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VICTIM'S RIGHTS AND CRIMINAL JUSTICE REFORMS

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AMONG THE many proposals on the table for reforming criminal justice, the one which attracts universal acclaim relates to the status and role of the victim in criminal proceedings. Today he is an informant and possibly a witness for the prosecution depending upon the good sense of the police and the discretion of the public prosecutor. Unlike the accused, he has no rights to protect his interests in the proceedings which are supposedly conducted on his behalf by the State and its agencies. And when the State agencies fail to do its duties as often happened in many cases in the recent past, the victim is left to suffer injustice silently or (as happened in Nagpur Court in 2005 when the victims assaulted the rapist and killed him) to take the law in his hands and wreak vengeance on the offender.

Being victim of a crime is indeed a distressing and unsettling experience. If the victim belongs to weaker sections of society the experience may be traumatic and frustrating. Some even go to the extent of committing suicide and seek heavenly justice! Some say that the system supposed to provide the victim with the relief itself becomes a problem to victims of crime. Often he faces double victimization.

Does the criminal justice system work as an end in itself and neglect the needs of the victim even denying him information on the progress of the proceedings? What are the rights, if any, the victim has in the legal proceedings conducted on his behalf? If the system does not operate to support the legitimate needs of the victim, can it at least ensure that he is not harassed, intimidated, humiliated and exploited? Respect for the victim can be an end in itself which may serve as public good in administration of justice. What can be done to give a better deal to the victims of crime as a strategy to improve the efficiency of the system and to make the proceedings equally fair to both sides.

U.N. Declaration on Basic Principles of Justice to Victims

In 1985 the United Nations adopted the Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power. The Declaration recognized four types of rights and entitlements to victims of crime. They are:

- a) **Access to justice and fair treatment** – which includes prompt redress, right to be informed of benefits and entitlements under law, right to necessary support services throughout the proceedings and right to protection of privacy and safety.
- b) **Right to Restitution** – return of property lost or payment for any harm or loss suffered as a result of the crime.
- c) **Compensation** – When compensation is not fully available from the offender or other sources, the State should provide it at least in violent crimes which result in serious bodily injury, for which a national fund should be established.
- d) **Personal Assistance and Support Services** – include material, medical psychological and social assistance through governmental, voluntary and community based mechanisms.

Developments on Victim Rights and Support Services in other Countries

The Council of Europe has recommended the revamping of criminal justice incorporating victims' rights in every state of criminal proceeding. Following it, many countries have amended the laws to include victims' rights and services.

The United Kingdom has enacted the *Criminal Injuries Compensation Act* in 1995. In 2001 in a report on "Criminal Justice: The Way Ahead", the Home Department found "that many victims felt that the rights of the accused of a crime take precedence over theirs in criminal proceedings". Every time a case is discharged or acquitted or the verdict is perceived to be unjust, a victim's suffering is made worse. During the long proceeding of investigation and trial, victims are not kept properly informed or provided with a sense of security. Too often they are expected to turn up at court for cases that are adjourned, or are subjected to unnecessarily stressful courtroom experiences. Crime can leave victims physically injured, emotionally traumatised, with potentially long lasting psychological trauma, all of which can be compounded by severe financial difficulties, observed the U.K. report. The agencies with which victims come into contact, particularly during the period after the crime, do not always understand and respond effectively to their needs. The U.K. report therefore recommended the following measures to balance the system of justice in that country :

- a) Legislate to entitle victims with information about release and management of the offenders and progress of their cases.
- b) Enable victims to submit a "victim personal statement" to the courts setting out the effect of the crime on their lives.

- c) Introduce measures to protect vulnerable victims/witness such as screens, video evidence, etc.
- d) Provide extended specialized support for victims of road traffic accidents and their families.
- e) Establish a victim's Commissioner (Ombudsman).
- f) Enable victims to report minor crime online and to tract their case online.
- g) Legislate to produce a Victims' Code of Practice setting out what protection, practical support and information, victims have a right to expect from criminal justice agencies.

Bereaved families, children, repeat victims, victims of human trafficking, of domestic violence, or sexual abuse and those belonging to minority communities are found to have particular needs which also need to be addressed in the Victims' Code of Practice. *A Victims and Witnesses Bill* was to be enacted in U.K. on the above lines.

In France, all those who suffer injuries on account of crime are entitled to become parties to the proceedings from the investigation stage itself. He can assist investigation to proceed on proper lines and move the Court for appropriate directions when the investigation gets delayed or distorted for whatever reasons. He may suggest questions to the Court to be put to witnesses produced in Court. He may conduct the proceedings if the Public Prosecutor does not show due diligence. He can supplement the evidence adduced by the Prosecution and put forth his own arguments. He will be of help to the Court in the matter of deciding the grant or cancellation of bail. He will adduce evidence in the matter of loss, pain and suffering to decide on his entitlement of interim relief and compensation by way of restitution. Wrongful attempts to withdraw or close the prosecution due to extraneous facts can be resisted. All these are valuable rights available to victims under the French system of criminal justice.

It is believed that the above rights of the victims are necessary to ensure fairness of proceedings to both the parties and to assist the Court in the search for truth. If the victim is dead or otherwise not available this right should vest in the next of kin. The right extends to preferring and appeal against any adverse order passed by the trial court.

Thus basically there are two sets of rights recognized in legal systems of Europe. Firstly, victims' right to participate in criminal proceedings (right to be impleaded, right to know, right to be heard and right to assist the Court in the pursuit of truth). Secondly, the victims of crime have

the right to seek and receive compensation for injuries suffered as well as appropriate interim reliefs from the criminal court itself.

Victims under Indian Criminal Justice System

In Indian Criminal Law, the victims' right is confined to a token compensation (section 357 CRPC) at the end of trial at the discretion of the judge. His right to participate as the dominant stakeholder in criminal proceedings got vested in the State. He has no right to lead evidence, he cannot challenge the evidence through cross-examination of witnesses nor can he advance arguments to influence decision-making.

If the victim of cognisable offence gives information to the police, the police is required to reduce the information into writing and read it over to the informant. The informant is required to sign it and get a copy of the FIR (section 154 (1) and (2) of Cr. P.C.). If the police refuses to record the information, the victim-informant is allowed to send it in writing and by post to the SP concerned (Section 154(3)). If the police refuses to investigate the case for whatever reason, the police officer is required to notify the informant of that fact (Section 157(2)). Alternatively, victims are enabled by section 190 of Cr. P.C. to avoid going to police for redress and directly approach the Magistrate with his complaint.

Complaints of victims are many. They are ill treated or harassed. Police do not truthfully record the information. Investigation being exclusively and police function, victim has a role in it only if police consider it necessary. Otherwise till the police report (*challan*) is filed under Section 173 Cr.P.C., the victim suffers the injury in silence running from pillar to post. If the magistrate decides to drop the proceedings, victim does not have an opportunity even to ventilate his grievance though the Supreme Court desired the Magistrates in such cases to issue notice and hear the victim-informant. There is no special provision for support to victims of rape to enable her overcome the trauma and hurt.

If the victim wants to engage a counsel, the Cr. P.C. allows him with the permission of the Court to assist the public prosecutor. He may also submit with the permission of the Court, written arguments after the closure of evidence in the trial.

In the granting and cancellation of bail, victims have substantial interests though not fully recognized by law. Section 439 (2) Cr. P.C. allows a

victim to move the Court for cancellation of bail; but the action thereon depends on the stand taken by the Prosecution. Similarly, Prosecution can seek withdrawal at any time during trial without consulting the victim (section 321, Cr. P.C.). Of course, the victim may proceed to prosecute the case as a private complainant. However, he cannot challenge the prosecution decision to withdraw at the trial stage itself.

Yes, victims have a right to testify as prosecution witness. But he is subject to intimidation and harassment from offenders and he has no protection. There is no victim protection law. If the victim belongs to the weaker section, the plight is indeed alarming. As the Malimath Committee remarked: "The adversarial trial built around cross-examination of witness often result in adding insult to injury against which even the Court may not be of much help. In several offences the experience may be a nightmare to victims".

Compensation provision is of little value. Section 357 CRPC says when the sentence of fine is imposed as the sole punishment or any additional punishment, the whole or part of it may be directed to be paid to the victim as per the discretion of the Court. Section 357 (3) makes provision for compensation even if fine does not form part of the punishment. There is no question of compensation if there is acquittal or where the offender could not be apprehended.

In 1992 the U.P. Government through an amendment to Section 357 provided that where the victim is an S.C. or S.T. and the person convicted is not of that category, the Court is obliged to order compensation to the victim.

Substantial compensation is sometimes ordered to be paid by the State for illegal detention, custodial torture etc. by the Constitutional Court under writ jurisdiction.

Recommendations of the Committee on Criminal Justice Reforms

"The *Malimath Committee on Criminal Justice Reforms (2003)* recommended the following measures by way of justice to victims:

1. The victim and if he is dead, his legal representative, shall have the right to be impleaded as a party in every criminal proceeding where the offence is punishable with 7 years imprisonment or more.

