the Bar Council of India's much talked about legal education reform in 1997,[3] that led to the introduction of four compulsory practical training subjects in the L.L.B. curriculum, namely, (i) Moot Court; (ii) Drafting, Pleading and Conveyancing; (iii) Professional Ethics; and (iv) Public Interest Lawyering, Legal Aid and Paralegal Services. The aforesaid practical training subjects did have a strong lawyering skill and professional value component, but a weak 'justice to client' component that could expose law students to the raw realities of law in action.

[2] Rodney J. Uphoff, *Why In-House Live Client Clinics Won't Work in Romania: Confessions of a Clinical Educator,* 6 Clinical L. Rev. 315, 328 (2000).
[3] Bar Council of India Circular on Clinical Legal Education, 1997, No. 4 of 1997.

In contrast to the idea of clinical legal education, the legal aid idea is premised primarily on the delivery of legal services to the poor and resource-less who are not otherwise in a position to secure the right of access to justice. The function of delivery of justice is performed by legal aid clinics set up in law schools. The very idea of a law school legal aid clinic also originated in U.S. law schools to serve the twin needs of clinical legal education as well as for setting off the legal services handicaps faced by the resource-less and the poor. The leading Indian law faculties/law schools had come under the influence of U.S. law schools in matters of course content and teaching methodology since 1960. It was therefore natural for the idea of the legal aid clinic to also catch their imagination. The Faculty of Law, University of Delhi and the Banaras Law School were amongst the first in North India to set-up legal aid clinics. However, unlike clinical legal education that had become much better integrated into the structure of Indian legal education, the legal aid clinic idea received only lukewarm integration. As a result, even today, most of the law faculties/law schools have either not established legal aid clinics or have set up clinics that are non-functional or at best partially functional.

II. Diversity in the Models of Legal Aid Clinics

From a sporadic beginning in the 1960s, the idea of legal aid clinics in law faculties/law schools caught on in 1980s and 1990s. Since such clinics were neither set up under any Central or State legislation nor designed to follow any standardized model, we can find great variation in their objectives, functions, structures and funding sources. Most legal aid clinics are set up pursuant to an ad-hoc decision of the school authorities. The usual pattern is to constitute a Legal Aid Committee comprising of interested law teachers, professional lawyers and law student volunteers. The Committee performs the key function of deciding the activities to be undertaken, format of delivery of legal services and deployment of manpower for the day-to-day running of the clinics. Most law faculties/law schools prefer indoor clinics that are located in the college premises and operate on fixed days and timings. Such indoor clinics expect clients to visit on an appointed day and time with a view to discussing their legal grievances with student volunteers and lawyers. After hearing their grievances, they are either counseled or advised or asked to go in for a negotiated settlement with the

other party (which requires the legal aid clinic to summon the other party to visit the clinic on a fixed day and time for negotiations) or to go in for litigation under the supervision of a legal aid lawyer assisted by student volunteers. Some law schools in Goa and Maharashtra have set up legal aid cells that settle disputes in rural and semi-urban regions on a regular basis. In addition to legal aid cells, the clinics also organize legal awareness camps and legal literacy melas in rural regions and slum settlements, where most of the legally illiterate are located. Occasional legal literacy camps and melas have inspired some of the legal aid organizers to set up outdoor legal aid clinics that, unlike the reactive indoor clinics, would be able to take a proactive approach to legal aid by reaching out to critical legal aid areas and needy parties. Such outdoor legal aid clinics are ideally suited to extend legal aid to prisoners (who are in prisons as undertrials and convicts) and beggars and destitutes (under detention in the poor house for trial under the Beggary Prevention laws).

Any move in the direction of bringing about some kind of uniformity or standardization in the model of legal aid clinic requires one to address the following critical issues:

i. Funding of Legal Aid Clinics: Most law faculties/law schools are worried about the issue of funding of legal aid clinics. In the existing scheme, clinics are funded either through ad-hoc grants from the University Grants Commission (UGC), grants from the National or State Human Rights Commissions (NHRC/SHRC), Students' Development Fund or donations from public spirited lawyers. Clinics require funds for stationery, paperwork and postal expenses, transport to courts and lawyers' chambers for the student volunteers, transport charges for the lawyers to courts/prisons/observation homes/reception-cum-classification centres and legal aid lawyer fees; to name a few. Extending the activities of legal aid clinics to paralegal and legal awareness requires additional expenses incurred in contacting relatives and friends to stand as surety and ensure safe custody after release. Therefore, definite funding sources are needed before expecting the law faculties/law schools to set-up clinics on a mandatory basis.

ii. Voluntary or Compulsory Membership of the Legal Aid Clinic: In most of the law faculties/law schools, the membership of a legal aid

committee is voluntary. Students are permitted to opt to participate either in debates and seminars, or moot court or legal aid. Such a voluntary aspect takes care of a student's inclination and motivation without putting undue pressure on the organizers of the legal aid clinic to provide for a diversified agenda. Voluntarism also helps considerably in keeping the membership of the legal aid clinic to a manageable limit. But once we accept the legal aid clinic as the best vehicle for clinical legal education as well as for the delivery of legal aid, there will be pressure to make it compulsory for every student to become a member and participate in legal aid activity, which is bound to impact the existing legal aid system.

iii. Dependence on the Lawyers and the Legal Professionals: Often the organizers of legal aid clinics complain that students lose interest in legal aid activity because they are required to perform the clerical work of recording information and passing it over to the lawyer for the final decision on litigation and preparing the case file.

It is true that every legal dispute and its resolution require input from different sources, but the law student need not be limited to a merely paralegal role. There are several processes, such as examining the case file, in which the legal aid volunteers can be involved. Our experience of law students' work in Patiala House Magistrates' Courts has been that out of thirty-five Magistrates' Courts, as many as thirty-two had no objection to students examining the case files of their clients and even filing bail bond applications. Actually, the essence of the law student's involvement in legal aid is to create new spaces for student volunteers that have hitherto remained unoccupied.

It may be useful here to refer to a recently published study by the Department of Justice, Government of India and the UNDP that has, for the first time, tried to evaluate the contribution of law school Legal Service Clinics in the context of access to justice for the marginalised consumers of justice.[4] Chapter III of the study has endeavoured to explore the reality of legal services clinics empirically by focusing on four main issues: approaches to legal aid, activities of legal aid, shortcomings in the law school clinic initiatives and challenges before the law school clinics. In

[4] DEP'T OF JUSTICE, GOVT. OF INDIA & U. N. DEVELOPMENT PROGRAMME, STUDY OF LAW SCHOOL BASED LEGAL SERVICES CLINICS (2011).

addition to these four issues, the study has focused on certain legal aid best practices in vogue in the seven 'Model Law Schools' and select foreign law schools. The study is based on a small sample of thirty-eight law schools and has arrived at certain conclusions that are focused on the shortcomings of, and challenges faced by, legal aid clinics. The study, the first of its kind in India, could have proved more useful if it had undertaken a better and more elaborate examination of the 'approach to legal aid' and 'activities of legal aid.' Such an examination is required because we are still at the stage of conceptualizing legal aid and devising the most appropriate model of legal aid for our law schools as these issues have much greater relevance for us today. The study has rightly concluded that the four top ranking reasons for the shortcomings in the performance of legal services clinics are: (a) lack of financial support; (b) restriction of faculty to practice; (c) absence of academic credit to students; and (d) legal aid not being a part of the workload of the faculty.[5] The study also brings up the heartening news that out of thirty-eight law schools clinics, thirty-seven opined that legal aid should be provided by students and thirty-two law school clinics opined that the students are capable of providing quality legal aid.[6] The study has in its findings strongly censured the National Law Schools for their unsatisfactory legal aid performance in these words:

> National Law Schools, which are termed as the premier institutions and the best schools for legal education in India, fare very poorly in providing legal aid to poor. Legal aid is neglected to the core in these Law Schools. Legal aid is not a compulsory component in any of the National Law Schools. As result, very few students participate in the activities of the legal aid, if any. Considering the reputation, resources and the support they receive from the public exchequer, their performance is dismal as far as legal aid is concerned.[7]

However, this study, which could have been path breaking in many respects, is flawed due to certain inherent limitations in its planning and vision. First, its focus on the seven low developmental indicator states (also known as the BIMARU states), where education, including legal education,

---

[5] *Id.* at 38.
[6] *Id.* at 40.
[7] *Id.* at 46.

is a low political and social priority activity, only gives a skewed picture of the legal aid reality. Instead, a choice of law schools from different regions of the country could have provided a more balanced picture of legal aid activity in the country. Second, the study seems to carry a myopic and unhistorical vision of students' legal aid movement in the country reflected in their finding that "[t]he Clinical movement in India came into shape due to the mandatory requirement from BCI (Bar Council of India). This was further strengthened by the directives from the State Legal Services Authority in some States like Rajasthan to start a Legal Aid Clinic."[8] Such a finding is at total variance with the reality which is that clinical legal education and legal aid was the result of the impact of American legal education on Indian law schools in the 1960s. Third, the study has been outright partisan in the selection of seven 'Model Law Schools' for the enumeration of legal aid best practices. The Banaras Law School and the Delhi Law Faculty Legal Aid Programmes and legal aid clinics have been operational since the mid-1960s and have some very worthwhile legal aid experiences to share with other upcoming law schools. The organizers of the study and their collaborators have, by ignoring the legal aid experiences of the Banaras Law School and Delhi Law Faculty, not only given evidence of a lack of professionalism, but have also intentionally distorted the legal aid reality. How can legal aid practices of foreign law schools be more relevant and appropriate than those of the Banaras Law School and the Delhi Law Faculty for the resource-starved law schools focused on in the study?

III. Unique Role of Legal Aid Clinics in the Delivery of Legal Services

Keeping in mind the diversity and enormity of legal aid needs in our country, one would ordinarily suggest that an ideal legal aid delivery regime should be constituted by a meaningful integration of state legal service initiatives, NGO/CSO legal service initiatives, and law students' legal aid initiatives. However, in reality, there exists very little coordination and convergence between the diverse initiatives. The reasons for such a lack of coordination are many: first, the state legal services delivery initiatives suffer from a tendency to monopolize the efforts of all other agencies

[8] *Id.* at 45.

involved in the task; second, the NGOs/CSOs which are primarily concerned with other welfare programmes tend to relegate legal services delivery to a secondary level concern; and third, legal aid that may be against the police or the prisons or the legal services bureaucracy is viewed as an anti-establishment initiative and is considered too serious a business to be left exclusively to the legal aid clinics manned mostly by law student volunteers. Therefore, before thinking about any meaningful coordination or convergence, there is a need to appreciate the distinct features of the diverse legal services delivery initiatives. Particularly important for the present discussion is the law student/youth initiative that has hitherto remained under-explored and scarcely researched.

It may be interesting to note the essential distinction between the state-organized legal services delivery system and the legal services delivery system organized by NGOs/CSOs on the one hand, and the law student legal services system on the other hand. State-organized legal services are statutorily placed under the supervision of a sitting judge of the Supreme Court of India, a High Court, District Court or a Taluka Court, and supported by lawyers drawn from the concerned Bar Associations, whose understanding of the laws, procedures and practices remains unquestioned.[9] Much like the state-organized legal services, NGOs/CSOs also rely on lawyers and other legal professionals to extend legal services in selective cases that fit into their welfare programme priorities. However, in the case of NGOs/CSOs, lawyers play second fiddle to the directors, manager, or chief executive officers who, more often than not, are non-legal persons. But, by and large, both state-organized legal services and NGO-organized legal services are known to be stronger in respect of the technical or 'court-room law' component. However, at this point we need to remind ourselves that legal aid is not only legal litigation aid but is much more than that and includes within its sweep the activities associated with the creation of legal awareness and legal literacy, paralegal work and even law reform. Thus, student-centric legal aid, which may be weaker in respect of the technical law component, would be naturally strong in respect of other components. The value of the paralegal aspect of student legal aid was convincingly brought forth during the course of a Delhi Magistracy Compounding of Cases Project in late 1990s. The student volunteers' work, which involved

[9] Legal Services Authorities Act, 1987 § 3A, 8A, 9, 11A.

visiting the parties locked-up for petty crime cases whose trials were long pending and persuading them to compound their disputes by appearing before the appropriate court, was a strong testimony of youthful idealism and commitment to justice that only students' paralegal work can perform. The uniqueness of the student legal service initiative is brought home convincingly through the following real legal service experiences:

i. Unravelling the Mystery of 'Disturbing the System' in the Beggars Court: Initially, the student volunteers received excellent cooperation from the Social Welfare Ministry run Reception-cum-Classification Centre (RCC) staff and Beggars Court. The legal services required in the Beggars Court were simple and brief. Student volunteers interviewed persons detained under the Beggary Prevention Laws at the RCC and filed bail applications before the Magistrate of the Beggars Court. The bail application ended with a prayer for either being acquitted or released on bond under section 5(2) of the Act.[10] All cases of release, whether on acquittal or bond, led to a short and simple second proceeding relating to the return of Jama Telashi or the case properties such as personal clothing, watch, jewellery, money, etc. deposited at the time of first admission to the RCC. The smooth tempo of legal services in the Beggars Court was broken by a Magistrate's Order prohibiting student volunteers from visiting the RCC for picking up new cases. The reason for this abrupt disruption was that the students were 'disturbing the system.' Apprehending indiscipline of some sort, I had to pay an immediate visit to the Poor House Complex to have an audience with the Magistrate. I was told upon inquiry that the reason for the prohibition order was that the students were 'disturbing the system' by telling every detained person that he/she has a right to representation and a fair chance of release and that the student volunteers were there to get justice for all. The Magistrate tried to convince me that such irresponsible behaviour of the students 'disturbs the system.' I had previously been told by informal sources that in the name of the 'system,' the Social Welfare Department staff and the Court staff extracted a fixed sum of money from the relatives of detained persons. It took me little time to appreciate the mystery of 'disturbing the system.' I politely but firmly told the Magistrate that, "the students have been taught in their classroom exactly what they have told the detainees and if necessary we may have to

[10] Bombay Beggary Prevention Act, 1959 (as extended to NCT of Delhi in 1961).

take the matter to the Chief Justice of the High Court in this regard."

Thereafter, the Magistrate revoked the ban order.

ii. Teaching the Magistracy Ways to Enjoy their Duties: The Prison Lok Adalat had almost full attendance on the last Saturday of one December. Legal aid clinic volunteers had taken great pains, demonstrated by them not only agreeing to cover the whole day's Lok Adalat proceedings but also to read and prepare the cases of their clients in advance. Before the commencement of the Lok Adalat, the Chief Judicial Magistrate had enquired from the Magistrate (who had only forty-four cases in his court as against the one hundred and forty one cases in the court of the other Magistrate), "Would it be possible for you to dispose of these forty-four cases in the pre-lunch period of four hours?" The Magistrate had replied, "I will take twice that time today. I am enjoying performing my duty in the Lok Adalat this day." On further inquiry about the cause for taking more time, the Magistrate had replied, "The concern and commitment shown by the students who are willing to participate in the proceedings all day without proper food and rest to deliver justice to poor and helpless inmates has impressed me to no end. Why should we not spare more efforts and time to render better justice through the Lok Adalat as well?"

I realized that the student initiative was decisively transforming the quality of justice even in this ignored criminal justice arena.

IV. Sharing The Delhi Law Faculty Legal Aid Clinic Experiences

As mentioned earlier, Faculty of Law, Delhi University, was one of the pioneers in picking up some of the notable legal education experiments from U.S. law schools. In the 1960s, young faculty members were afforded the opportunity to visit law schools in the U.S. for training in teaching methodology by observing teaching in action. The U.S. law schools' legal aid clinic experiment inspired several young members of the staff to come forward and set up legal aid clinics in the Faculty of Law, Delhi University upon their return. The clinic was located in the faculty building and was assigned a room for receiving clients and space for an office. Clients would

visit the clinic on an appointed day for advice and counseling. The majority of cases that were brought before the clinic related to matrimonial disputes, tenancy disputes, service matters and industrial disputes. Since the idea of an educational institution taking initiatives in reaching out for ensuring access to justice to the resource-less and the poor was not something very usual, the media and broadcasting agencies were used to publicize the idea of legal aid clinics. In order to give wider publicity to the clinic, the setting up of legal aid camps in adjoining villages once or twice a year was made part of the action agenda. Since there was no fixed term and tenure of legal aid clinic members, there were periods of both intense activity as well as flux in the legal aid clinics run in the Faculty. Constituting a new Legal Aid Committee and appointing the Director/Convenor of the Committee remained the prerogative of the Dean of the Faculty, who enjoyed a tenure of three years. In 1976, the newly constituted Legal Aid Committee decided to give an outdoor orientation to the Faculty's legal aid activities. Giving such an outdoor orientation automatically led to the end of the indoor legal aid activities with a view to concentrating on reaching out directly to clients outside, thereby giving a proactive orientation to the legal aid idea. The following were some of the notable outdoor clinic programmes:

(a) The Beggars Court Legal Service Programme (1976-1979 and 2001-2005);
(b) The Prison Legal Service Programme (1995-97 and 1999-2001);
(c) The Delhi Slums and Jhuggi-Jhopri Cluster Legal Service Programme;
(d) Prison Lok Adalat Legal Services; and
(e) Compounding Cases Legal Services in Tees Hazari Courts.

It may be interesting to share certain experiences in light of two off beat legal services programmes, namely, (a) Legal Services in Beggars Courts; and (b) Legal Services in the Prisons.

A. Legal Services in the Beggars Court

Though the students of the Department of Social Work focused on the destitute and beggars for their social work field studies, legal aid services in the Beggars Court were rarely heard of in the Law Faculty in the early days. As a young law teacher, it was not difficult for me to imagine that trial in the

Beggars Court, the lowest category of criminal court which regulated the lives of some of the poorest in our society, would be an ideal yet the most ignored legal aid arena. The proposal for extending legal aid activities to the Beggars Court was hotly debated by the Law Faculty Legal Aid Committee in the first activity identification meeting and approval was accorded to the proposal very reluctantly. We learnt that the Beggars Court was open to the public, but the RCC, which was located in the Poor House complex, required permission for entry from the Directorate of Social Welfare. The first exploratory visit to the Poor House and the Beggars Court had set the stage for a serious and challenging legal service experience. At the end of the exploratory visit, the duty Magistrate told us curtly, "You are students and teachers coming from well-to-do families, therefore, to you, everything here would appear to be boring, even disgusting. I would advise you not to repeat your visit if you are looking for fun and excitement. But if you decide to come for service to the resource-less and the poor, there is no better place than this." Thereafter, for almost three years, every court day (twice a week) a member of the legal aid committee remained present to render legal services to the beggars. The services that we extended were extremely simple and short, comprising a bail application, simple argument denying the allegation of seeking alms in a public place or, in the alternative, giving an undertaking to the court to desist from begging if released on bond under section 5(2) of the Bombay Beggary Prevention Act of 1959.[11] After the case was over, an application for disposal of case property would be made. It did not take us long to realize that what appeared to us to be so simple may mean a father, a brother or a son to a wife; someone whose near and dear ones had been locked up in the Poor House without the vital support of legal services. The following incident at the Beggars Court one cold and heartless afternoon epitomizes the spirit beautifully.

The released beggar had weakly and meekly walked to us and had expressed profound gratitude for the kindness we had shown by rendering legal services to him. His demeanour reflected that he had fully accepted the low, the sinner self-images imposed by the law. For once I told him the whole truth, "Why do you feel ashamed? It is we who should feel ashamed for putting you in this state of multiple disadvantages. First, by not providing you the means that will keep you away from begging, and then by exposing you to this trouble of a formal stigmatization drama. Now, you

[11] Bombay Beggary Prevention Act, 1959 (as extended to NCT of Delhi in 1961).

have come to suffer a third disadvantages at my hand by accepting this myth that I have done you an obligation. Please do not."[12]

B. Legal Services in the Prison

Our experience of organizing extra-curricular activities for students has always been a mixed one. By and large the students welcome extra-curricular activities, primarily because it provides an opportunity of getting away from the routine and rut of the classroom. But their interest and involvement in field-centric or outdoor services and those activities that permit them to play 'adult roles' is always greater. This is the reason why prison legal services evoked considerable student interest. Since prisons are formal state institutions, which serve as custodial agencies even for the most serious criminals, legal aid in prisons required completing certain formalities like seeking permission from the Director General of Prisons and getting identity cards made for the student volunteers which were to be presented on every visit to the prison. The prison legal services programme was preceded by a briefing session on prison law and practice in which necessary information was imparted to the student volunteers. The legal services volunteers were placed in one of the three cells, namely, (i) the Prison Legal Literary Cell; (ii) the Prison Litigational Services Cell; and (iii) the Prison Paralegal Services Cell. The volunteers of each cell competed with the other Cells in launching their activities. While the Literacy Cell required conducting literary research and gathering feedback from the prisoners regarding legal awareness and literacy issues, the Paralegal Cell went ahead with the task of contacting the family members and friends of inmates to take necessary steps to get legal relief. The Litigational Services Cell, which gave an opportunity to the students to interact with both the prisoners and the courts, became the first choice for the maximum number of volunteers. Litigational Services started with the interview of undertrial prisoners selected by the prison authorities. The volunteers were instructed to select a few cases of petty offences that prima facie deserved immediate relief. In the Litigational Services Cell, the student volunteers were required to provide five kinds of Litigational Services:

---

[12] B.B. Pande, *Administration of Beggary Prevention Laws in India: A Legal Aid View Point*, 11 INT'L. J. SOC. L. 291, 303 (1983).

(a) Filing Bail applications in appropriate cases;
(b) Filing applications for rationalizing the conditions for the grant of Bail;
(c) Filing Personal Bond release applications;
(d) Filing application for expeditious trial; and
(e) Conducting trial advocacy with the permission of the court.

The prison legal services programme acquired a new sheen in 1999 when the National Human Rights Commission approved our proposal for a Pilot Project for students' legal services in prisons and also extended financial support for the same. The approval and support from the NHRC accorded credibility and prestige to the legal services programme, leading to a large number of student volunteers seeking membership. The Pilot Project provided unique insights into the prison institution to a large number of students and afforded them unlimited opportunity to extend legal services to prisoners in multiple ways. The valuable experiences of the project were compiled by students into a monograph titled 'Joy of First Release,' that contains the students' narration of the joy they derived upon learning that their efforts had led to the freedom of a stigmatized, unknown stranger; a prison inmate.

V. Integrating the Clinical Legal Education and Legal Aid Component into Legal Education

Legal education in India has increasingly assumed a theoretical character. Even the newly set up National Law Universities tend to teach law mainly in the classroom without much field exposure. I can still recall how a majority of teachers in the Delhi Law Faculty ruled out teaching law through experiential learning methods and how the case method of teaching was considered to be a very radical shift in legal education. The majority of faculty members argued that learning law outside the classroom was a time-consuming exercise and a distraction from the serious pursuit of knowledge. The Bar Council initiative which led to the introduction of compulsory practical training courses, as discussed earlier, was considered an effort to alter the theoretical character of legal education. But even those practical training courses, though handled by professional law teachers, remained at best classroom-based. Thus, legal education still awaits two

significant transformations, namely, (a) clinical legal education transformation; and (b) justice education transformation. While clinical education transformation would require integrating a field or experiential component in the teaching of even traditional subjects such as Criminal Law, Tort Law, Contract Law or Constitutional Law, justice transformation can happen only by underscoring the students' role in ensuring that the right of access to justice reaches the resource-less and the poor. Alan Norrie has tried to give a glimpse of this higher morality in his recent book:

> We are aware of social injustices that law perpetuates, which necessarily work their way into its own systems and practice., When the law seeks in its own terms to do justice, even on a terrain of injustice, when it moves back and forth between the antinomies which constitute it, does it not also march towards a justice that lies beyond it and that echoes inchoately within it? Might this not be the remnant of that expressive morality on which modernity was founded, but which was repressed by being channelled into the social forms through which human kind lives today.[13]

Unfortunately, the tradition of partnerships of law teachers and students in clinical legal education and justice education is still weak. Even the recent move of the Bar Council to introduce practical training courses, without any kind of tie-up with the ideal of access to justice, is likely to bypass any kind of real and meaningful change in legal education. Therefore, the need of the hour is to set up legal services clinics in all the law faculties/law schools and law universities compulsorily with a view to strengthening the clinical legal education and justice education component. Legal services clinics would have to be built into the legal education curriculum. Students' legal services clinic experience would need to be recognized and used as a learning base for future clinical legal education and justice education courses on a regular basis.

[13] ALAN NORRIE, LAW AND THE BEAUTIFUL SOUL 196 (2005).

SHAPING OF FUTURE JUDGES: TASKS, CHALLENGES AND STRATEGIES

*N.R. Madhava Menon**

Do judges need specific education and training in order to prepare them for the task of judging? Till recently, it was widely assumed that no such training was required. However, a change in this thinking is evident from the establishment of multiple judicial academies, including one at the national level, across the country. What should be the focus and content of judicial education imparted at these institutions? What value systems should these institutions try to inculcate? And who should be responsible for imparting judicial education? This article is addressed to these questions. It argues that judicial education should draw upon three sources to define the role of a judge, the social function of adjudication, and the concept of justice that judges should apply, viz., the structure and procedure of judicial systems introduced by the British; the ideas of justice and judging inspired by the traditions and culture of India's 2500 years of pluralist history; and, constitutional values including the Directive Principles. In particular the article emphasizes the need to constitutionalize and contextualize the task of judging, by highlighting the importance of constitutional values in the process of adjudication.

* Founder Director, National Judicial Academy, Bhopal; India Member, Advisory Board, Commonwealth Judicial Education Institute, Halifax, Canada.

INTRODUCTION

A few years ago, nobody believed, at least in India, that judges needed education and training before they were put on the job of adjudication of disputes and the administration of justice. Every lawyer with a certain period of experience at the Bar was considered good enough to assume the role of a judge, even in the highest court of the land. During the colonial period, members of the Indian civil services were also posted as judges, even without a law degree, possibly on the assumption that judging is a task which every person with a capacity to understand and reason can perform, given the adversarial setting and the procedural guidelines of adjudication. Today, on the contrary, very few people think that judges, like civil servants, can be selected and posted to preside over courts without preparing them for the tasks involved in the complex process of dispensing justice in a manner considered to be fair, just and reasonable not only by the litigants but also by the society at large.

What led to this transformation of perception on judging and how did the judiciary respond to the challenge? What goes into the making of a judge and are they universally the same? Is there any difference between judicial education and judicial training? Can the knowledge, skills, attitudes and ethics which a judge requires, be imparted in law schools and judicial academies? Is it true that only judges can train other judges? What is the status of judicial education and training today and does it promise a qualitative change in justicing in the future? These questions have seldom been addressed outside the judiciary till recently because of the popular belief that whoever sits on the judicial chair is a noble and enlightened individual who cannot be unfair or do anything but justice. Slowly there has been a realization that judges are also ordinary people sharing the attributes and habits of the same society in which they live. They too can go wrong if they are not professionalized as judges by education, training and such other methods of conditioning which justice demands in a given constitutional and social order.

I. CONCEPTIONS OF JUDGES, JUDGING, AND JUSTICE

Though there are some universal attributes shared by all judicial systems and cultures, the conceptions of judges, judging, and justice do assume varying complexions and characteristics based on traditions, historical experiences and constitutional philosophies. In feudal and imperialist societies, administration of justice was the privilege of the monarchy and nobody questioned the monarchy's wisdom or authority to sit in judgment on others. In the colonies of the imperialist powers, judging was a part of sovereign powers which the imperialist powers exercised according to their interests and as per the law that they chose to impose on the people of the colonies. What they decided was taken as just and whosoever was given that function was considered to be the judge to be obeyed without question. In indigenous cultures, the function was assigned to some groups based on beliefs and traditions where religion and folklore played a significant role. India, which represented a mixture of all the above streams of thoughts and practices at the time of Independence, decided to adopt the English judicial institutions and systems, appropriately modified by the values of the freedom movement articulated in the Republican Constitution of 1950. As such, any inquiry on conceptions of judges, judging and justice in India has to be based on the Indian Constitution and interpreted in the context of the country's history, culture and traditions.

In the above context, one would suggest three independent approaches to appreciate the status of judges, judging and justice in the contemporary Indian society. First, the role and functions of judges have to be drawn from the structure and procedure of the judicial systems introduced by the British when they introduced the modern judicial apparatus as a shadow of the English system. Second, the ideas of justice and judging should be informed by the native traditions and composite culture of India's 2500 years of pluralist history. Finally, judging in post-Constitution India has to be inspired and guided by constitutional values including the Directive Principles which are declared as "fundamental in the governance of the country."[1] Judicial education and training, therefore, have to be organized in such a way that the future judges imbibe the knowledge and sentiments of all three strands of judicial history and acquire the capacities to discharge

[1] INDIA CONST. art. 37.

judicial functions in a manner appropriate to changing conditions and demands. Furthermore, with revolutionary changes happening in science and technology, any institution of governance, including the judiciary, has necessarily to adopt them to manage affairs efficiently for the convenience of the consumers of justice. This is, indeed, the challenge before judicial educators who generally come from judicial ranks with a generally conservative outlook and obsession for precedents even when they are of colonial vintage. Therefore, judicial education should start with educating the educators or training the trainers with clear objectives on the outcomes and with an open mind on strategies, materials and methods. An inclination to critique the existing methods of justicing and to appreciate its weaknesses will do a lot of good even if better alternatives are not immediately available to replace established procedures. Independence of the judiciary guaranteed by the Constitution is also intended to give the autonomy and flexibility to judges themselves to decide the standards and approaches which they consider appropriate to achieve the best outcomes.

Colonial notions of justice and judging are reflected in the provisions of the Civil Procedure Code ("C.P.C"), the Criminal Procedure Code ("Cr.P.C.") and the Evidence Act enacted 150 years ago. They spell out the role and functions of the judges as was perceived by the British for Indians in the 19th century. If judges literally follow those norms and procedures without understanding the context in which they were evolved, it is likely that injustice might result as was noticed by the Indian Supreme Court in matters regarding arrest, bail, detention, sentencing etc. The very structure of adversarial adjudication is found to be counter-productive to fair trial in modern times. Even in England the adverse effects of adversarial proceedings are sought to be moderated by recourse to juries in criminal trials and alternate dispute resolution methods in civil cases. Many features of the inquisitorial proceedings of the civil law system are also being integrated into the common law system to produce a more balanced trial procedure in European and American courts. In India, the Parliament has amended the Civil Procedure Code and the Criminal Procedure Code several times in the recent past with similar intentions though they have not made much of a difference in the way proceedings are conducted in courts. The question of whether this lack of transformation is because of inadequate orientation and training needs to be examined by those in charge of judicial administration and appointment of judges.

A second dimension to the popular conception of justice and judging is to be found in Indian history and culture. The concept of 'Dharma' is variously interpreted not only to convey notions of justice and standards of behaviour, but also how 'neeti' and 'nyay' are to be administered by those in power. Judges are supposed to be free from bias and are themselves to be subjected to the rule of law and ethical conduct, much above that intended for ordinary men. In small disputes, the village panchayats presided over by elders were to make collective decisions on the basis of evidence and fair procedures. The method was more conciliatory and less adversarial. The process was transparent and participatory because of which people accepted judgments voluntarily, without even resorting to appeals to a higher authority. The system is still prevalent in rural India as it carries legitimacy and is cheap, quick and efficacious. In tribal areas, native judicial systems are constitutionally protected and they constitute the mainstream channel for the administration of justice even today. Here again, the question is how much of these indigenous institutions and practices need to be invoked by the formal system transplanted from England in order to make justice and judging socially relevant to Indian conditions and aspirations. Can judicial education and training play a useful role in this regard?

The third and most significant question to be addressed by judicial educators in the present context is the impact of constitutional values and Directive Principles on the concepts of justice and justicing in contemporary times and how judges can be enabled to discharge their role through institutionalized pre-service education and training. Do democracy and republicanism make a difference in the matter of judging disputes between individuals and between individuals and the State? How does the value of equality of status and of opportunity impact the judicial processes particularly in a society steeped in inequality and discrimination based on status, income, caste, religion and gender? What is the effect of secularism and minority rights on judicial proceedings particularly in religious disputes? How far does the judicially non-enforceable Directive Principles of State Policy bind judicial thinking, attitudes and interpretations vis-a-vis socio-economic rights and issues of social justice?