2. In select cases notified by the appropriate government, with the permission of the court, an approved voluntary organization shall also have the right to be impleaded in court proceedings.
3. The victim has a right to be represented by an advocate of his choice; provided that an advocate shall be provided at the cost of the State if the victim is not in a position to afford a lawyer.
4. The victim's right to participate in criminal trial shall, inter alia, include:
 - a. To produce evidence, oral or documentary, with leave of the Court and/or to seek directions for production of such evidence.
 - b. To ask questions to the witness or to suggest to the court questions which may be put to witnesses.
 - c. To know the status of investigation and to move the court to issue directions for further investigation on certain matters or to a supervisory officer to ensure effective and proper investigation to assist in the search for truth.
 - d. To be heard in respect of the grant or cancellation of bail.
 - e. To be heard whenever Prosecution seeks to withdraw and to offer to continue the prosecution.
 - f. To advance arguments after the Prosecutor has submitted arguments.
 - g. To participate in negotiations leading to settlement of compoundable offences.
5. The victim shall have a right to prefer an appeal against any adverse order passed by the court acquitting the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation. Such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court.
6. Legal services to victims in select crimes may be extended to include psychiatric and medical help- interim compensation and protection against secondary victimization.
7. Victim compensation is a State obligation in all serious crimes, whether the offender is apprehended or not, convicted or acquitted. This is to be organized in a separate legislation by Parliament.

8. The Victim Compensation Law will provide for the creation of a Victim Compensation Fund to be administered possibly by the Legal Services Authority. The law should provide for the scale of compensation in different offences for the guidance of the Court. It may specify offences in which compensation may not be granted and conditions under which it may be awarded or with drawn.

It is the considered view of the Committee that criminal justice administration will assume a new direction towards better and quicker justice once the rights of victims are recognized by law and restitution for loss of life, limb and property are provided for in the system. The cost for providing it is not exorbitant as sometimes made out to be. With increase in quantum of fine recovered, diversion of funds generated by the justice system and soliciting public contribution, the proposed victim compensation fund can be mobilized at least to meet the cost of compensating victims of violent crimes. Even if part of the assets confiscated and forfeited in organized crimes and financial frauds is made part of the Fund and if it is managed efficiently, there will be no paucity of resources for this well-conceived reform. In any case, dispensing justice to victims of crimes cannot any longer be ignored on grounds of scarcity of resources.

PROMISES AND PERILS OF PUBLIC INTEREST LITIGATION IN PROTECTING THE RIGHTS OF THE POOR AND THE OPPRESSED

Parmamand Singh*

I Introduction

PUBLIC INTEREST Litigation (PIL) has today become the household word for judicial involvement for the protection of the rights of the poor and the oppressed. Over the years a vast literature has emerged on the role of PIL in social empowerment and social change.¹ With the active assistance of social activists, PIL activism aims at innovative remedial measures for the vindication of constitutional commitments for the welfare and relief of the disadvantaged groups. The increased judicial repertoire symbolizes the politics of emancipation and social empowerment. PIL has today acquired unprecedented legitimacy and binding power and is acknowledged as a powerful weapon to combat governmental lawlessness and social oppression. The judicial messages radiated through PIL cases provide legal resources to launch struggles against domination and abuses of power. The Indian PIL has grown in the context of political history of State repression. It emerged as a device to activate judicial power to force the government to live up to its commitments. This paper seeks to portray

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¹ For a detailed analysis of the evolution and development of PIL see, Parmamand Singh "Human Rights Protection Through Public Interest Litigation in India" Vol. XLV, *Indian Journal of Public Administration*, 731-749(1999). Also see the present author's survey of cases on PIL published in *Annual Survey of Indian Law* Vol. XXI 160(1985), Vol. XXII 483(1986), Vol. XXIII 13(1987), Vol. XXIV 123(1988), Vol. XXV 45 (1989), Vol. XXVI 181(1990), Vol. XXVII 35(1991), Vol. XXVIII 239(1992), Vol. XIX 245 (1993) Vol. XXXIX 66(2003), Vol. XL, 543(2004). Rajeev Dhavan, "Law As Struggle: Public Interest Law India", *36 Journal of The Indian Law Institute* 302-338(1994); Rajeev Dhavan, "Ambedkar's Prophecy: Poverty of Human Rights in India", *36 Journal of The Indian Law Institute*, 9-36(1994); B.B. Pandey, "When They Came To the Court Seeking Basic Needs: Alternatives To The Flawed Responses", *31 Journal of The Indian Law Institute* 368(1989); S. Mukherjee, "Poverty and Legal Aid: Access To Criminal Justice, 175-298 (2004); C.D. Cunningham, "Public Interest Litigation in Indian Supreme Court: A Study in the Light of The American Experience", *29 Journal of The Indian Law Institute*, 494(1987) Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" in U.Baxi(ed) Law and Poverty: Critical Essays, 387-415 at 389 (1988) Also see by the same author, "The Avatars of Indian Judicial Activism: Explorations in the Geographies of (in)justice" in S.K. Verma and Kusum (eds) Fifty Years of the Supreme Court of India: Its Grasp and Reach, 156-209(2000). Also see, J. Cassels "Judicial Activism and Public Interest Litigation: Attempting the Impossible" *37 American Journal of Comparative Law* 495(1989); Carl Baar, "Social Action Litigation in India: The Operation and Limitation of the World's most Active Judiciary", *19 Policy Studies Journal*, 140-147(1990), S.P.Sathe, *Judicial Activism in India* (2003).

2005] the evolution and growth of PIL ever since early eighties and offers a critique of judicial responses to the PIL actions alleging violation of human rights of the poor and the oppressed.

II Promises of PIL movement

PIL is a unique phenomenon in the Indian constitutional jurisprudence that has no parallel in the world. This technique is concerned with the protection of the interests of a class or group of persons who are either the victims of governmental lawlessness, oppression, or social oppression or denied their constitutional or legal rights and who are not in a position to approach the court for the redressal of their grievances due to the lack of resources or ignorance or their disadvantaged social and economic position. In the area of human rights judicial activism was evolved in the post emergency period as a result of what has been called "judicial populism".² The Indian Supreme Court began to identify itself as an institution of last resort when the other two branches of the government were facing legitimation crisis. With the change of political situation after the 1975-77 emergency, the judges began to realize that by strict adherence to the Anglo-Saxon model of adversarial litigation the human-rights of the masses who had no access to justice could not be realized. Under the traditional system of adversarial litigation only the person "aggrieved" could approach the court for the redressal of grievances. Thus, those people who, because of ignorance, poverty, lack of resources, or economic disability, could not on their own approach the court had to suffer violations of their human rights. No one could espouse their cause on their behalf. The result was that for the poor, the disadvantaged and the exploited the legal procedure became a hindrance for the vindication of their legitimate rights. Realizing this deficiency in our legal procedure some judges, particularly Justices V.R.Krishna Iyer and P.N.Bhagwati openly started to disregard the impediments of Anglo-Saxon procedure to provide access to justice to the poor and disadvantaged sections of the society. This they did by relaxing the

² The expression 'judicial populism' was used by Upendra Baxi. He observed "Judicial populism was partly an aspect of post-emergency catharsis. Partly it was an attempt to refurbish the image of the Court tarnished by a few emergency decisions and also an attempt to see new historical bases of legitimation of judicial power." See, U. Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" 8-9 *Delhi Law Review* 91(1979-80); Parmamand Singh, "Access to Justice: Public Interest Litigation and the Supreme Court", 10-11 *Delhi Law Review* 156(1980-81).

³ The concept of PIL was most clearly articulated in *S. P. Gupta v Union of India* 1981 (Supp) SCC 87 and further explained in *Bandhua Mukti Morcha v. Union of India* (1984) 4 SCC 151.

rule of *locus standi*. In *S.P. Gupta v. Union of India*⁴, Justice P.N. Bhagwati articulated the concept of PIL as follows⁵:

Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of person by reason of poverty, helplessness or disability or socially or economically disadvantaged position unable to approach the court for relief, any member of public can maintain an application for appropriate direction, order or writ in the High Court under Article 226 and in case any breach of fundamental rights of such persons or determinate class of persons, in this court under Article 32 seeking judicial redress for the legal wrong or legal injury caused to such person or determinate class of persons.

The new procedure evolved by the Indian Supreme Court allows any member of the public acting in a *bona fide* manner to espouse the cause of the victims of human rights violations. One can invoke court's jurisdiction just by writing a letter or sending a telegram. This has been termed epistolary jurisdiction. Only a person acting *bona fide* and having sufficient interest in the proceedings of PIL has a *locus standi* and can approach the court to wipe out the tears of the poor and the needy, suffering from violation of their fundamental rights but not for personal gain or private profit or political motive or any oblique consideration. PIL proceedings entail new forms of fact finding such as appointment of socio-legal commissions of inquiry and handing over the investigation to the National Human Rights Commission or CBI. The court has taken the help of journalists, lawyers, district judges, bureaucrats, and expert bodies for ascertaining the facts alleged in PIL proceedings. This has been called investigative litigation. In dealing with these cases the courts have fashioned new kinds of relief for the victims of State lawlessness – compensatory, rehabilitative, restitutive, preventive and curative. For example, the court can award interim compensation to the victims of governmental lawlessness. This stands in sharp contrast to the Anglo-Saxon mode of adjudication where interim relief is limited to preserving status quo pending final decision. The grant of interim relief in PIL cases does not preclude the aggrieved person to claim damages from a civil court.

⁴ *Supra* note 3.

⁵ *Id.* at 210.

To sum up, PIL is not in the nature of adversary litigation but it is "a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution. The government and its officers must welcome public interest litigation, because it would provide them an occasion to examine whether the poor and the down-trodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections of the community and whether social and economic justice has become a meaningful reality for them or it has remained merely a teasing illusion and a promise of unreality, so that in case the complaint in the public interest litigation is found to be true they can in the discharge of their constitutional obligation root out exploitation and injustice and ensure to the weaker sections their rights and entitlements".⁶ In entertaining PIL, the court does not do so "in a caviling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive, framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive. The court is thus merely assisting in the realization of the constitutional objectives".⁷

Ideologically, the PIL activism addresses and confronts the domination formations in civil society and activates public discourse on practices of power with the partnership of the media, legal academics, bar and the judges. It is in essence a movement to involve the judicial process for the creation of norms of a just social order based upon the principles of justice and humanism. In this movement, people participate in the activation of the judicial power for creating a regime of human rights with the active support of the social activists. PIL seeks to hold the government and its agencies within the leading strings of egalitarianism, humanism and fairness and correct by judicial admonition, episodes of governmental lawlessness and excesses of power or abuse of authority or lapses.⁸

⁶ Per Justice P. N. Bhagwati in *Bandhua Mukti Morcha*, *supra* note 3 at 182-183.

⁷ *Ibid.*

⁸ In *Bijn Chandra v. State of Gujarat* A.I.R.2002.Guj. 99, a PIL was filed for a direction to the government to provide relief to the earthquake victims in Gujarat. On the morning of 26th January 2001 an earth quake of a high magnitude had shook the whole of Gujarat leaving thousands dead, injured, crippled, orphaned and homeless. The PIL was filed on the basis of newspaper reports that the government had failed to meet the situation arising from the calamity and had no adequate infrastructure to satisfactorily perform the stupendous task of providing relief and rehabilitation to quake victims.

A. Human rights

Hussainara Khatoon v. State of Bihar was the first reported case of PIL seeking relief for the under-trial prisoners languishing in jails.⁹ The PIL proceedings in this case resulted in the release of nearly 40,000 under-trial prisoners, then languishing in Bihar jails. *Anil Yadav v. State of Bihar*¹⁰ depicted the police brutalities. About 33 suspected criminals were blinded by the police in Bhagalpur jail in Bihar through putting acid into their eyes and then eyes were burnt. The Supreme Court quashed the trial of blinded persons, condemned the police barbarity in strongest terms and directed the Bihar government to bring the blinded persons to Delhi for medical treatment at the state's expense. The court declared free legal aid as a fundamental right as an aspect of right to life and personal liberty. The human rights of prisoners subjected to torture,¹¹ victims of police excesses,¹² inmates of protective homes¹³ and mental asylums,¹⁴ bonded¹⁵ and child labour,¹⁶ victims of sexual harassment¹⁷ and earthquake victims¹⁸ and many others have been protected by the Supreme Court.

In environmental cases, the court has addressed the issues of environmental degradation such as vehicular pollution,¹⁹ leakage of oleum gas from a factory,²⁰ danger to the Taj Mahal from Mathura refinery,²¹

⁹ *Hussainara Khatoon v. State of Bihar* (1 to V) A.I.R. 1979 SC 1360. (Right to speedy trial recognized as a fundamental right under Article 21 of the Constitution).

¹⁰ (1981)-1 SCC 622.

¹¹ *Kaori v. State of Bihar* (1981) 1 SCC 627, 635; *Veena Sethi v. State of Bihar* (1982) 2 SCC 583 (Right to legal aid declared as an aspect of Article 21).

¹² *Nilabati Behera v. State of Orissa* A.I.R. 1993 SC 1961.

¹³ *Upendra Bari v. State of UP* 1981 (3) SCALE 1136.

¹⁴ *R.C. Narain v. State of Bihar*, (1986) Supp SCC 576; *B. R. Kapoor v. of India* A.I.R. 1990 SC 752. On the basis of a newspaper report that more than 25 mentally challenged patients housed in mental asylum in Ervadi in Ramanathapuram district of Tamil Nadu were charred to death as the patients could not escape the blaze as they had been chained to poles or beds, the Supreme Court in *re: Death of 25 Chained inmates in Asylum Fire in T.N.* (A.I.R. 2002 S.C. 979) took *suo moto* action by way of PIL and issued several directions to every State and Union Territory to implement the Mental Health Act, 1987.

¹⁵ *Bandhua Mukti Morcha v. Union of India supra* note. 3. See, Parmanand Singh, "Bandhua Mukti Morcha: Social Action and the Indian Supreme Court", 12 *Indian Bar Review* 228 (1985).

¹⁶ *M. C. Mehta v. Union of India* (1986) Supp. SCC 553.

¹⁷ *Vishaka v. State of Rajasthan* (1997) 6 SCC 241.

¹⁸ *In Bipinendra v. State of Gujarat* A.I.R. 2002 Guj. the High Court of Gujarat applied the doctrine of parents/parents' patriae for providing relief to earthquake victims of Gujarat, holding that under the Constitution the State has an obligation to help people in distress. Article 21 was the repository of all human rights. The court gave directions for the relief and rehabilitation of earthquake victims.

¹⁹ *M.C. Mehta v. Union of India* 1996 (1) SCALE 42.

²⁰ *M.C. Mehta v. Union of India* (1987) 1 SCC 395 &

²¹ *M.C. Mehta v. Union of India* (1996) 4 SCC 351.

degradation of Ridge area in Delhi,²² pollution caused by shrimp farming,²³ tanneries,²⁴ and chemical industries²⁵ and so on. The court has taken several activist measures to ensure compliance of pollution standards. However, the judicial activism in this area has been criticized on the ground that the Court has not taken into account the interest of the workers and their families while passing orders for the closure of polluting industries. The interest of the tribal population has not been taken into account by the court while passing orders for the enforcement of Forest Act and Wildlife Protection Act.²⁶

The most abiding contribution of PIL has been the emergence of new human rights such as right to speedy trial, right against torture, right against bondage, right against sexual harassment, right to shelter and housing, right to dignity, right to clean environment, right to education, right to legal aid, right to health care and so on. It creates a new jurisprudence of accountability of the State for constitutional and legal obligations adversely affecting the interest of the weaker sections of the society. It reminds and alerts the political executive of its failings and lapses. Much of the future of PIL in India will depend upon the active partnership and co-operation between the bench and the bar on the one hand and the political executive on the other. Since the executive will always be interested to cover up the facts, any allegation of governmental lapse or callousness will be countered by questioning the bona fides of the initiators.

The *Best Bakery* case²⁷ is a blatant example of the callousness of the political executive. The communal violence had gripped Gujarat in the aftermath of the killing of *Karsevaks* aboard *Sabarmati* express at Godhra on March 1, 2002 killing 14 persons. A SLP was filed by the National Human Rights Commission of India (NHRC) for setting aside the judgment and order dated 27.6.2003 passed by the Additional Sessions Judge, Fast Track Court, No.1 at Vadodara, acquitting 21 accused in the *Best Bakery* case in which 14 innocent persons were burnt alive. The NHRC sought a direction from the Supreme Court for fresh investigation of the case by an independent agency and trial by a court outside the State of Gujarat. On April 12, 2004 the Supreme Court created history by ordering that the infamous *Best Bakery* case be tried all over again—this time in Maharashtra. Making stinging remarks against the political executive, Justices Doraiswamy Raju and Arjitt Pasayat

²² *M.C. Mehta v. Union of India* (1996) 1 SCALE SP-22. *M.C. Mehta v. Union of India* (1996)

6 SCC 756.

²³ *S. Jagannath v. Union of India* (1997) 2 SCC 87.

²⁴ *Citizens Welfare Forum v. Union of India* (1996) 5 SCC 647.

²⁵ *In re Bhavani River Sakti Sugar Ltd* (1998) 6 SCC 335.

²⁶ *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664.

²⁷ *National Human Rights Commission v. Union of India* 2003(9) SCALE 329, 2003(8) scale 701, 2003(10) SCALE 126

said that modern day Neros fiddled while the innocent children and hapless women were burning. These Justices criticized the Gujarat High Court for making "irresponsible" remarks against those seeking trial—social activists and the key witness and NHRC. The Supreme Court directed Bombay High Court to designate a court in Maharashtra to conduct the trial.²⁸ The re-trial of this case in Maharashtra is in progress at the time of writing this paper.

PIL activism has brought to the notice of the Supreme Court incidents of human rights violations by custodial institutions such as prisons, mental asylums and women's homes. Incidents of police brutalities and encounter killings have also attracted remedial attention. In 1981 two law professors drew the attention of the Supreme Court to the barbaric conditions of the inmates of Agra Protective Home for women. The letter petition, after some initial difficulties, succeeded in securing humane conditions for the inmates.²⁹ The horrific conditions of institutions for mentally ill in Ranchi and Delhi were chronicled by *R.C. Narain v. State of Bihar*³⁰ and *B.R.Kapoor v. Union of India*³¹ and in response to PIL, the administration of these institutions was taken out of the hands of local administration and broad guidelines were issued for the better management of these mental asylums. In a landmark judgment the Supreme Court ruled that every injured person has a fundamental right to get immediate medical treatment and that a hospital cannot refuse to treat a medico-legal case.³² Five women prisoners in Bombay city jail were subjected to custodial violence. The Supreme Court issued guidelines applicable to whole of Maharashtra requiring that only police women be used to guard or interrogate women prisoners.³³

In *D.K. Basu v. State of West Bengal*³⁴ the Supreme Court acted upon a letter petition in August 1986 by the chairman of the Legal Aid Services, West Bengal which referred to the increasing incidents of custodial deaths in West Bengal. The Court issued extensive directions to be followed by the police upon the arrest of a person and the minimum facilities available to such person. The Court observed:³⁵

Police is no doubt, under a legal duty and has a legitimate right to arrest a criminal and to interrogate him during the

²⁸ *The Times of India*, New Delhi, April 12, 2004.