While the superior courts have invoked Fundamental Rights and Directive Principles to illuminate the grey areas of civil and criminal

jurisprudence, the subordinate courts seem to be not really involved in social transformation through the rule of law as envisaged by the Constitution. Precedent-bound, procedure-constrained trial judges who are over-worked and under-paid seem to be disposing of cases in ways no different from what their counterparts were doing before the Constitution. This is the tragedy of the administration of justice for the common man who was promised equal justice - social justice guaranteeing basic human rights. Public interest litigation and judicial activism based on the philosophy of equal justice did generate hopes among those who were at the receiving end of a discriminatory social order sustained by a legal system which favoured the rich and the powerful irrespective of justice and fairness. The challenge before judicial educators again is how this new philosophy of social justice promised by the Constitution can be used to change old mindsets and ways of doing justice so that the trial courts, which dispense justice to the common man, are as much imbued by constitutional values and promises as the higher courts in the country.

The arguments that emerge from the discussion above are *first*, that judicial education is serious business with a definite ideological purpose and accountability; *second*, that judging cannot be a business as usual; and, *third*, that the emphasis on training ought to be on fresh recruits to the judiciary, particularly at the trial level who dispense justice to over ninety percent of litigants. In the absence of a clear policy on judicial education and training, the tasks and challenges before the judiciary are complex and numerous which judicial educators will have to discuss while proposing programmes and strategies therefor.

II. Nature and Scope of Judicial Education and Training

Education is defined as systematic instruction to develop capacities for rational thinking, acceptable behaviour and moral decision making. It is a continuing process of integrating knowledge with experience and moulding attitudes and conduct accordingly. Educators will have to decide the nature and scope of knowledge which a future judge needs to have, for dispensing justice of the type discussed earlier, keeping in mind what an average law graduate would have acquired in the course of his college education.

There can be different levels of judicial education. Imparting updated information on statutes and cases which enable the judge to perform effectively is the first level of judicial education. It is more information-oriented and less of creative thinking. When education aims to go behind the laws and inquire into the shift in philosophy and organizational objectives, one moves into the domain of strategic and creative thinking. One needs to bring in several related subjects outside statutes and cases to serve the purpose of this advanced level of judicial education. At this level, the judge is enabled to exercise judicial discretion responsibly to advance the cause of justice beyond the immediate goal of dispute resolution. The judge becomes a creative artist with a broader perspective on the role of law in society and in development. New jurisprudence emerges in this process and law is enabled to respond to changes, bridging the gap between law and justice.

At another level, judicial education aims to bring about attitudinal and behavioural changes to enhance impartiality and accountability. This is a subtle process which demands ingenuity and imagination on the part of judicial educators in setting the context, assembling the relevant reading materials to challenge the judicial mind and employing an appropriate environment for adult learning. This is the most difficult part of judicial education for which there is no standardized agenda or method. It depends on the mindset, value-system and prior background of each judge participating in the programme and the flexibility in the activities to suit every individual in the group. This is what professionalization is about, which is the cumulative result of education, environment, motivation and commitment. Ultimately, education is about broadening and deepening of the thought and behavioural patterns which is a continuing process all through life. Institutionalized instruction in judicial academies can only be a catalyst in the shaping of the judicial mind in the desired direction.

Educational psychologists talk about different learning objectives, dividing them into three major domains:[2] the cognitive domain, the affective domain and the psycho-motor domain. (According to Bloom, the cognitive domain includes objectives which deal with the recall or recognition of knowledge and the development of intellectual abilities and

[2] BENJAMIN BLOOM, TAXONOMY OF EDUCATIONAL OBJECTIVES (2d. ed., 1984).

skills.[3] Here the learner acquires the learning objectives of knowledge, comprehension, application, analysis, synthesis and evaluation. If judicial education programmes can help achieve these objectives, it would meet the needs of basic competence for beginners in judicial services.[4]

In the affective domain of learning objectives are included those which describe changes in interests, attitudes and values, and the development of appreciations and innovativeness in thought and action. This is what advanced programmes in continuing judicial education should aim at. In this domain, the learner acquires the ability to address complex issues, internalizes a value system and attitudes based on it and adopts the desired behaviour with competence and professionalism. Ordinarily, the affective domain is less familiar to educators as compared to the cognitive domain and most programmes end up with the latter.

In contrast to education, training is intended to get the trainee to conform to a certain pattern of behaviour, almost a mechanical pre-determined style of conduct. It is more vocational than intellectual. The functions of a judge involves docket and court management, fact ascertainment, issue settlement, framing of charges, appreciation of different types of evidence, finding the law and applying to facts, judgment writing and a variety of related activities for successful conduct of judicial proceedings. Many of these functions are skills-based and are repetitive in nature which a judge can pick up while at work. Of course, the same can also be taught in judicial academies in simulated situations. Further, manuals and judicial handbooks can help judges learn these functions by themselves. In this regard, institutionalized training can instil a certain degree of confidence in a new entrant to the profession and give him the ability to face new situations as they arise. Risk management is an art and a science which every professional has to learn before entering into professional roles and law college learning is inadequate for this purpose. By and large, it is this limited object that is intended by training which is best given on the job rather than in judicial academies.

The function of a judge was described by the former Chief Justice of India, J.S. Verma as "reading the law so as to achieve justice." According to

[3] *Id*.
[4] *Id*.

him "Law + x = Justice," where "x" is the input of the judge. In a thought-provoking note, a former Director of the National Judicial Academy observed that in gathering appropriate inputs, the judge may be helped by the following: (i) knowledge about the normative vision, values, standards, rights and duties of the Constitution; (ii) how to concretize concepts of quality and responsive justice in specific circumstances; (iii) analysing acquisition of capacity to the social context in which issues need to be considered, the policy goals underlying the laws and the social impact of alternative choices available to courts; (iv) binding judicial precedents; (v) skills of judicial reasoning including approaches to appreciation of different types of evidence and interpretation of statutes; (vi) methods to enhance fairness and efficiency in managing court procedures; and (vii) ways to make courts more user-friendly and accessible.[5] The function of judicial academies is to design and conduct programmes aimed to assist judges acquire inputs essential to convert facts and law into justice.[6]

III. JUDGING: ROLE OF CONSTITUTIONAL VALUES/PRINCIPLES AND SOCIAL CONTEXT

A significant event which ought to have made a big difference in the role and functioning of the judiciary was the adoption of a democratic, secular, socialist Constitution in 1950 declaring certain values and principles as fundamental in the governance of the country.[7] A deep understanding of the constitutional goals, philosophies, values and principles as reflected in the Preamble, Fundamental Rights, Fundamental Duties and Directive Principles all of a sudden became the key new element in judging and governance. Constitutionalism in a multi-cultural, democratic society with a federal polity posed difficult problems to those exercising public power who were used to governance under a colonial regime,[8] more so, because the Constitution allowed the pre-independence laws and systems to be continued till they were amended or repealed.[9] The

[5] Note from G. Mohan Gopal, Director, National Judicial Academy, Judicial Education at NJA: Note for Resource Persons (2007) (on file with the author).

[6] Michael Kirby, *Modes of Appointment and Training of Judges — A Common Law Perspective*, 26 COMMONWEALTH L. BULL. 540 (2000).

[7] *See* GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: THE CORNERSTONE OF A NATION (2d ed., 1999).

[8] *Id*.

[9] INDIA CONST. art. 372.

challenge before judicial educators is to ensure that judges are enabled to appreciate the significance of the change brought about by a democratic constitution to judicial reasoning in individual cases coming before them. Judging, analytically speaking, involves formulation of the judge's own theory of justice in the context of the facts of the case and this is reflected in framing of issues, appreciation of evidence, judicial reasoning, etc. What is sought to be achieved by judicial education therefore is the cultivation of judicial reasoning around given constitutional values and principles and social expectations from the laws.[10] This is what Cardozo in his famous treatise, *Nature of the Judicial Process,* characterized as the "judicial method."[11] It is said to be the product of the judge's philosophy, his logic, his understanding of history, social reality, his sense of right and his perceptions of justice.[12]

IV. Social Context Judging: A Constitutional Imperative

'Social context' is another major input employed by the judge to make law serve the ends of justice. Contextual judging is the method employed by different judicial systems to moderate technicalities of procedure with the demands of justice.[13] Equity Courts in the past did serve such a purpose in England. Later judicial conscience was supposed to achieve the same purpose. Broadly speaking, the inquisitorial system prevailing in continental jurisdictions used 'social context judging' more widely as compared to the adversarial system with its heavy emphasis on technicalities of procedure and dependence on precedents. What seems to be happening today in the Common Law world is a convergence of the civil and common law systems tending to moderate the perceived excesses of "adversarial legalism."[14] It is happening more in the area of public law where newly adopted Constitutions are setting new human rights standards and justice goals for legislatures as well as the judiciary to follow in the

---

[10] Clifford Wallace, *Judicial Education and Training in Asia and the Pacific*, 21 Mich. J. Int'l L. 849 (2000).

[11] Benjamin N. Cardozo, The Nature of the Judicial Process (1921).

[12] *Id*.

[13] Carl Baar, *Social Action Litigation in India: The Operation and Limitations of the World's Most Active Judiciary*, 19 Pol. Stud. J. 140 (1990).

[14] *See* Robert A. Kagan, Adversarial Legalism: The American Way of Law (2003).

cause of justice. In private law, there are constant tensions experienced when the old and the new jurisprudence mediate to strike a balance which has legitimacy among all sections of the people. Family law in India based on personal laws of different religious communities is a good example of this process where contextual judging is increasingly being canvassed for equality and gender justice in matrimonial relations.

Many roads and by-lanes are available to a judge interested in 'social context judging.' For example, he may invoke principles of fairness and equality which are essential for dispensing justice. He may, in appropriate cases, accept legislative history and the mischief intended to be avoided by the law to reason his interpretation. He will use the power of appreciation of witness evidence in such a way as to remove possible disabilities attached to it with a view to ensure equality before law. After all, the testimony of a village Harijan girl cannot be read in the context of an educated urban girl. The judge may try to understand systemic disadvantages suffered by parties and seek the support of available empirical evidence for furthering the cause of substantive equality. To be able to do so, he may start by interrogating the assumptions and presumptions which according to him inhibit delivery of equal justice. He should be concerned with shifts in public policies and community expectations from courts; advances in scientific knowledge; power imbalances between the two parties and their possible consequences, etc. The judge should be prepared to work with other functionaries in the system (like child psychologists and family counsellors), who may have specialized knowledge which the legislature desired to be included within judicial decision-making.

Problem solving should be a dominant goal in 'social context judging' and this demands therapeutic approaches to the maximum extent that the law permits.[15] Thus perceived, every judge in the family court, juvenile court, environmental court, tribal court, court for matters of the disabled, court hearing conflict of law cases, etc., is typically to be a 'social context judge.' The core competence of such judges is equality consciousness and a willingness to respect diversity. Judging is not just deciding; it is strengthening social cohesion, pushing the development process, enabling co-existence of diversity, maintaining rule of law and legitimacy of

[15]Micheal S. King, *Therapeutic Jurisprudence's Challenge to the Judiciary*, www.uaf.edu/files/justice/King,-TJ's-Challenge-to-the-Judiciary.pdf.

governance. Contextual judging indeed helps to bridge the gap between law and life, between law and justice.[16]

Determination of facts and law as well as judicial reasoning is influenced by social context. As such, social context education is a key factor in judicial education and training. Emphasis on social context in judicial education helps judges to understand the nature of social reality in the Indian setting and the impact of all types of disadvantages and disabilities on socio-cultural issues which shape the attitudes of litigants and witnesses. Such an approach would encourage judges to examine their own assumptions in this regard and help them avoid stereotyping. 'Social context judging' also provides judges with jurisprudential and analytical tools to examine the objects of legislations and underlying concepts in the light of constitutional imperatives.[17]

As the social context keeps changing, judicial education in this respect has to be a continuing process designed to help the judge to grasp the changed context. Multi-cultural societies, caste-ridden societies or societies with wide economic disparities indeed pose difficult problems to conscientious judges who seek to administer equal justice to all. Therefore, learning the skill of understanding the context and of dealing with diversity in a fair and acceptable manner is, indeed, the purpose of social context education for judges.

V. The Judge of the Future and the Future of Judicial Education

'The Judge's Book' published by the U.S. National Judicial College and the American Bar Association refers to a study that found that the transition of a lawyer to a judge often took as much as fifteen years through a four phase process of professional socialization, self-concept change and resolution of role conflicts, commitment to the bench and satisfaction with judicial life. No doubt, in India too, the transition does take years to

[16]Suki Goodman & Joha Louw-Potgieter, *A Best Practice Model for the Design, Implementation and Evaluation of Social Context Training for Judicial Officers*, 5 AFR. J. LEGAL. STUD.181 (2012).
[17] *Id*.

complete. It is a major development in which the new judge has to keep a distance from his lawyer friends cultivated over years of law practice, develop a network of judicial colleagues, evolve new perspectives on law, justice, the profession, rule of law and the role of judge in dispensing justice. The public perception of an all-powerful and always righteous judge is increasingly exposed to the spotlight of media scrutiny, establishing him as an ordinary human being subject to all human frailties. The judge is no more protected from public scrutiny and at the same time, the public expectation of him has increased to a very high standard of conduct in and out of court. Technology is changing the functioning environment of the courtroom and demands special expertise from presiding officers. The personal computer and the internet will enormously increase the research and communication capabilities of future judges. As was observed in the Judge's Book, "although speculations about the judge of the future bring visions of robotic truth assessing machines, law dispensing computers and chemical test determined dispositions, human being rather than mechanical marvels will continue to exercise the fine art of judgment for any foreseeable future."[18]

Along with the problems and challenges arising from the world outside, judges of the future will have to cope up with the structural and organizational changes happening within the judiciary itself. There has been growing diversity in the composition of the Bench and the Bar, bringing with it problems of adjustment in inter-personal relationships and the working environment. A growing number of women will occupy judicial offices in the future with many of them occupying positions of chief justices deciding policies of judicial administration. The same is true for Dalits and other minority groups, thereby forcing changes in the dynamics of judicial decision-making. All these factors pose challenges to those in charge of judicial education and training.

Given the range of tasks and challenges involved in judicial education and training, it is natural to raise the question as to how it has to be organized and by whom. Traditionally, all over the Commonwealth countries and other jurisdictions following the Common Law, there is an unquestioned assumption that judicial education should be controlled by the judiciary and

[18] American Bar Association & National Judicial College, The Judge's Book (1994).

should be imparted by judges themselves. It is believed that judicial control will give credibility to the programmes among judges and they will more readily accept the instruction if given by their peers. The concept of judicial independence is also advanced as a justification to keep the job with the judiciary. These implicit assumptions have not only delayed the introduction of judicial education but also unintentionally distorted the effective delivery of education and training.[19]

No one can dispute the control of judicial education by judges. Judicial academies have to have a majority of judges in their Governing Boards and all programmes imparted must have the approval of judges. However, to say that judges should alone be imparting education of the type envisaged in the foregoing sections of this essay is to defeat the very purpose of education in the modern context. At best, judges can manage the training part of the programme but certainly not the wide ranging knowledge and attitudinal components of judicial education. Once the objects are clear and the needs are ascertained, it must be left to the experts to design the curriculum, assemble the materials, select the pedagogic tools and methods and deliver the programmes, of course, under the supervision and assistance of judges. In other words, the strategy should be a partnership between judges on the one hand and law teachers, behavioural scientists, management experts, technology specialists and even social activists/NGOs, on the other. Unfortunately, even after three decades of judicial education and the establishment of nearly two dozen judicial academies around the country, there are no trained judicial educators nor is there a cadre created to attract talented people for the job. Ad hoc-ism is practiced without any evaluation of what returns the investment is bringing to the system. The Thirteenth Finance Commission (2009),[20] appreciating the importance of judicial education and training for redeeming the judicial system has allocated substantial funds for strengthening judicial academies. It is up to the Supreme Court of India and High Courts who are in command to use the opportunity and funds to prepare future judges to take the system to greater efficiency through a planned program of judicial education and training.

---

[19] Kirby, *supra* note 6.

[20] REPORT OF THE 13TH FINANCE COMMISSION (2009).

CHALLENGES FOR FREE ACCESS TO LAW IN A MULTI-JURISDICTIONAL DEVELOPING COUNTRY: BUILDING THE LEGAL INFORMATION INSTITUTE OF INDIA

Graham Greenleaf,[A] *VC Vivekanandan,*[B] *Philip Chung,*[C] *Ranbir Singh*[D] *and Andrew Mowbray*[E]

This article analyses the complexities involved in providing free public online access to the 'public legal information' of the Indian legal system. It starts with some of the causes of the complexity of Indian legal information, then describes the considerable progress that has been made previously in the provision of free access to some types of legal information, and analyses why the result is still below international standards. The article then presents a project – the Legal Information Institute of India (LII of India) that attempts to build on, enhance and consolidate much of the good work that has already been done by Indian government organisations and NGOs, to develop free access to legal information in India, and to overcome many of the deficiencies identified in the previous section. The considerable remaining challenges for the creation of a world-standard and sustainable

[A] Graham Greenleaf, Professor of Law D Information Systems, University of New South Wales.

[B] Dr.V.C.Vivekanandan, Ministry of HRD IP Chair Professor, NALSAR University of Law, Hyderabad.

[C] Philip Chung, Lecturer in Law, University of Technology, Sydney and Conjoint Lecturer in Law, UNSW.

[D] Prof. (Dr.) Ranbir Singh, Vice-Chancellor, National Law University, Delhi.

[E] Andrew Mowbray, Professor of Law D Computer Science at the University of Technology, Sydney.

This article first appeared in 8(3) SCRIPTed 292 (2011). The assistance of Rajan Sharma, system developer for LII of India at AustLII, Jill Matthews, Indexer, prior AustLII staff, and SCRIPTed editors and referees is gratefully acknowledged. An earlier version of this article was presented at the Law via the Internet Conference, University of Hong Kong, 2011. The article was completed while Graham Greenleaf was a Visiting Fellow at the SCRIPT/AHRC Law and Technology Centre, University of Edinburgh. The LII of India has been assisted by an AusAID PSLP (Public Sector Linkages Program) grant concerning access to South Asian legal information, and from an ARC (Australian Research Council) LIEF grant concerning CommonLII

system are then outlined, and steps are proposed to address them. The extent to which this collaborative project might be a model for development of free access to legal information in other countries is considered. The future of LII of India depends on a number of factors, including the establishment of an effective technical team and servers in India, an Indian-based governance structure, collaboration with organisations in India with similar goals, establishment of local financial sustainability, and continuing technical support from AustLII during the establishment phase. The article discusses these challenges and highlights difficulties in extending development at the State level, the longer term challenges of providing information in languages other than English, and the legal issues surrounding that task.

INTRODUCTION

This article analyses the complexities involved in providing free public online access to the 'public legal information' of the Indian legal system. It starts with some of the causes of the complexity of Indian legal information, describes the considerable progress that has already been made in the provision of free access to some types of legal information, and analyses why the result is still below international standards. The article then describes a project to remedy some of these deficiencies. This project, called the Legal Information Institute of India (LII of India), is being carried out by eight Indian law schools and an international partner. It developed in its first year of public operation, a system with over 750,000 searchable documents and 151 databases. The considerable remaining challenges for the creation of a world-standard and sustainable system are outlined in the article, and steps are proposed to address them. The extent to which this collaborative project might be a model for development of free access to legal information in other countries is also considered. By 'public legal information' we mean that information which, as a matter of public policy, ought to be available for free public access in a society which values democracy and the rule of law. This has been argued elsewhere to include legislation, case law, the treaties a country has entered into, reports proposing reform of the law, and such legal scholarship as authors have chosen or are required to make freely available to the public.[1] For the purpose of this article, this definition is assumed.

I. COMPLEXITY OF THE INDIAN LEGAL AND SOCIAL CONTEXT

Developing a free access legal information system for India involves more complex technical and organisational issues than is the case for most other countries. This is because of the complexity of India's constitutional structure and resulting legal institutions, the value it places on democracy, human rights and the rule of law, the litigious nature of its citizens, its

[1] *See generally* DECLARATION ON FREE ACCESS TO LAW, 2002, http://www.fatlm.org/declaration/. *See* Graham Greenleaf, *Free Access to Legal Information, LIIs, and the Free Access to Law Movement, in* IALL INTERNATIONAL HANDBOOK OF LEGAL INFORMATION MANAGEMENT (Richard A. Danner & Jules Winterton eds., 2011).

linguistic complexity, and its expanding market economy.

A. A Complex, Sophisticated Legal System and a Litigious Society

India is a very complex country of 36 jurisdictions: the Union, twenty-eight States and seven Union Territories comprise a system which shares characteristics of both a federation and (because of the powers of the centre) a unitary government.[2] It is a parliamentary democracy with a written constitution including human rights provisions.[3] The Constitution is constantly interpreted by an activist Supreme Court which has delivered over 29,000 decisions since 1950, at a rate of 500 per year.[4] Since independence from the United Kingdom in 1947, India has gradually expanded its number of States and Territories through splitting existing States, primarily on linguistic lines,[5] and the process continues. This means there has been a steady increase in the number of separate legislatures, and the number of High Courts (the apex court within a State), although some States and Territories still share a High Court.

India's judicial system is primarily based on the common law tradition inherited from English law, with decisions of Indian courts going back to the eighteen century. Its radical structure is that of a "single structure of courts with the Supreme Court at its apex."[6] Central government legislations which are still in force date from 1857, and that of some States go back even earlier (for example, West Bengal to at least 1848).[7] The complexity of Indian law is therefore both broad and deep. The number of court decisions by Indian courts is prodigious compared to most countries. The total number of published decisions of India's Supreme Court and High Courts approaches three quarters of a million for the past decade alone. Unlike some countries in Asia, India can be considered to be a litigious country in which people at all levels of life resort to the Courts to resolve many disputes (even though this often takes many years). Judicial and quasi-judicial forms have also gone beyond those based on British or

---

[2] *See generally* BIPAN CHANDRA ET AL., INDIA AFTER INDEPENDENCE (1999).
[3] *See generally id.* at pp. 31-48.
[4] *See* Supreme Court of India, http://www.liiofindia.org/in/cases/cen/INSC/ (last visited on March 21, 2013).
[5] *See generally* CHANDRA ET AL., *supra* note 2, at pp. 98-105.
[6] *See generally* CHANDRA ET AL., *supra* note 2, at pp. 31-48.
[7] West Bengal Acts, http://www.liiofindia.org/in/legis/wb/act/

common law models. The first local people's courts, or *lok adalats* was established in Chennai in 1986, based on Article 39A of the Constitution of India, and have gradually widened their scope from matrimonial affairs into many other matters.[8] Numerous administrative tribunals have been established[9] which are relatively more accessible to ordinary people than many courts, including tribunals for electricity and railway disputes. Some of these tribunals report considered decisions (as distinct from merely deciding cases) in vast numbers. There are 67,651 reported decisions interpreting the RTI Acts from the Central Information Commission of India from 2006-2011,[10] an average of more than 10,000 decisions per year.

B. A 'Monitory Democracy'

Indian democracy has twice recovered from near-death experiences- in 1975-77 and 2002-04,[11] and has been brought back to life by the Indian people at the ballot box. Indian democracy is vibrant and tumultuous, despite its vicissitudes, the most obvious at present being the prevalence of corruption and the strong campaigns against it. Representative democracy goes beyond central and state legislatures, with local self-government *(panchayats)* having been introduced into India's 600,000 villages and towns in 1993.[12] Keane argues that developments in Indian democracy are the clearest example of a new form of democracy that he calls 'monitory democracy,'[13] distinct from direct democracy and representative democracy, that has emerged since World War II (coincident with Indian independence in 1947). He argues that India shows more clearly than elsewhere, a recognition that citizens' interests in a democracy "must be represented not just through elections and debates and decisions in the central parliament, but in a wide range of post-Westminster processes," the essence of which is that they are "new mechanisms designed to introduce greater public accountability in the making of decisions by government."[14] Among the devices he notes are the *panchayats,* very strong judicial review,

[8] JOHN KEANE, THE LIFE AND DEATH OF DEMOCRACY 622, 623 (2010).
[9] *See* a list of fifteen such tribunals at http://www.worldlii.org/catalog/56666.html.
[10] *See* CENTRAL INFORMATION COMMISSION OF INDIA, http://www.liiofindia.org/in/cases/cen/INCIComm/.
[11] *See generally* CHANDRA ET AL., *supra* note 2, at pp. 246-260, 462-470. KEANE, *supra* note 8, at 618-19, 637-47.
[12] KEANE, *supra* note 8, at 627.
[13] *Id*. at 630-31, 688.
[14] *Id*.

compulsory quotas for those not previously represented in politics, and constitutional protection of indigenous rights.[15] For Keene,

> [O]f vital importance was the application of new power-checking mechanisms, including *lok adalats* and water consultation schemes, but also extra-parliamentary inventions like participatory budgeting; 'yellow card' reports on government services issued by citizen groups; the handling of public disputes through railway courts and the invention of public interest litigation enabling individuals and groups to have their grievances presented on their behalf to the courts by public spirited individuals, or by the courts themselves.[16]

Monitory inventiveness continues since Keane wrote, notably including the 'I Paid a Bribe' online whistle-blowing movement,[17]which aims to "uncover the market price of corruption" and invites readers to "tell us your bribe story," so that the identified information can produce maps of India's bribery 'hot spots' down to the level of individual departments and cumulative amounts of bribes paid.

Of the wide range of mechanisms of 'monitory democracy' India has developed, one of the most striking (though not noted by Keane) and most relevant to free access to legal information, is the development of the 'right to information.'

C. Constitutional Right to Information and Bureaucratic Lag

India has developed a constitutional right to public information. A number of Indian states including Tamil Nadu, Goa, Rajasthan, Delhi, Maharashtra, Assam, Madhya Pradesh, Jammu & Kashmir) enacted 'Right to Information' ("RTI") Acts from 1997 to 2004, covering what is elsewhere called 'freedom of information' in relation to the public sector. In 2004, India's Supreme Court conclusively interpreted Article 19(1)(a) of the Constitution of India to impliedly include the right to information in the

---

[15] *Id*. at 629-30.
[16] *Id*. at 630.
[17] *See* http: //ipaidabribe. com/

constitutional guarantees of freedom of speech and expression.[18] Consequently, a national legislation was enacted - *Right to Information Act, 2005*. The reach of the legislation is to all tiers of the government and considerably beyond that, to some parts of the private sector.[19] This right, forced on the national government by the Supreme Court, has resulted in the Indian government institutions being required to make new efforts towards data management, and to provide access to the community about the laws that govern them. Though the constitutional right of freedom of speech has been interpreted to include access to information, this constitutional principle has not yet been developed in relation to legal information to require governments to meet the needs of the ordinary citizen to access legal information for free or to international standards of quality. One possible opportunity for the free access to law movement in India, which would rarely be possible in other countries, is to trigger a constitutional action to extend the scope of the constitutional guarantees toward a positive requirement to provide effective public access to legal information. Even if unsuccessful in the courts, such an initiative might catch people's imagination and demonstrate the need for government to take more effective action in relation to access to legal information.

India is often praised as a successful democracy and open society[20] but this is still limited when it comes to access to legal information. As we will see, information on legislation and judicial decisions is scattered and often buried in a maze of websites run by Ministries at central, State and Territory levels. It is ironic that, while India is a hub for outsourced data processing, with a myriad of infotech companies working to cater to the database demands of the developed world, insufficient resources have been put into India's 'domestic space' to bring it up to international standards.

D. 'Auntie English' and the Complexity of Language Issues

India has twenty-two official languages, and somewhere between 150 and 1,500 languages (depending on definitions of language and dialect).[21] Questions of language always have been and always will be controversial in

---

[18] People's Union for Civil Liberties v. Union of India, A.I.R. 2004 SC 1442.
[19] DR. R.K. VERMA, RIGHT TO INFORMATION LAW AND PRACTICE 1, 31 (2nd ed.).
[20] KEANE, *supra* note 8, at 585-647.
[21] NANDAN NILEKANI, IMAGINING INDIA: IDEAS FOR A NEW CENTURY 77 (2008).

India. Many independence leaders saw English as the language of colonialism. However, proposals to adopt Hindi as the only official language in the Constitution met strong resistance from India's southern states, where it was not spoken widely. It was decided that the Constitution would provide that Hindi would be India's official language, but English was to continue in use for all official purposes until 1965 when Hindi would become the sole official language. However, opposition from the south continued (and was fortified by support from the Dalit community), and in 1967 a compromise was reached providing that "the use of English as an associate language in addition to Hindi for the official work at the Centre and for communication between the Centre and the non-Hindi states would continue as long as the non-Hindi states wanted it."[22]

The authors of an authoritative history of India since independence note that India is now becoming more multilingual, with knowledge of Hindi spreading in the south through modern communications and entertainment and the study of English becoming more common in all strata of Indian society as a language of economic advancement. They conclude that "English is not only likely to survive in India for all time to come, but it remains and is likely to grow as a language of communication between the intelligentsia all over the country, as a library language, and as the second language of the universities."[23] It is also likely to retain its privileged, but not exclusive, position in the legal system for some time to come. One of the founders of Infosys, India's first successful high technology company, recounts that "the seven founders of Infosys between themselves spoke five different languages at home, and English was the only language [they] shared."[24] Estimates of the current percentage of English-speakers in India vary. While the exact percentage is not important, it is important to note that most sources of legal information in India are in English, a language that is only directly accessible by a minority of the population. The majority must otherwise rely on English-speaking intermediaries to deal with the legal system, at least at its higher levels. Nevertheless, English is the 'link language' between all geographical and linguistic areas of the country, and the most common language of administration, business and the law. Nilekani calls it India's "auntie" language - perhaps not exactly one of the

[22] CHANDRA ET AL., *supra* note 2, at 123. *See also* NILEKANI, *supra* note 21, at 77-85.
[23] CHANDRA ET AL., *supra* note 2, at 124.
[24] NILEKANI, *supra* note 21, at 77.

family, but still a welcome guest.[25]

E. The Need for Free Access to Indian Legal Information

When considering needs, we should consider the various audiences that a free access legal information system for India could attempt to serve. At a minimum level, the legal profession, government administrators, small to medium businesses (SMEs), NGOs, students and academics, and the general public, can all be considered as somewhat distinct audiences who may value such a service.

As is the case in many developing countries, a high quality free access legal information system can have considerable significance for the legal profession, because the majority of lawyers do not have access to the commercial online services for legal information provided by the multinational legal publishers and a small number of Indian commercial providers. Nor do SMEs, NGOs, students, and academics, all potentially significant categories of users as well. Only a minority of them can afford the cost of accessing most commercial online services. Nevertheless, all of them need to make considerable use of legal resources. Existing resources available for free access from government have serious limitations (discussed in the next section). By and large, these categories of users will be able to cope with the language requirements of a legal system which operates primarily in English, and they will be able to obtain a basic level of Internet access necessary to make use of such a service.

The extent to which such a free access service can be made relevant to the needs of the general public in India (and in most developing countries) is a different and more difficult question because of great differences in the levels of Internet access and literacy (particularly in relation to a legal system which still operates largely in English).