²⁹ *Upendra Baxi v. State of Uttar Pradesh*, *Supra*, note 18.

³⁰ See *Supra* note 19.

³¹ *Ibid*.

³² *Paramanand Katara v. Union of India*, AIR 1989 SC 2039. Also see, *Paschim Banga Khet Majoor Samity v. State of West Bengal* (1996) 4 SCC 37.

³³ *Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378.

³⁴ (1997) 1 SCC 416.

³⁵ *Id* at 439.

investigation of an offence but the law does not permit use of third degree methods or torture of the accused in custody during interrogation and investigation with a view to solve the crime.

The court ruled that a relative of the arrested person must be promptly notified and that the police stations must prominently display the basic rights available to a detainee. The non-compliance of the directions would amount to contempt of court. PIL has been used to activate the court in cases involving encounter killings and police brutalities. In *R. S. Sodhi v. State of U.P.*³⁶ the Supreme Court directed the Central Bureau of Investigation (CBI) to investigate into the encounter killings in Pilibhit. During the troubled days of militancy in Punjab, the killings of lawyers in Punjab formed the subject-matter of PIL. On a direction of the Supreme Court, a CBI inquiry revealed the involvement of Punjab police in the abduction and killing of lawyers. The Punjab government was directed to pay compensation to the families of the deceased.³⁷ In another PIL the Supreme Court awarded compensation to the parents of a person killed as a result of criminal conspiracy of Punjab police.³⁸ A CBI inquiry revealed mass cremation of 585 bodies labeled as unidentified by Punjab police. The Court directed the National Human Rights Commission to determine the amount of compensation to be paid to the families of the deceased.³⁹ On November 11, 2004, the Commission has awarded compensation of 2.5 lakh each to 109 families whose relatives were reported missing during the insurgency and alleged to have been killed in extra-judicial encounters. Though the Commission is hearing cases of 2,097 missing persons, the aforesaid compensation has been awarded in cases where the Punjab Government has accepted to have taken the deceased into their custody.⁴⁰ However, the Commission has, in its order, cautioned the petitioners that the award should not be taken in the spirit of victory or loss. Both the State authorities and the citizens should treat this order as an application of balm to whatever wounds still left and to engage themselves to make the State of Punjab more prosperous and peaceful.

These are few instances of denial of human right where the only way to protect human rights has been to grant compensation. The compensation jurisprudence was most clearly articulated by the Supreme

³⁶ (1994) Supp. 1 SCC 143.

³⁷ *Punjab and Haryana High Court Bar Association v. State of Punjab* (1994) 1 SCC 616, *Nankhtran Singh v. State of Punjab* (1995) 4 SCC 591.

³⁸ *Ranjit Kumar v. Secretary of Home Affairs, Punjab* 1996 (2) SCALE 51.

³⁹ *Paranjit Kaur v. State of Punjab* (1996) 7 SCC 20.

⁴⁰ See, *Indian Express*, November 12, 2004, New Delhi p. 6.

Court in 1993 in *Nilabari Behera v. State of Orissa*⁴¹ in response to a PIL alleging death of a boy of 22 years in police custody. The Court evolved the principle of public law doctrine of compensation for violation of human rights. According to this doctrine, liability of the state for violation of human rights is absolute and admits of no exception such as sovereign immunity. In this case the court awarded Rs. 1,50,000 to the mother of the boy as compensation for custodial death. In *D.K. Basu*, the Supreme Court has articulated compensation jurisprudence thus:⁴²

Award of compensation for established infringement of indefeasible rights guaranteed under Article 21 is a remedy available in public law since the purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved.

Compensation jurisprudence for custodial violence is a positive achievement of PIL but compensation award appears to be arbitrary and look more like a charity. The Court has not laid down the criteria or yardsticks to measure the amount of compensation to be given for violation of human rights. Then, there is little evidence that the guilty officials have actually been punished. Even in those cases where the prosecution has been launched, the cases remain pending for years in the absence of judicial monitoring of proceedings.

B. Gender justice

Women's issues have increasingly been brought before the Supreme Court with the growth of women's movement and investigative journalism exposing cases of dowry, rape, sexual harassment and discrimination. It is widely perceived that investigation into crimes against women have been unsatisfactory and in some cases even the judges have shown gender bias. Then there are complaints about long delays in final disposal of cases not only in lower courts but also in higher courts.

In *Delhi Domestic Working Women's Forum v. Union of India*,⁴³ the PIL arose out of indecent sexual assault by seven army personnel against six domestic servants traveling in train from Ranchi to Delhi. The Supreme

⁴¹ See *Supra* note 17. The idea of awarding interim monetary relief was articulated in early cases of *Rudal Shah v. State of Bihar*, AIR 1983 SC 1086; *Sebastian M. Hongary v. Union of India*, AIR 1984 SC 571; *Bhim Singh v. State of J & K*, AIR 1986 SC 494.

⁴² *Supra* note 41 at 439.

⁴³ (1995) 1 SCC 14.

Court, with a view to assisting rape victims, has laid down various broad guidelines. These guidelines include the legal assistance, anonymity, compensation and rehabilitation to rape victims. The National Commission for Women was directed to evolve a scheme for providing adequate safeguards to these victims. In another significant pronouncement, *Vishaka v. State of Rajasthan*,⁴⁴ the Supreme Court declared that sexual harassment of women at workplace constitutes violation of gender equality and right to dignity, which are fundamental rights. Taking note of the fact that the existing civil and penal laws in India did not provide adequate safeguards against sexual harassment at work place, the court laid down 12 guidelines to be followed by every employer to ensure prevention of sexual harassment. Most importantly, the court ruled that all courts in India must construe the contents of fundamental rights in the light of international conventions so long as such conventions were not inconsistent with fundamental rights.

The judicial response in addressing the injustices to women has not been satisfactory. Even where the courts have directed inquiries, this has taken many years. Recourse to PIL has been futile in many cases relating to custodial rape. The broad guidelines issued by the Supreme Court on rape trial and sexual harassment have remained largely of academic interest.

C. Justice for the victims of human bondage

In India the bonded labour system continues to be the most pernicious form of human bondage. Under such system a worker continues to serve his master in consideration of a debt obtained by him or his ancestors. Bondage can be inter-generational or child bondage or loyalty bondage or bondage through land allotment. According to an early study there were 26,17,000 bonded labourers only in ten States.⁴⁵ Most of these labourers come from lowest strata of the society such as the untouchables, *adivasis* or agricultural labourers. It occurred to the Indian government only in 1976 to pass a central legislation, Bonded Labour System (Abolition) Act, 1976. After the Act came into force bonded labour system has been abolished at least on paper and the practice of bonded labour has been made punishable.

Most of the PIL proceeding on bonded labour seek to implement the Act. The first major PIL on this issue was *Bandhua Mukti Morcha v. Union of India*,⁴⁶ filed in 1981 and decided on December 16, 1983. The

⁴⁴ See *Supra*, note 22. This principle was reiterated in *Apparel Export Promotion Council v. A. K. Chopra*, AIR 1999 SC 634.

⁴⁵ M. Sharma, "Bonded Labour in India: A National Survey on the Incidence of Bonded Labour" *Final Report, Academy of Gandhian Studies, Hyderabad*, (1981).

⁴⁶ *Supra* note 3. Also see *Bandhua Mukti Morcha v. Union of India* (2000) 10 SCC 104.

action was brought for the identification, release and rehabilitation of hundreds of bonded labourers working in the stone quarries of Haryana. The court issued 21 directions to Haryana government. During the proceedings, the court monitored its own directions and appointed a number of commissions of inquiry. Unfortunately most of the directions remained unimplemented for many years. The court acknowledged its limited capacity in monitoring the schemes of rehabilitation. In 1992 the court recounted the history of the case and was shocked to note that there was not the slightest improvement in the conditions of the workers of the stone quarries. The litigation ended up with one more warning to the government to be responsive to judicial directions⁴⁷. Despite the initial failure of *Bandhua Mukti Morcha* case in terms of effectiveness, PIL were brought before the courts for the liberation of bonded labourer in Madhya Pradesh,⁴⁸ Tamil Nadu,⁴⁹ Bihar⁵⁰ and other states.

In my view the public interest actions focusing on the plight of bonded labourers have to some extent helped the implementation of this Act. The basic problem, however, in the implementation of this Act is that emphasis is being placed only on the identification, release and rehabilitation of bonded labourers. There is no effort to punish the owners of these labourers. The real emancipation of bonded labourers would be achieved not by cutting them off from the life support system but rather by allowing them to work where they are working. The Government must ensure them a reasonable wage and better living conditions.