II. The State of Access to Indian Legal Information up to 2010

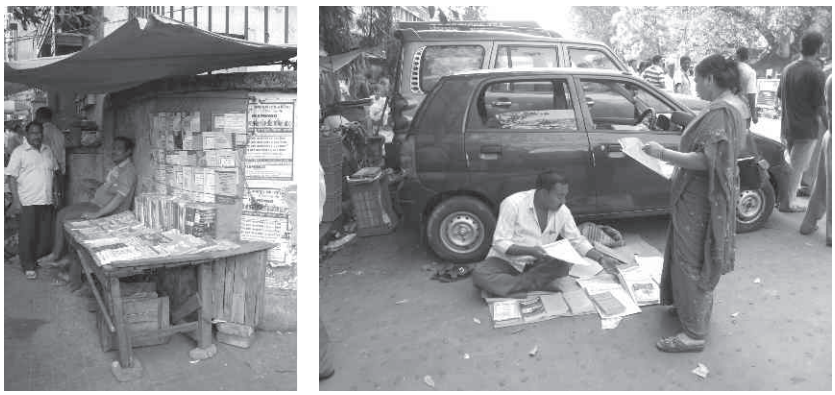
One aspect of the difficulties of developing a free access legal

[25] *See generally* NILEKANI, *supra* note 21.

information system for India can be seen by considering each category of legal information that other LIIs often include, and what we consider to be the 'five pillars' of free access to law: legislation, case law, treaties, law reform and open scholarship.

A. Legislation

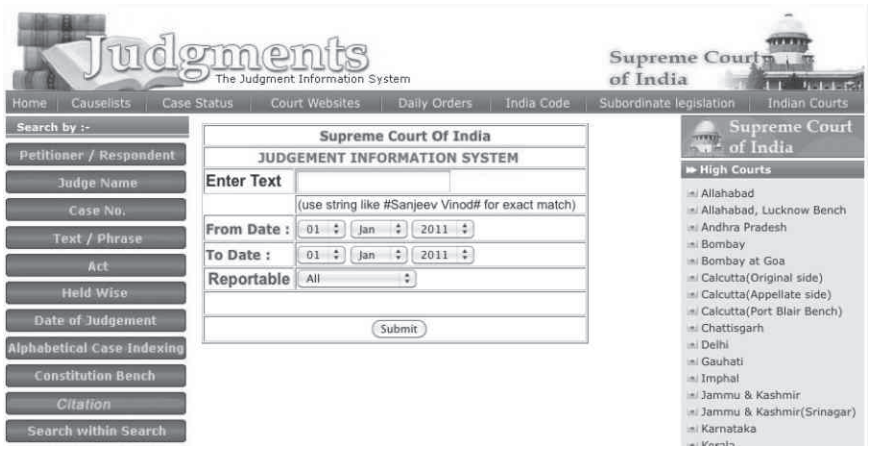
Legislations from the Central Government are in theory available online from the 'India Code' database provided by India's National Informatics Centre (NIC). The problem is that the NIC database has not included consolidations of Acts for many years (consistent consolidation seems to have stopped in the 1990s) and to make matters worse, many amending Acts are not included either. Central Government delegated legislations are only available on departmental websites. In the States and Territories the government offices responsible for legislations only intermittently produce consolidations of legislation, and usually years in arrears, so that this lucrative field is largely left to commercial publishers. The provision of online legislations varies greatly among States, ranging from nearly non-existent to occasionally approaching comprehensiveness of either annual or consolidated legislation. The one government site that attempts to aggregate State and Territory legislations provides a very incomplete coverage because its sources share the defects that have previously been discussed. For the general public, most businesses and litigants, and for most lawyers other than the wealthiest, up-to-date legislation can only be obtained from small publishers in pamphlet form, often sold through outlets such as those shown below.



Two Legislation Vendors in the Street behind the High Court of Kolkota, April 2011

B. Case Law

Case laws have been provided online, usually for about ten years, by a series of NIC-developed databases for the Supreme Court, 24 High Courts, 6 District Courts, and most of the larger central government Tribunals. Although all of the databases are presented through one central website, the Judgment Information System (JUDIS),[26] there is no overall search facility. Even though this has been a heroic effort, with somewhere between half a million to one million cases being provided for free access, it has crippling limitations for serious legal research because of the following factors: (i) the data is spread over more than 30 completely separate databases in different locations, all with search-based interfaces that are different from each of the other court interfaces; (ii) the interfaces are largely impenetrable unless a user already knows which case he/she wants to find; and (iii) the contents of the databases cannot be browsed, because there are no tables of contents.



One of Eleven Possible Search Screens in the NIC/JUDIS Interface to Supreme Court Decisions

The rather inflexible text search interface for the Supreme Court is shown above. India-wide searching for case law is therefore impossible via these government resources, because each court database has to be searched separately. Even free text word searching is ineffective for most High Courts. The comprehensiveness of the JUDIS databases is also an open question, which needs systematic testing .

[26] The Judgment Information System, http://judis.nic.in/.

C. Treaties, Scholarship, and Law Reform

India since independence has always been a very active participant in international law, but its treaties are hard to find. India's bilateral treaties (from 1947-1980) were published by a commercial publisher in a book form, and those treaties are available on the Ministry of External Affairs website, but the list is not searchable.[27] Post-1980, the situation has been much worse. The online availability of treaties on the Ministry website is sporadic, there is no printed compilation of bilateral treaties, and even the Ministry does not hold a consolidated set in a reproducible form.[28]

India has hundreds of law schools, of greatly varying quality. Since the formation of the National Law School of India University, Bangalore in 1987, fourteen National Law Schools[29] have been developed as 'stand alone' Universities across India. The then Union Law Minister Moily had stated that "[t]here are now 14 such schools and the idea is to have one national law school in each State." [30] With a small number of new private law schools and a handful of law schools in State Universities, they constitute the 'top tier' of Indian legal education (though various private law colleges are also highly ranked), and are often of high international repute. However, dedicated online sources of Indian legal scholarship are hard to find. There are no India-wide repositories of legal scholarship equivalent to the Legal Scholarship Network (LSN) on SSRN,[31] or Bepress Legal Repository,[32] or AustLII's Legal Scholarship Library.[33] There is as yet only a scattering of Indian academic law journals on the web. Indian legal scholars generally prefer to publish in foreign law journals because of the low visibility of their own journals. One unfortunate situation is that the Indian Law Institute's Journal and Yearbook ('Annual Survey'), to which scholars from all over India have contributed for decades, and which are centerpieces of Indian legal scholarship, have allowed LexisNexis to have exclusive online rights

---

[27] Ministry of External Affairs, http://www.mea.gov.in/
[28] Personal communication from a senior officer of the Ministry, January 2010.
[29] *See* list of National Law Schools and links at http://www.worldlii.org/catalog/ 56662.html
[30] *Moily Inaugurates CLEA and Talks of 14 More National Law Schools*, Jan. 30, 2011, http://barandbench.com/brief/2/1257/moily-inaugurates-clea-and-talks-of-14-more-national-law-schools#.UUtz Exd9HqE
[31] *See* http://www.ssrn.com/lsn/index.html
[32] *See* http://law.bepress.com/
[33] Australian legal Scholarship Library, http://www.austlii.edu.au/au/journals/

to date. Issues of corresponding benefits to the Institute and the authors of articles, compared with the benefits of free public access, deserve reconsideration in the emerging very different international information environment for legal scholarship.

Law reform is carried out by many bodies in India. The National Law Commission has made all 36 of its reports made since 1950 available online,[34] but only few State law reform bodies do so (e.g., Goa Law Commission is exceptional)[35] and neither do most bodies tasked with a specific subject of investigation and law reform (the National Human Rights Commission is an exception).[36]

D. The Lack of Comprehensive Search Facilities

In addition to the separate deficiencies of each of the existing sources of free access online resources, the over-riding problem is that no free access source has created facilities so that all of these sources - case laws, Central and State legislations, treaties, open access scholarships and law reforms can be searched together. There is no comprehensive site which allows users to search any one of these 'five pillars' of legal information across India, let alone all five of them. Some non-government free access providers have, however, been taking steps recently to remedy parts of these problems, notably the NGO - Parliamentary Research Service (PRS) in relation to legislations, and Indian Kanoon in relation to case laws. Their efforts are occurring in parallel with the efforts being made by LII of India, and will be discussed later.

III. Building the LII of India After One Year (2011)

We now turn to a project that attempts to build on, enhance and consolidate much of the good work that has already been done by Indian governmental organisations and NGOs, to develop free access to legal information in India, and to overcome many of the deficiencies identified in the previous section.

---

[34] *See* http: //lawcommissionofindia.nic.in/
[35] *See* http://goalawcommission.gov.in/reports.htm
[36] *See* http://www.nhrc.nic.in/

A. Background: The Free Access to Law Movement and AustLII

For nearly twenty years, various academic-based organisations, initially in the USA, Australia and Canada, have been making public legal information available for free access via the Internet, and have self-consciously done so as a group of collaborating 'legal information institutes' (LIIs).[37] Since 2002 they have created the Free Access to Law Movement (FALM), which now has over 40 members,[38] with an ideology expressed in the Declaration on Free Access to Law,[39] based on the rights of individuals to have effective free access to public legal information, and the right of those who wish to republish that information to meet that need to be able to do so. The Australasian Legal Information Institute (AustLII) has been at the forefront of those developments since 1995,[40] and operates by far the largest and most-accessed online legal resource in Australasia.[41] Since 2000 it has been assisting organisations in other countries to develop free access to legal information in their countries or regions, and is also operating three collaborative portals for those FALM members who wish to participate: WorldLII, CommonLII and AsianLII.[42]

B. Formation of LII of India (2007-11)

The LII of India has had a long gestation. In 1999 AustLII had its first discussion with National Law School in India (NLSIU, Bangalore via Dr. Vivekandan) about expanding free access to Indian law in the context of an Asian Development Bank Project (Project DIAL - Developing the Internet for Asian Law). These discussions were taken up again in 2007 with the (then) Vice-Chancellor of NALSAR University of Law in Hyderabad, Prof. Ranbir Singh and with Dr. Vivekandan who by then had moved from Bangalore to Hyderabad. When Prof. Ranbir Singh took up a new Vice-Chancellorship to start the National Law University, Delhi, two National

---

[37] *Supra* note 6.
[38] *See* Members of the Free Access to Law Movement (FALM), http://www.fatlm.org/
[39] DECLARATION ON FREE ACCESS TO LAW, http: //www.fatlm. org/ declaration/
[40] *See* Graham Greenleaf et al., *AustLII: Thinking Locally, Acting Globally,* U. NEW SOUTH WALES 44 (2011). *See also* Graham Greenleaf et al., *A Snapshot at Age 15*, Nov. 2010, http://www.austlii.edu.au/austlii/publications/2010/1.pdf>
[41] *See* http://www.austlii.edu.au.
[42] WORLD LII LEGAL INFORMATION INSTITUTE <http://www.worldlii.org>. COMMONWEALTH LEGAL INFORMATION INSTITUTE <http://www.commonlii.org>. ASIAN LEGAL INFORMATION INSTITUTE <http://www.asianlii.org>.

Law Universities (NLUs) were involved, and NLSIU Bangalore soon became the third. These partner NLUs supported AustLII's application to AusAID (Australia's foreign aid agency) for funding under its Public Sector Linkages Program (PSLP) to develop free access to law in South Asia, and funding of A$275,000 was eventually granted in late 2009. Database development started at AustLII, and the partners held their first meeting in New Delhi in January 2010. They were joined by Raiiv Gandhi School of Intellectual Property Law, Indian Institute of Technology, Kharagpur, where Dr. Vivekandan was Dean for some time. They decided on the name and structure, and to aim to launch a new LII by early 2011.

Since 2010 four other NLUs have become partners, bringing the total partners to eight: National University of Juridical Sciences, Kolkata (NUJS); Gujarat National Law University, Gandhinagar (GNLU); Tamil Nadu Dr. Ambedkar Law University, Chennai (TNDALU); and Raiiv Gandhi National University of Law, Patiala (RGNUL). The March 2011 meeting of the partners decided to leave the partnership structure at eight members until formal incorporation, but to invite other law schools to become Supporting Organisations. Geographical dispersion of workload across India is seen as crucial to the long-term success of the project. National Law University, Delhi has hosted the two meetings of partners to date, but it is proposed that later meetings will be rotated between the NLUs.

The Legal Information Institute of India (LII of India)[43] aims to be an international standard, free-access and non-profit, comprehensive online collection of Indian legal information. The India technical hub of the project is at NALSAR, with Prof. Vivekanandan as Director, and as of late 2011, technical staff was yet to be employed. AustLII is providing the initial technical development, with progressive transfer of operations to the Indian partners planned (as of 2011) for 2011 and 2012. AustLII's involvement is funded primarily by AusAID (Australia's foreign aid organisation), but with additional funding (past and present) from the Australian Research Council (ARC).

C. Motivations of the Indian Partners

For the Indian partners in this project, the development of free access to

[43] *See* www.liiofindia.org

law in the Indian context is based on three important principles which they articulate in their public presentations, and which are consistent with the Free Access to Law Movement's Declaration on Free Access to Law,[44] which they regard as a basic source of inspiration:

- Laws are by the people, for the people and of the people, and hence are the property of the society in general;
- The quality of democracy is directly proportional to people's awareness of, and access to the laws that govern their society; and
- If information, particularly legal information, is the oxygen of the body politic, it has to be breathed freely.

In short, free access to legal resources is expected to contribute towards combating misuse of power, corruption and policy deviations, leading to greater accountability and transparency in shaping healthy democracy, perhaps more than the tokenism of periodic elections that are often construed as democracy. If Indian democracy is to survive, it will squarely depend on how a vigilant civil society functions, and this in turn requires free access to legal resources. Kofi Annan, the ex secretary General of the United Nations once remarked that "[i]f information and knowledge are central to democracy, they are the conditions for development."[45] A vibrant and dynamic society like India prides itself as an open society and its sustenance requires free access to the laws governing its citizens. The concept and construction of the LII of India is based on these principles, and the Indian law schools involved consider that they have the platform, visibility and networking to make it a reality.

D. The LII of India Website and its Launches

LII of India is, at the time of writing (December 1, 2011) one year old, having been open for free access public use since November 25, 2010. LII of India was then admitted as the 34th member of the Free Access to Law Movement.[46] The national launch of LII of India was organised and hosted

[44] DECLARATION ON FREE ACCESS TO LAW, http://www.fatlm.org/declaration/
[45] United Nations Meetings Coverage & Press Releases, Press Release SG/SM/6268, June 23, 1997, http://www.un.org/News/Press/docs/1997/19970623.sgsm6268.html
[46] *See* Members of the Free Access to Law Movement (FALM), http://www.fatlm.org/

by National Law University, Delhi at Vigyan Bhawan in Delhi on March 9, 2011. LII was launched by the then Union Minister of Law and Justice, Dr. M. Veerappa Moily, and was attended by members of the Judiciary, Law Commissioners, and representatives of the Foreign Ministry and many agencies. It was followed by 'satellite launches' in Hyderabad, Bangalore, and Kolkota during March and April 2011, hosted by the respective National Law Universities in those cities. The system and its contents are therefore only now becoming known to lawyers, students and librarians, as such awareness does not happen automatically.

E. Content Development of the 'Five Pillars' in Stage One

The initial version of LII of India is built largely on the shoulders of existing providers of legal information online, particularly India's National Informatics Centre (NIC), whose data collection efforts since the mid-1990s have resulted in dozens of separate case law and legislation databases. Several law schools, the External Affairs Ministry and some supporting organisations like Parliamentary Research Service (PRS) and Indian Kanoon have also provided data. Virtual databases of Indian law developed from content on other LIIs cooperating with AustLII are also included. LII of India aggregates this content, puts it into a more consistent format, and makes it jointly searchable for the first time.

Section 52(q), Indian Copyright Act of 1957, like copyright laws in

most countries, aids the non-government development of free access by exempting any reproduction of legislation, case law, law reform reports or similar official reports (in broad terms) from copyright infringement. Treaties are not mentioned, but the Indian government has no objection to reproduction of such treaties.[47] Copyright law is therefore not an impediment to the development of LII of India or similar sites. Nor do Indian government websites use the Robot Exclusion Protocol[48] to block other parties from using web 'robots' or 'spiders' from copying data from their sites.

By the time of the official launches of LII of India in March 2011, the first stage of development had resulted in 109 databases, and by the time of writing (December 1, 2011) this has risen to 151 databases, plus four 'virtual' databases where the data is drawn from databases located on other LIIs. However, an equally significant indicator of the size of what has been built is that LII of India now includes a total of 778,848 documents, with databases ranging in size from a few pieces of legislation from small States or Territories, to the West Bengal Appellate Court database with over 100,000 documents.

The rate of expansion of content of LII of India is also accelerating. For example, in November 2011, there were 28,483 documents added to the system. The main reason for the accelerated growth, and why it can be expected to be sustained, is that full automation has now been achieved for the updating of content from the six most prolific courts (Indian Supreme Court, Delhi High Court, Calcutta High Court, Calcutta Appellate Court, Calcutta High Court Port Blair Branch and the Information Commission of India). We expect that (provided funding is available), the system can continue to expand by over a quarter of a million documents per year for the indefinite future. It is already one of the largest LIIs, and may become the largest in due course.

[47] Personal communications with Indian Ministry of Foreign Affairs, January 2010, and subsequent development on LII of India of databases of Indian treaties without objection from the Ministry.

[48] *See* The Web Robots Page, http://www.robotstxt.org/

The content of LII of India as of 2011, and some of its limitations will now be outlined briefly, stating only at this point what content is included. Material which is still planned to be added under Stage 2 of content development is discussed later.

i. Legislation: There are 93 legislation-related databases with about 7,000 items of legislation: the India Code from 1836 (1248 Acts); Central Government Bills; the Constitution; Acts from 31 States and Territories (about 2,500 Acts); regulations from 28 States and Territories (about 2,000); 29 databases of 'schemes' (other types of delegated regulations); commentary on central government Acts (provided by the Parliamentary Research Service); and central government Bills (recently again available from the Lok Sabha (Parliamentary) website).[49]

ii. Case Law: There are 43 databases of Indian case laws comprising over 750,000 cases in full text: the Supreme Court from 1947; 23 High Courts; 9 District Courts; 6 central government tribunals (those concerning electricity, railways, administrative decisions, right to information, cyber disputes and intellectual property); plus two virtual databases, one of cases concerning India from the pre-1873 *English Reports* (virtual database from CommonLII) and the other of cases concerning India in International

[49] *See* Parliamentary Bills Information System, http://164.100.24.209/NewBios_search/Report3.aspx?house=bh&typ=All&year=2011&sort=0&stitle=bill

Courts and Tribunals (virtual database from WorldLII).

iii. Treaties: There are two databases - all Indian bilateral treaties up to 1980, plus some subsequent bilateral treaties; plus a virtual database of Indian bilateral treaties found on other LIIs (from WorldLII and other LIIs).

iv. Law Reforms: Included as of 2011 are the 80 most recent reports since 1999 of the Law Commission of India.[50]

v. Scholarship: There are 13 law journals included (GNLU Journal of Law, Development and Politics; Indian Journal of Constitutional Law; ; Indian Journal of Intellectual Property Rights; Indian Journal of Law and Economics; Indian Journal of Law and Technology; ISIL Year Book of International Humanitarian and Refugee Law; NALSAR Environmental Law and Practice Review; NALSAR Law Review; NALSAR Media Law Review; NALSAR Student Law Review; and NUJS Law Review), eight of which are from the partner NLUs in LII of India (NUJS, NALSAR, GNLU and NLIU); plus one virtual database of Articles about Indian law in other law journals (from other LIIs).

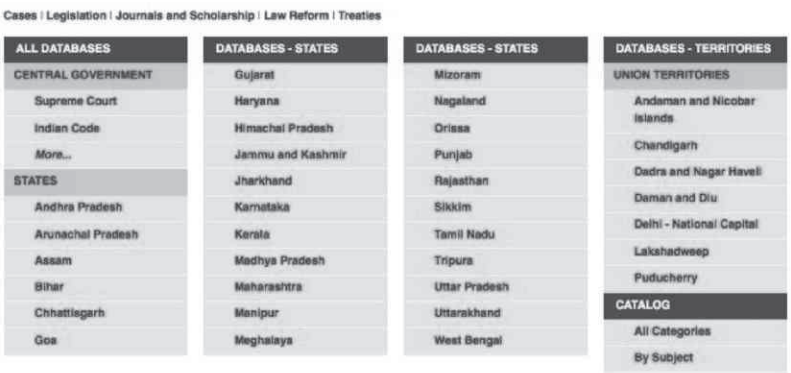
There is still considerable work to be done on Stage One, primarily the extraction of case law from the remaining JUDIS databases, which will add another 200,000 decisions at least. But the phase of aggregation of existing web-sourced data from government resources is well underway (and complete for the largest courts and tribunals), subject to the continuing challenges of updating of databases. The different and more difficult tasks of sourcing data for Stage Two lie ahead.

F. Design Considerations

Design considerations in the development of LII of India included that the interface should be straight-forward but informative of the various search and browsing options that the complexity of the Indian legal system makes necessary. It needed to enable the data to be searched over the whole system simultaneously, or over only a particular type of data (e.g., case law), or for only a specific State or Territory. As the quantities of data to be

[50] *See* http://www.liiofindia.org/in/other/lawreform/INLC/

searched are so large, fast search speed is essential. Finally, the nature of the Indian legal system makes it acceptable to start with a system that is based on English, for reasons already indicated and discussed in more detail later. As can be seen from the first line of the front page extract below, each of the 'five pillars' of content types described above can be separately searched or browsed. However, what is more important is that each State's or Territory's databases can be searched separately, with the case laws, Acts, Regulations, and other relevant databases for the State or Territory all being able to be searched together. This is not possible on any of the government-provided sites. In Stage One, this is often limited to the High Court decisions for a State, its Acts, and its Regulations (to the extent that each of these are available online). In some cases there is also a District Court, and occasionally a law journal from a NLU located in the State. This is illustrated later in relation to West Bengal. As can be seen from the screen extract below, the facility is available for all 36 States and Territories.



Stage One has also incorporated a number of features found on other LIIs developed by AustLII, including a catalog of hundreds of Indian law-related websites[51] (also categorised by State and Territory, as illustrated below), and a 'Law on Google' feature which translates LII of India searches into Google syntax, and limits their scope to legal materials from India (and where appropriate to a specific State or Territory). LII of India therefore offers as many different ways to find free access online legal information, whether in its own databases or not, as can be provided. Another design consideration is that LII of India's content should also be searchable from the other free access to law portals, CommonLII, AsianLII, and WorldLII.[52]

[51] *See* http://www.worldlii.org/catalog/221.html
[52] *Id*.

Users who find LII of India content through searches over these portals are returned to LII of India to view the content. The file structure of LII of India has been organised in a similar way to the file structure of these portals, so as to make it much easier to include this content in their searches.

G. Technical Facilities

LII of India is using the AustLII-developed open source Sino search engine[53] and other AustLII-developed tools on a Linux platform. The search engine used by other LIIs (AsianLII, AustLII, BAILII, CommonLII, CyLaw, HKLII, LiberLII, NZLII, PacLII, SAFLII and WorldLII),[54] enables boolean and proximity searching and gives flexible displays of results (by relevance, by date, by database and by citation frequency). LII of India has relatively consistent formatting of data across Indian jurisdictions, insofar as the source data permits; large scale automated addition of hypertext links among cases, legislation, treaties, law journal articles and law reform reports; and provision of 'noteups' from texts to where they are cited.[55]

LII of India also has automated extraction of parallel citations and creation of citation tables by the AustLII developed LawCite citator,[56] which includes citation data drawn from the twelve LIIs collaborating in WorldLII, resulting in citation records for approximately four million cases, journal articles and treaties. The Law Cite international citator is also integrated into the search results of LII of India, showing the subsequent citation histories (in India and overseas) of 496,000 Indian cases law journal articles and treaties. More citation data will be extracted in due course, once further work is done on the automated recognition of unique India patterns of case law citations, and on how use can be made of them in a variety of document formats. An example of LawCite as an international citator is the Indian Supreme Court decision in *Indian Express Newspapers Bombay (P) Ltd. v. Union of India*[57] which the LawCite record shows, has been cited 67 times, including by courts in Lesotho and South Africa, as well as by

---

[53] Sino Free Text Search Engine, http://www.austlii.edu.au/techlib/software/sino/
[54] Members of the Free Access to Law Movement (FALM), http://www.fatlm.org/
[55] User Guide to LII of India, http://liiofindia.org/liiofindia/guide/current.pdf
[56] *See* http://www.austlii.edu.au/cgi-dev/lawcite.pl?iuris=india>
[57] [1984] I.N.S.C. 230; (1985) 2 S.C.R. 287; (1985) 1 S.C.C. 641; [1985] S.C.C. (Tax) 121; 1984 2 S.C.A.L.E. 853

numerous Indian courts. At present, the LII of India server is located at AustLII. A staged transfer of processing control between production servers and mirror servers, in Australia and India, will start once an AusAID-funded mirror server is acquired and installed in Hyderabad, and technical staff is employed there. Scanning, comprehensiveness checking, content acquisition and other labour-intensive tasks will be distributed geographically among the partner and supporting law schools in India, with an initial distribution of responsibilities having been agreed at the March 2011 meeting of the partner law schools.

H. Usage

By December 2011 the LII of India website was receiving over 6,000 page requests per day, and will have received approximately 2.25 million accesses in the 2011 calendar year. This is a respectable result for the first year while databases are still developing, but is only a fraction of the expected long-term usage rate. Because search engine web spiders are blocked from accessing any case law databases (over 95% of all files), almost all of these accesses are by real users, not by search engine spiders.

As might be expected, the most-accessed case law databases were those of the central government courts and tribunals (67,000 accesses per month) and West Bengal courts (11,000 accesses per month). For legislation databases the most accesses were to central government legislation (9,000 accesses per month) and West Bengal legislation (500 accesses per month). The significant usage of West Bengal databases reflects the quantity and quality of the content available from one State on which we are focusing initial development efforts. The small collection of law journals receives 2,500 accesses per month, and the law reform reports and treaties receive about half that usage. It is impossible to establish the percentages of this usage which comes from Indian users, because 88% of all accesses come from numerical IP addresses which cannot be resolved into domain names (e.g., with a '.in' suffix), due to incomplete server configuration. Of the 12% of usage which does come from geographically identifiable addresses, usage from India and Australia are each about ten times larger than from any other country. It seems reasonable to infer (or at least, to speculate) that the majority of LII of India usage comes from India, from incompletely configured servers, but the precise percentages must remain undetermined.

There is also significant identifiable usage (at least 10% of the Indian identifiable usage) originating from the UK, USA, Malaysia, Canada, South Africa, and Pakistan, as well as from Australia.

In summary, the usage is modest but satisfactory, the most popular databases are those with the largest amount of content, and the locations of users seem to be mainly from India but with significant international usage as well.

IV. Future Plans and Challenges

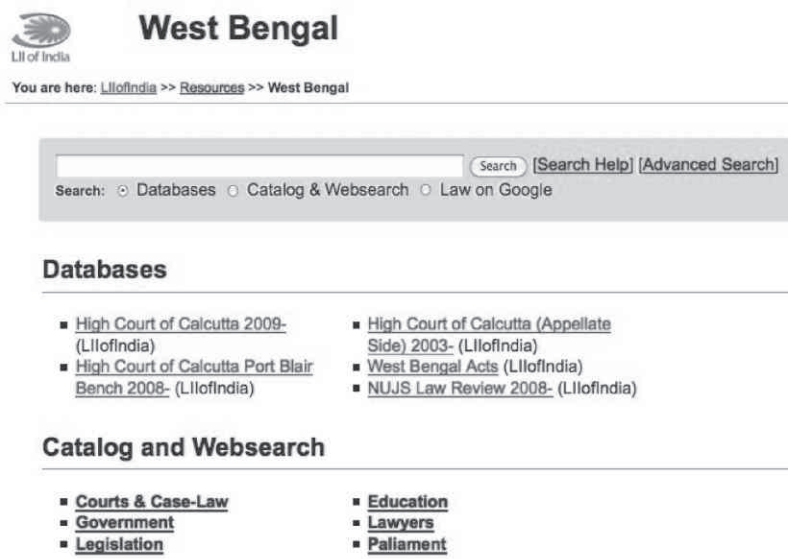
The future of LII of India depends on a number of factors, including establishment of an effective technical team and servers in India, an India-based governance structure, collaboration with organisations in India with similar goals, establishment of local financial sustainability, and continuing technical support from AustLII during the establishment phase. While these elements of long-term sustainability are being achieved, stage two of content development continues.

A. Content Development: Stage Two

The second stage of content development involves as its key - focus the capture of additional case laws and legislations not already digitised, from all 36 jurisdictions, and from sources spanning jurisdictions. This is a huge task, requiring a decentralised data collection approach. In additional to the five initial Indian partners, other supporting and collaborating institutions are being sought, primarily in the academic sector, to give as broad an 'ownership' of LII of India as possible, and so as to decentralise the difficult task of obtaining data at the State and Territory levels. Take the State of West Bengal as an example of what needs to be done in a single State. West Bengal was home to the world's first and most long-lived elected Marxist government.[58] The Bengal Presidency, based in Calcutta (now Kolkata), was also one of the origins of common law courts in India (with the Madras and Delhi Presidencies). The West Bengal 'home page' at present includes three databases - the High Court of Calcutta, High Court of Calcutta

[58] Chandrahas Choudhury, *Bengal Shakes off 34 Years of Communist Rule*, BLOOMBERG, Apr. 18, 2011, http://www.bloomberg.com/news/2011-05-25/bengal-shakes-off-34-years-of-communist-rule.html.

(Appellate) and High Court of Calcutta (Port Blair Bench) databases between them contain over 200,000 decisions since the year 2000. The West Bengal Acts database contains 364 items of legislation from 1848-1984 (provided by PRS Laws of India) and a few subsequent Acts. The West Bengal page also includes the law journal of the National University of Juridical Science (NUJS), Kolkata. NUJS has also agreed to develop a 'NUJS Law Research Series' database, a repository for all legal scholarship from one of India's leading NLUs. Much is still to be done before this is as valuable as possible a research facility for West Bengal law. NUJS has agreed to test the comprehensiveness of the three West Bengal High Court databases against a list of the 100 most significant cases in West Bengal law from the last decade, to assess whether they are all included in the databases (or what is the percentage of inclusion). To improve the legislations, NUJS has provided the West Bengal Code to 2003 (10 volumes) to AustLII to scan and Optical Character Recognise (OCR), and the annual volumes of legislations since 2003. The databases created from this legislation will then be provided to PRS Legislative Research for use on their Laws of India service if they wish, as well as being made available on LII of India.[59]



Across India as a whole, Stage Two development requires further work on each of the 'five pillars' of free access, and much of it will require

[59] *See* LAWS OF INDIA, http://www.lawsofindia.org/index.php

the work and cooperation of partner/supporting Law Schools in the relevant states:

i. Legislation: Missing as yet are the majority of annual Acts from States, most consolidated Acts (Central or from States) and Bills from States. Discussions are ongoing with PRS Legislative Research concerning comprehensive cooperation in relation to provision of free access to Indian legislation from all jurisdictions. The digitisation of printed statutes from selected priority states, commencing with West Bengal, will indicate what demand there is for this information.

ii. Case Law: Case law from important State-level subordinate courts and tribunals needs to be obtained. The comprehensiveness of the High Court database for each State needs to be checked. As soon as possible, active cooperation with NIC/JUDIS is necessary so that a direct email feed of case law (if possible) is provided in replacement of the current very inefficient and costly methods of extracting data from form-based court websites.

iii. Treaties: Paper or soft copies of missing bilateral treaties post-1980 need to be obtained from the Ministry of External Affairs, and digitised where necessary. This may require cooperation from the Indian Society of International Law (ISIL).

iv. Law Reform: The first 156 reports of the Law Commission of India are still to be added, but this is underway as part of completion of stage one. Reports of State law reform bodies need to be obtained and digitised where they are not already in digital form. Reports from important central government bodies such as the National Human Rights Commission also need to be added.

v. Legal Scholarship: Law journals from as many Indian law schools as possible need to be obtained and digitised, from both partner law schools and those others wishing to provide their journals. All partner law schools and subsequently other law schools need to be encouraged to provide scholarship repositories ('Law Research Series'). The cooperation of the Indian Law Institute in providing its journals and yearbooks ('Annual Review') for free access needs to be sought.