D. Juvenile justice

Public interest actions on children have sought the implementation of constitutional and statutory obligations towards children⁵¹. Early PIL cases focused on the children in prisons. In 1981, the Supreme Court's attention was drawn to a news report about sexual exploitation of children by hardened criminals in Kanpur jail.⁵² The court directed the District Judge, Kanpur to visit the jail and report. The report confirmed the crime of sodomy committed against the children. The court directed the release of the children from jail and their shifting to children's home. No punishment was given to the

administrators of the jail. Another PIL exposed the inhuman conditions of children in Tihar jail, Delhi.⁵³ Sexual exploitation of children in Orissa jails also formed the subject matter of PIL.⁵⁴

A major PIL on juveniles in jails was filed by a journalist in 1985. The petition asked for release of children below the age of sixteen and for information on the number of such children. The court was also asked to ensure that adequate facilities were provided for the children in the form of juvenile courts, homes and schools, that district judges should be directed to visit jails and so on. There were many orders from 1985 onwards which remained unimplemented for a long time.⁵⁵ In the meantime Parliament passed the Juvenile Justice Act 1986. The court's attention was now diverted to the implementation of the Act. Then the Supreme Court Legal Aid Committee pursued the case. In its final order in 1989, the Supreme Court stressed the need to create juvenile courts, homes and schools. A committee of advocates was appointed to prepare a draft scheme for the proper implementation of Act. PIL in this case was ultimately effective as today the country has no juvenile delinquents in jails.⁵⁶

We may now briefly address to the problem of child labour. PIL on child labour began in early 1980s in response to a large number of news reports exposing the exploitation of children in fire works and match factories of Sivakasi in Tamil Nadu and in carpet industries in Mirzapur, Uttar Pradesh. The investigative journalism coupled with PIL cases led to the passing of Child Labour (Prohibition and Regulation) Act 1986. This Act prohibits the employment of children in hazardous industries. In response to a PIL the Supreme Court appointed a commission of inquiry on the child labour in carpet industries in Uttar Pradesh. The report indicated high incidence of child labour. With the help of local administration these children were released.⁵⁷ In 1986 a major PIL was brought before the Supreme Court complaining that thousands of children were employed in match factories in Sivakasi, Tamil Nadu.⁵⁸ These children were exposed to fatal accidents occurring frequently in the manufacturing process of matches and fire works. The court directed the state government to enforce the Factories Act and to

⁴⁷ *Bandhua Mukti Morcha v. Union of India* A.I.R. 1992 S.C. 38.

⁴⁸ *Makeesh Advani v. State of M.P.*, AIR 1985 SC 1363.

⁴⁹ *H.P. Swaswamy v. State of Tamil Nadu*, 1983 (2) SCALE 45.

⁵⁰ *T. Chakkachal v. State of Bihar*, JT 1992 (1) SC 106.

⁵¹ See Article 15(3), 21(A) 24, 39(e), 39(f) and 45 of the Constitution of India, Juvenile Justice Act, 1986; Child Labour (Prohibition and Regulation) Act, 1986.

⁵² *Minnu v. State of U.P.* (1982) 1 SCC 545.

⁵³ *Sanjay Surt v. Delhi Administration*, 1987 (2) SCALE 276.

⁵⁴ *M.C. Mehta v. State of Orissa*, W.P. (C) 1504 of 1984 (Unreported).

⁵⁵ *Sheela Barse v. Union of India*, AIR 1986 SC 1773.

⁵⁶ *SCLAC v. Union of India*, (1989) 2 SCC 325. On 17th March 1989 the court again issued directions to every district judge to report to the court as to the exact position of juveniles in jails, setting up of juvenile homes, special homes and observation homes. In *SCLAC v. Union of India*, (1989) 4 SCC 738, the court expressed its satisfaction that except in Andaman and Nicobar, a Union Territory, no state had kept the children in jails.

⁵⁷ *Bandhua Mukti Morcha v. Union of India*, 1986 (Supp) SCC 553.

⁵⁸ *M.C. Mehta v. State of Tamil Nadu*, AIR 1991 SC 417.

provide facilities for recreation, medical care and basic diet to the children during working hours and facilities for education. The court also advocated a scheme of compulsory insurance for both adults and children employed in hazardous industries. Every employee had to be insured for a sum of Rs. 50,000. A committee was appointed to monitor the judicial directions. It is rather surprising that although the Child Labour (Prohibition and Regulation) Act, 1986 has banned the employment of children in manufacture of matches yet the court in this case permitted the child labour in the process of packing because "tender hands of the young workers were more suitable to the task." The court here failed to recognize that manufacture and packing of matches is inseparable. In a sense, in this case the response of the court on child labour was superficial.

In its final judgment delivered in 1996 the Supreme Court directed that the offending employer of child labour in match factories will pay Rs.20,000 which would then be deposited in a Child-Labour-Rehabilitation-Cum-Welfare-Fund.⁵⁹ The children illegally employed would receive education at the cost of the employer. This is a happy development.

The PIL activism on child labour has been unsatisfactory. Some countries still continue to refuse to purchase goods made through the employment of child labour. Frequent reference is being made to the International Convention on the Rights of the Child. The real solution lies not in the displacement of child labour and pay compensation to them but in launching a massive developmental programme, especially in irrigation so that the land owning parents experiencing economic recovery might withdraw their children from exploitative labour conditions. Problem of child labour cannot be eliminated by judicial activism alone in the face of capitalist development and global power relations. Complete absence of data on the prosecution of the employers of the child labour is disturbing.

In *Centre For Enquiry Into Health And Allied Themes (CEHAT) v. Union Of India*⁶⁰, a PIL was filed by a social action organization for a direction for the effective implementation of the law banning sex selection and sex determination.⁶¹ The court has expressed its deep concern over the non-action of the executive in preventing pre-natal sex determination leading to female foeticide. The court observed that discrimination against girl child

⁵⁹ *M.C. Mehta v. State of Tamil Nadu*, 1996 (1) SCALE 42.
⁶⁰ 2003(7) SCALE 345.

⁶¹ The Pre-natal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1994. This Act has now been re-titled as The Preconception and Pre-natal Diagnostic Technique (Prohibition Of Sex Selection) Act. In this PIL, the Supreme Court issued several directions to the government to create public awareness about the new law through advertisements throughout the country through both electronic and print media.

still prevails, may be because of prevailing uncontrolled dowry system despite the Dowry Prohibition Act, as there is no change in the mind set and also because of insufficient education and the tradition of women being confined to household activities. Sex selection and sex determination further adds to this adversity. The court referred to all its earlier directions⁶² to the Central and State Governments and found it very unfortunate that they have not been implemented. Here also the judicial intervention to end female foeticide has not made much impact. For instance a study conducted by a Research Group has indicated that the PNDT Act has not been used as stringently as it should have been to book the guilty. The report says that the practice of female foeticide is on the increase in the ravines of Mornea and Bhind in Madhya Pradesh where hundreds of unborn baby girls are being killed secretly and in silence and the offence go largely unreported. The ultrasound clinics providing safe haven for illegal foetal sex determination are proliferating with widespread social acceptance of eliminating the girl child. Not one case of female foeticide has been reported in the State so far.⁶³

E. Freedom from hunger

The Indian Supreme Court has recognized various social rights such as right to means of livelihood, right to adequate health care, right to housing, right to education as aspects of 'Right to Life' guaranteed by Article 21 of the Constitution of India.⁶⁴ A food petition⁶⁵ arising out of starvation death in certain parts of the State of Orissa has given rise to a claim that right to food should be declared a fundamental right. The NHRC has also been dealing with the reports of starvation deaths since 1996 and the Supreme Court has issued certain directions to the State government from time to time to take preventive and curative measures to avoid starvation deaths and provide for adequate food supply to the needy people. In *People's Union for Civil Liberties v. Union of India*⁶⁶ the petitioners sought a direction for the enforcement of Famine Code and immediate release of food grains lying in the stocks of the Government of India. Directions were also sought

⁶² Directions issued on 4.5.2001, 19.9.2001, 17.11, 2001, 31.3. 2003. Also see *CEHAT v. Union Of India* (10) SCALE 118,119.

⁶³ See, Vinati Bhargava, "Little Girls Dying to be Born", *The Indian Express*, New Delhi, October, 22, 2004, p. 9.

⁶⁴ *Francis Corallie v. Union Territory of Delhi* (AIR 1981 SC 746); *Bandhua Mukti Morcha v. Union of India*, *supra* note 3; *Chameli Singh v. State of U.P.* (AIR 1996 S.C. 1051); *Samatha v. State of A.P.* AIR 1997 SC 3297; *Uthi Krishnan v. State of A.P.* AIR 1993 SC 2178; *State of Punjab v. M. S. Chawla* AIR 1997 SC 495.

⁶⁵ *People's Union for Civil Liberties v. Union of India* (2001) 7 SCALE 484. In this case the Supreme Court issued directions to make available the bare minimum rations through public distribution system for those below poverty line.

⁶⁶ 2003(9) SCALE 835 and 840.

requiring the Government to frame fresh schemes of Public Distribution for the Scientific and Reasonable Distribution of food grains. The Court expressed its deep concern that despite the fact that plenty of surplus food grains was lying in the stocks of the Union of India or drought affected areas, people were dying of starvation. The Court recalled that between 2001 and 2003 it had passed various directions to see that food was provided to the aged, infirm, disabled and destitute men and women who were in danger of starvation, pregnant and lactating women and destitute children especially in cases where they or members of their family did not have sufficient funds to get food. It was unfortunate that plenty of food was available but distribution of the same was among the very poor and destitute was scarce leading to starvation, malnutrition and other related problems. Mere schemes without implementation was of no use. The Court observed:⁶⁷

Article 21 of the Constitution protects for every citizen a right to live with human dignity. Would the very existence of life of those families, which are below poverty line not come under danger for want of appropriate schemes and implementation thereof, to provide adequate aid to such families? Reference can also be made to Article 47 which *inter alia* provides that the State shall regard the raising of level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.