Identification of a Stage Two invites the question of what would be in Stage Three. One aspect is that most LIIs have started with a focus on current law, and LII of India is no exception, with the decisions of most High Courts only going back a decade or so. The digitisation or other acquisition of India's rich history of development of the common law would be a valuable task once more immediate priorities are resolved. So would the provisions of consolidated legislations where they are not yet available.

B. Collaborations

Seeking cooperation with all those involved in the provision of free access to Indian law will probably be the key to the successful development of LII of India, because the task of capturing all the relevant data is too large for any one organisation. The very extensive Indian Kanoon (iKanoon) search engine for Indian case law is sharing its case law with LII of India (content is still being processed from its collection), and LII of India has offered to do likewise with those databases that iKanoon does not hold. Cross-use of data extraction software is also being considered. Senior personnel from PRS (Chakshu Roy) and iKanoon (Sushant Sinha) have agreed to join an LII of India Technical Advisory Committee once LII of India has its own technical staff.

The other key element of cooperation is of course that provided by the NLU partners in LII of India and other NLUs and law schools who wish to support this development in their States. The commitments made by NUJS in relation to development of the West Bengal databases are a model which now needs to be successfully applied to law schools willing to cover all other States and Territories. It will be a long process, but it should ultimately give India a sustainable LII.

C. Languages other than English

As explained earlier, English has a unique position as an 'associate' official language in India's law and Constitution, and continues to be widely spoken in both north and south to an extent matched by no indigenous language. English continues to be the language of most legislations in India, though some State and Territory legislations are in local languages. All Bills, Acts and Regulations, of both the centre and the States and Territories,

must be in English unless legislation of the Indian Parliament provides otherwise.[60] Where a State legislature does prescribe local languages for legislation, an English language translation published in the Official Gazette of the State is deemed to also be an authoritative text.[61] The India Code is available in Hindi. Languages other than English may be used in proceedings of the High Courts of a State or Territory (but not in the judgments or orders of such Courts), by agreement of both the Governor of a State, and the President of India, in accordance with constitutional requirements.[62] Judgments of lower courts may be in languages other than English. The use of Hindi has been approved in various State courts. There are proposals that Tamil should be the official court language in the Madras High Court.[63] Where legislations or orders made under it are available in translation from English (or vice-versa), Section 52(r), Indian Copyright Act, 1957 also allows liberal use of such translations by re-publishers such as LII of India.

It is sufficient to say that Indian legislations, court decisions (at least of lower courts) and other public legal information are likely to be available increasingly in languages other than English in the future. While the position of English in India's legal system is protected very strongly in Indian law, the Indian legal system is likely to gradually become more multi-lingual. Additionally, English is only spoken by a minority of people in India. For both reasons, it will be necessary at some point in the further development for LII of India to aim to incorporate legal documents in other Indian national languages. This requirement introduces technical complexities, because Indian languages require the use of double-byte representations, and cannot be searched in the same way as the Roman alphabet used by English which employs a single-byte representation. However, AustLII's Sino search engine, used by LII of India, has a multi-lingual search capacity allowing simultaneous searching and ranking of documents in languages with different representations. As yet, this capacity has only been employed for the simultaneous searching of English and Chinese, for the Hong Kong Legal Information Institute and the Asian

---

[60] INDIA CONST. art. 348(1).
[61] INDIA CONST. art. 348(3).
[62] INDIA CONST. art. 348(2).
[63] *Indian Law: Tamil as Language in Courts*, http://www.lawisgreek.com/indian-law-tamil-as-language-in-courts

Legal Information Institute.[64] It should be possible to develop this capacity so that LII of India can simultaneously search and rank documents in English and Indian languages.

D. Sustainability and Governance

A trust, charitable company or other appropriate entity will be formed to provide the governance structure for LII of India, with assistance from an Advisory Committee. In the meantime an Interim Management Committee comprising representatives of the partner NLUs and AustLII manages the system. The AusAID project is an appropriate management vehicle for the project while AusAID funding of the project continues, but a more permanent structure will then be needed.

Establishing financial sustainability from local funding sources is crucial, as an Indian system is not likely to obtain ongoing foreign aid funding. A central government start-up grant is possible, and is being pursued. The Indian partners consider that funding solely from the legal profession is not to be feasible in India, though it may be possible to obtain some level of contributions. One funding model under consideration involves soliciting voluntary contributions from a diverse range of contributors and from governments and academic sources as well, using the model employed by AustLII.[65]

A third element of sustainability is that AustLII intends to continue providing technical assistance to LII of India for so long as it is requested (subject to AustLII's own capacity to do so), irrespective of the availability of funding assistance. AustLII continues to provide such assistance to other LIIs that it has assisted to develop, in keeping with the cooperative aspirations of the Declaration on Free Access to Law.

---

[64] Alex Y.H. Fung et al., *Searching in Chinese: The Experience of HKLII*, Law via Internet Conference, June 8-10, 2011, The University of Hong Kong, http://www.hklii.hk/conference/paper/1C3.pdf

[65] 2012 Funding Sources, http://www.austlii.edu.au/austlii/sponsors/

CONCLUSIONS

Beyond the questions of whether the LII of India will prove to be valuable to India's lawyers, students, businesses, administrators and citizens at large, we should ask some broader questions to conclude. Might this India experiment be valuable as a model for creating free access to legal information in some other equally complex countries? And what is the significance of free access to legal information (no matter who provides it) for India's vibrant democracy?

A. One Model for Assisting LII Development?

There are many ways in which established LIIs can assist in the development of new LIIs, in order to further the global spread of free access to legal information and the objectives of the Free Access to Law Movement. Although the development of LII of India is far from complete, it may demonstrate key elements of one model for successful LII development, such as the following:

Early identification by an established LII of local partner organisations with substantial non-commercial reasons to wish to establish free access to law, and their involvement in all stages of the project.

Adoption of a broad approach to content acquisition, including all 'five pillars' of free access content, so as to create a LII with the richest possible search results and serving the broadest audience.

Utilisation of available online resources to build an initial system quickly, with impact.

Active collaboration by local partners to source data previously not available online.

Active collaboration with other free access to law providers, particularly from the NGO sector, including swapping and sharing of database content.

Continuous involvement by the established LIIs in technical assistance, and possibly in governance.

Development of a funding model relying on diverse sources of funding.

The tentative view of all the partners involved in the development of LII of India is that this approach is paying dividends for India, though there is much work to be done before it can be demonstrated that the model has been successful and sustainable.

B. A Necessary Element in India's 'Monitory Democracy'?

If India is a pioneer of the notion of 'monitory democracy,' then one of the key mechanisms of accountability of government decision-making must be open access to government information. Without guaranteed access to information about what government does, extra-parliamentary institutions have no possibility of making governments accountable. The enormous success of the right to information movement in India over the last decade is therefore crucial to its monitory democracy. Surprisingly, this is not explicitly recognised as a key element in Keane's account either of monitory democracy generally or of the Indian example.

It is a part and parcel of this argument to say that an essential element of any monitory democracy must be that citizens have effective and up-to-date access to the laws that govern them and (in a society based on the rule of law) also the powerful institutions of society in both the public and private sectors. For NGOs representing citizens or criticising governments or polluters, for small businesses wanting to assert their rights against cartels or unfair competitors, or for lawyers without the assets of national or multi-national law firms wanting to defend their clients against abuses of power, such access to legal information is essential to enable their roles in making the institutions of monitory democracy work as they are designed. Both India's public institutions that provide a basic form of such access, and the Legal Information Institute of India and similar NGOs adding value to that legal information, are playing an essential role in India's emerging monitory democracy.

PARALEGAL EDUCATION IN INDIA: PROBLEMS AND PROSPECTS

*Srikrishna Deva Rao**

Paralegal education is part of an integrated approach to legal services aimed at providing access to justice to the poorest and most marginalized sections of society. This article makes a case for devoting resources, both in law schools and in the legal profession more generally, for paralegal education. To do so, the article critically examines the development of alternative lawyering practices in India as well as other methods for advancing a pro-poor approach to legal education and to the provision of legal services. The author concludes that since there are not enough lawyers to provide legal aid services, paralegal education is an important tool and method to provide the unmet legal needs of the people. Proactive education of the public about the law is a national priority, and to ensure this, the legal community needs to support and develop paralegal education in India.

* Professor of Law and Registrar, National Law University, Delhi.

INTRODUCTION

Law, the legal system and the notion of legal professionalism visualise dual roles of lawyering. Conventionally, lawyering is considered to be a site of oppression; legitimizing lawlessness and invading the freedoms and liberties of citizens and marginalized populations. Alternatively, it can act as a site for progressive and redistributive politics by laying down foundations of the rule of law, recognising and articulating new rights and liberties, exploring social action through law and using the courts as an arena for the struggle for justice. The legal aid and human rights movements in India have used lawyering skills for a cause and as a resource for the exploited. The Indian human rights movement has also used a wide range of public interest law practices for the amelioration of human rights. Law as a resource for the poor travels beyond conventional courtroom process, and moves towards securing and challenging the structures of power and inequality. The roots of these progressive practices of law for people can be found, in the Indian context, in the traditions of liberal, socialist and radical left politics.

Ignorance of the law is a major cause of perpetuation of injustice. Citizens are subjected to exploitation due to their lack of knowledge about the law and their legal rights. Additionally, the poor and disadvantaged are largely excluded from the legal system as they have no means to secure the help of lawyers and access legal institutions. This situation is made even worse by the fact that the traditional forms of dispute settlement by caste panchayats and the like tend to systematically disadvantage vulnerable groups. At the same time, the privileged sections of society use the law to their own advantage and in many instances stall the implementation of the spirit of the law.

Access to justice depends on the implementation of rights, a fair hearing and legal representation. Legal literacy is the first step towards promotion of a legal culture. It is a right as well as a duty to build the legal knowledge and skills of lawyers as well as laypeople to ensure citizenship education. Paralegal education takes a pro-poor stance and is influenced by a range of new and old social movements. It raises fundamental questions about the social justice mission of legal education and its commitment to certain values such as democracy, individual liberty, and social and

economic equality including gender equality. Paralegalism is essentially a new kind of alternative lawyering for the poor aimed at providing effective access to justice.

This article makes an attempt to critically examine the methods to advance a pro-poor stance in legal institutions and bring the law closer to people. The article also analyses the contribution of legal education in India towards public legal education and developing the public defender system. It traces alternative lawyering practices in India for defending communities.

The article consists of four parts. Part I introduces the importance and significance of paralegal education as a practice of law for the people. Part II explores the concept of legal literacy and the role of the legal aid movement in India in promoting legal awareness. Part III examines alternative lawyering practices and strategies to mobilize communities towards legal aid. Part IV considers the response of legal education to institutionalized public legal education in India.

I. Paralegal Education: Practicing Law for the People

Ensuring that citizens develop a basic understanding of the law and the court system as well as legal rights and responsibilities is a mandatory duty of the state which has not been taken seriously in India. When compared to legal education and lawyer-centric legal aid, paralegal education in India has received very little attention. The assumption of a proactive role in educating the public about law as part of legal education should be a national priority. Unfortunately, this has never been a priority for the government or for the legal academia.

The conventional method of providing legal empowerment is the provision of legal aid services in civil and criminal matters. The worldwide access to justice movement contributed to the creation of alternative lawyering of this kind. In an attempt to expand the scope of formal legal services, it emphasized the need to help people enforce their traditional legal rights adequately in the courts through state-employed lawyers. It was

also concerned with using social movement politics to change the law, court procedures, and ultimately society so that access to justice becomes more meaningful. It advocated the employment of more lawyers by institutions of civil society so that reform of formal legal institutions may be carried out.

However, court and lawyer-centric legal services have a number of limitations. The services of lawyers are costly, the justice system is very slow and solutions afforded by litigation and a formal legal process may not be the remedy desired by the people. The second method is real legal empowerment, where members of the community are trained as paralegals to act as a bridge between law, society and people. Paralegals tend to be closer to communities and focus on a harmonious reconciliation of disputes rather than an adversarial approach.

In response, current 'Access to Justice' movements are a conglomeration of several movements aimed at institutionalisation of citizens' legal education. They advocate informal community-based dispute resolution as the alternative to formal legal justice. The 'Legal Aid' movement provides commitment and opportunity to students and citizens to use legal knowledge to meet the needs of the poor and unrepresented. The 'Street Law' movement provides a practical understanding of the law and the legal system and informs people about the laws that affect them in their everyday life. The emphasis of 'Human Rights Education' is on educating people about their rights in order to equip them to enforce these rights. The 'Plain English Movement' emphasizes the need to demystify the law and legal jargon for the poor and vulnerable. 'Clinical Legal Education' is based on learning practical skills and introducing students to social justice issues to prepare them to become public interest lawyers. 'Community radio' offers another major opportunity to effectively communicate with the people in developing legal awareness.

Paralegal education is part of this framework of access to justice. It envisages practicing law for the people, through an integrated approach to legal services. Paralegals are persons with specialised training in law who can provide legal assistance to the poor, and can therefore complement access to legal advice and representation. They are important and cost-effective components of any justice system.

II. The Legal Aid Movement in India

Legal aid includes legal advice, assistance, representation, education and mechanisms for alternate dispute resolution in order to develop and maintain a just and fair legal system. The real question is how to make legal aid more responsive to the needs of the poor and ensure adequate protection of their rights. It requires concerted efforts at several levels by the media, government, civil society, judiciary and legal academia to promote legal awareness as a vehicle for the promotion of justice.

Legal aid is a basic human right and integral to the right to life and personal liberty provided in the Indian Constitution.[1] Legal aid and support was declared as an aspiration of the Indian Constitution but was given a statutory footing only in 1987. The emphasis on 'court-centred legal services' can be traced back to 1958 when the Law Commission of India recommended that courts should enact rules to render legal aid.[2] As a consequence, important provisions were added to procedural laws.

The legal aid movement in India received a great fillip due to two reports. The first report by the Expert Committee on Legal Aid under the chairmanship of Justice V R Krishna Iyer recommended creating legal aid programmes through a network of legal aid groups including law schools.[3] The 1977 report by Justice P N Bhagawati urged law schools to participate in building legal aid clinics and recommended the introduction of legal aid related subjects, such as law and poverty and law and society, into the curriculum. The report also recommended the provision of academic support to law school clinics.[4]

India witnessed its first real upsurge of legal activism in 1977 after the resurgence of democratic liberalism in order to "regain the legitimacy forfeited partially during the emergency."[5] This activism was also based on

[1] India Const. art. 21.
[2] II Law Commission of India, Fourteenth Report of the Law Commission of India: Reforms of the Judicial Administration (1958).
[3] Expert Committee on Legal Aid, Ministry of Law & Justice, Govt. of India, Processual Justice to the People (1973).
[4] Committee on National Judicare, Ministry of Law & Justice, Govt. of India, Equal Justice; Social Justice (1977).
[5] Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in India*, *in* Law and Poverty: Critical Essays (Upendra Baxi ed., 1992).

the principle of equal justice which requires that the State has the responsibility to provide access to legal advice and assistance in case of poor and indigent people.[6] The real emergence of legal activism was initiated through 'social action litigation' which inaugurated a new range of themes on which public discourse on the ethics of practices of power emerged.[7] Social action litigation is itself an extension of human rights and popular movements in a state's formative practices.[8] This new era of legal activism for social action expanded the regime of rights, converting the Supreme Court of India into a permanent Constituent Assembly of India, sculpting the nature and future of the rights movement.[9]

The legal aid movement and post-emergency judicial activism have provided fertile ground for Civil Society Organizations (CSOs) to use law for the amelioration of victims of human rights violations. However, these organizations do not regard law as a crucial resource in the struggle for emancipation and challenging injustice. Civil liberties groups like the People's Union for Civil Liberties (PUCL) and People's Union for Democratic Rights (PUDR) and several Non-Governmental Organisations (NGOs) have used the 'epistolary jurisdiction' of the Supreme Court and various High Courts in creating alternative jurisprudence in a number of public interest cases. However, using legal strategies for the enforcement of human rights has yet not been considered a mainstream activity.

III. Alternative Lawyering: Practices and Strategies

Legal support groups in India are broadly of two types, the 'Traditional Legal Service Groups' ("TLSGs") and 'Strategic Legal Support Groups' ("SLSGs"). In their initial phase of development, legal support groups essentially worked on individual claims of clients and focused on representation in courts using social action litigation strategies. The early TLSGs, the 'first generation legal support groups,' include the Consumer Education and Research Centre, Rajpippla Free Legal Services

---

[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

Programmes and AWARE, Hyderabad. The 'second generation legal support groups' are SLSGs which combined both formal courtroom advocacy for individual claims as well as strategic interventions in the courts for a public cause. These include groups like Lawyers Collective (Mumbai and Delhi), Indian Centre for Human Rights (Mumbai and Delhi), Majlis (Mumbai), Alternative Law Forum (Bengaluru), Rural Litigation and Entitlement Kendra (Dehradun) and Centre for Social Justice (Ahmedabad).[10]

SLSGs adopt a wide range of proactive strategies to reach their constituent groups; they create precedents by test cases, promote community legal awareness, train paralegals, encourage and advocate settlement of disputes at the grass root level, carry out public advocacy campaigns and provide legal support to grass root level NGOs. Rather than remaining court room advocates, these groups act as conciliators, mediators, legal advisors and social justice lawyers in order to enable the rural poor to access their entitlements. This necessarily results in a holistic approach towards legal issues, which in turn provides a strong normative frame work for SLSGs to carry forward their objectives.

Social justice lawyers, through their strategic legal interventions, not only motivate their cadres but also inspire them to consider a career in public interest law. SLSGs typically work on a broad mandate of social justice lawyering where they involve themselves in representations against specific patterns of human rights violations and in advocating reform and policy changes. Through this process of strategic legal interventions, social justice lawyers not only experience the impact of law on human life, but discover ways in which they can widen the scope of human rights and the rule of law.

A. Access to Criminal Justice

In India, legal services are provided mostly during a criminal trial if the accused is unable to engage a lawyer. Reading the 'due process clause' into Article 21 of the Constitution of India, the Supreme Court has interpreted the right to life and personal liberty to include the right to a fair trial,

[10] MARC GALANTER, NEW PATTERN OF LEGAL SERVICES IN INDIA: LAW AND SOCIETY IN MODERN INDIA (1997).

including the right to legal representation.[11] The right to be provided with a lawyer was seen as being restricted to defence in criminal trials where the issue of personal liberty was involved. But in *Sheela Barse v. State of Maharashtra*,[12] the Supreme Court held that if the legal assistance was not provided to an indigent accused whose life and liberty were in jeopardy, injustice would likely result. The Court stated that "every act of injustice corrodes the foundations of democracy and rule of law because nothing rankles more in the human heart than a feeling of injustice."[13] Today, legal aid as a right has been extended to all forms of legal proceedings starting from arrest till sentencing, before a variety of fora. The presence of a lawyer during interrogation is an important aspect of legal aid and legal services which needs to be properly articulated in the backdrop of the agonizing domain of custodial violence.

Another issue of criminal jurisprudence which has been keenly contested over the years is the right to silence *vis-a-vis* the constitutional right against self-incrimination. The Indian Supreme Court's famous decision in *Nandini Satpathy v. P.L. Dani*[14] emphasised the similarity between the "spiritual thrust" of the Indian and American rights against self-incrimination and the burning relevance of the moral from *Miranda*[15] in India.

B. Prison Legal Services

Indian jails are populated not by persons convicted of crimes, but by prisoners awaiting trial; undertrials who cannot afford bail. The sole basis of detention is to ensure their appearance at trial. People who enter prisons encounter a complex world where the coercive thrust of the state does not end with the deprivation of their liberty, but continues to impact every aspect of their life through the prison and its staff.

The closed, guarded doors of prisons tend to perpetuate state violence. The liberty, dignity and freedom of prisoners are denied due to

---

[11] Maneka Gandhi v. Union of India, (1978) 2 S.C.R. 621.
[12] Sheela Barse v. State of Maharashtra, (1983) 2 S.C.R. 337.
[13] *Id.* at 341.
[14] Nandini Satpathy v. P.L. Dani, (1978) 3 S.C.R. 308.
[15] Miranda v. Arizona, 384 U.S. 436 (1966).

overcrowding of jails, prolonged detention of undertrials, solitary confinement, unhygienic living conditions and the denial of proper food, clothing and even medical treatment. The plight of women, delinquent children, young offenders, destitute, vagrant, lunatic and psychiatric patients is far more shocking.

By virtue of prisons being 'closed institutions,' prisoners and their problems are invisible. Moreover, since what happens inside prisons is not open to public scrutiny, most violations of rights are discretely hidden away and shrouded from public view. This results in the denial of dignity of prisoners and the destruction of their personality. Legal aid and services institutions can provide visibility and bring the law relating to prisons from the margins to the mainstream, thereby ensuring transparency, accountability and the protection of rights.

IV. Response of Legal Education

The content and method of legal education in India, for a very long time, was oriented towards legalistic lawyering with emphasis on technical interpretations of the law. Currently, there is a growing concern that the law and legal jargon need to be simplified for the poor so that their 'unmet legal needs' may be fulfilled.

Legal education in India has passed through different phases of evolution since independence.[16] The first phase (1950-1965) was its transformation from its colonial heritage to a new Indian identity; the second phase (1965-1975) was a move towards professional legal education; and the third phase (1976-1987) saw the 'modernisation' of the law school curricula with some emphasis on India's social problems through Law & Society and Law & Poverty studies.

The establishment of National Law School ("NLS") at Bangalore in 1987 was a trend-setter for legal education in India. The fourth phase reflects the impact of NLS on legal education in India as evident in the recommendations by the Chief Justices Conference, 1993 and the Law

[16] *See* B.S. Chimni, *The Future of the New Law Universities: An Agenda for Collective Thinking and Action* (January 2005) (A note submitted for discussion at a one day conference of Directors/Vice-Chancellors of the National Law Schools).

Ministers Conference, 1995 that the National Law School model be replicated in other states in India. The fifth and ongoing phase is a reflection of the quality legal education offered by these law schools and a critical introspection with respect to their goals, mission and social relevance.

Clinical Legal Education is one of the most successful innovations in legal education. It has two important purposes: first, to teach practical skills and inculcate professional responsibilities, and secondly to provide legal services to meet the needs of the poor and unrepresented. The concept of clinical legal education was developed in the United States in the 1960s with the civil rights movement serving as inspiration for the same. South Africa, UK, Latin America and Asia have all subsequently designed their clinical programmes to meet the societal need for improved legal representation for those who cannot afford to pay for legal services. In the Indian context, legal awareness coupled with concerted community action, law reform and a change in power relationships are required. Legal aid clinics and clinical legal education have to take on the social responsibility of not just providing access to justice but ultimately transforming power relations.[17]

A. Clinical Legal Education

Clinical legal education in India has its roots in both legal aid and legal education reforms. It introduces law students to social justice issues and the rule of law and imbues these future legal professionals with a greater understanding of law and the role of lawyers in maintaining the rule of law in society.[18] Prof. Sathe has outlined the social justice mission of legal education as follows:

> A lawyer is not only seller of services but he is a professional who renders services for maintaining the rule of law. He is supposed to be an office of the court. He has to have a commitment to certain values such as democracy, individual liberty, social and

[17] *See* Public Interest Law Initiative, *Clinical Legal Education: Forming the Next Generation of Lawyers, in* PUBLIC INTEREST LAW INITIATIVE, HUMAN RIGHTS LAWYERING 257 (2001); WALTER KOLIN & SRIKRISHNA DEVA RAO, REPORT ON EVALUATION OF LEGAL SUPPORT GROUPS IN INDIA : A CASE STUDY OF CENTRE FOR SOCIAL JUSTICE IN GUJARAT (1999).

[18] FRANK S. BLOCH & N. R. MADHAVA MENON, CLINICAL LEGAL EDUCATION: CONCEPT, GOALS AND METHODS (2007).

> economic equality including gender equality and concern for the disadvantaged sections of the society which will include the poor, women, the physically handicapped, children, the minorities and the dalits. Legal education has to create such a commitment.[19]

The most valuable product of clinical legal education is the deep satisfaction gained by young law students while providing free legal assistance to people in need. In the legal aid clinic, the student learns not only about the law but also its impact on life. By bringing law to life through the experience of clients in need, law school clinics assume an important role in the improvement of human rights and the development of rule of law.

V. Paralegal Education in India

The vast majority of people who are either affected by or engaged with the legal system are poor and have no resources to protect their rights. There are not enough lawyers to provide legal aid services. Paralegal education is an important tool and method to provide for the unmet legal needs of the people. It will improve the overall quality of professional legal education while expanding the services for the poor. Paralegals can assist the community by providing legal advice, assistance and promoting community dispute resolution.

A paralegal acts as a bridge between the community, the social worker, the common person, and the lawyer. Paralegals receive two kinds of training: substantive training in formal law and government procedures, and skills-training in investigation, interviewing and community dispute resolution methods. They complement formal legal aid.

Legal education in India is currently facing serious challenges with respect to its goals, mission and social relevance. Clinical legal education is one method to introduce law students to social justice issues and prepare future public interest lawyers. However, what is far more important and what must become a national priority is the proactive education of the

---

[19] S. P. Sathe, *Community Responsive Legal Education: Trends in South Asia* (November 2001) (Keynote address at a Roundtable discussion organized by the United States Educational Foundation of India in collaboration with Pune Law College in 2001).

public about law. In order to enable this, legal education in India needs to undergo serious introspection, strategically allocate community services and support paralegal education. It needs to establish a cadre of 'barefoot lawyers,' who will provide legal aid and assistance to the poor and vulnerable.

INTRODUCTION

Procedural delay in the delivery of criminal justice causes hardship to victims and their families and undermines public confidence in the criminal justice system's ability to deliver justice in a timely fashion.[1] Delay and pendency resulting in docket explosion is an important concern for legal academics, policy makers, the judiciary, civil society and all concerned citizens interested in improving the efficiency and the effectiveness of the criminal justice process.

The concept of speedy trial was read into art. 21 as an essential part of the fundamental right to life and liberty guaranteed under the Indian Constitution.[2] The Supreme Court of India reiterated this is *Motilal Saraf v. Jammu & Kashmir*[3] and observed that,

> [T]he right to speedy trial begins with actual restraint imposed on arrest and consequent incarceration and continues at all stages, namely the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality can be averted.

In the recent case of *Imtiyaz Ahmad v. State of U.P.*,[4] the Supreme Court of India underscored the importance of expediting the trial of criminal cases.[5] In this case the Supreme Court was called upon to decide a set of appeals against a batch of interlocutory orders passed by a learned Single Judge of the Allahabad High Court staying the order passed by the Additional Chief Judicial Magistrate, Uttar Pradesh for registration of a case against the respondent.[6] These cases have been pending in the

[1] LAW COMMISSION OF INDIA, SEVENTY SEVENTH REPORT OF THE LAW COMMISSION OF INDIA: DELAYS AND ARREARS IN TRIAL COURTS 1 (1978); Hussain v. State, (2012) A.C.R. 3528; Zahira Sheikh v. State of Gujarat, (2004) 4 S.C.C. 158; Shalini v. State, 71 (1998) D.L.T. 19; Kartar Singh v. State of Punjab, (1994) 3 S.C.C. 569; Ajaykumar v. State, 1986 Cri. L. J. 932.

[2] Hussainara Khatoon v. State of Bihar, 1979 A.I.R. 1369.

[3] Motilal Saraf v. State of Jammu & Kashmir, (2007) 1 S.C.C. (Cri) 180.

[4] Imtiyaz Ahmad v. State of U. P., (2012) 2 S.C.C. 688.

[5] *Id.*

[6] *Id.*

Allahabad High Court since 2003.

Concerns about delays in the criminal justice process were also expressed by two division benches of the Supreme Court in January, 2012. Referring to the pendency of over three crore cases before trial courts, High courts and the Supreme Court, Justice A.K. Ganguly and Justice T.S. Thakur questioned the Government on policy decisions and judicial reforms including the speeding up of justice delivery.[7] Another bench of Justices A.K. Patnaik and Swantanter Kumar was critical of the Government's decision to scrap fast-track courts.[8]

Reforming the criminal justice system so as to reduce and ultimately eliminate judicial delays is therefore both a pressing need and a growing concern within the legal community. In order to assist in thinking about the trajectories of possible reforms, in this paper, I explore the causes of delay in the criminal justice system, and the consequences of such delay for the rights of the accused, particularly for those who are imprisoned pending trial. Keeping such a rights-based approach in mind, I then highlight certain core areas that require immediate focus in order to address the problem of delays and arrears in the criminal justice system.

I. THE *IMTIYAZ AHMAD* CASE: STAY OF CRIMINAL CASES BY THE ALLAHABAD HIGH COURT

The *Imtiyaz Ahmad*[9] case brought to the attention of the Supreme Court the manner in which criminal investigations and trials had been stayed by the Allahabad High Court. Similar instances were being reported in several other High Courts. Considering the importance of the issues, the Supreme Court appointed Mr. Gopal Subramanian, Senior Advocate to assist the Court as Amicus Curiae.[10] The Supreme Court also issued directions to the

---

[7] Dhananjay Mahapatra, *Govt. Faces Supreme Court Ire over Pendency*, TIMES OF INDIA, Jan. 13, 2012 http://articles.timesofindia.indiatimes.com/2012-01-13/india/30623353_1_courts-ftcs-justice-delivery; Dhananjay Mahapatra, *Fast track Courts get a New Life*, TIMES OF INDIA, Mar. 30, 2005, http://articles.timesofindia.indiatimes.com/2005-03-30/india/27852345_1_ftcs-courts-11th-finance-commission.

[8] *Id.*

[9] Imtiyaz Ahmad v. State of U. P., (2012) 2 S.C.C. 688.

[10] *Id.*

registrars of all High Courts to furnish statistics of pending serious cases[11] in which proceedings had been stayed at the stage of registration of the First Information Report (FIR), investigation, framing of charges, and/or trials in exercise of the power under Article 226 of the Constitution or sections 482 and/or 397 of the Code of Criminal Procedure (CrPC).[12]

The reports of various High Courts disclosed that large numbers of such cases were pending before the courts. The important trends that emerged were as follows:[13]

1. 45% of cases pending are murder cases.
2. 25% of cases have been pending for 2-4 years from the date of a stay order and 8% of cases have been pending for 6 years or more.
3. 77% of the pendency was reported from four High Courts, viz., Kolkata (31%), Allahabad (28.6%), Patna (8.8%) and Orissa (8.2%).

The Supreme Court in the present case also analyzed 10,541 cases that were stayed in the Allahabad High Court.[14] The analysis of data revealed the following:[15]

1. 9% of cases were pending for more than 20 years.
2. 21 % were pending for more than 10 years.
3. Average pendency was around 7.4 years.
4. Submission of charge-sheet was found to be the most common stage where the cases were stayed, with almost 32% of the cases falling under this category. The next two most common stages are found to be those of "appearance" and "summons", with each comprising 19% of the total number of stayed cases.

The observations and analysis of data in Imtiyaz Ahmad demonstrated the urgency and importance of conducting a further study on the issue of delays in the criminal justice process, in order to put in place measures &

---

[11] I.e., cases dealing with serious offences such as murder, rape, kidnapping and dacoity.
[12] *Imtiyaz Ahmad, supra* note 9, *id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*

mechanisms to reduce pendency in criminal cases. For this purpose the Supreme Court of India has directed the Law Commission of India to undertake a study and to suggest measures for the reduction of delay in cases where proceedings of criminal cases have been stayed at the stage of investigation or trial by the High Court.