The NHRC in its report of January 17, 2003 expressed the view that right to food should be recognized as a guaranteed fundamental right.⁶⁸

The reading of Article 21 together with Articles 39(a) and 47, places the issue of food security in the correct perspective, thus making Right to Food a guaranteed fundamental right which is enforceable by virtue of the constitutional remedy under Article 32 of the Constitution. It follows, therefore, that there is a fundamental right to be free from hunger.

In *Kapila Hingorani v. State of Bihar*⁶⁹, the matter of denial of human right to food was and means of livelihood was brought to the attention of the Supreme Court by way of PIL. The PIL arose from a newspaper report that due to non-payment of salary for a long time resulting in starvation

⁶⁷ *Id* at 836.

⁶⁸ NHRC Order January 17, 2003, Case No. 37/3/97: Coram Justice J.S. Verma, Chairperson, Justice Sujata V. Manohar and Sri Virendra Dayal.

(2003) 6 SCC 1.

of an employee of Bihar State Agro-Industries Development Corporation, the employee tried to immolate himself. This employee later succumbed to burn injuries suffered by him. It was also reported that apart from the employees of public sector undertakings, even the teaching and non-teaching staff of unaided schools, *madararas*, and colleges had been facing the similar fate. It was reported that about 250 employees died due to starvation or committed suicide owing to acute financial crisis resulting from non-payment of salary to them for a long time. Holding corporate entities liable to respect the life and liberty of all citizens in terms of Article 21 and also their own employees, the Court came to a finding that food, clothing, and shelter are core human rights in a civilized society and the State of Bihar made itself liable to mitigate the suffering of the employees of the public sector undertakings and government companies. The Court directed the State of Bihar to deposit Rupees 50 crores with the High Court for disbursement of salaries to the employees of the corporations. The Court recognized that hunger was a violation of human rights and the State has an obligation to satisfy basic human needs.

IV Perils of PIL movement

PIL has produced astonishing results which were unthinkable three decades ago. Degraded bonded labourers, tortured under-trials and women prisoners, humiliated inmates of protective women's home, blinded prisoners, exploited children, beggars,⁷⁰ and many others have been given relief through judicial intervention. The greatest contribution of PIL has been to enhance the accountability of the governments towards the human rights of the poor.⁷¹ However, the judges acting alone cannot provide effective responses to state lawlessness but they can surely seek a culture formation where political power becomes increasingly sensitive to human rights. When people's rights are invaded by dominant elements, PIL emerges as a medium of struggle for protection of their human rights. The legitimacy PIL enjoys in the Indian

⁷⁰ *M.S. Patil v. Government of N.C.T. Delhi* A.I.R. Delhi 133. (A PIL was filed by a social worker seeking appropriate compensation and direction fixing responsibility on persons responsible for the death of 8 beggars in a beggars home in Delhi. The High Court of Delhi issued directions to make the beggars home more habitable).

⁷¹ See Mahendra P. Singh, *Statics and Dynamics of Fundamental Rights and Directive Principles—A Human Rights Perspective*, in S.P. Sathe and Sayanarayan (eds) *Liberty, Equality and Justice: Struggles for a New Social Order 45-58* (2003) Eastern Book Company, Lucknow. Singh brilliantly argues that social rights which are largely enshrined as directive principles must be given equal weight and should be judicially enforceable. He laments that the current scholarship and judicial intervention have paid scant regard to these rights and have focused attention on negative rights concerning bodily harm. Also see his *Judicial Activism in India—An Overview*, 5 *Waseda Proceedings of Comparative Law* 72 (2003) where he traces the evolution of judicial activism in India since the commencement of the Constitution.

legal system is unprecedented. PIL activism interrogates power and makes the courts as people's court.

There are however certain perils of PIL. PIL actions may sometime give rise to the problem of competing rights. For example, when a court orders the closure of a polluting industry,⁷² the interests of the workmen and their families who are deprived of their livelihood may not be taken into account by the court. A court order for the closure of a polluting abattoir may deprive the means of subsistence of the butchers.⁷³ The construction of a dam to provide water to the people may deprive other citizens their right to shelter.⁷⁴

To conclude, it may be said that judicial activism and PIL will not automatically achieve the goal of social empowerment. We need to know how far the judicial initiatives have been effective in providing symbols for rallying victimized or exploited groups before the courts and other forums. How far the awareness of the new dispensation is accompanied by enhanced capabilities of the dispossessed groups to make a sustained and effective use of legal resources to combat governmental lawlessness? How far the judicial initiatives have been able to promote drive for wider legislative changes or law reform or for launching people's movement to force the government to be responsive to judicial prodding? It must be recognized that PIL emphasizes litigation as a means of social change and thus enhances the dependency the victim groups on the social activists. Perhaps, it does not generate any effective participation of these groups who remain passive depending upon the efforts of others. PIL strategy is largely controlled by the elites who utilize the legal resources according to their own priorities and choices.

The impact of PIL decisions is hard to measure and requires serious social research. The effectiveness of judicial decisions are powerfully affected by several interlocking factors too remote from the knowledge and control of the courts such as traditional resistance to change, alliances of the implementers of law with vested interests (local *dadads*, influential politicians, and other dominant elements), improper or ambiguous

dissemination of judicial directions, etc. Weak communication channels accompanied by well-nurtured and well-structured barriers to information may also lead to the diffusion, delay or defiance of judicial directions. It is undoubtedly true that in recent years the cause of social justice and emancipation of the oppressed groups has been advanced in many ways through the device of PIL, but the fact that in some cases PIL has achieved positive success does not certify this technique as a sovereign remedy to protect human rights of the poor. Mass production of rights through PIL has resulted in heightened expectations from the judges that they are available to provide relief from all miseries and misfortunes. Human rights of the poor and the disadvantaged groups will be better protected by subjecting PIL to discipline and control that should be limited only to the cases focusing on hapless victims of domination and governmental lawlessness. The overuse of PIL for every conceivable public interest might dilute the original commitment to use this remedy only for enforcing human rights of the victimized and the disadvantaged groups.

⁷² *M.C. Mehta v. Union of India* (1997) 11 SCC 227, 312, 327.

⁷³ *Buffalo Traders Welfare Association v. Maneka Gandhi*, 1994 Supp. (3) SCC 448.

⁷⁴ *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664.

RECEPTION OF THE DOCTRINE OF PRECEDENT IN A MIXED LAW JURISDICTION

*Prof. Rajen Narsinghen**

I Introduction

THE DOCTRINE of precedent is one of the main pillars of 'common law' legal system¹. Along with common law doctrine and equity, there is no dispute about its importance and its contribution for the growth and expansion of 'common law system' within the bounds of England², and also its flourishing in ex-colonies and many commonwealth countries. However, it is also known that the civil law system rejects the doctrine of precedent³ on philosophical, technical, cultural and legal grounds. Mauritius is one of the few countries which, though being a commonwealth country and ex-colony of U.K., has a hybrid system of law⁴. Before becoming a British colony in 1810, this tiny Island of the Indian Ocean was a French colony. In spite of the defeat of the French in 1810, the legal system has kept many aspects of the Civil law system. The scope of this research is to find out how can the doctrine of precedent be applied in a context of a hybrid system. Such application is inherently difficult as common law system accepts almost blindly the doctrine of precedent and other systems like the civil law system rejects it.

II The main features of a mixed-legal jurisdiction and qualification of the Mauritian legal system

The Mauritian legal system is neither civilian nor common law in nature⁵. It possesses features, which belong to both systems. Is the Mauritian legal system, a species of its own? The present analysis will show that it is a hybrid system.

Mauritius was initially a French colony (1715 to 1810) and subsequently it became a British colony (1810 to 1968). It acceded to Independence in 1968, but remained a member of the Commonwealth with the Queen as the Head of State where the Governor General was her representative in Mauritius having residual 'constitutional powers'. The country acceded to the status of Republic in 1992. Thus, French law had a considerable impact up to 1810 and

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then common law came in force as from 1810. In spite of the conquest of the Island by the British, French law continued to play a major role, because the Treaty of Capitulation and later confirmed by the Treaty of Paris. The two treaties accepted that "the inhabitants were allowed to preserve their religion, laws and customs."⁶ Private law in Mauritius is derived to a great extent from the French Civil code, the Penal code and the 'code de commerce'⁷. Contrastingly the adjectival law or procedural law is derived mainly from English law⁸. The public law seeks inspiration from English law, with a Constitution adapting the 'export model of the Westminster', which differs from the English constitution, having a lot of original features. Other branches of law pertaining to commerce, shipping finance, banking, company law, trade, negotiable instruments and bankruptcy etc, have been borrowed from English law. The administrative law is modelled more or less on English law⁹. In many modern legislations, the legislators have created original Mauritian solutions. At the same time, the judiciary and the Bar comprised mostly Mauritians, though at the beginning there were a few British. Hence, the Mauritian professionals, especially the judges, have been fully alive to the Mauritian realities and specificities and then developed a sort of Mauritian approach to precedent and in their judicial thinking.

It can be seen that Mauritian law has a dual foundation. It combines English law (common law) and French law (civil law) and there is also the emergence of 'Mauritian law'⁹. Civil law and common law provide the ingredients, which form the pillars of the Mauritian legal system. Thus, the Mauritian legal system fully satisfies the first important criterion of a mixed legal system. It also satisfies the second criterion from qualitative and psychological perspectives¹⁰. Mauritian law does not borrow blindly from English law and French law. In fact, in many areas of private law, family law¹¹, property law, the Mauritian judges have provided original solutions. It is also a fact that in spite of the undertaking by the British to keep intact the law, custom and language in the two treaties, the compliance was not complete in practice. For instance Justice Blackburn in 1835 expressed the view that he would be guided by English case law when presiding over a criminal trial.

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¹ Farrar and Daggdale *Introduction to Legal Methods*, Sweet and Maxwell, 21

² G. Williams *Learning the Law*, 35

³ Ricci J. C. *Introduction à l'étude du droit*, Hachette

⁴ Venchard L. E., 1982. L'application du droit mixte à Maurice; *Mauritius Law Review*, 34

⁵ *Id.*, 36

⁶ D'Unienville, (1994) *L'Evolution du droit civil mauricien*: Best Graphics, Port Louis

⁷ Doolally PAC *Comité Judiciaire du Conseil Privé et le droit mauricien*, Thesis, 24-28

⁸ Bridge, 1997 *Judicial Review in Mauritius and the continuing legal process*

⁹ *Supra* note 4 at 36.

¹⁰ Vernon Palmer *Mixed Jurisdiction Worldwide* 20

¹¹ *Ramsamy v. Ramsamy* (1989) MR 25 - where for a case of divorce and 'Logement Principal', the judge had recourse to English precedents.

The British judges sent to Mauritius, faced difficulties to understand the French law and even the French language. An Order in Council in 1841 put an end for the drafting and promulgation of laws in English and French and favoured only the English language. This short analysis of the mixed nature of the legal system, shows that though the civil law is antagonistic to the doctrine of precedent, yet in the Mauritian legal system, which is of mixed nature, there is room for manoeuvre to accommodate the doctrine on account of historical, cultural and technical grounds. A hybrid legal environment is not the same as a civil law environment.

III The essence of the doctrine of precedent

A judicial precedent can be described as the main legal reasoning (ratio decidendi) derived from a case, decided by a relatively higher court, where a relatively lower court is bound to follow. There is always a legal obligation on a judge or Magistrate to give reasons for his decision¹². The binding nature of the principle in the case will depend upon whether the legal issues at stake are same or more or less the same and also whether the facts resemble. The ratio decidendi of a case is not attached to the facts of the case. However, it would constitute a precedent for the future cases, only so far as the facts of the two cases are similar. Such proposition was laid down by Lord Halsbury in *Quinn v/s Leahern*¹³. The judge stated, "Every judgement must be read as applicable to the particular facts proved or assumed to be proved since the generality of the expressions which may be found, then are not intended to be exposition of the whole law, but govern and are qualified by the particular facts of the case on which such particular expression is to be found."

The application of the doctrine of precedent presupposes the existence of a well-established hierarchy of courts¹⁴. In UK, at the bottom there are the County Courts and Magistrate's courts. The High court came just above. Then there are the courts of appeal with the criminal and civil divisions. At the apex there is the House of Lords¹⁵. In Mauritius also, there is a well-established hierarchy of courts. At the apex, there is the Judicial Committee of the Privy Council. Then, there are the Court of Appeal and the Supreme Court as court of first instance and in the middle there is the Intermediate Court and down the ladder, there is the District Court.

¹² Goodhart, A. L., Determining the ratio decidendi of a case, *Yale Journal*, (1930) 161.

¹³ 1990 AC 495.

¹⁴ Ss. 76 - 81 of the Mauritian Constitution.

¹⁵ Heap B *General Principles of English Law*. HLT Publication.

Therefore, it is not in all cases, that there would be precedents established. This will arise only when there is a dispute on a new point of law, which requires a finding. In the majority of cases, there is no dispute on law, but a dispute on the facts and such pronouncement in a judgement revolving around facts will not constitute a ratio decidendi. At the same time, comments and pronouncements made by the Judge(s), by the way that or these are not related to the problem(s) of the present cases are known as the 'Obiter Dicta'¹⁶. Such 'Obiter Dictum' is not binding in the lower court, but it will have a highly persuasive authority.

In England, judicial decisions gathered great importance, through the doctrine of stare decisis, which is a Latin word. It means: 'to stand by decided cases.' Such doctrine has been fundamental for the development of English common law. The decision of the court in a case not only binds the parties, but the main legal reasoning has to be followed in similar cases in the future, unless they are overturned by an act of Parliament or by a higher court or exceptionally by the same court.

IV Reception of the doctrine in Mauritius

The doctrine is fully applicable in Mauritius. Even the decisions of the Judicial Committee of the Privy Council (J.C.P.C.) which is not a Mauritian court, will be binding on the lower courts of Mauritius. Since its independence in 1968, and even after the accession to the status of Republic, Mauritius has retained the J.C.P.C. as the ultimate Court of Appeal¹⁷, just like a few other commonwealth countries have done, for example Trinidad, Jamaica etc. The J.C.P.C. is an English Court, but does not try English cases. Mauritian courts will be bound by decisions of the J.C.P.C., when it has adjudicated on Mauritian cases, as pointed out in the case of *Société United Docks v/s Government of Mauritius*¹⁸. Though trial judges may not be satisfied with the decision of the J.C.P.C., they are still bound by it, as demonstrated in the case of *Curpen v Q19* and *Samputh v Q20*. The J.C.P.C. is bound by its own precedent, though it can depart, when the conditions have changed drastically. There should be solid and valid reasons for overruling as pointed out in *Buxoo v Q21*.

Inferior Courts in Mauritius are bound by the precedents of the Supreme Court. The case of *Andre v/s Baissac*²² stated that when the Supreme Court

¹⁶ Obiter dicta is the plural form of obiter dictum.

¹⁷ S. 81 of the Constitution.

¹⁸ 1981 MR 50.

¹⁹ 1987 MR 328.

²⁰ 1987 SCJ 382.

²¹ 1987 P. C. Appeal No. 18.

²² 1862 MR 83.

has settled the law, the lower courts are expected to follow the doctrine of precedent to safeguard the principle of certainty in law. The case of *D.P.P. v/s Mootooocuppen*²³ came to confirm the acceptance of the doctrine of the precedent in Mauritius. The judge stated: "It is clear that if a treaty was to be written in Mauritian law, the source of our law would not be limited to statute, but would have to include case law." (At this stage, it would be apposite to find how the difficulties for mixed law jurisdiction to incorporate the doctrine of precedent.)

V Obstacles for the reception of the doctrine

There are a few obstacles for the reception of the doctrine of precedent. The mixed legal system of Mauritius seeks a lot of inspiration from the Civil law system as well as the Common law system. The civil law system in France after the Revolution has harboured a deep-rooted suspicion towards the judiciary, because the latter was close to the ruling class. Thus, after the revolution, France opted for a strict separation of powers²⁴. Judges could not be creative because they would be accused of encroaching upon the legislature. Judges were adhering to legislations and codes. On account of this general suspicion and judicial culture, article 5 of the Napoleon code was enacted. This article prevented judges from giving judgement in the nature of a general rule. Furthermore, Article 1351 of the same code consecrated the principle of '*Resjudicata*'²⁵, whereby a judicial decision has authority only for that specific case and it binds only the parties, but cannot be extended further to third parties.

However, Article 4 of the same code seems to contradict the two previous articles. It is a penal offence for a judge to refuse to adjudicate on the pretext that the law is silent. However, in France, the initial approach, after codification, was to reject the doctrine of precedent. In Mauritius also, we have the same three provisions of the law, namely Articles 4, 5 and 1351 of the Napoleon code. Mauritius should have followed the French approach and ignored the doctrine of precedent. Yet, it has adopted the British approach, by incorporating the doctrine of precedent. It is to put on record that even in France, judicial decisions have over the years gained importance, without having a binding authority in law. Judicial decisions do have some weight and some authority, according to circumstances. Such situation is known as '*jurisprudence constante*'²⁶.

The application of this '*jurisprudence constante*' used to be an exception in France, but it is more and more applied. Thus, when there is a consistency of judicial decisions on a particular point, adapting the same solution or view, such reasoning is qualified as '*jurisprudence constante*'. Such '*consistent precedent*' will be followed by lower courts. Unlike normal precedent in common law countries, here the principle (*ratio*) must be consecrated repeatedly. Now, it would be important to find out the justification for the adherence to the doctrine of precedent in Mauritius.

VI Justification for the reception of the doctrine of precedent

First and foremost, there is a historical reason for the reception of the doctrine of precedent in Mauritius. In spite of the undertaking²⁷ of the British to keep intact the customs, language and law, the British judges were forced to have recourse to common law procedures and techniques because of their ignorance of civil law²⁸. Thus, the British judges started to apply the doctrine of precedent.

Next, the Charter of Justice was promulgated in 1881²⁹ and that was a real turning point. The Supreme Court was set up and that court was to have the same process as the High Court in UK. The Supreme Court was vested with the same powers of the High Court in UK³⁰. Therefore, it could have recourse to common law and equity in the absence of statutory provisions. Judges could use general provisions and precedents, in spite of the provisions of Article 5 of the Napoleon Code, which prohibits such recourse. In terms of interpretation of statutes, the latest legislation supersedes the previous one, in the eventuality of conflict. Hence, the Charter of Justice came in force after the code and therefore the former prevails.

Another justification for the reception of the doctrine of precedent is a structural one. An analysis of our structure and hierarchy of courts shows that the J.C.P.C. is the highest court. The J.C.P.C. is an English Court based in England, but it has no significant jurisdiction for UK, but a jurisdiction for some commonwealth countries, including countries like Jamaica, Trinidad, Mauritius etc. The J.C.P.C. uses the doctrine of precedent. How can a relatively lower court in Mauritius refuse to follow its established precedent? The Mauritian courts cannot afford to do so. It is firmly established that the

²³ 1988 MR 195.