II. JURISPRUDENCE OF DELAY

In 2007, a research study was conducted by Salar Khan on the nature and extent of judicial delays in criminal trials in Delhi.[16] The researcher studied the cause list of 135 criminal courts in Delhi on a single working day, 16 November, 2007, and found that in the sessions courts the overwhelming majority of cases where the offence was alleged to have been committed in 2006, had been pending for more than a year.[17] Specifically, the study showed that approximately 67% of the pending criminal trials were one to five years old, 12% six to ten years old, 4% 11 to 15 years old, and around 2% pending for more than 15 years.[18]

On the date selected a mere 14% of the matters had come up for trial in the same year. Similarly, the courts of the Metropolitan Magistrate also have matters pending trial for offences registered more than 19 years ago.[19] The analysis showed that approximately 51% of pending cases in the sample were between one to five years old, 21% six to ten years old, 7% 11 to 15 years old and around 1% pending for more than 15 years.[20] A mere 20% of the matters taken up on the day studied pertained to the year 2007. [21]

The study therefore revealed that delay is endemic and entrenched in the judicial system. In what follows, I explore the impact of this delay on those who suffer the most by it, viz., undertrial prisoners.

---

[16] SALAR KHAN, JUDICIAL DELAYS TO CRIMINAL TRIALS IN DELHI 7 (2008). *See also* Ashok Agrawal, Salar Khan et al., *Using Delays and Acquittals as a Method of Dispensing Criminal Justice: A Case Study from the Trial Courts at Delhi* 12 (2008), http://pappdf.2650_paper/papers/org.ipsa.erroom.
[17] Ashok Agrawal, *id*. at 44.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 45.
[21] *Id.*

III. The Impact of Delay on Undertrial Prisoners

Undertrial prisoners form a major share of prison inmates among various types of prisoners. 66.4% of those lodged in jails across the country are under trial. A total of 6, 672 undertrial prisoners were lodged beyond three years and up to five years at the end of the year 2009. There were 2,026 such undertrial prisoners in Uttar Pradesh followed by 771 in Punjab, 749 in Bihar, and 707 in Delhi. The highest percentage of undertrial prisoners detained for more than three years but less than five year was reported from Sikkim (9.7%) followed by Delhi and Jammu & Kashmir (7.9% each). 2,422 undertrials were detained pending trials for 5 years or more in the country. The highest numbers of such undertrial prisoners were reported from Punjab where as many as 680 undertrials were lodged in jails for over five years, which accounted for 28.1% of such prisoners at the national level, followed by Bihar (447, 18.5%) Uttar Pradesh (399, 16.5%) and Delhi (143, 5.9%).[22]

In July 2010, the Ministry of Law and Justice announced a program to secure the release of two-thirds of undertrial prisoners who constituted over 70% of the prison population.[23] The efforts of the Law Ministry need appreciation for securing the release of 200,000 undertrials. However, the solution to the problem of undertrial prisoners is linked to systemic faults within the Indian criminal justice system - police and trial delays, an absence of legal aid, poor prison administration and a lack of accountability all undermine undertrials' right to the speedy resolution of their cases and damage public faith in the criminal justice system.[24]

The huge proportion of undertrial prisoners in Indian jails is caused by the poor administration of criminal justice processes, starting from arrest up to conviction or acquittal.[25] There are often substantial delays in the conduct of investigations after arrest.[26] Although the CrPC states that investigations

---

[22] *See* National Crime Records Bureau, Prison Statistics India 111 (2009).
[23] Department of Justice, Delivery of Justice & Legal Reforms – Undertrial Programme, July 1, 2011, http://doj.gov.in/?q=node/209.
[24] Yash Vijay, *The Adversarial System in India: Assessing Challenges and Alternatives,* http://dx.doi.org/ 10.2139/ssrn.2147385.
[25] NHRC, Annual Report 2000-2001, http://nhrc.nic.in/ar00_01.htm.
[26] Kartar Singh v. State of Punjab, (1994) 3 S.C.C. 569; D.K. Basu v. State of West Bengal, (1996) 1 S.C.C. 416.

should take less than six months to complete, after which the investigation should be stopped by a magisterial order,[27] the police often take much longer to submit charge sheets. After the charge sheets are filed and a court date is set for the trial to begin, the police have often reported a shortage of personnel to escort undertrials to court hearings. Staff shortages amongst the judiciary have similarly impacted the speedy resolution of cases. Even when undertrial cases are brought before the court, the process of hearing the case is often delayed at every possible opportunity.[28] Despite amendments to the CrPC in 2008, which stipulate that adjournment of cases is not allowed for fickle reasons,[29] cases are nevertheless consistently adjourned due the absence of one of the parties. While staff and resource shortages are some of the causes behind the problem of delay at the trial stage, this cannot be used to justify the violation of citizens' rights.

Being ignorant of their right to free legal aid,[30] the accused are unable to apply for bail or provide the sureties required for release.[31] Section 436 of the CrPC stipulates that persons accused of bailable crimes must be released on a personal bond, without the requirement of surety if they are not able to provide bail for a period of seven days after arrest. Those accused of non-bailable offences are eligible for bail after having served half of the maximum sentence they could receive if they were found guilty.[32] Furthermore, according to the CrPC, the maximum time any undertrial can be held for without conviction is equal to the maximum sentence they would receive if found guilty.[33] All undertrials therefore have a legislated date on which they must be released, whether convicted or not; that this date is often ignored is a problem of prison administration, which can easily be rectified by implementing modern record management systems. We need to develop simple record keeping related to prisoners, legal aid, escorts, production in court, parole, remission, interviews with families and lawyers, health care, inventory, and civil society involvement. Ineffective

---

[27] Code of Criminal Procedure §167 (hereinafter CrPC).
[28] Antulay v. Nayak, 1992 Cri. L. J. 2717.
[29] Code of Criminal Procedure (Amendment) Act §8 (2008); CrPC §309(1).
[30] INDIA CONST. art.39A; Pandian v. State of Tamil Nadu, (2002) 3 M.L.J. 513; Laxman v. State of Gujarat, (1999) 1 G.L.R. 889; Free Legal Aid Committee v. State of Bihar, A.I.R. 1982 SC 1463; State of Maharashtra v. Vashi, A.I.R. 1996 SC 1.
[31] Sukdas v. State of Arunachal Pradesh, A.I.R. 1986 SC 991.
[32] CrPC §436A.
[33] *Id.*

prison record keeping often results in the denial of justice for a substantial number of undertrials.[34]

A related issue is that of adequate provision of legal aid to under trial prisoners. The Supreme Court has read in a 'due process clause'[35] into art. 21 of the Constitution. Therefore, the right to fair trial,[36] including the right to legal representation, now falls within the scope of the article.[37] In the land mark case of *Sheela Barse v. Union of India*,[38] the Supreme Court remarked on the importance of legal aid and held that when legal assistance is not provided to an indigent accused who is arrested and put in jeopardy of life and liberty, injustice will likely result and that "every act of injustice corrodes the foundations of democracy and rule of law because nothing rankles more in the human heart than a feeling in injustice."

Legal representation is an important concern for under trial prisoners. The sole basis of detention of under trial prisoners is to ensure their appearance at trial, and not for conviction.[39] The people who enter the prison encounter a complex world where the coercive impact of the State does not end with the deprivation of their liberty, but rather the State through its prison and its staff intervenes in almost every aspect of their lives.[40]

The closed guarded doors of prison and it walls and bars tend to perpetuate violence denying the rights of individuals, their dignity, liberty and freedom, thereby legitimizing the administration of criminal justice system. A part of the sordid story is the overcrowding of jails, prolonged detention of undertrial prisoners, solitary confinement, unhygienic living conditions, denial of proper food, clothing and even medical treatment.[41] The plight of women, delinquent children and young offenders, destitute,

---

[34] REPORT OF THE HUMAN RIGHTS COMMITTEE, U.N. Doc. A/67/40 (Nov., 2011).
[35] Menaka Gandhi v. Union of India, A.I.R. 1978 SC 597.
[36] Agarwal v. Agarwal, A.I.R. 2003 SC 2686; Darisuz v. Union of India, A.I.R. 1990 SC 605; Vatheeswaran v. State of Tamil Nadu, A.I.R. 1983 SC 361; State of Maharashtra v. Champalal, A.I.R. 1981 SC1675.
[37] Khatri v. State of Bihar, 1981 S.C.R. (2) 408.
[38] Sheela Barse v. Union of India, 1986 S.C.A.L.E. (2) 230.
[39] State of Maharashtra v. Najakat, 2002 (2) A.C.R. 1813 (SC); State of Andhra Pradesh v. Venkateswara, A.I.R. 1977 SC 1096.
[40] Upadhyay v. State of Andhra Pradesh, 2006 (2) A.C.R. 1722 (SC).
[41] *Id*.

vagrant, lunatic and psychiatric patients is much more shocking.[42]

The worrisome reality is that prisons and prisoners and their problems are invisible.[43] The invisibility has resulted from its nature of being a 'closed institution'. As what happens in prison is not open to public scrutiny, most rights violations are discretely hidden away and shrouded from public view.[44] This results in denial of dignity of prisoners and destruction of their personality. Here the legal aid and services institutions can provide visibility and bring the law relating to prisons from the margins to the mainstream ensuring transparency, accountability and protection of rights.

Recognizing the systemic problems associated with the speedy release of undertrials, the Law Ministry suggested some reforms to the system such as using video conferencing technologies and introducing plea bargaining systems.[45] While these solutions can alleviate some of the backlog, they are piecemeal and can obfuscate the need for lasting systemic reform.[46] Furthermore, both video conferencing[47] and plea bargaining[48] can invade the rights of the accused. Video conferencing, while alleviating the need to allocate resources for escorting prisoners to and from court hearings, also impedes prisoners from consulting their lawyers in a substantive manner, and fails to convey important elements available in a face-to-face trial. While plea bargaining expedites the criminal justice process, it is liable to lead to a miscarriage of justice in a heavily backlogged system, since the accused would prefer to plead guilty than to wait out the lengthy trial process.[49] That pleading guilty is more attractive to prisoners than a just investigation into the case points out the extent to which lengthy delays in the processing of undertrials has undermined the concept of a fair trial that is intrinsic to justice in a democratic state.[50]

---

[42] *See* KRISHNA DEVA RAO, BARS AND BEHIND BARS (1995). *See also* KRISHNA DEVA RAO, TIHAR: PRISON OR MORTUARY (1995).
[43] Upadhyay v. State of Andhra Pradesh, 2006 (2) A.C.R. 1722 (SC).
[44] *Id.*
[45] NATHAN REHN ET AL., JUSTICE WITHOUT DELAY: RECOMMENDATIONS FOR LEGAL AND INSTITUTIONAL REFORMS IN THE INDIAN COURTS 14, 15 (2011).
[46] Zauderer v. Ohio, 471 U.S. 626 (1985); United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982).
[47] CrPC §273.
[48] CrPC §§265A-265L.
[49] Zauderer v. Ohio, 471 U.S. 626 (1985); United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982).
[50] JAYANTH KRISHNAN & RAJ KUMAR, DELAY IN PROCESS, DENIAL OF JUSTICE: THE

IV. Court Culture and Adjournments

Speedy case procession per se is not necessarily a positive thing. In principle, trade-offs exist between court efficiency and due process. In 1968, a paper titled 'Continuances in the Cook County Criminal Courts' was published in the University of Chicago Law Review. This paper is one of the most comprehensive studies of adjournments to date. The researchers classified adjournments into three categories:

1. 'Fair hearing' adjournments[51] (such as those due to missing witnesses);
2. 'Abuse' adjournments[52] (such as those which sought to try and avoid a judge perceived as hard); and,
3. 'System overload' adjournments[53] (such as those due to lack of court time or judges).

They concluded that the possibility and desirability of preventing each of these types of adjournments differs.[54] The researchers also identified factors that made a case more prone to adjournments, such as whether the accused was in custody or had previous convictions.[55]

A research study into causes of adjournments in criminal cases in four courts in Scotland revealed an interesting fact about court culture:[56] three of the courts in the study had what was termed a passive/co-operative culture. Adjournment requests were informally agreed between prosecution and defense, rarely opposed, and seldom questioned by judges.[57] In Court D, there was a far more proactive culture. Sheriffs questioned requests for an adjournment aggressively, with the result that both prosecution and defense

---

Jurisprudence and Empirics of Speedy Trials in Comparative Perspective (2011).
[51] Laura Banfield & David Anderson, *Continuances in the Cook County Criminal Courts*, 35 U. Chi. L. Rev. 264 (1968).
[52] *Id.* at 266.
[53] *Id.*
[54] *Id.* at 292.
[55] *Id.*
[56] Fiona Leverick & Peter Duff, Adjournments of Summary Criminal Cases in the Sheriff Courts 39-52 (2001).
[57] *Id.* at 69.

avoided asking for adjournments unless absolutely necessary, for fear of being criticized in court. If an adjournment of a trial date was granted, it was likely that an earlier rather than a later date would be substituted.[58] There were also a number of specific local factors at work, such as problems in obtaining police witness statements at Court D and Court C; and a shortage of Sheriffs and accommodation at Court B.[59]

Unnecessary adjournments have a number of adverse effects. There are financial and time costs and, where the adjournments occur on the day of the trial, there are cost to all the parties who have attended court unnecessarily, whether they be witnesses, legal professionals, or indeed, the accused. An additional problem is that delays as a result of a culture of adjournments can become self-perpetuating. The attitude of judges is critical in establishing the court culture. This was demonstrated in the fourth court, where a pro-active approach taken to questioning the need for an adjournment was accompanied by relatively low rate of adjournments, whereas adjournment rates were higher in the other three courts where the judges saw their role as merely adjudicating over disputed adjournment requests. The difference in adjournment rates is explained by the difference in court culture and the attitude of judges is critical in setting the culture in a particular court.[60]

V. Issues for Discussion

Keeping in mind the issues with delay highlighted above, the key priority areas for prevention of judicial delay in the criminal justice system are as follows:

1. Improving the quantity, quality and timeliness of information sharing and communication between investigating authorities, the prosecution, the defence and the court.
2. Improving the method of trial listings.
3. Availability of legal representation at the earliest possible time of arrest and prior to charge.

---

[58] *Id.* at 21-28.
[59] *Id.* at 15.
[60] Fiona Leverick & Peter Duff, *Court Culture and Adjournments in Criminal Cases: A Tale of Four Courts,* Crim. L. Rev. 39 (2002).

4. Procedure and institutional mechanisms for monitoring stay orders in criminal cases.
5. Fast track mechanisms for disposal of stay orders.
6. Research on judgments of all High Courts relating to the issue of stay orders in criminal cases and evolving a consistent judicial policy in this regard.
7. Development of guidelines in cases of grant of stay on investigation and trial in criminal cases.
8. Constitution of a research wing in each High Court to study and submit monthly reports dealing exclusively with the reduction of pendency.
9. Development of an 'Operations Management' plan for the fast track movement of High Court stay orders in criminal cases.

CONCLUSION

The then Chief Justice of India, Justice S. H. Kapadia in his 2011 Law Day address observed that "all the stakeholders are accountable for maintaining and achieving standards of court excellence. The Executive including the police and the bar have an important role to play in expeditious disposal of cases."[61] According to him, a complete solution to the problem of backlog of cases could be found by appointing a working committee on arrears and court management.

In addition, as Pratiksha Baxi has rightly observed,

> [T]he problem of court arrears or judicial delay must be contextualized in terms of the regimes of criminal law and patterns of prosecutions brought against the poor….The lack of legal aid to the indigent prisoner, the overcrowding of prisons, the appalling toll judicial delay takes on an undertrial and the conditions of violence imposed on her remain grim descriptions of the criminalization of the lives of the poor. The regimes of impoverishment that are instituted by judicial delay may be mapped according to the differential impact of judicial delay on

[61] S.H. Kapadia, *Law Day Speech*, Nov. 29, 2011, http://supremecourtofindia.nic.in/speeches/lawdayspeech.pdf.

> victims, witnesses, undertrials, respondents and the accused. Judicial delay has led to suicides or deaths in custody; increased the possibilities of out of court settlements in criminal trials and resulted in loss of livelihood.[62]

In other words, we need to pay attention to researching how pending cases are disposed and whether the jurisprudence of delay builds notions of substantive justice into the very act of judging pending cases. Any approach to the resolution of the problem of delays that does not focus on the social and substantive justice implications of the process is bound to add to, rather than ameliorate, the pathologies of the existing system.

---

[62] PRATIKSHA BAXI, ACCESS TO JUSTICE AND RULE-OF-[GOOD]-LAW: THE CUNNING OF JUDICIAL REFORM IN INDIA (Institute of Human Development, 2007).

BHULLAR, THE BOGEY OF HUMAN RIGHTS, AND THE DEATH OF DUE PROCESS

*Aparna Chandra**

In Devender Singh Bhullar v. NCT, Delhi ("Bhullar")*, decided in April, 2013, the Indian Supreme Court held that though normally delay in deciding a death row inmate's mercy petition may be a ground for commuting the death sentence, such commutation is not appropriate in 'terror' cases. This case comment analyses the* Bhullar *decision and argues that the judgment violates both binding precedent on the specific question of delays as a ground for commutation of a death sentence; as well as fundamental constitutional norms of due process enshrined in Article 21 of the Constitution. The comment also points to the disturbing trend in all branches of the state of treating terror cases as exceptions to thA rule of law, a view that the Supreme Court appears to endorse in* Bhullar.

The recent spate of executions and denial of clemency petitions has brought the issue of the death penalty to the forefront of legal and political

*Assistant Professor, National Law University, Delhi. A previous version of this article appeared in the online legal news and analysis website, Bar and Bench. *See* Aparna Chandra, Bhullar, *the Bogey of Human Rights, and the Death of Due Process*, Apr. 26, 2013, BAR AND BENCH, http://barandbench.com/content/bhullar-bogey-human-rights-and-death-due-process#.UY_oJbX-FDQ

discourse in India.[1] Now that the President has started rejecting clemency petitions after a long hiatus, one concern that has surfaced is whether an inordinate delay in the execution of a death sentence should itself be a ground for commuting the sentence. The controlling precedent on this point is *Trivenben v. State of Gujarat*,[2] which held that after the final appeal has been heard, if there is an inordinate delay in executing the death sentence, and such delay is attributable to executive sluggishness, then delay becomes a factor in determining whether the death penalty should be commuted or not.

Two sets of cases, one pending, and one recently decided, have required the Supreme Court to revisit the issue of the delays in execution. In *Devender Pal Singh Bhullar v. NCT, Delhi*,[3] handed down by the Supreme Court on April 12, 2013, the Court held that in terror related cases, delay in deciding clemency petitions will not be a ground for commutation of death sentences. In this note I argue that the Court's judgment is legally and constitutionally indefensible.

I. The Case: "Proof Beyond Reasonable Doubt is a Guideline, Not a Fetish"

Bhullar was convicted and sentenced to death by a TADA Court for various offences under TADA and the IPC. The conviction was based solely on his own, non-corroborated, and retracted confessional statement made to a police officer. On appeal, by a 2:1 split verdict, the Supreme Court upheld the conviction and the sentence.[4] The dissenting judge acquitted Bhullar on the ground of lack of evidence, and infirmities and inconsistencies in the testimonies of the prosecution witnesses. However, the majority refused to

---

[1] *See e.g.,* V. R. Krishna Iyer, *Terror and Horror of the Death Sentence,* Feb. 17, 2013, The Hindu, http://www.thehindu.com/news/national/terror-and-horror-of-the-death-sentence/article4422870.ece; Sandeep Joshi, *Civil Rights Groups Worried Over Executions in India*, Apr. 15, 2013, The Hindu, http://www.thehindu.com/news/national/civil-rights-groups-worried-over-executions-in-india/article4617642.ece Martha Nussbaum, *Fatal Error*, Feb. 28, 2013, The Indian Express, http://www.indianexpress.com/news/fatal-error/1080761/; *Karunanidhi Reiterates Demand for Abolishing Death Penalty*, Apr. 13, 2013, The Indian Express, http://www.indianexpress.com/news/karunanidhi-reiterates-demand-for-abolishing-death-penalty/110196 1/#sth ash.vSfwBzTb.dpuf.

[2] (1989) 1 S.C.C. 678.

[3] W.P. (Crl.) D 16039 of 2011.

[4] Devender Pal Singh v. NCT, Delhi, A.I.R. 2002 SC 1661.

give Bhullar the benefit of the doubt in face of the sparse evidence, stating instead that, "[o]ne wonders whether in the meticulous hypersensitivity to eliminate a rare innocent form being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish."[5]

The Supreme Court's decision was handed down in March 2002. A review petition was dismissed in December 2002.[6] In January 2003, Bhullar made an application for clemency before the President. A curative petition filed by Bhullar before the Supreme Court was dismissed in March 2003. The Cabinet finally recommended the rejection of the clemency petition in July, 2005, that is, after a period of two years.[7]

The Presidential Secretariat sat on the petition for the next five years and nine months without deciding on it. In April, 2011, the Ministry of Home Affairs recalled the file, scrutinized it again, and in May, 2011 again recommended against granting clemency to Bhullar. Finally in June, 2011, that is *eight and a half years* after the clemency petition was filed, Bhullar was informed that his petition had been rejected.[8]

In the present case, Bhullar filed a writ before the Supreme Court for quashing the rejection of the petition. The writ did not seek quashing on the merits of the decision, but on the ground that the delay of eight years in deciding his application amounted to cruel, inhuman and degrading treatment and that the prolonged delay in deciding the clemency petition should itself be a ground for commuting his sentence.

II. Delay and the Death Row Phenomenon

Why should inordinate delay be a ground for commuting the death sentence? Generally two arguments are presented in support. One, an inordinate delay amounts to cruel, inhuman and degrading treatment because of the prolonged mental torture, agony, and suffering that a person under penalty of death has to go through. Second, the inordinate delay

[5] *Id.* (*per* Pasayat J.).
[6] Devender Pal Singh v. NCT, Delhi, (2003) 2 S.C.C. 501.
[7] *See* Devender Pal Singh v. NCT, Delhi, W.P. (Crl.) D 16039 of 2011.
[8] *Id.*

amounts to a second punishment altogether. Let us look at each of these reasons.

A. The "Dehumanizing" Effect

One argument for commuting a death sentence on grounds of inordinate delay is that the convict has to suffer immense mental trauma from being under a sentence of death for such a long time. The controlling precedent on the matter, *Triveniben*, recognized this suffering, called such mental trauma torture, and held this to be one factor in considering commutation of the death sentence. The Supreme Court has also recognized (in a different case which was subsequently overruled, but on another point) that "the dehumanising factor of prolonged delay in the execution of a sentence of death has the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way" and thus violates the Article 21 guarantee. [9]

Commonly referred to as the Death Row Phenomenon, the mental health impact of a prolonged delay in execution has been documented the world over.[10] The U.S., which is notorious for the length of time a convict spends on death row, has had extradition requests to that country denied, by the European Court of Human Rights on the ground that a conviction in the US would expose the person sought to be extradited to cruel, inhuman and degrading treatment.[11] Similarly, the United Nations Human Rights Committee,[12] the Privy Council,[13] as well as a host of other foreign courts have held that prolonged incarceration on death row amounts to cruel, inhuman and degrading treatment. Ironically some of these decisions cite the Indian Supreme Court's dicta in the now overruled *Vaitheeswaran* [14] and *Triveniben*, as persuasive authority for their holding.[15]

---

[9] T.V. Vaitheeswaran v. State of Tamil Nadu, [1983] 2 S.C.R. 348 *overruled* in Sher Singh v. State of Punjab, (1983) 2 S.C.C. 344.

[10] *See generally* Centre for Constitutional Rights, *The United States Tortures Before It Kills: An Examination of the Death Row Experience from a Human Rights Perspective*, Oct. 10, 2011, http://ccrjustice.org/deathrowtorture

[11] Soering v. United Kingdom, 161 Eur. Ct. H.R. at 154 (1989).

[12] Francis v. Jamaica (No. 606/1994). UN Doc. CCPR/C/54/D/606/1995 (1995).

[13] Pratt v. The Attorney General for Jamaica, Privy Council Appeal No. 10, 22 (1993).

[14] *Supra* note 9.

[15] *See e.g.,* Pratt v. The Attorney General for Jamaica, Privy Council Appeal No. 10, 22 (1993).

In the present case, Bhullar's lawyers produced documents and medical certificates to substantiate the claim that Bhullar had suffered mentally and physically as a result of the inordinate delay in execution. The Supreme Court recognized that these documents did so indicate, but refused, without clarifying why, to rely on these documents to commute his sentence.

B. The Double Punishment Claim

A second, somewhat distinct but related claim is that a prolonged delay in execution amounts to double punishment for the same crime, first by imprisoning the accused and then by executing him. In *Triveniben* the Court rejected the argument that a long period of incarceration followed by the death sentence amounts to being punished twice for the same offence. The Court reasoned that the purpose of the jail custody for a prisoner awaiting execution of the death sentence was not punitive. Therefore, the long incarceration would not amount to a second punishment. This reasoning is problematic. Regardless of the "purpose" of the custody, such a person *is* kept in jail for a prolonged period. In all material sense his liberty is as deprived as that of a person sentenced to serve out a specific number of years in jail as punishment. Therefore, the argument that the jail custody is not meant to be punitive and that therefore it cannot be understood as a second punishment is patently unreasonable.

A related line of thought is that the *mental agony* caused by the prolonged incarceration on Death Row is the second punishment. This seems to be the argument advanced by Bhullar in the present case.[16] Since the Court refused to consider Bhullar's mental trauma as a result of the delay to be a ground for commutation, the Court did not accept the related double punishment argument as well.

---

[16] As per the Supreme Court, "[t]he thrust of the argument … is that inordinate delay in disposal of mercy petition had tendered the sentence of death cruel, inhuman and degrading and this is nothing short of another punishment inflicted upon the condemned prisoner." Devender Pal Singh v. NCT, Delhi, W.P. (Crl.) D 16039 of 2011.

III. The Court's Reasons: "The Bogey of Human Rights"

What did the Court hold and why? The Court held that the delay of eight years in deciding Bhullar's clemency petition was not reason enough to commute this death sentence. Therefore, it refused to quash the President's rejection of the clemency petition.

The Court's reasoning - or what passes for it- is summed up in this paragraph, and merits quotation in full:

> We are also of the view that the rule enunciated in Sher Singh's case, Triveniben's case and some other judgments ***that long delay may be one of the grounds for commutation of the sentence of death into life imprisonment cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes. Such cases stand on an altogether different plane and cannot be compared with murders committed due to personal animosity or over property and personal disputes.*** The seriousness of the crimes committed by the terrorists can be gauged from the fact that many hundred innocent civilians and men in uniform have lost their lives. At times, their objective is to annihilate their rivals including the political opponents. They use bullets, bombs and other weapons of mass killing for achieving their perverted political and other goals or wage war against the State. While doing so, they do not show any respect for human lives. Before killing the victims, they do not think even for a second about the parents, wives, children and other near and dear ones of the victims. The families of those killed suffer the agony for their entire life, apart from financial and other losses. ***It is paradoxical that the people who do not show any mercy or compassion for others plead for mercy and project delay in disposal of the petition filed under Article 72 or 161 of the Constitution as a ground for commutation of the sentence of death. Many others join the bandwagon to espouse the cause of terrorists involved in gruesome killing and mass murder of innocent civilians and***

raise the bogey of human rights.[17]

Therefore, in sum, delay in execution does not amount to cruel, inhuman and degrading treatment because Bhullar was convicted of a terrorist offence. At one further level of abstraction, a person loses her right to procedural due process when convicted of a terrorist offence.

This decision is problematic on various counts. ***First***, the categorical decision of the Court that delay cannot be a ground for commutation of a death sentence in terrorism cases flies in the face of the Constitution bench decision in *Triveniben.* In that case, the Court had held that delay can be a ground for commutation but that in each case, the Court has to determine whether the sentence ought to be commuted on the grounds of delay, keeping in mind "[t]he nature of the offence, the diverse circumstances attendant upon it, its impact upon the contemporary society and the question whether the motivation and pattern of the crime are such as are likely to lead to its repetition, if the death sentence is vacated." Therefore, the Court in *Triveniben* required a case-by-case determination of whether delay ought to be a ground for commutation. *Bhullar*, a two-judge bench decision, has held that delay is not a ground for commutation in *all* terrorist cases. This categorical exclusion of terrorist cases is against the *Triveniben* holding.

Relatedly, it is not clear, and the Court does not specify why terror cases are materially different from other cases in the context of delay in the execution of a death sentence. A death sentence is supposed to be awarded only in the rarest of rare cases. By the Court's own decisions, any case which merits the death sentence is one where the crime is heinous and the convict is beyond reform. In what material way is a terror case different from other "rarest of rare" cases? The Court never explains.

Second, and more fundamentally, both *Bhullar* and *Triveniben* confuse two distinct issues: the nature of the crime on the one hand, and the procedural due process rights of the convict, on the other. A convict does not waive her procedural due process rights by committing a crime, even a dastardly one. Rather, these rights obligate the state to follow a just, fair, reasonable procedure in dealing with *any* accused or convict at *all* stages of

[17] Devender Pal Singh v. NCT, Delhi, W.P. (Crl.) D 16039 of 2011 (my emphasis).

the trial, appellate, clemency and incarceration phases. As the Court itself recognized in *Sher Singh v. State of Punjab*, [18] and reiterated in *Triveniben*, the protective arch of Article 21 extends to the stage of execution of the death sentence, such that "all procedure no matter the stage, must be fair, just and reasonable."[19] Therefore, as the Court in *Triveniben* recognized "procedural fairness is required to be observed at every stage and till the last breath of the life... Speedy trial is a part of one's fundamental right to life and liberty. This principle…is no less important for disposal of mercy petition." [20]

Procedural due process- which the Court in *Bhullar* thinks of as quibbling over process, and as the "bogey of human rights" has, since *Menaka Gandhi v. Union of India*,[21] been one of the most important constitutional bulwarks against state oppression in India. In *Menaka Gandhi* the Supreme Court recognized that a person cannot be deprived of life or personal liberty without following a just, fair and reasonable procedure. This fundamental right extends to all actions of the state that deprive a person of life or liberty, including the power to commute a sentence, which is itself a constitutional power and has to be exercised in a constitutionally valid manner. [22] Therefore, due process rights are not only the fundamental right of a convict, but are also and concurrently, important limitations on state action. The Constitution does not give the state the power to deprive a person of their life or liberty except by following due process. If that is the case, and if delay causes mental torture and is therefore unfair, unjust and unreasonable (as the Court in *Triveniben* recognizes), then why does the nature of the crime dictate whether the court should condone the delay or not? The Court is in effect saying that torture of a convict is just, fair and reasonable as long as the crime was serious enough. In such a case the fundamental rights of a person sentenced to death becomes, in Krishna Iyer's inimitable words, "chimerical constitutional claptrap." [23]

---

[18] [1983] 2 S.C.C. 582.
[19] (1989) 1 S.C.C. 678.
[20] *Id.*
[21] (1978) 1 S.C.C. 248.
[22] Epuru Sudhakar v. Government of A.P, (2006) 8 S.C.C. 161.
[23] Sunil Batra v. Delhi Administration, A.I.R. 1978 SC 1675.

IV. TERRORISM AND THE LEGAL BLACK HOLE

The Court's only reason for not commuting the death sentence after an inordinate delay that leads to mental torture is that this is a case of terrorism. This is the crux of the decision and is in keeping with a long line of cases where the Court has created a regime of exception, a legal black hole if you will, in dealing with terror related cases.[24] Just as light bends in the presence of a black hole and the normal laws of physics do not apply, so also in the presence of terror all rules of law get distorted and bent out of shape. Bhullar himself has been a victim of the legal black hole phenomenon twice. In rejecting his appeal against his conviction, the Supreme Court had held in 2002 that the requirement of proving a case beyond reasonable doubt - otherwise called the golden thread that runs through criminal jurisprudence[25] - is only a guideline. Similarly in the present case, the Court characterized the insistence on due process as "rais[ing] the bogey of human rights." Therefore, the normal rule of proof beyond reasonable doubt becomes a guideline, and due process becomes a bogey when used in the context of terror.

Other branches of the state are not immune to the black hole phenomenon. Ajmal Kasab's hush-hush hanging denied him the right to appeal against his clemency petition, a right otherwise recognized in *Maru Ram v. Union of India*[26] and *Kehar Singh v. State*.[27] Afzal Guru's entire case was built around the distortion of the normal rules of law. In death too, the secrecy surrounding the hanging ensured that normal procedures did not apply to him.[28] India is not the only country facing this "terror- as – legal - black hole" phenomenon. The regime of legal exception that is Guantanamo Bay has also often been dubbed a legal black hole.[29] Recently,

---

[24] *See* Mrinal Satish & Aparna Chandra, *Of Maternal State and Minimalist Judiciary: The Indian Supreme Court's Approach to Terror Related Adjudication*, 21(1) NAT'L L. SCHOOL. INDIA REV. 54 (2009).

[25] *See e.g.,* Woolmington v. DPP, [1935] UKHL 1; S.Gopal Reddy v. State of Andhra Pradesh, (1996) 4 S.C.C. 596; Krishna Lal v. Govt. of Kerala, 1994 (5) S.C.A.L.E. 1.

[26] A.I.R. 1980 SC 2147.

[27] A.I.R. 1988 SC 1883.

[28] For further details and analysis of the multiple ways in which the legal system failed Afzal Guru, *see* http://www.justiceforafzalguru.org/ (a collection of writings by various scholars and activists on Afzal Guru's case and his execution).

[29] *See e.g.,* J. Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 (1) INT'L & COMP. L. Q. 1 (2004).

the denial of *Miranda* rights to the suspected Boston bomber was sought to be justified by invoking the category of "unlawful enemy combatant," the US euphemism of choice for denying the application of the rule of law.[30] Due process, the rule of law, and fundamental constitutional values all bend before the almighty terrorist threat.

V. Conclusion: Whither Due Process on Death Row?

In sum, the entire decision in *Bhullar* is badly reasoned and completely unprincipled. The only justification that the Court has to offer for not commuting the death sentence is that on the "peculiar" facts of the case- that this is a case of terror- such a commutation is not warranted. The Court in effect gives the executive a *carte blanche* to keep a terror convict on death row, and potentially even indefinitely. As per the Court's reasoning then, the executive is not bound by the constraints of Article 21 in dealing with terror convicts on death row. The Court does not engage with what makes a terror case, in any material sense, different from other rarest of the rare cases, and why the normal rules of due process should not apply to such cases. The Court also does not explain why it would not rely upon the evidence that indicated that Bhullar had a suffered serious mental and physical health issues as a result of his long incarceration pending execution.

It is disheartening that a Court that has recently determined that completing one's commitment to making movies is a humanitarian ground for the dilution of the rigour of the law,[31] does not find it a problem to send a person with mental health issues caused by the state's own apathy, to the gallows. Even though the Court found that since 1999 the Presidential Secretariat has not dealt with clemency petitions with "requisite seriousness," and exhorts the government to deal with such matters

---

[30] *See* Charlie Savage, *G.O.P. Lawmakers Push to Have Boston Suspect Questioned as Enemy Combatant*, Apr. 21, 2013, The New York Times, http://www.nytimes.com/2013/04/22/us/gop-lawmakers-push-to-hold-boston-suspect-as-enemy-combatant.html?pagewanted=all&_r=0; Adam Banner, *Miranda, McVeigh, and the Boston Marathon Bombing: Where's the Distinction?*, May 9, 2013, Huffington Post, http://www.huffingtonpost.com/adam-banner/miranda-mcveigh-and-the-b_b_3245308.html

[31] Sanjay Dutt v. State of Maharashtra, Crl. Misc. Petition No. 8482/2013 in Criminal Appeal No(s). 1060 of 2007.

expeditiously, it fails to take seriously the fact that Bhullar has been incarcerated for a period of 8 and a half years- 3072 days- without having his petition decided. Of this period, the government had *no* explanation, valid or not, for why the matter lay before the President and was not dealt with for a period of 2128 days. Justice Bhagwati had once lamented that "our justice system has become so dehumanised that lawyers and Judges do not feel a sense of revolt at caging people in jail for years…"[32] When Supreme Court revisits, as it soon will, the issue of delays in deciding clemency petitions, it should reflect on Justice Bhagwati's anguish, our core constitutional values, and future of our commitment to due process.

[32] Kadra Pehadiya v. State of Bihar, A.I.R. 1981 SC 939.

FAMILY LAW VOLUME I: FAMILY LAW & CONSTITUTIONAL CLAIMS AND VOLUME II: MARRIAGE, DIVORCE AND MATRIMONIAL LITIGATION

Flavia Agnes, Oxford University Press, New Delhi, 2011, Paperback, Pages 600 +508. Rs. 350 +450.

*Anju Tyagi**

INTRODUCTION

Personal laws occupy a unique position in today's age and play a pivotal role in keeping the society within moral and civil bonds. Matrimonial Jurisprudence and constitutional claims of women are the main themes of these volumes, which has been explored by the author in depth. Justice Ajit Prakash Shah has aptly observed, in the Foreword to the book, that the "primary aim behind writing the present books is to bring a number of problems in the society to the fore, and not merely to enter into an academic exercise of compilation of information."[1] Upendra Baxi has rightly remarked that the books highlight "the imperatives of retooling and recrafting activist critique in the service of a better future of Women's Rights as Human Rights."[2]

---

* Associate Professor, National Law University, Delhi.

[1] Ajit Prakash Shah, *Foreword*, *in* FLAVIA AGNES, FAMILY LAWS & CONSTITUTIONAL CLAIMS (OUP 2011) (hereinafter CONSTITUTIONAL CLAIMS).

[2] FLAVIA AGNES, MARRIAGE, DIVORCE & MATRIMONIAL LITIGATION (OUP 2011) (hereinafter MATRIMONIAL LITIGATION) (Back cover blurb by Upendra Baxi).

I. LAW, JUSTICE AND GENDER

The introductory chapters of both these volumes are titled 'Law, Justice and Gender.' Reflecting on the first concern i.e., 'Law', the writer asserts that it should be understood and determined by the practices of courts, law officers and police stations, rather than as rules and doctrines set forth in the statutes or in learned treatises.[3] The book attempts to bridge the gap between the theory and practice of law, between the 'doctrine'[4] and 'non-doctrine,'[5] between the 'ideal'[6] and the 'technical'[7] and hopes to blur these extremes through a comprehensive and inclusive approach.

With regard to her second concern, 'Justice', which is a key element of Law, the writer has explored the concept in the context of legal interpretations of a woman's claim.[8] The concern of this extensive work is to assess how women perceive justice, how they pursue and access it, and what are the measures of determining the success of these pursuits. A particular concern is how substantive law is entangled within procedural technicalities and how it thus hinders the process of accessing Justice.[9]

The writer examines 'Gender' from the perspective of feminist legal theory.[10] She emphasizes the use of a gender neutral term 'spouse' instead of 'man' and 'woman.' She further demands a catalytic effort at evolving a 'Uniform Civil Code'[11] that may help considerably in the resolution of matrimonial issues.

Volume I traces the legal history of diverse personal laws in colonial & post-colonial periods and women's claims within them as well as women's rights located within the Constitution of India.[12] The author also explores the gendered notions of citizenship claims. Volume II addresses three

---

[3] CONSTITUTIONAL CLAIMS xxii.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at xxii-xxv.
[9] *Id.* at xxiv.
[10] *Id.* at xxv.
[11] INDIA CONST. art.44.
[12] *Id.* arts.14, 15(3), 16, 21, 23; Vishaka v. Rajasthan, A.I.R. 1997 SC 3011.

distinct concerns - women's rights within the law of marriage and divorce,[13] matrimonial rights and obligations,[14] and the procedural aspect of the functioning of Family Courts in India.[15]

II. Family Law and Constitutional Claims

In Chapter I of Volume I, titled 'Personal Laws and Women's Rights,' the writer gives a comprehensive account of personal laws under seven major systems that exist in India - Hindu, Islamic, Christian, Parsi, Jewish, civil and customary practices.[16] Volume I, Chapter II is titled 'Constitutional Claims and Citizenship Claims.' In this chapter, the author examines the notions of equality, special protection, freedom, liberty and various landmark rulings which have breathed life into constitutional proclamations and have advanced women's rights.[17]

The author has examined Article 44 of the Constitution of India, relating to the Uniform Civil Code ("UCC").[18] The author further examines under this chapter, from a purely academic point of view, the drafts of the Uniform Civil code prepared by various groups - legal academic, state functionaries and women's groups from the perspective of gender justice.[19]

III. Marriage, Divorce and Matrimonial Litigation

Volume II, chapter I, titled 'Marriage and its Dissolution' reflects on the litigation around the validity of marriage and procedures for dissolving it.[20] This chapter also highlights several problems that have perennially plagued society such as child marriage, registration of marriages and traditional notions of heterosexual marriages.[21]

---

[13] Matrimonial Litigation 1-127.
[14] *Id.* at 128-268.
[15] *Id.* at 269-315.
[16] Constitutional Claims 1-113.
[17] *Id.* at 114-182.
[18] *Id.* at 148-169.
[19] *Id.* at 170-182.
[20] Matrimonial Litigation 1-127.
[21] *Id.* at 102-106.

Volume II, chapter II on 'Matrimonial Rights and Obligations' focuses on the framework of law on the issues of maintenance, matrimonial property, matrimonial residence and custody and guardianship of minors.[22] The author considers the significance of the real problem of cruelty and the cultural norms that are used to interpret what act constitutes cruelty. The stereotypical roles assigned to women within a society and judicial notions regarding women's position play an important role for determining cruelty.[23] The most important aspect of this chapter is that the author throws light on legal technicalities which often hinder the substantive rights of women and serve to delay the process of justice.

Volume II, Chapter III titled 'Family Courts and Gender Justice' throws light on the procedural aspects of Matrimonial Law, in the context of Family Courts and issues relating to it.[24] In spite of the present legal mechanism the author has also given due importance to conciliatory measures as an alternative means to avoid litigation.[25]

Volume II Chapter IV explores the interface between life and law, between meta-narratives of justice and the isolated experiences of individual women who venture out to claim their rights in this interface, where the mundane and the ordinaries of life, gets intermingled with lofty jurisprudential concepts and gets transformed into a legal narrative.[26] The manner in which women negotiate their claims and entitlements within the realm of law and the manner in which the fluidity of women's life experiences are fitted into the rigid structures of Courts, Statutes and sections, according to author tests our notions of Law and Justice.[27] The contents of this chapter are an outcome of the author's activist profile that adds to the existing material on the subject, thereby enhancing the utility of the volume to the reader. It may be lauded as an innovative initiative, seldom witnessed in the established literature on the subject.

---

[22] *Id.* at 128-269.
[23] *Id.* at 31-41.
[24] *Id.* at 269-316.
[25] *Id.* at 294-305.
[26] *Id.* at 328-349.
[27] *Id.* at 329-346.

CONCLUSION

The two volumes on Family Law are an exhaustive amalgamation of legal principles, decisions and opinions. The book is the result of tremendous research and practical experience which the learned author has acquired over time. It is up to date with the latest case law and is a comprehensive resource for teaching Family Law in India. What makes these books unique is that ground level litigation practices around women's rights are interwoven with the critical analysis of the statutory provisions and judicial decision from a feminist perspective.

The author examines Family Law in light of social realities, contemporary rights discourse and the idea of justice. It may however be pointed out that its exhaustive coverage becomes complicated and protracted for the average student or beginners although for academicians and experts it is a ready reckoner. The flawless language and the style of effective articulation, scholarly analysis of the subject, testify to the author's excellent command over the diverse issues pertaining to Family Law.

A fairly exhaustive index, detailed bibliography and comparative view of different concepts under different personal laws in the tabular form add to the usefulness of the book for researchers and students of Family Law. The book will prove to be a valuable contribution to the existing literature on the subject and is strongly recommended to professors, students, researchers, lawyers, judges and those interested in the subject of Family Law.

The book has the potential to transform the teaching of Family Law in Indian Law Schools by bringing a practical orientation through clinical family education to classroom discourses, thereby bridging the gap between substantive law concerns and contemporary issues.

INDIA AND THE UNIVERSAL PERIODIC REVIEW, 2012

*Ranbir Singh**

The existence and validity of human rights are not written in the stars. The idea concerning the conduct of men toward each other and the desirable structure of the community have been conceived and taught by enlightened individuals in the course of history. Those ideals and convictions which resulted from historical experience, from the craving for beauty and harmony, have been readily accepted in theory by man – and at all times, have been trampled upon by the same people under the pressure of their animal instincts. A large part of history is therefore replete with the struggle for those human rights, an eternal struggle in which a final victory can never be won. But to tire in that struggle would mean the ruin of society.

Albert Einstein

The protection of basic human rights is one of the most pressing and elusive goals of the international community. Since the establishment of United Nations n 1945 and adoption of the Universal Declaration of Human Rights in 1948, there has been a rapid growth in international law mechanisms for the protection of human rights. There are nearly 100 universal and regional agreements regarding the protection of human rights to which a vast majority of nation States bind themselves today. Yet, the lingering effects of violence, disease, famine, and the destruction of economic and social infrastructure continue to violate human rights and increase the world's death toll.

The codification of human rights has happened over the centuries. In 1188 A.D., the Cortes, the feudal assembly of the Kingdom of Leon, received confirmation from King Alfonso IX of a series of rights, including

* Vice-Chancellor, National Law University, Delhi

the right of the accused to a regular trial and the right to inviolability of life, honour, home, and property. In 1222 A.D., the Golden Bull of King Andrew II of Hungry guaranteed that no noble would be arrested or ruined without first being convicted in conformity with judicial procedure. In 1215 A.D., the Magna Carta was accepted by King John at Runnymede. Clause 39 of the Magna Carta says that no free man shall be taken or imprisoned or exiled or in any way destroyed expect by the lawful judgment of his peers or (and) the law of the land. England secured instruments like The English Petition of Rights, 1628 and the English Bill of Rights, 1688 to improve the rights of Englishmen. The American Bill of Rights was adopted in 1791 which was itself influenced by English documents and the French Declaration of the Rights of Man and of the Citizen, 1789. In the words of Justice V.R. Krishna Iyer,

> The finest hour of humanity's modern history of human rights dawned when, overpowering Hitler's hordes and Nipponese hounds and their harshest and most horrendous savageries, fifty progressive, peace-seeking leaders of the planet adopted and signed on 26th June 1945 in San Francisco the Charter which founded the United Nations, the hallowed haven of the people of the earth.

An important tool for preserving and effectuating the human rights regime inaugurated in the post-World War II era, is the Universal Periodic Review. Under the Universal Periodic Review (UPR), each member state is reviewed once every four years. The review is conducted by the UPR Working Group, which consists of all the members of the Human Rights Council. Each review is facilitated by a group of three council members representing a different region each, selected on through a draw of lots. The set is referred to as the 'troika' which in India's case included Kuwait, Mexico and Mauritius. States are reviewed on the basis of the UN Charter, UDHR and other UN human rights treaties to which the state is party to as well as other international commitments made by a state in the field of human rights. A review includes analysis of three reports: the national report (which is produced by state under review), Compilation of UN information (produced by OHCHR) and the summary of stakeholders information (compiled by the OHCHR on the basis of shadow reports submitted by NGOs, national human rights institutions, civil society

organizations, academic sources and other regional organizations).

What follows is the national report submitted by India at the Universal Periodic Review, 2012. The report is reproduced here in order to disseminate information about crucial issues in the domain of human rights and their current status. This is a modest attempt to sensitize various stakeholders regarding human rights challenges before the country.

Human Rights Council

Working Group on the Universal Periodic Review Thirteenth session
Geneva, 21 May-4 June 2012

NATIONAL REPORT SUBMITTED BY INDIA IN ACCORDANCE WITH PARAGRAPH 5 OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 16/21*

I. Introduction

1. As the largest democracy in the world, Indian polity weaves immense diversity into the fabric of a civilizational ethos of tolerance, respect and mutual understanding. India is home to 1.2 billion people. India has a very large population of Hindus (80% of the population), Muslims (13.4% i.e 138 million), and a great many followers of other faiths, including Christians (2.3% i.e. 24 million), Sikhs, Jains, Parsis and others. India has 22 scheduled languages, but more than 1,650 dialects are spoken across the country.

2. Twenty-eight States and seven Union Territories constitute India into a federal polity. There are 640 Districts and 640,867 villages in India. India is also the most representative democracy where, in a unique feature, there are over 3 million elected local representatives in the *Panchayats,* which are the units of local self-government at the village level, out of which around 1 million elected local representatives are women. Elections at regular intervals reinforce the democratic polity of the country.

3. The Constitution of India has ensured through its Fundamental Rights and Directive Principles of State Policy that India remains a multi-religious, multi-cultural, multi-linguistic, multi-ethnic and secular democracy. The

---

* A/HRC/WG.6/13/IND/

secular backbone to India's socioeconomic development has been vital in India's continued progress. India's approach towards protection and promotion of human rights has been characterised by a holistic, inclusive and multi-pronged effort. Prime Minister Dr. Manmohan Singh has observed "India's struggle for social and economic transformation of its 1.2 billion strong population in the framework of an open society and a democratic polity, committed to respect fundamental human rights and the rule of law has no parallel in history. Our success in accomplishing this gigantic task could have great significance for the evolution of human kind in this twenty first century of ours."

II. METHODOLOGY

4. In the preparation of the India Report under the Universal Periodic Review, the General Guidelines for the preparation of information have been followed broadly.

5. The process has been broad and inclusive involving concerned Ministries and Departments of the Government of India, including Ministry of External Affairs, Ministry of Home Affairs, Ministry of Social Justice and Empowerment, Ministry of Minority Affairs, Ministry of Defence, Ministry of Consumer Affairs, Food and Public Distribution, Ministry of Health and Family Welfare, Ministry of Housing and Urban Poverty Alleviation, Ministry of Human Resource Development, Ministry of Labour and Employment, Ministry of Law and Justice, Ministry of Panchayati Raj, Ministry of Rural Development, Ministry of Statistics and Programme Implementation, Ministry of Tribal Affairs, and Ministry of Women and Child Development (MWCD). Planning Commission has also been consulted.

6. Consultations were held with the stakeholders consisting of several non-governmental organisations and experts involved in human rights related activities. In addition, the Government also participated in the consultations held by the National Human Rights Commission in all parts of the country. The draft UPR - II was also posted on the website for comments prior to its finalisation. A National Report has thus evolved, reflecting this extensive consultation process. The Action Taken Report on recommendations on UPR 2008 is at Annexure I.

III. Background to Fundamental Rights and Their Impact on Legislative and Regulatory Framework

7. India is not only the largest democracy, but is also distinguished by a vibrant and evolving Constitutional system which is founded on the recognition of human rights placed in the forefront of the Constitution, viz Part III and has taken root in the ethos of the nation. The spirit underlying the Chapter on Fundamental Rights in Part III of the Constitution and the Directive Principles of the State Policy in Part IV of the Constitution is the recognition and the need to balance the immense diversity of India with the imperative of maintaining the fabric of civilization and progress, coupled with tolerance, respect, mutual understanding, and recognition of the importance of human life and individual rights. Foremost among these are measures for the removal and eradication of inequality.

8. The Chapter on human rights has undergone a revolutionary interpretative evolution at the hands of the Supreme Court (fully supported by the Government), as a result of which new vistas have emerged around the dynamic content of human rights. To illustrate a few, India has broadened the traditional narrow approach towards equality and proceeded on the basis of a positive mandate to eradicate backwardness in any form, social, economic and educational. Similarly, the freedoms under Article 19 have been given a wide connotation as, for instance, the expansion of the freedom of speech and expression to include the right to obtain information. The Right to life and Personal Liberty in Article 21 has now come to encompass the right to a clean environment, right to legal aid, elimination of bonded labour, right to livelihood, right to speedy and fair trial, and right to education, amongst various other rights.

9. This National Report seeks to identify various steps taken by India in the ongoing effort of making fundamental human rights real and meaningful. A summary of some important judicial pronouncements which have enabled this progressive evolution of the fundamental rights incorporated in the Constitution is at Annexure II.

10. In recent years, India has taken several important initiatives aimed at securing human rights, including the following:

In 2010, in a unique development and to ensure citizens their right to live with dignity in a healthy environment, the National Green Tribunal Act was enacted providing for effective legal protection for environment, forests and other natural resources.

In the same year, the Government introduced in Parliament the Protection of Women against Sexual Harassment at Workplace Bill covering both organized and unorganized sectors.

In 2009, the Right to Education Act was enacted, which introduced a new fundamental right for free and compulsory education of children in a neighbourhood school.

In 2008, a Constitutional amendment bill was introduced in Parliament to reserve for women nearly one-third of seats in the Lok Sabha (Lower House of Parliament) and the state legislative assemblies for a period of 15 years. The Rajya Sabha (Upper House of Parliament) passed this bill in 2010. It is currently in the Lok Sabha.

In 2007, the National Commission for the Protection of Child Rights (NCPCR) was established to ensure that all legislative and administrative measures are in consonance with the Child Rights perspective as enshrined in the Constitution of India and the Convention on the Rights of the Child.

The Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 rests forest rights and occupation with forest dwelling tribals and other forest dwellers.

In 2005, the landmark Mahatma Gandhi National Rural Employment Guarantee Act was passed and the programme launched in 2006 to confer livelihood right on the poor.

The Protection of Women from Domestic Violence Act 2005 came into force in 2006.

During 2005, the historic Right to Information Act (RTI) was enacted.

11. As mentioned earlier, the judiciary has been a major catalyst for change, including through its Public Interest Litigation for protection against grave violation of human rights. The Judiciary has also ensured that, even if India has not signed or ratified any particular international instrument/protocol, cognizance of these is taken through its various judgments.

12. The establishment of an autonomous National Human Rights Commission (NHRC) in 1993 under the Protection of Human Rights Act reflects our continuing commitment for effective implementation of human rights. Wide powers and functions have been given to the NHRC. State Human Rights Commissions (SHRCs) have been set up in 20 states. During the year 2010-11 99,185 cases were registered for consideration in NHRC and it disposed of 87,568 cases. During the said period, the Commission recommended payment of monetary relief in 583 cases amounting to Rs. 198,655,500. For e.g. in *Jaywant P. Sankpal v. Suman Gholap* (AIR 2010 SC 208), the Supreme Court upheld the award of compensation by the Maharashtra State Human Rights Commission for use of excessive force by police.

13. The Constitution has vested in the Election Commission of India the superintendence, direction and control of the entire process for conduct of elections to Parliament and Legislature of every State and to the offices of President and Vice-President of India. The Election Commission of India is a permanent Constitutional Body and has, over the decades, ensured free and fair elections.

14. The Comptroller and Auditor General is a Constitutional authority with powers to oversee and audit the accounts of the entire Government of India.

Transparency and Good Governance

15. The Government has taken following recent far-reaching steps to ensure

transparency in governance:

1. Right to Information Act

16. To increase transparency in the functioning of Government and accountability in public life, and expanding the ambit of Article 19(1)(a) on the Freedom of Speech and Expression, the Government brought forward the historic Right to Information Act, 2005. The Act has a wide reach, covering the Central and State Governments, Panchayati Raj Institutions, local bodies, as well as recipients of Government grants. It has given citizens access to information.

2. Citizens' Charters

17. The main objective of Citizens' Charters is letting people know the mandate of the each Ministry/ Department/ Organisation, how one can get in touch with its officials, what to expect by way of services and how to seek a remedy.

3. E-Governance

18. E-Governance in India has steadily evolved from computerization of Government Departments to initiatives such as citizen centricity, service orientation and transparency. The National e-Governance Plan (NeGP), takes a holistic view of e-Governance initiatives across the country. A massive countrywide infrastructure is evolving, and large-scale digitization of records is taking place.

IV. Civil and Political Rights

A. Right to Life and Liberty, Fundamental Rights and Directive Principles of State Policy

19. The Constitution offers all citizens, individually and collectively basic freedoms which are justiciable and inviolable in the form of Fundamental Rights in Part III of the Constitution (Commentary at Annexure II).

20. The Constitution also lays down certain Directive Principles of State Policy which are 'fundamental in the governance of the country' and it is the duty of the State to apply these principles in making laws.

21. India has the unique provision where the citizen has a right to invoke the highest court of the land directly where violation of Fundamental Rights and human rights are concerned under Article 32. Similar provision exists under Article 226 for the States and their High Courts. These provisions have been used frequently and effectively.

B. Recent Developments/Issues

22. India has borne the brunt of terrorist activities over the last three decades from across the border. Insurgency in some parts has added another dimension. Terrorists and insurgents have taken advantage of our open and democratic society to perpetrate violence and killings with deleterious effect on the population and on their enjoyment of human rights. For e.g. the 26/11/2008 and 11/7/2006 terrorist attacks in Mumbai claimed several hundred lives and injured many more. Combating these challenges has been a major priority since the threat they pose are existential. However, we are enthused by those insurgent groups and individuals, who have renounced violence and come forward to pursue the path of dialogue with the Government.

23. An internal challenge has been left wing extremism and violence. The Left Wing Extremists (LWE) have killed 464 civilians and 142 security forces between 1.1.11 to 31.12.11. Most of those killed by LWE belong to poor and marginalised sections of society. They torture and execute after holding kangaroo courts called Jan Adalats. The Government believes that through a combination of development and security related interventions, the LWE problem can be tackled. We do not underestimate the challenge these so-called "Maoists" pose. The civil society needs to build pressure on them to eschew violence, join the mainstream and recognise the fact that the socio-economic and political aspirations of a 21st century India are far removed from their world-view. India is committed to meet these threats with compassion, people-oriented development and resolve.

C. Armed/Security Forces and Human Rights

24. The Government of India remains committed to fulfill its obligation to secure to its citizens all civil and political rights. Concerns have been raised about the Armed Forces Special Powers Act,1958. At the outset, it is important to point out that the constitutionality of this Act was upheld by the highest judicial body in India i.e Supreme Court of India in *Naga People's Movement for Human Rights v. Union of India* [AIR 1998 SC 431]. Even while doing so, the apex court has reduced the rigour of its provisions and laid down an elaborate list of dos and don'ts for army officials while working in disturbed areas.

25. This Act is considered necessary to deal with serious terrorist and insurgency/ militancy situation arising in certain parts of the country and uphold the duty of the state to protect and secure its citizens. It provides necessary powers, legal support and protection to the Armed Forces for carrying out proactive operation against the terrorists in a highly hostile environment. An analysis of the ground realities shows that the violence levels and the fighting ability of terrorists have reduced over the years. Nevertheless, they still possess sophisticated weapons and modern communication equipment and the terrorist infrastructure across the borders is still active. The terrorists continue to intimidate the public. In such a challenging environment, where the very lives of its citizens and the unity and integrity of India is at stake, as long as deployment of armed forces is required to maintain peace and normalcy, AFSPA powers are required. However, it is pertinent to point out that the extension of declaration of "disturbed areas" is a subject matter of periodic review in consultation with the State Government and security agencies.

26. The Army maintains continuous vigilance to prevent human rights violations by its forces. Human Rights Cell in the Army Headquarters was established in March 1993, even before the NHRC was constituted. These cells have been established at various levels. The investigations of violations are carried out swiftly and in a transparent manner and exemplary punishments are meted out to those involved. The troops are sensitized on upholding human rights and avoiding collateral damage. The Chief of the Army Staff has issued the Ten Commandments to be followed by the Army personnel while dealing with the militants and the insurgents. The Supreme Court has expressed its satisfaction with respect to these commandments in

Naga People's Movement for Human Rights v. Union of India [AIR 1998 SC 431] case, and observed that they were in essence a set of guiding principles for the prevention of human rights violation by the soldiers.

27. Since January, 1994 until December, 2011, out of 1,429 complaints of human rights excesses received against the personnel of Army and Central Para Military Forces, 1,412 have been investigated and 1,332 found false. In 80 cases, where the complaints were found genuine, stringent punishment has been imposed. 17 cases are under investigation.

D. Death Penalty

28. In India, the death penalty is awarded in the 'rarest of rare' cases. The Supreme Court has restricted the use of death penalty only where the crime committed is so heinous as to 'shock the conscience of society'. Indian law provides for all requisite procedural safeguards. Juvenile offenders cannot be sentenced to death under any circumstances and there are specific provisions for pregnant women. Death sentences in India must also be confirmed by a superior court. The President of India in all cases, and the Governors of States under their respective jurisdictions, have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence. For instance, 13 mercy petitions were decided between 1.11.2009 and 23.11.2012 of which 10 were commuted to life imprisonment and 3 rejected. The last death sentence in India was carried out in 2004.

E. Torture

29. India has signed the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. A Bill introduced in the Parliament was passed in the Lok Sabha in 2010. In Rajya Sabha, it was referred to a Parliamentary Select Committee which has made certain recommendations. These are under examination by the Government. Although India has not yet ratified the Convention, Article 21 and other Articles of the Constitution of India and the relevant provisions under the Indian Penal Code, 1860, provide for adequate safeguards. The Supreme Court of India, through its judgments, has also laid down exacting standards on this issue.

F. Detention and Enforced Disappearances

30. Article 21 and other articles of the Constitution as well as the Criminal Procedure Code provide protection to persons under detention. India has signed the Convention for Protection of all Persons from Enforced Disappearance in 2007. We are actively considering its ratification. The Constitution guarantees the right to approach the higher courts by way of Habeas Corpus petitions. Indian courts have also been awarding compensation in such cases even though our domestic laws do not have any such provision. Apart from Article 21 itself, under Article 20(3) of the Constitution, no person accused of any offence can be compelled to be a witness against himself. Articles 22 (1) and (2) provide that a person who is arrested must be informed of the grounds of his arrest. The person also has the right to consult a lawyer of his choice. An arrested person must be produced before the nearest magistrate within 24 hours of his arrest. To protect persons in police custody from abuse, the Supreme Court has laid down specific rules that police must follow while making arrests, such as informing relatives of an arrest or detention, recording the arrest in a diary, medical examination norms, signing of "Inspection Memo" both by the arrestee and the police officer effecting the arrest etc. (e.g. *D.K. Basu v. State of West Bengal* (AIR 1997 SC 610).

31. In addition, the Code of Criminal Procedure (Amendment) Bill, 2010, was passed by Parliament and became law in 2010. It provides for additional protection to the accused from police arrests.

G. Access to Justice and Legal Aid

32. In order to ensure greater access to justice for the cross-section of the population, India has taken important strides in this direction. The National Legal Services Authority (NALSA) was constituted in 1987 under the Legal Services Authorities Act, 1987 to provide free legal services to the weaker sections of the society and to organize Lok Adalats for amicable settlement of disputes. In every State, State Legal Services Authority and District Legal Services Authority have been constituted to give effect to the policies and directions of the NALSA. Until March 31, 2009, about 9.7 million people have benefited through legal aid in which about 1.4 million persons belonging to Scheduled Castes and 464,000 persons of Scheduled

Tribe communities were beneficiaries. More than 1 million people were women and about 235,000 people in custody were also benefitted. About 725,000 Lok Adalats have been held throughout the country in which more than 2.68 million cases have been settled.

33. The Gram Nyayalayas Act, 2008 which came into force in 2009, provides for the establishment of Gram Nyayalayas (Village Courts) at the grass roots level for the purposes of providing access to justice to the citizens at their doorsteps and to ensure that opportunities for securing justice are not denied to any citizen by reason of social, economic or other disabilities. Many States have established the Gram Nyayalayas.

H. Corruption

34. In order to curb corruption and in a path-breaking development, the Government has introduced the Lok Pal and Lokayukta Bill in the Parliament in 2011. This was passed by the Lok Sabha in December 2011, and is now before the Rajya Sabha for its consideration.

I. Human Trafficking

35. India has ratified the United Nations Convention against Transnational Organized Crime and its two protocols, including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, in May 2011. Article 23 of the Constitution prohibits both trafficking in human beings and forced labour. Substantive laws like the Indian Penal Code 1860, special legislations like the Immoral Traffic (Prevention) Act 1956, the Bonded Labour System (Abolition) Act 1976, etc. and local laws like the Goa Children's Act 2003, provide the legal regime. In addition, judgments by the Supreme Court and various High Courts have provided further legal strength to the law enforcement agencies.

36. India has made significant efforts on the issue of human trafficking. The Government has, *inter alia,* already set up 104 local anti-trafficking units and increased the numbers of convictions of people involved in human trafficking for forced labour. Project IND/S16 of the United Nations Office on Drugs and Crime, a joint initiative with the Government, was launched

in April 2006. This project is focused on "Strengthening the law enforcement response in India against trafficking in persons, through training and capacity building". It is proposed to establish 330 Anti-Human Trafficking Units throughout the country and impart training to 10,000 police officers through Training of Trainers (TOTs) component in three years. A comprehensive scheme for prevention of trafficking and rescue, rehabilitation, re-integration and repatriation of victims of trafficking for commercial sexual exploitation namely "Ujjawala" is being implemented since 2007 under which 86 rehabilitative homes have been sanctioned to accommodate nearly 4000 women victims. It is done in partnership with civil society.

J. Sexual Orientation

37. Homosexual intercourse was a criminal offence until 2009 under Section 377 of the Indian Penal Code, 1860. The law was struck down by the Delhi High Court in 2009, in the matter of *Naz Foundation v. Govt. of NCT of Delhi* as a violation of fundamental rights in the case of consensual adults.

V. Economic, Social and Cultural Rights

A. Developmental Imperatives

38. The central vision of the 11th Plan (2007-2012) is to trigger a development process which ensures broad-based improvement in the quality of life in an inclusive manner. It includes several inter-related components, including rapid growth that reduces poverty and creates employment opportunities, access to essential services in health and education, equality of opportunity, empowerment through education, environmental sustainability, recognition of women's agency and good governance. Larger resources are being invested in sectors providing basic services to the poor and for improving their capabilities to participate in the growth process, and in economically weaker states and backward regions. In fact, there is now a mandatory requirement that all Cabinet proposals should specifically mention how 'equity' will be served.

B. Right of Children to Free and Compulsory Education

39. The right to education is now guaranteed under Article 21-A as a part of the right to live with dignity. The Right of Children to Free and Compulsory Education (RTE) Act, 2009 came into effect from April 1, 2010. It makes it mandatory for every child between the ages of 6-14 to be provided free and compulsory education by the State. It is a justiciable right up to 8 years of elementary education in an age appropriate classroom in the vicinity of his/her neighbourhood. The Act has special provisions for girl child education, including out of school girl children. It further mandates the private schools to ensure at least 25% of its seats are available for marginalised households. The implementation of RTE Act is a shared responsibility of both the central and the state governments and the total expenditure managed by the centre-state ratio of 68:32.

40. The Act has considerable implications for the implementation of *Sarva Shiksha Abhiyan* (SSA), which is Government's flagship programme for achievement of Universalization of Elementary Education (UEE) in a time bound manner. SSA is being implemented in partnership with State Governments and address the needs of 192 million children in 1.1 million habitations. The vision, strategy and norms under SSA are being harmonised with the RTE Act of 2009 mandate. The Right of Children to Free and Compulsory Education Rules, 2010 have been formulated and a National Advisory Council was set-up in 2010 to advise on implementation in an effective manner.

41. The *Sarva Shiksha Abhiyan* (SSA) has positively impacted the access and retention in schools and availability of teachers. SSA has ensured almost universal access to primary education and provides special focus on education of girls. The following achievements are worth mentioning:

> Rural habitations with access to primary school increased from 87 per cent in 2002 to 99 per cent in 2008, and that of upper primary school from 78 per cent to 92 per cent during the same period.
>
> 99% of the rural population has a primary school within 1 km.

An independent survey in 2010 shows that for age group 6-14 years in rural India, the percentage of children who are not enrolled in school has dropped from 6.6% in 2005 to 3.5% in 2010.

Proportion of girls in the age group 11-14 years who were out of school has declined from 11.2% in 2005 to 5.9% in 2010.

Gross Enrolment Ratio (GER) at the primary level improved from 96.3 in 2001-02 to 114.37 in 2008-09, that for upper primary from 60.2 to 76.23.

Gender gap in enrolment at the elementary level impressively declined from 17 to 7 percentage points. Gender Parity Index has appreciably improved.

42. Further, for increased access to quality secondary education with equity, *Rashtriya Madhyamik Shiksha Abhiyan* (RMSA) was launched in March 2009.

C. Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MGNREGA)

43. In India, where labour power is the only economic asset for millions of people, gainful employment becomes the channel for the fulfillment of the other basic rights. The right to work was included in the Directive Principles of State Policy as an aspirational goal but the MGNREGA has made this a legal guarantee.

44. The NREGA Scheme is one of the largest in the world in terms of finances and outreach. It is demand driven and people-centered and implemented through a decentralised, bottom-up and participatory process. This model of rural growth is revolutionary because of its basic principles of inclusive growth, the right to work and a rational centre-state relationship.

45. Under MGNREGA, which was enacted in 2005, at least one adult member of every household in rural India has a right to at least 100 days of

guaranteed employment every year. The statutory minimum wage is paid for casual manual labour and it shall be paid within 7 days of the week during which work was done. It pays particular attention to marginalised groups and women.

46. Since April 2008, this scheme has been extended to all the districts of the country. More than 54 million households were provided employment in 2010-11, marking a significant jump in coverage. Out of the 2.57 billion person-days created under the scheme during this period, 31 and 21 per cent were in favour of the Scheduled Castes (SC) and Scheduled Tribes (ST) population respectively, while 48 per cent of the total person days created went in favour of women. An allocation of Rs 400 billion has been made for MGNREGA in the Budget for 2011-12.

47. It is worth mentioning that states have reported that social audit has been conducted in more than 90% of the Gram Panchayats. 244,000 reports on Social Audit have been uploaded on the MGNREGA website. A new scheme of monitoring by eminent citizens has also been introduced. MGNREGA has also made excellent use of ICT-enabled Management Information System, where data is made available in the public domain. India is conscious of the difficulties in implementation of this ambitious scheme across India and is constantly reviewing it to address shortfalls.

D. Food Security and Strengthening of Public Distribution System

48. To make a paradigm shift from welfare to rights approach and provide food security to ensure the right to live with dignity, the government introduced the National Food Security Bill, 2011 in the Parliament in December 2011. The landmark Bill confers a legal right to cheaper food grains to 63.5 per cent of the country's population. Under this legislation, people eligible would be entitled to 7 kg of food grains comprising rice, wheat and coarse grains per person per month at very low rates. The law seeks to significantly extend the reach of India's existing public food distribution system that sells food items to low-income families much below market prices and, inter alia, give nutritional support to women and children. In a unique feature, the Bill provides that only woman can be treated as head of household for issue of ration cards.

49. The Public Distribution System (PDS) is the world's largest food programme and a crucial part of Government's policy for management of food economy. Given the joint responsibility of the Central and the State Governments, it is a dual purpose vehicle - on the one hand, for giving farmers assured and remunerative prices for their produce through Minimum Support Price (MSP), and on the other, to provide food security to the most vulnerable sections. Government also makes allocation of food grains for other welfare schemes at subsidized below-poverty-line (BPL) prices. In addition, the 11th Five Year Plan schemes also give added fillip keeping in mind the requirements of small and marginal farmers.

E. Social Security and Labour

50. The Government has enacted the Unorganised Workers' Social Security Act, 2008 for providing social security to unorganised workers. The National Social Security Board was constituted in 2009 for formulation of social security schemes, namely: i) health and maternity benefits ii) death and disability and iii) old age protection. The Government has also set up National Social Security Fund for unorganised sector workers to benefit 433 million workers in the unorganised sector, including weavers, toddy tappers, rickshaw pullers, beedi workers and women workers.

51. The Rashtriya Swasthya Bima Yojana providing for smart card based cashless health insurance cover of Rs. 30,000 to BPL families in the unorganised sector has been launched. More than 21.8 million BPL families have been covered as on 30.11.2010.

52. To provide a life of dignity, eradication of the practice of manual scavenging is an area of priority for the Government and a three-pronged strategy has been adopted through legislation, development and rehabilitation. Out of the 770,000 manual scavengers and dependents to be rehabilitated by the National Scheme for Liberation and Rehabilitation of Scavengers and their dependents (NSLRS), 428,000 have been rehabilitated into alternative occupations. For the remaining 342,000, the Self Employment Scheme for Rehabilitation of Manual Scavengers (SRMS) was launched in January, 2007. The Scheme is being implemented at the national level through the four National Finance and Development Corporations. All states have confirmed that eligible and willing

beneficiaries identified under SRMS have been given financial assistance for alternative occupations.

53. India is also constantly striving to enhance protection to its workers from exploitation during the process of recruitment and during their employment overseas, through bilateral agreements and a range of policies and schemes.

F. Health

54. Under Article 47 of the Constitution pertaining to the Directive Principles of State Policy, the State has a duty to raise the level of nutrition and improve public health. Recognising this, the Government has launched the National Rural Health Mission. The Mission adopts a synergistic approach by relating health to determinants of good health viz. segments of nutrition, sanitation, hygiene and safe drinking water.

55. Massive investment in this sector has led to drop in infant mortality rate from 58 per 1000 live birth in 2005 to 47 in 2010; Maternal Mortality Ratio from 254 per 100,000 live births for 2004-06 to 212 for 2007-09 and total fertility rate to 2.6 (2009) from 3.2 (2000). India has not reported a single polio case since 12 January 2011. The number of newly detected HIV positive cases has dropped by over 50% in the last decade.

56. However, there are inequities based on rural-urban divide, gender imbalance and child nutrition. The Government's Strategy Note to 'Address India's Nutrition Challenges' was discussed with various stakeholders and presented to Prime Minister's National Council for India's Nutrition Challenges. A multisectoral programme for addressing nutrition in 200 high burden districts is being finalised. To bring pregnant women into the institutional fold, Janani Suraksha Yojana has seen phenomenal growth in the last 6 years and the beneficiaries have increased from 644,000 in 2005-06 to 10.6 million in 2010-11. The Janani Shishu Suraksha Karyakaram started from June, 2011 entitles pregnant women to a range of services in public health institutions including free delivery, free medicines, free diet and treatment of sick newborns.

G. Housing and Rehabilitation

57. Housing shortage remains an area of concern and Government has enhanced its focus on this issue. The Indira Awaas Yojana (IAY) is a flagship scheme of the Ministry of Rural Development to provide houses to the Below Poverty Line (BPL) families in the rural areas. It has been in operation since 1985-86. Since inception, 27.3 million houses have been constructed at an expenditure of Rs. 795 billion (until January 2012). There is high degree of satisfaction with this scheme since beneficiaries participate in the construction of their own houses. The role of the State Government is limited to the release of funds and facilitating use of appropriate technology.

58. Jawaharlal Nehru National Urban Renewal Mission (JNNURM), 2005 provides focused attention to integrated development of urban infrastructure and services in select 65 cities with emphasis on urban poor, slum improvement, community toilets/ baths, etc. Under JNNURM, a total of 1.58 million dwelling units have been approved for construction. Out of these 533,000 dwelling units have been completed and 369,000 is under progress. The total Central share approved under JNNURM is Rs 231 billion and Rs. 124 billion has been released to the states. Apart from regular state and regional reviews, Government has empanelled agencies to play the role of Third Party Inspection and Monitoring Agency (TPIMA) for monitoring the progress and quality of projects under JNNURM and installments are sanctioned only after the quality is certified by the TPIMA.

59. Further, to create a slum-free environment, a new scheme 'Rajiv Awas Yojana' (RAY) has been launched in June, 2011. This scheme provides financial assistance to states willing to assign property rights to slum dwellers and to avail of the same level of basic amenities as the rest of the town. The scheme is expected to finally cover about 250 cities by 2017 and funds have been released to 157 cities for preparatory work. The Affordable Housing in Partnership scheme has been dovetailed into this new scheme.

60. In a recent ruling in January 2012, the Supreme Court directed compliance with Article 21 by providing night shelters for the homeless since people sleeping on pavements in the night was a breach of their right to live with dignity. The Delhi High Court also ordered reopening of

temporary night shelters.

61. Conscious of the need to address the issue of rehabilitation of displaced persons, the new National Mineral Policy of 2008 states that "... all measures proposed to be taken will be formulated with the active participation of the affected persons, rather than externally imposed."

H. Sanitation and Drinking Water

62. Total Sanitation Campaign (TSC) is a comprehensive programme to ensure sanitation facilities in rural areas. TCS has been able to accelerate the sanitation coverage from a mere 22% as per 2001 census to approximately 68% in December 2010.

63. The National Rural Drinking Water Programme is a flagship scheme to ensure that all households in rural areas have access to safe and sustainable drinking water facilities. More than 1.23 million rural habitations have been provided with this facility under this scheme. It is estimated that during the 11th Five Year Plan, an amount of nearly Rs.900 billion has been spent for this purpose. The latest NSSO survey of 2008-09 reveals that about 90% of the rural households obtain their drinking water from improved sources.

64. In a significant development, all schools in all States of India will have toilet facilities by April 2012, as directed by the Supreme Court of India under Article 21A. Similar directions by the Supreme Court have also ensured drinking water facilities to all schools in the country.

I. Poverty Eradication

65. While, as per the Lakdawala Committee constituted by the Planning Commission, poverty declined from 36% in 1993-94 to 27.5% in 2004-05, as per the Tendulkar Committee, also constituted by the Planning Commission, poverty declined from 45.3% in 1993-94 to 37.2% in 2004-05. Significantly, in both the Committees' methodologies, the extent of poverty reduction in appreciable and in comparable percentage point is broadly the same.

VI. Groups in Need of Special Attention

A. Children

66. A combination of law and robust policy initiatives has given a strong thrust to the protection and welfare of children in India. Children have received considerable attention in the 11th Five Year Plan. It takes forward the agenda of child rights by further strengthening legislations and expanding the delivery systems. Some of the initiatives include universalization of services for nutrition and development of children in the age group of 06 years; adoption of free and compulsory education for the age group of 6-14 years; amendment of existing legislations; and launch of comprehensive schemes for protection of children in difficult circumstances, working children, victims of trafficking and other vulnerable children.

B. National Commission for Protection of Child Rights

67. The National Commission for Protection of Child Rights (NCPCR) was set up on March 5, 2007 under the Commissions for Protection of Child Rights (CPCR) Act, 2005. It is one of the few commissions of its kind in Asia. The Commission ensures that all laws, policies, programmes, and administrative mechanism are in consonance with the child rights perspectives enshrined in the Constitution and Convention on the Rights of the Child. In addition, it takes *suo motu* cognizance of violation of rights and analyses data on children. During the year 2010-2011 (up to February 28, 2011), NCPCR has dealt with 675 complaints of violations/deprivations of child rights. The Commission constituted an Expert Group in 2009 with eminent persons for advice NCPCR's role in monitoring children's right to education. NCPCR has also involved civil society in the Social Audit of the RTE to strengthen the process of performance and delivery.

68. The impressive developments through the Sarva Shiksha Abhiyan have been dealt with earlier in the report.

69. The Juvenile Justice (Care and Protection of Children) Act, 2000, (JJ Act) is the principal legislation for the protection of children. The JJ Act was

amended in 2006 and The Juvenile Justice (Care and Protection of Children) Rules, 2007, (JJ Rules, 2007) were also framed for effective implementation of the Act. In 2006, the scope of the Act was expanded, inter alia, by including child beggars and working children in the category of children in need of care and protection. In November, 2010, the Government introduced the Juvenile Justice (Care and Protection of Children) Amendment Bill, 2010, with the aim of removing discriminatory references against children affected by diseases such as leprosy, Hepatitis B, sexually transmitted diseases and tuberculosis. It has since been passed by the Parliament.

70. In 2006, the Prohibition of Child Marriage Act (PCMA) was enacted repealing the Child Marriage Restraint Act of 1929 making child marriage an offence.

C. Integrated Child Protection Scheme (ICPS)

71. The Integrated Child Protection Scheme (ICPS) for children in difficult circumstances was launched in 2009-10 and aims to reduce their vulnerability to situations and actions that could lead to abuse, neglect, exploitation, abandonment and separation. The Scheme subsumes three central schemes, namely: (i) Programme for Juvenile Justice, (ii) Integrated Programme for Street Children, and (iii) Scheme of 'Assistance to Homes *(Shishu Greti)* for Children.' More than 90,000 children are benefiting under the Scheme. Initiatives include:

> Establishing Statutory Bodies in every district and service delivery structures for child protection at State and District levels
>
> Upgrading and establishing standard institutional services and putting dedicated child protection personnel in place
>
> Expansion of Emergency Outreach services (Childline services, 1098)
>
> Promotion of non-institutional care

Initiation of Child Protection Division in the National Institute for Public Cooperation and Child Development (NIPCCD)

Child Tracking System

D. Integrated Child Development Services (ICDS)

72. The period from birth to six years of age, especially those below two years of age is considered the most important period for any intervention on malnutrition. The ICDS, launched in 1975, is a comprehensive programme addressing the health, nutrition and preschool needs of children under six. It provides a package of services comprising of supplementary nutrition, pre-school non-formal education, nutrition & health education, immunization, health check-up and referral services. The Scheme, inter alia, aims to improve the nutritional and health status of pregnant and lactating mothers and children below 6 years of age. The Central Government contributes 90% of all costs and 50% of the cost of supplementary nutrition and the remaining is funded by the state governments. The budgetary allocation for ICDS has been greatly increased from Rs.103 billion in Tenth Plan to Rs.444 billion in the Eleventh Plan. Additionally, Rs. 90 billion has been allocated for maternity entitlements scheme. Recognising the need to cover children under two years of age, the 11th plan focused on 'restructuring' the ICDS, so that the programme is universalised, supplementary nutrition is of better quality, fund transfer is made on time and maternity and child care services are provided. Beneficiaries of the ICDS are 97.5 million, including 79.5 million children (6 months to 6 years) and 18 million pregnant and lactating mothers. The Prime Minister's National Council on Nutritional Challenges decided in November 2010 to strengthen the ICDS scheme.

73. The Pre-School Education (PSE) component of the ICDS Scheme is being strengthened to ensure universalisation of early childhood education and preparation of children, particularly those belonging to socially disadvantaged groups, for formal schooling. The beneficiaries under PSE have increased from 21.4 million in 2004-05 to 33 million in 2007-08 and further to 35 million by December 2010.

E. Exploitation of Children

74. The Information and Technology Act was amended in 2008 to address exploitation of children through the internet. Section 67 (b) of the Act provides for punishment for publishing or transmitting material depicting children in sexually explicit acts, etc. in electronic form.

75. Since sexual offences against children are not fully addressed by existing legislation, the Government introduced a Bill in Parliament on Protection of Children from Sexual Offences in March, 2011, which is currently under consideration of the Rajya Sabha. The Bill, inter alia, defines the offences, provides for special courts for such offences and stringent punishment to offenders.

F. Adoption and Alternative Care

76. Adoption procedures in the country are governed by specific guidelines notified by the Government and clearly define the roles and responsibilities of those involved. In order to incorporate the amended JJ Act, 2006 and Model Rules, 2007, wherein surrendered children could be rehabilitated through adoption in accordance with guidelines of Central Adoption Resource Agency (CARA), and keeping in mind the various directions from different courts and stipulations for inter-country adoptions laid down by the Special Commission of the Hague Convention held in 2010, it became imperative to revise the guidelines in June 2011 to reflect these changes. A web-based Child Adoption Resource Information and Guidance System (CARINGS) has been launched making the process of adoption more transparent.

G. Child Labour

77. Given the socio-economic conditions in the country, a multi-pronged strategy for elimination of child labour has been adopted, which emphasises on legislative measures; general development programmes for the benefit of families of child labour and project-based action in areas of high concentration of child labour.

78. As per Child Labour (Prohibition & Regulation) Act, 1986, children below the age of 14 years are prohibited for employment in hazardous occupations/processes specified in the Act. India has not ratified ILO Conventions No. 138 and 182 since they fix minimum age of employment as 18 years. The Government is working on the modalities of ratifying these ILO Conventions, particularly No. 182. Consultations are taking place. However, it is pertinent to point out that the Government issued three notifications in the last five years, expanding the list of banned and hazardous processes and occupations in Schedule II of the *Child Labour (Prohibition and Regulation) Act, 1986.* The number of occupations listed in Part A now is 18 and the number of processes listed in Part B is 65. Further, the worst forms of child labour are already prohibited under various Acts such as Bonded Labour System (Abolition) Act, 1976, Immoral Traffic Prevention Act 1956, the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 and Child Labour (Prohibition and Regulation) Act, 1986. Consequently there is no dearth of inclination to progressively eliminate child labour from India.

79. The Government is implementing National Child Labour Project (NCLP) for the rehabilitation of child labour. The NCLP is operational in 266 Districts, with about 7300 special schools. These special schools are mainly run by NGOs and impart non-formal/ formal education, vocational training, etc. to children withdrawn from employment, so as to prepare them to join mainstream education system. 852,000 children have been mainstreamed under NCLP. There has been a 45% reduction in child labour over the last 5 years (2009-10).

H. Mid-Day Meals Scheme for Children in Schools

80. The coverage of this immensely popular and effective Mid-Day Meals Scheme for children in schools, which satisfies both 'hunger' and 'education,' has been extended even further in August 2009 and now covers all children studying in Classes I-VIII in Government, Government-aided and Local Body schools and Education Guarantee Scheme (EGS) and Alternative and Innovative Education centres supported under SSA, including Madarasas and Maqtabs as well as children under National Child Labour Projects.

I. Women

81. The Constitution of India guarantees equality of status of women and has laid the foundation for such advancement. It also permits reverse discrimination in favour of women and many important programmes have been designed specifically to benefit girls and women. A number of laws have been enacted by the Indian Parliament, which has brought forth a perceptible improvement in the status of women. Some of these are: Prohibition of Child Marriage Act, 2006, Hindu Succession Act, 1956; Indecent Representation of Women (Prohibition) Act, 1986; Dowry Prohibition Act, 1961; Maternity Benefit Act, 1961; the Equal Remuneration Act, 1976; The Immoral Traffic (Prevention) Act, 1956; Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994; and Protection of Women from Domestic Violence Act, 2005.

82. The Planning Commission of India, through its Five Year Plans is committed to enable women to be "equal partners and participants in development". The Eleventh Five Year plan has recognized women as agents of sustained socio-economic growth and change and funding is being provided to a large number of gender specific schemes.

83. The amendment of the Hindu Succession Act in 2005 was an important legal reform which will contribute towards economic empowerment of women, giving daughters equal rights in the ancestral property.

84. Domestic violence against women is integrally linked to women's economic dependence and lack of support systems. Recognising this, the Protection of Women from Domestic Violence Act, 2005 has been envisaged as a civil law, which not only defines for the first time 'domestic violence' and entitles women to get a Protection Order, but also contemplates various forms of reliefs such as maintenance, compensation, residence and custody.

85. Declining Child Sex Ratio is a matter of concern. To deal with this, the Government has in place, inter alia, the Pre-Conception and Pre-Natal Diagnostic Technique (Prohibition of Sex Selection) Act 1994 which prohibits sex selection and regulates prenatal diagnostic techniques to

prevent their misuse leading to sex-selective abortion. Recent steps include amendment of Rules to provide for confiscation of unregistered machines, further punishment for unregistered ultrasound clinics and reconstitution and strengthening of the National Inspection and Monitoring Committee.

86. The Government launched the National Mission for Empowerment of Women (2010-15) in March 2010 to, inter alia, secure convergence of schemes of different Ministries of Central and State Governments, review gender budgeting and various social laws concerning women.

87. In several milestone decisions, the Supreme Court of India has established jurisprudence reinforcing women's rights and the provision of a safe and healthy environment at home and work.

88. Many women have also joined the Armed Forces. The Delhi High Court in a landmark verdict on March 12, 2010 has directed the Indian Air Force (IAF) to allow its lady officers to be eligible for the Permanent Commission (PC) status. Prior to this, women officers were restricted to Short Service Commission (SSC) status, which entitles a maximum service period of 14 years as against a PC officer who is eligible to serve till the age of 60 and are also eligible to various other benefits.

89. The National Commission for Women is a statutory body with the mandate to safeguard the constitutional and legal rights of women, redress deprivation of women's rights and promote gender justice and equality.

90. Mandatory registration of the wife in all property owned or acquired by the husband is another progressive step taken by many State Governments. Further, government financed asset ownership schemes have women's ownership of assets. Accordingly, in housing schemes like the Indira Awaas Yojana (IAY) or the Rajiv Gandhi Gramin LPG Vitrak (RGGLPGV) Scheme, the allotment is done in the name of the female member of the households or in the joint names of husband and wife.

91. Recognising that increased female literacy is a force multiplier for social development programmes, the Government has launched a National Mission for Female Literacy in 2009 to make every woman literate in five years.

92. The significant advance made by women today is evident from various socioeconomic indicators relating to health, literacy and education, workforce participation rate etc. In the field of education, girls constitute approximately 48.46% of the total enrolment of the primary level and 41.12% at the upper primary level (2009-10). The 2011 Census has shown improvements in the literacy rate of women, from 53.67% in 2001 to 65.46% in 2011, and in the total sex ratio, from 933 females in 2001 to 940 females per 1000 males in 2011.

93. The Janani Suraksha Yojana (JSY) has been covered above under 'Health.' Several schemes are being implemented to address infant and child mortality. Notable among these are Universal Immunisation Programme for immunisation of children against six vaccine preventable diseases; Integrated Management of Neonatal Childhood Illnesses (IMNCI), which focuses on the preventive, promotive and curative aspects among newborns and children; and the Reproductive and Child Health (RCH) Programme, which has entered its second phase (2005-2010).

94. In order to incentivise the birth of a girl child and encourage families to place a premium on her education and development, a number of States are implementing Conditional Cash Transfer schemes. Government is also implementing a similar scheme -'Dhanalakshmi', launched in March, 2008, on a pilot basis. For nutrition and skill development of adolescent girls, a pilot scheme 'Sabla' has been launched in 200 districts.

95. Recognising the problem of "missing" girls as a result of sex-selective abortions, infanticide or neglect, the ICPS envisages setting up Cradle Baby Reception Centres in each district.

96. Recognising the compulsions faced by many women who continue to work till the last stage of pregnancy and resume work soon after childbirth, a new initiative has been launched recently in 2010-11 by the Ministry of Women and Child Development (MWCD). 'Indira Gandhi Matritva Sahyog Yojana (IGMSY)' is a Conditional Maternity Benefit (CMB) Scheme that has been launched on a pilot basis in 52 districts, with the two-fold objective of providing cash assistance to pregnant and lactating women to overcome loss of working days and providing better nutrition. The Scheme uses the

ICDS platform and covers approximately 1.4 million women in the initial years.

97. Government has a unique provision where a 2-year child care leave can be availed of by its women employees anytime during the childhood years.

J. Mainstreaming Gender

98. One of the key initiatives undertaken by the Government to promote gender equality has been the adoption in 2005 of Gender Budgeting as a tool for mainstreaming gender in all government policies and programmes. Through Gender Budgeting, the Government aims to ensure the translation of Government's policy on gender equity into budgetary allocations. To institutionalise this process, the Government had initiated the formation of Gender Budget Cells (GBCs) within all Central Ministries/ Departments. So far 56 Ministries/Departments have set up GBCs. One of the focus of the National Mission for Empowerment of Women 2010 is to review gender budgeting.

99. The Government has also been focusing on interventions in the sphere of economic empowerment through generating employment opportunities for poor and women, capacity-building especially through the Self-Help Groups (SHGs) movement. There are around six million SHGs of which 80% are women's groups.

K. Registration of Marriages

100. In spite of the socio-economic challenges, India is working towards making registration of all marriages compulsory. This direction comes from the Supreme Court which in *Seema v. Ashwini Kumar* (2006 (2) SCC 578), directed that registration of marriages of all persons, irrespective of their religion, who are citizens of India should be made compulsory in their respective states. In this context, 19 States have already taken necessary legislative measures.

L. Persons with Disability

101. According to Census 2001, there are 2.19 million persons with

disabilities in India who constitute 2.13 percent of the total population. Seventy-five (75) per cent of persons with disabilities live in rural areas, 49 per cent of them literate and only 34 per cent are employed.

102. The emphasis is now on social rehabilitation and mainstreaming them in the society. The Government has enacted three legislations for persons with disabilities, namely, (i) Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, which provides for education, employment, creation of barrier free environment, social security, etc. (ii) National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability Act, 1999 has provisions for legal guardianship of the four categories and creation of enabling environment for as much independent living as possible (iii) Rehabilitation Council of India Act, 1992 deals with the development of manpower for providing rehabilitation services.

103. India became a party to the United Nations Convention on Rights of Persons with Disabilities (UNCRPD) in 2008. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (PWD Act) requires to be modified to incorporate areas recognized in the UNCRPD. The Chief Commissioner and Commissioner respectively in the Centre and States function as Ombudsmen for Persons with Disabilities under the 1995 Act. The Government is in the process of drawing up legislation in place of PWD Act, 1995, in a consultative manner involving all stakeholders and keeping in view all developments in this sector. The courts have been active as well. For e.g. in *Suchita Srivastava v. Chandigarh Administration* (AIR 2010 SC 235), where a mentally challenged woman refused to give her consent for the termination of pregnancy, the Supreme Court held that a women's right to personal liberty includes the right to make reproductive choices and that the state must respect her choice.

M. Older Persons

104. As our society is witnessing a withering away of the joint family system, a large number of parents and senior citizens are being neglected. The Maintenance and Welfare of Parents and Senior Citizens Act of 2007 was enacted in December, 2007 to ensure their need-based maintenance and

welfare. The Act has already been notified by 23 States and all UTs. In pursuance of the National Policy on Older Persons, a National Council for Older Persons was constituted as the highest body to advise the Government and oversee the implementation of the policies. Due to uneven implementation, review is being carried out to strengthen implementation. The Ministry of Rural Development launched the Annapurna scheme in 2000-01 for indigent senior citizens of 65 years of age or above who are not getting pension under the National Old Age Pension Scheme, where 10 kilograms of food grains per person per month are supplied free of cost.

N. Scheduled Castes and Scheduled Tribes and Minorities

1. Scheduled Castes (SC) and Scheduled Tries (ST)

105. India's programme of affirmative action is without parallel in scale and dimension in human history. Apart from the Fundamental Rights to prohibit discrimination in any form, the Constitution also provides for advancement of Scheduled Castes (SC), Schedules Tribes (ST) and other backward classes (OBC). Legislative measures and guaranteed political representation provides for strong and robust protection for SCs and STs. A programme of 'compensatory discrimination' reserves 15% for SCs and 7.5% for STs in employment, education and a range of areas. Quota for the OBCs has also been earmarked. Their socioeconomic backwardness has been specifically addressed in the Eleventh Plan through the approach of 'faster and inclusive growth' and a three-pronged strategy has been adopted namely: (i) social empowerment; (ii) economic empowerment; and (iii) social justice, to ensure removal of disparities and elimination of exploitation.

106. In upholding the constitutional commitment, specific legislations and programmes are being implemented specifically for SCs and STs:

a) Central assistance is being provided for the effective implementation of the Protection of Civil Rights (PCR) Act, 1955, and the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities [PoA]) Act, 1989, mainly for:

i) State level SC and ST Protection Cell and Special Police Stations;

ii) Special Courts;
iii) Awareness generation;
iv) Inter-caste marriages; and
v) Relief to atrocity victims.

b) In order to ensure speedy trial of cases under the SC/ST (Prevention of Atrocities) Act, 1989, special courts and special police stations for offences against SCs and STs have been set up in a number of States. 177 special courts and 77 special police stations have been set up.

c) Constitution provides for several special provisions for protecting interests of Scheduled Tribes. A separate Ministry for Tribal Affairs was set-up in 1999.

107. There is a National Commission for Scheduled Castes, a Constitutional Ombudsman body, set up under Article 338 having wide powers to protect and promote the interests of SCs, and a National Commission for Scheduled Tribes as well.

108. Improving the educational status of SCs, especially of women and girl children in this category is one of the main priorities. The Centrally Sponsored Scheme (CSS) of post-matric Scholarships to SC students, involving 100 per cent Central assistance, has been accorded high priority in the Eleventh Plan. This scheme benefits about 4 million SC students annually and has been revised in 2010. Rajiv Gandhi National Fellowship (RGNF) scheme for SC students was launched in 2006 for providing financial assistance to SC students pursuing M.Phil and PhD. Under this scheme, 2000 fellowships are provided annually to SC beneficiaries. There are parallel educational development schemes for ST candidates and students also.

109. The National Scheduled Castes Finance and Development Corporation (NSCFDC) was set up in 1989 to provide soft loans to SCs living below the poverty line for taking up income generating self-employment ventures. Rs 3250 million have been released towards equity of NSCFDC in the Eleventh Five-Year Plan. Beneficiaries covered under the scheme since its inception is 762,000 of which 410,000 (53.34%) are women. The National Scheduled Tribe Finance and Development

Corporation is the counterpart organisation for the Scheduled Tribes.

110. India's sensitivity to the interests of the tribal population is equally unparalleled. The STs and other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 rests forest rights and occupation in forest dwelling STs and other forest dwellers to address their insecurity of tenurial and access rights.

111. The revised CSS Strengthening Education among ST Girls in Low Literacy Districts scheme is being implemented in 54 identified low literacy districts where the ST population is 25 per cent or more and ST female literacy rate is below 35 per cent. Besides formal education, the scheme also takes care of skill upgradation.

112. The Planning Commission set up a Task Force to review guidelines on Scheduled Castes Sub-Plan (SCSP) and Tribal Sub-Plan (TSP) in June 2010. Pursuant to its recommendations, implementation of SCSP is being streamlined.

2. Minorities

113. The Ministry of Minority Affairs was created in 2006 in order to ensure a more focused approach towards issues relating to the minorities. The National Commission for Minorities is a statutory body under the National Commission for Minorities Act of 1992. Other organisations like the Maulana Azad Education Foundation and National Minorities Development and Finance Corporation function under the Ministry.

114. The Government is actively pursuing minority related programmes under the Prime Minister's New 15-Point Programme for the Welfare of Minorities announced in 2006. It, inter alia, provides for earmarking 15% of the outlays for minorities in the flagship programmes of other Ministries, enhancing education opportunities, equitable share in economic activities and employment and equitable flow of benefits in development. Further, under this programme, 11.7 million scholarships have been given for minority students. Certain proportion of development projects is also to be earmarked for the minority concentration areas. Public Sector banks have been directed to open branches in districts having substantial minority

population and 15,204 such branches have been opened till March 2011. Active consultation with the civil society is integral to the formulation of plans.

115. To monitor minority welfare schemes, a system of National Level Monitors was launched. Government has approved a sub-quota of 4.5% reservation for minorities within 27% OBC quota. In order to amend the Waqf Act 1995, the Waqf Amendment Bill 2010 was passed by the Lok Sabha and now is with the Rajya Sabha. Consequent to the recommendation of the High-level Committee, Government is implementing Multi-sectoral Development Programme since 2008 aimed at 90 Minority Concentration Districts with an allocation of Rs. 37 billion under the Eleventh Plan.

VII. Environment and National Green Tribunal

116. Fully conscious of India's role in environmental protection, in an unprecedented development, the National Green Tribunal has been established in October 2010 under the National Green Tribunal Act 2010 for, inter alia, effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right and giving relief and compensation for damages to persons and property. It is a specialized body equipped to handle environmental disputes involving multi-disciplinary issues. The Tribunal's dedicated jurisdiction in environmental matters shall provide speedy environmental justice and help reduce the burden of litigation in the higher courts.

VIII. Human Rights Education

117. The National curriculum for school education of National Council of Educational Research and Training (NCERT) has included the human rights education component in social science subjects. In order to create human rights education sensitivity and skills amongst the teachers in schools, a module for teacher training programme has also been prepared by the taskforce of the NHRC for this purpose. NHRC has continued to play an active role in raising all round human rights literacy and awareness including month-long internship programmes for University students and

programmes focused on public servants especially police in collaboration with the Administrative Training Institutes and Police Training Institutions. In addition, the Central Board of Secondary Education (CBSE) has also evolved a syllabus for human rights education at lower level, which has come into force in 2008.

IX. India and The United Nations

118. India continues to play an active and constructive role in all human rights related issues in the UN, including the UN Human Rights Council. India has extended a standing invitation to Special Procedures Mandate Holders during the 18th Session of HRC in September 2011, in keeping with our Voluntary Pledges and Commitments made to the HRC in May 2011. India's contribution to the Voluntary Fund for technical Cooperation has been doubled to US$ 100,000. We have also started contributing to the Voluntary Trust Fund on Contemporary Forms of Slavery of US$ 25,000 per year and Voluntary Fund for Victims of Torture of US$ 25,000 per year. These were also part of our Voluntary Pledges to HRC. We also contributed US$ 1 million to UN Women.

119. In conclusion, India has a robust legislative and institutional framework to address the twin tasks of protection and promotion of human rights. In spite of a number of serious challenges, India remains deeply committed to human rights and has taken significant strides towards these goals.

A BRIEF SYNOPSIS OF THE NEW OFFENCES/PROCEDURES RECOMMENDED BY THE JUSTICE VERMA COMMITTEE ON AMENDMENTS TO CRIMINAL LAW

Mrinal Satish and Shwetasree Majumder***

* Associate Professor of Laws, National Law University, Delhi.
** Partner, Fidus Law Chambers. Both the authors were part of the research team that assisted the Justice Verma Committee. They have prepared this synopsis in their individual capacities. They do not purport to represent the views, or speak for, the Justice Verma Committee. An earlier version of this synopsis has been published on the online legal website, Bar & Bench.

INTRODUCTION

Rape law reform in India has more often than not been sporadic and reactionary. Post the enactment of the Indian Penal Code (IPC) in 1860, the first major changes to Sections 375 and 376 (which define and punish the offence of rape) were made in 1983. This was in response to reactions of civil society, and academia[1] to the judgment of the Supreme Court in the Mathura rape case.[2] The next major change occurred earlier this year with the promulgation of the Criminal Law (Amendment) Ordinance, 2013, in February 2013, as a reaction to the Delhi gang rape incident of December 16. This was followed by the enactment of the Criminal Law (Amendment) Act in March 2013. Coincidentally, in order to fulfil longstanding demands for reform in rape laws, the government had introduced a Criminal Law (Amendment) Bill, in the Lok Sabha on December 4, 2012. The gang rape incident of December 16 led to protests and added fresh impetus to demands for a critical re-look at existing rape laws. In response, the Government of India set up a Committee under the Chairmanship of Chief Justice J.S. Verma. The mandate of the Committee was to review existing laws and suggest amendments to criminal law to effectively deal with instances of sexual violence.[3]

The Committee, however, did not view its mandate as only involving the drafting of new laws. It placed its mandate within the framework of the Constitution. The Committee grounded its report in the State's obligation to secure the fundamental rights of its citizens, which includes the right of every person, including women to assert one's individual autonomy. The Committee felt that if women are denied autonomy, even by actors other than State, the duty of the State does not diminish only on that ground. The failure to secure rights of women results in the State denying the right to equality and dignity that women are guaranteed under the Constitution.[4] The Committee's report, including the new offences that have been created and modifications that have been suggested of the existing ones, need to be viewed within this Constitutional framework.

---

[1] *See* Upendra Baxi, Vasudha Dhagamwar, Raghunath Kelkar, Lotika Sarkar, *An Open Letter to the Chief Justice of India*, (1979) 4 S.C.C. 17 (JOURNAL).

[2] Tukaram v. State of Maharashtra, A.I.R. 1978 SC 185.

[3] *See* Government of India Notification No. SO (3003) E, Dec. 23, 2012.

[4] JUSTICE VERMA COMMITTEE, REPORT ON AMENDMENTS TO CRIMINAL LAW 65-67 (2013) [hereinafter REPORT].

The Justice Verma Committee made wide ranging recommendations for changes to various laws that impact upon women's right to equality and right to dignity. Apart from recommending amendments to the existing provisions in the Indian Penal Code pertaining to rape laws, the Committee also suggested the creation of various new offences to take into account the multiple ways in which gender-based violence is perpetrated in society. In this synopsis, we describe this set of new offences recommended by the Committee. We also discuss the modifications suggested to section 354 of the Indian Penal Code, which previously defined the offence of "outraging the modesty of a woman." We also discuss amendments suggested to the Code of Criminal Procedure, 1973 ("Cr.P.C.") and the Indian Evidence Act, 1872 ("IEA").This synopsis provides a summary and brief explanation of the changes recommended, and the reasons for these changes. Many of the changes recommended by the Verma Committee have now become the law of the land vide the Criminal Law (Amendment) Act, 2013. We therefore note whether and to what extent, the recommended changes were incorporated into the Criminal Law (Amendment) Act, 2013. The synopsis does not contain an analysis or a critique of the provisions.

I. Amendments to the I.P.C. and the Introduction of New Offences

A. Acid Attacks

The Committee highlighted the heinous and yet commonplace nature of acid attacks in several Asian and African countries including India.[5] Although the Committee noted that traditionally the offence is dealt with under section 326 of the IPC, it observed that

> [W]hat happens when there is permanent physical and psychological damage to a victim, is a critical question and law makers have to be aware that offences are not simply based on the principle of what might be called offence against the body, i.e., damage of the body, but they must take into account the

[5] *Id.* at 146.

consequences on the right to live with dignity which survives the crime.[6]

The Committee noted that the Criminal Law (Amendment) Bill, 2012 included the offence of voluntarily causing grievous hurt, through use of acid[7]. Under the proposed section 326A of the Amendment Bill, if a person causes permanent or partial damage to the body of another person by throwing acid on, or administering acid to that person, with the intention of causing injury, or with the knowledge that injury shall be caused, that person shall be guilt of the offence defined in section 326A. The Amendment Bill had proposed a minimum punishment of ten years, and a maximum of life. It had also proposed that a fine of a maximum of rupees ten lakhs may be imposed, which shall be given to the victim.

The Committee made some key modification to this provision. It recommended that the offence not be confined to only throwing acid on a person. It suggested that if a person causes permanent or partial damage to the body of another person, by using means other than throwing acid, such person and acts should also be brought within the purview of the section.[8] The Committee also recommended that the victim should receive Central and State government assistance through a compensation fund.[9] It further recommended that instead of a fine, the convicted person be liable to pay compensation to the victim, which should be sufficient to *at least* cover the medical expenses of the victim.[10]

The first explanation to the Committee's draft of the section takes the offence beyond the specific sphere of acid attacks to other violent hate crimes against the body of a woman, which maim or permanently damage or disfigure her, such as forced circumcision of a woman or female genital mutilation.[11] The second explanation pre-empts an argument against

---

[6] *Id.* at 147.
[7] *Id.* at 148.
[8] *Id.* at 435-36.
[9] REPORT, *supra* note 4, at 148. This recommendation was not incorporated in the Criminal Law (Amendment) Act, 2013.
[10] This recommendation was partly accepted. The Criminal Law (Amendment) Act, 2013 states that a fine shall be imposed on the offender, and such fine (which shall be paid to the victim), should be "just and reasonable" to meet the medical expenses of the treatment of the victim.
[11] The recommendation that forced circumcision be brought within the ambit of Section

liability if the victim 'reverses' the visible effects of the attack, through medical treatment. This formulation captures the Committee's recognition that the offence is not only about physical damage, but also about the right of a person to live with dignity.

The Criminal Law (Amendment) Bill, 2012 proposed the addition of section 326B to punish the voluntary throwing or attempt to throw acid on a person. The offence was punishable with imprisonment for a minimum period of five years, which could extend to seven. Along the lines of its recommendations for modifying section 326A, the Committee recommended the broadening of section 326B to include any other means to achieve the purpose of permanently or partially damaging a person's body.[12]

B. Sexual Assault

Under the pre-amendment section 354 of the Indian Penal Code, a person who "assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty" was punished with imprisonment of upto two years, or fine, or both. The focus of the provision, rather unfortunately was on "outraging of the modesty" of a woman and invariably the defence against the application of such a provision centred around what constitutes a woman's modesty, whether the woman in question was of such a character to claim that her modesty was outraged, whether young girls below the age of puberty have 'modesty' etc.[13] Further, under the modesty formulation the offender could argue that he had no intention to "outrage the modesty" of the woman, or that he did not know that his actions would result in the "modesty of the woman" being outraged.[14] Hence, the need for change was palpable, so as to alter the focus of the crime from notions of "modesty" to violation of sexual autonomy. The recasting of the provision therefore needed to be wider in scope, cover a range of offences (and consequently provide higher degrees of punishment) and be a gender neutral provision that criminalised unwelcome sexual acts of varying degrees of severity.

326A was not accepted by the Government, and does not find place in the Criminal Law (Amendment) Act, 2013.

[12] REPORT, *supra* note 4, at 436.

[13] *See, e.g.*, State of Punjab v. Major Singh, A.I.R. 1967 SC 63.

[14] For a discussion, *see* Rupan Deol Bajaj v. Kanwar Pal Singh Gill, (1995) 6 S.C.C. 194.

The Committee recast the provision in its entirety to criminalise all acts of non-penetrative sexual violence under the umbrella term of 'sexual assault.' This ranges from the intentional contact of a sexual nature with another person without their consent, to using words, acts or gestures towards or in the presence of another person to create an unwelcome threat of a sexual nature or which result in an unwelcome advance. In its recommended avatar the provision shifts focus from the "modesty" of the woman being the lens to view the offence to an assessment of when sexual assault can be said to have occurred. The Committee also recommended the repeal of section 509 of the IPC, since the acts criminalized under that section are covered in the recast section 354.[15]

Drawing from the Canadian approach, the Committee explained in the context of the recast section 354 that while the offence of sexual assault should include all forms of non-consensual non-penetrative touching of a sexual nature, the 'sexual nature' of an act would be established if: "viewed in the light of all the circumstances…the sexual or carnal context of the assault [is] visible to a reasonable observer."[16] The Committee observed that the courts will examine factors such as the part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, threats, intent of the accused and any other relevant circumstances but warns that it should not be a prerequisite that the assault be for sexual gratification. The motive of the accused is 'simply one of many factors to be considered."[17]

The Committee also recommended changes in the sentencing framework. For an act that involves physical contact, a maximum penalty of imprisonment for five years was recommended. For acts that do not involve physical contact, a maximum sentence of one year was suggested.[18]

The recommendations of the Committee in relation to section 354 were not accepted by the Government. The only change made by Parliament in the Criminal Law (Amendment) Act, 2013 was to increase the punishment

[15] REPORT, *supra* note 4, at 111.
[16] *Id.* at 110.
[17] *Id.* at 112.
[18] *Id.* at 436.

for a person convicted of "outraging the modesty" of a woman. A minimum punishment of one year's imprisonment has now been provided. The maximum punishment has been increased from two years to five years.

C. Public Disrobing of a Woman

The Committee took note of various instances across the country of humiliating a woman by publicly disrobing her. Recognizing this as a crime usually done with the intention of publicly humiliating a woman, the Committee proposed a separate provision to deal with this act. It recommended enactment of section 354A to deal with this offence. A minimum sentence of three years, and a maximum sentence of seven years were recommended for this new offence.

The recommendation of the Committee was partly accepted. The Committee had recommended that the offence be gender-neutral in relation to the perpetrator. However, under the new law, only a man can be convicted for the offence. Further, Parliament also removed the necessity that the disrobing of a woman occur in a public place. Under the new framework, if a man uses criminal force with the intention of disrobing or compelling a woman to be naked, he is guilty of the offence.

D. Voyeurism

The Committee recommended the introduction of a new offence of voyeurism. Although the Information Technology Act covers invasion of privacy using electronic devices, the IPC does not contain a provision that defines and punishes voyeuristic acts. This new recommended section achieved that purpose. The provision covered two types of instances (1) where the perpetrator watches the woman secretly, and (2) where the woman might have consented to the perpetrator watching her (for instance, when the woman might be in a relationship with the perpetrator) but not of any third party watching her at the perpetrator's behest. Watching a woman in these circumstances amounts to voyeurism if she was engaged in a 'private act,' which, in the first explanation to the provision is defined as

> [A]n act carried out in a place which, in the circumstances, would reasonably be expected to provide privacy, and where the victim's

> genitals, buttocks or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the person is doing a sexual act that is not of a kind ordinarily done in public.

The second explanation covers instances where a woman may have consented to her private images being captured by the perpetrator (such as, once again in instances of a relationship between them) but not to such pictures being disseminated by him to third parties. The recommended punishment for the offence of voyeurism was of imprisonment of one to three years and with fine, and in the event of a second or subsequent conviction with imprisonment for a minimum of three years which may extend to seven years and also with fine.

The recommendation of the Committee was accepted, except for the introduction of "capturing of images" of a woman engaging in a private act. As in the other provisions, although the Committee had recommended that the offence be gender neutral as regards the perpetrator, the recommendation was not accepted. Only a man can be convicted of the offence.

E. Stalking

The Committee recommended the introduction of a new offence of stalking. Expressing surprise that "offences such as stalking, voyeurism, 'eve-teasing' etc. are perceived as 'minor' offences, even though they are capable of depriving not only a girl child but frail children of their right to education and their freedom of expression and movement,"[19] the Committee took the view that it was not enough for the State "to legislate and establish machinery of prosecution, but conscious and well thought out attempts will have to be made to ensure the culture of mutual respect is fostered in India's children. Preventive measures for the initial minor aberrations are necessary to check their escalation into major sexual aberrations."[20]

---

[19] *Id.* at 215.
[20] *Id.*

The offence of stalking (which is gender neutral) is committed in any one of three situations listed below:

Situation 1: Where a person

(i) Follows another *and*
(ii) contacts, or attempts to contact them
(iii) in order to foster personal interaction
(iv) repeatedly
(v) despite a clear indication of disinterest, or

Situation 2: Where a person

(i) monitors the use by another person of the internet, email or any other form of electronic communication, or

Situation 3: Where a person

(i) watches or spies on another person,
(ii) in a manner that results in a fear of violence or serious alarm or distress in the mind of the other person, or
(iii) in a manner that interferes with the mental peace of the other person

The provision includes three exceptions, where the action will not amount to stalking:

(a) where the course of conduct is pursued for the purpose of preventing or detecting crime and the person accused of stalking has been entrusted with the responsibility of prevention and detection of crime by the state; or,
(b) where the course of conduct is pursued under any enactment or rule of law, or to comply with any condition or requirement imposed by any person under any enactment; or,
(c) where, in the particular circumstances the pursuit of the course of conduct was reasonable.

The punishment recommended for the offence of stalking was imprisonment of either description for a term which shall not be less than one year but which may extend to three years along with a fine.

The Parliament while enacting the Criminal Law (Amendment) Act,

2013 made substantial changes to the recommended offence. First, the Committee had recommended that the offence be completely gender neutral. However, the Act makes it gender specific. Only a man can commit the offence, and only against a woman. Second, the Committee had recommended that the enumerated acts would constitute stalking only if they result in a fear of violence or serious alarm or distress in the mind of the victim, or if it interferes with the mental peace of the victim. This requirement was removed in the Criminal Law (Amendment) Act. Hence, under the new law, a man may convicted of the offence of stalking, even if his actions do not lead to fear of violence, or distress to the woman.

II. Amendments to the Code of Criminal Procedure

The Criminal Law (Amendment) Bill, 2012 suggested amendments to five sections of the Criminal Procedure Code, 1973 (Cr.P.C). In light of its mandate and the changes suggested to the I.P.C. and other substantive laws, the Committee suggested changes to various other sections of the Cr.P.C. We have summarized these suggestions and provided a brief commentary on the rationale behind them.

A. Section 39, Cr.P.C.

Section 39 imposes a duty on the public to report offences if they become aware of commission or the intention of a person/s to commit the offences listed in sub-section (1) of that section. If a person intentionally omits to inform the police or the nearest magistrate, such omission is punishable under section 176 and 202 of the Indian Penal Code, 1860 (I.P.C.), both of which provide a term of imprisonment which may extend to six months. Currently, section 39(1) of the Cr.P.C. does not include sexual offences. The Committee recommended that sections 326A, 354, 354A, 354B, 354C, 376(1), 376(2), 376A, 376B(2), 376C, 376D and 376F be added to the list of offences in section 39(1), Cr.P.C.[21]

This proposed change in the law recognizes the under-reporting of rape

[21] Report, *supra* note 4, at 447.

cases, because of survivors being discouraged by individuals who become aware of the incident. By the proposed amendment, a person who becomes aware of an incident of sexual abuse would be legally bound to report the crime. However, this recommendation was not accepted by the Government.

B. Section 40A, Cr.P.C.

Section 40 of the Cr.P.C. is along the lines of section 39. It casts a duty on officers employed in connection with the affairs of a village and residents of a village to report the commission of offences listed in section 40(1). An officer employed in connection with the affairs of the village includes the members of the village panchayat, and others in similar leadership roles. The Committee recommended that a new section, section 40A be added to the Cr.P.C. This section would obligate "every officer employed in connection with the affairs of a village, and every person who is part of a village *panchayat*" to report without delay, the commission (or the intention to commit) offences listed in that section. The offences listed are sections 326A, 326B, 354, 354B, 354C, 376(1), 376(2), 376(3), 376A, 376B(1), 376B(2), 376C and 376D of the IPC.[22]

This suggested amendment recognizes the fact that in rural areas, the *sarpanch* or a member of the village *panchayat* is often informed about the commission of a sexual offence. Panchayats often engage in getting the parties to compromise, and discourage the survivor and her family from reporting the incident to the police. If this suggestion of the Committee were to be accepted, the members of the *panchayat* and any other person in a leadership role in a village would be legally bound to report the offence to the police. However, this recommendation was not accepted by the Government.

C. Section 54A, Cr.P.C.

The Committee recommended amending section 54A of the Cr.P.C., which deals with "identification parades." The purpose of an identification parade is for a person who has information about the crime and/or the

[22] *Id.*

offender to identify a person who is suspected of having committed the crime. In an identification parade the person identifying generally points out the person to the police officer conducting the parade. Recognizing that the current process might not be disabled-friendly, the Committee proposed that in cases where the person identifying is physically or mentally challenged, a different procedure be used. Instead of a police officer, such parade shall be conducted by a judicial magistrate, who shall devise a method of identification, which the physically or mentally challenged person is comfortable with.[23] The Committee also suggested that the entire process be videographed.[24] This recommendation was accepted *in toto* by the Government and finds place in the Criminal Law (Amendment) Act, 2013.

D. Section 154, Cr.P.C.

The Criminal Law (Amendment) Bill, 2012 proposes amendments to section 154(1), Cr.P.C. which deals with filing of First Information Reports. The amendment proposed by the Bill was that in cases involving sections 354, 375, 376, 376A, 376B and 509 of the IPC, FIRs should be recorded, as far as possible, by a woman police officer.

The Committee made four additional suggestions. First, it added all sections in the I.P.C. dealing with sexual offences against women (including those proposed by the Committee) to the list of offences already suggested by the Amendment Bill. Second, it suggested that if the rape survivor is a woman, then she should be provided legal assistance, as well the assistance of a healthcare worked and/or a women's organization. Third, in the event that the survivor (male or female) is temporarily or permanently physically challenged, the police officer is required to record the FIR at a place convenient to the survivor, in the presence of a special educator or an interpreter. The Committee also recommended that the process be videographed. The final recommendation was that after recording the survivor's statement, the police should get the survivor's statement recorded by a judicial magistrate.[25]

---

[23] *Id.*
[24] *Id.*
[25] *Id.* at 447-48.

Filing of the FIR is a major hurdle for a rape survivor. The atmosphere of a police station is not friendly to reporting a sexual crime. It has been alleged that police officers are not sensitive while recording FIRs for rape. Recognizing that women might be more comfortable in reporting the offence to a female police officers, previous law reform initiatives, including the Criminal Law (Amendment) Bill, 2012, have suggested that FIRs in sexual offences be recorded by women police officers. The Committee's recommendations would help make the process of initiating legal proceedings less intimidating than it currently is. This would result in rape survivors being provided better access to the legal system.

All recommendations, except the requirement to provide legal assistance, as well as assistance of a healthcare worker and/or a women's organization was accepted in the Criminal Law (Amendment) Act, 2013.

E. Section 160, Cr.P.C.

Section 160 of the Cr.P.C. deals with the power of the police officer to summon a person acquainted with the facts of the case. This is generally done for recording of the statement of the witness, and the person may be called to a police station. The pre-Amendment provision, however, provided that no woman or a male under the age of fifteen shall be questioned, except at their residence. The Criminal Law Amendment Bill proposes to extend the age for men, providing that a man under the age of fifteen or over the age of sixty five shall be questioned at his residence. The Committee recommended that a physically or mentally challenged person also be questioned at his/her residence.[26] These recommendations find place in the Criminal Law (Amendment) Act, 2013.

F. Section 164, Cr.P.C.

Section 164 of the Cr.P.C. deals with the recording of confessions and statements by Magistrates. The Committee recommended that as soon as the commission of a sexual offence is brought to the attention of the police, the police shall arrange to have the survivor's statement recorded by a Magistrate. It further recommended that in the case of a mentally or

[26] REPORT, *supra* note 4, at 448.

physically challenged person, such statement shall be videographed, and shall be taken with the assistance of an interpreter or a special educator. It also recommended that in the case of mentally or physically challenged persons, this statement before the Magistrate shall be considered as their examination-in-chief.[27] This implies that the person will not have to re-assert the statement at trial, but only be available for cross-examination.

A major reason for acquittals in rape cases is the survivor turning hostile. In a large number of cases, the survivor retracts from her prior statement to the police, due to societal and other pressures. The consequence of getting a statement recorded by a magistrate is that the survivor cannot claim that he/she did not make such statement, or dispute its contents. This would ensure that the person does not retract from his/her statement because of extraneous reasons. On the other hand, if she does retract, he/she will be liable to prosecution for making false statement under oath.

These recommendations were accepted by the Government and find place in the Criminal Law (Amendment) Act, 2013.

G. Section 197, Cr.P.C.

Section 197(1) of the Cr.P.C bars a court from taking cognizance of an offence, if it is committed by a judge, magistrate or a public servant, while acting or purporting to act in the discharge of his official duties, unless sanction is granted by the appropriate government. The Committee recommended that the section be amended to lift the bar on taking cognizance in sexual offences, as well as for the offence of trafficking. Under the pre-Amendment framework, if a public servant committed an offence, including a sexual offence, the government sanction was required for prosecution. Delay in granting sanction, or cases where sanction was not granted led to impunity in custodial rape cases. The proposed amendment recognized that committing an act of sexual violence cannot be a part of person's official duties. Hence, the Committee recommended that no sanction be required in prosecutions for sexual offences.[28] The

[27] *Id.* at 448-49.
[28] *Id.* at 449.

recommendation was accepted and a clarification has been appended to section 197 stating that sanction will not be required in cases of sexual offences.

H. Section 198B, Cr.P.C.

The Committee recommended adding section 198B to the Cr.P.C, by virtue of which a court is barred from taking cognizance of a report of marital rape, unless such report is made by the wife against her husband. This ensures that a third person does not interfere in a marital relationship, by filing a report of marital rape.[29]

Although Parliament did not accept the recommendation to make marital rape itself an offence, it retained the recommendation of the Committee to introduce section 198B. However, this does not make logical sense, since the Committee's recommendation for introducing a limitation on cognizance was contingent on marital rape being made an offence. The Criminal Law (Amendment) Act, 2013 now mandates that before taking a cognizance, the court shall be satisfied that there are *prima facie* facts to indicate that an offence or rape during separation (which is the limited extent to which marital rape is criminalized) has occurred.

I. Section 327, Cr.P.C.

Section 327(1) of the Cr.P.C. states that all trials shall be open to the public. However, sub-section (2) states that trials of cases under sections 376, 376A-D shall be conducted *in camera*. In suggesting modification of the Criminal Law (Amendment) Bill, the Committee proposed that trials for all the new sexual offences that it has suggested also be in camera.[30] The Committee however recommended that unless there are compelling reasons, only the examination in chief and cross-examination be in camera. The rest of the proceedings should be open to the public in order to ensure that there is a check on misogynistic and prejudicial practices in court proceedings.[31] The Committee further recommended that the survivor be provided with the assistance of a person from a women's organization

[29] *Id.* at 449.
[30] *Id.* at 449.
[31] REPORT, *supra* note 4, at 288.

through the trial. These recommendations were not accepted.

J. Section 357, Cr.P.C.

One of the amendments that the Committee suggested in the I.P.C. is that, if convicted, the offender should be liable to pay monetary compensation to the victim. Consequently, amendments were suggested to section 357, Cr.P.C. which empowers courts to award compensation. The proposed change operationalizes the suggested amendment to the I.P.C. by requiring suitable changes to the Cr.P.C. These recommendations were not accepted.

K. Amendments to the First Schedule of the Cr.P.C.

In light of the seriousness of sexual offences, the Committee recommended that all the offences suggested by the Committee be made cognizable and non-bailable. This recommendation was accepted in part.

III. Amendments to the Indian Evidence Act (I.E.A.)

The Criminal Law (Amendment) Bill, 2012 suggested amendments to sections 53A, 114A and 146 of the Cr.P.C. The Committee suggested further modifications to these proposed amendments, as well as an amendment to section 119 of the Evidence Act.

A. Amendments to Sections 53A and 146, IEA

Sections 53A and 146 of the IEA deal with the issue of sexual history of the rape survivor. The Amendment Bill, 2012 had proposed that in sexual offences, where consent is an issue, the character or past sexual history of the survivor shall not be relevant in deciding on the issue of consent. The Committee recommended that past sexual history should not be relevant in all sexual offences. It further recommended that past sexual history be considered irrelevant not only in determination of the question of consent, but during the determination of any other fact during the trial process.[32]

[32] *Id.* at 451.

The proviso to section 146 bars the rape survivor being asked questions about her sexual history during cross-examination. The Amendment Bill made the section gender neutral and added a few more offences to the existing list. The Committee recommended that the bar on asking a rape survivor questions about her sexual history should extend to all sexual offences.[33] In sum, the past sexual history of the survivor will not be a relevant fact in a prosecution for any sexual offence. However, this recommendation was not accepted.

B. Amendment to Section 114A, IEA

Section 114A of the IEA states that in a prosecution for rape under certain clauses of section 376(2) of the Indian Penal Code, if sexual intercourse is proved by the prosecution, and the issue is one of consent, and the woman testifies that she did not consent, the Court shall presume the lack of consent. The Committee recommended the extension of this presumption to all clauses of section 376 (2), as also to the offence of gang rape defined by the newly proposed section 376C.[34] The Criminal Law (Amendment) Act amended Section 114A to extend the presumption to all clauses of section 376(2). However, in what appears to be an oversight, it fails to extend the presumption to Section 376D, which defines and punishes the offence of gang rape.

C. Amendment to Section 119

The final amendment suggested to the IEA is with respect to section 119. Section 119 referred to people with speech disabilities as "dumb witnesses." The Committee recommended that an amendment be made to the section and that "dumb" be replaced by "persons who are unable to communicate verbally." It also recommended that in recording the evidence of such persons, the Court shall take the assistance of a special educator or interpreter, as required, and that the process be videographed.[35] This recommendation was accepted and section 119 was amended by the Criminal Law (Amendment) Act, 2013.

---

[33] *Id.* at 452.
[34] *Id.* at 451.
[35] *Id.* at 451.

CONCLUSION

The recommendations of the Justice Verma Committee are likely to have a long lasting impact on Indian jurisprudence regarding sexual offences and women's rights more generally. The Committee's Report reconceptualised sexual violence as a violation of sexual autonomy, thus taking it out of the honour-chastity-modesty framework, within which sexual violence is currently placed, in the judicial and social imagination.[36] If internalized, this change in conception will, in our belief, have a transformative impact on adjudication of rape cases in the future.

[36] *See* Mrinal Satish, *Virginity and Rape Sentencing*, TIMES OF INDIA CREST EDITION, Jan. 12, 2013, http://www.timescrest.com/society/virginity-and-rape-sentencing-9566