²⁴ Pactet, *P. Droit Constitutionnel et Science Politique*.

²⁵ Venchard, *Le Code Napoleon: "Le Principe de l'Autorité relative de la chose jugée"*.

²⁶ Blanc-Jouran and Boulouis *International Encyclopedia of Comparative Law* F.36.

²⁷ Undertaking given in the 'Treaty of Paris' and in the 'Treaty of Versailles'.

²⁸ *Supra* note 6 at 41.

²⁹ Ordinance 2 of 1881.

³⁰ S. 17 of Courts Act, ".....the Supreme Court and the judges shall sit and proceed to and conduct and carry on business in the same manner as the High Court of Justice in England and its judges".

Mauritian courts are bound by the 'ratio' of the J.C.P.C when it rules on Mauritian law²¹. Does it include also the 'ratio' pronounced in cases from foreign countries, like Trinidad or Jamaica? The Mauritian courts will be bound by the ratio from the 'foreign cases' and only to the extent where the provisions of law under scrutiny are the same or similar to existing Mauritian legal provisions. Otherwise, the ratio from the foreign cases will only have persuasive effects and no binding effects. The case of Sip Heng Wong Ng shows how the Mauritian judges or magistrates are bound by the precedents of the Judicial Committee of the Privy Council, even when they are not personally satisfied by the reasoning²². Thus, the retention of the J.C.P.C as an ultimate court of appeal, consolidates the justification to accept the doctrine of precedent as a legal source of law. A local court cannot afford to depart from an established precedent of the J.C.P.C, where the point of law at stake was same or similar with the Mauritian legal provision. Any departure would constitute a breach of the doctrine of precedent and any eventual decision of a lower court, which does not comply, with the ratio of the J.C.P.C will be granted ultimately.

DEALING WITH INTERNATIONAL MIGRATION: NEED FOR A GENDER SENSITIVE MIGRATION POLICY

Kamala Sankaran

PEOPLE HAVE been on the move from the beginning of humankind. What sets the past couple of decades apart has been the increase in the number of women migrants across regions.¹ These women are not merely migrating as part of 'family unification programmes' but are instead migrating alone as part of the growing force of migrant women workers moving from South and Southeast Asia to other countries in the same region, the Middle East or the West. There is thus a feminisation of the migrant workforce in certain sectors. This mobility of women workers is also occurring simultaneously with a marked increase in the number of women being trafficked or smuggled illegally across borders. In addition there are a large number of persons who are internal migrants within countries in South Asia. Much of the internal migration is in the form of movement of people from rural to urban areas, contributing to the growing urbanisation of the population. It is reported that unlike male migration which is subject to economic upswings and downswings (as witnessed in the spurt in demand for construction workers in the Gulf in the 1970's and later the demand for higher skilled professionals there), the demand for female migrants is relatively constant and not subject to much variation since it is in the area of domestic work and care work.²

Much of this immigration flows have been unilaterally determined by destination countries, leaving source countries to manage migration flows. The current period has been characterised by the 'commercialisation of migration' through smuggling and trafficking and the employment of migrant workers in informal employment in destination countries, posing challenges to the managing of migration and the rights of migrant workers.

This paper argues for the urgent need for countries in this region to articulate a comprehensive policy on managing migration in a safe manner that also keeps in mind the rights of the persons migrating. Such a policy needs to deal with both migrations across borders as also internal migration (the paper focuses more on the former). It is also becoming clear that the

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¹ The ILO notes that from women constituting 47 percent of international migrants in 1960 they constituted 49 percent of international migrants in 2000. See, ILO, *Towards a Fair Deal for Migrant Workers in a Global Economy* 10 (2004).

² See Maruja M.B. Asis, *Asian Women Migrants: Going the Distance, But Not Far Enough*, Migration Policy Institute 2 (2003). Available at <http://www.migrationinformation.org/Feature/display.cfm?id=103> (visited 14 February, 2006).

migration process is not gender-neutral but can in fact impact women very differently. Women migrants need to become more visible in policies and laws dealing with migration. This paper deals with identifying the key components of a policy on gender-sensitive safe migration that countries in this region need to adopt, the framework within which safe migration would be managed, and the legislative regime within which the rights of migrants, particularly women could be best protected. Part I of the paper situates the context within which migration particularly by women takes place in order to understand the special concerns of women migrants. Part II sets out the need for a proactive policy on migration and identifies the components of a gender-sensitive safe migration policy and the legal and administrative measures needed for this purpose.

I Greater migration by women

Women economic migrants from Asian countries usually work in destination countries as domestic workers, workers in labour intensive manufacturing industries such as ferment manufacture, health workers such as nurses, entertainment workers, and agricultural workers, in the informal economy and as self-employed.³

There is growing demand for domestic services in the more developed countries in the world. The nuclear family with adult working members coupled with lack of adequate child-care and other support services for the aged has led to a spurt in demand for such forms of work. The sexual division of labour within the household now has an added global dimension. Informal activities, domestic and care work in the developed countries is now being performed by immigrant labour from developing countries.⁴ The gendered nature of this work – seen as women's work and non-remunerative – has meant that it is a sector capable of being filled by migrants. In such a situation, any shortfall in the supply of regular economic migrants in the destination countries is filled by irregular migrants. It has often been pointed out that development of new forms of communication technology and means of transport has considerably broadened the means of entering other countries in an irregular manner. The domestic nature of the work that renders it 'invisible' also poses challenges to the enforcement of rights of migrants in host countries. Domestic work is an area where labour laws scarcely apply. Flexible (read: unprotected) labour contracts, dispersed workplaces under

disparate employers and vulnerable workers contribute to informal and potentially exploitative work conditions. Getting labour laws enforced is also another challenge since it typically opens up the private domain of the home of the employer to inspection and scrutiny. In addition, handing over the passport to her employer or the employer sending her wages directly to her family (in instances where the employer and employee are linked through common region or caste) also occur. On the other hand the conflation of the place of work and the place of residence for the domestic workers implies that she can enjoy her 'own' private space and time with great difficulty alone. The possibilities for sexual and economic abuses are very high. Often if a woman is found to be pregnant, she is deported.⁵ Framing laws and policies for the domestic work place are notoriously difficult. The problems are compounded in the case of irregular migration. Where the woman is an irregular migrant, she may be unable to claim her welfare benefits even if the employer was making the contribution to the social security system.

There is also a great demand for nurses from countries in the South Asian region who are predominantly women. As the population ages in developed countries there is greater demand for migrant health workers. Some of the problems faced by health workers who are usually women are the lack of recognition of skills or technical qualifications or previous experience obtained in the home country prior to migration. Some of these services are covered by what is known as Mode 4 under the General Agreement on Trade in Services (GATS) dealing with migration of natural persons for services.⁶

There is also a general feminisation of the workforce in the labour intensive manufacturing sector such as garments in developed countries, and this demand is often met by migrant women workers. The other areas where women migrant workers are presently employed are newly emerging forms of informal employment in developed countries such as entertainment workers. A large number of irregular migrants crowd these sectors making it difficult for law enforcers to monitor their employment conditions and to intercede where needed.

Migrants are also in self employment in which case many of the international standards of the ILO (which relate in the main to those in employer-employee relationships) would not apply. It is reported that immigrants are over-represented in self-employment in OECD countries

³ For instance, 81% of all women migrant from Sri Lanka are in the domestic work market in Arab States. See ILO, *Gender and Migration: The Case of Domestic Workers* 15 (2004).

⁴ Sakia Sassen, *Global Cities and Survival Circuits*, in Barbara Ehrenreich and Arlie Russell Hochschild, *Global Woman: Nannies, Maids and Sex Workers in the New Economy* 238 (2003).

⁵ Mandatory maternity tests are contrary to the ILO Maternity Protection Convention 2000 (No. 183).

⁶ For further details about GATS, see Rupa Chanda, GATS: Implications for Social Policy-Making XXXVIII(16) *Econ. and Pol. Weekly* 1567, 1567 (2003).

running shops, news agencies and cafes which would otherwise have closed down.⁷ As has been noted in South Asia, women who are in self-employment are often performing unpaid family labour in businesses owned by their husbands. Thus family reunification form of female migration (where women may not have a work permit) may see women in this unpaid form.

Women are increasingly being employed as domestic workers in destination countries in South-east Asia and in the Middle-East. There are also patterns of irregular migration and trafficking of women from Nepal, Bangladesh and India within and out of this region. Obviously there are a host of factors responsible for these patterns of migration that we are currently witnessing. Apart from economic aspects, structures of patriarchy and patterns of family-life have also influenced why the migration of women is greater in some societies. There is also a close intersection of these structures with those of religion, caste and region within the South-Asian region. An understanding of the economic and social factors underpinning the position of women in these countries is needed in order to articulate a progressive women-centred stance on migration.

One of the spheres where women participate in 'outside work' (that is, work outside the home) is in agriculture, and this coupled with the fact that agriculture until recently was the major sector of employment for the labour force in these countries explains the relatively higher work participation rates for women here. Other than in agriculture, women's work participation has been in the informal sector. Quite often in both these sectors, her employment has been in the form of unpaid family labour. There is a rich literature on the aspect of how national accounts are 'gendered' and make invisible much of the unpaid family work and care work that women perform.⁸ This has not only contributed to her not being seen by policy makers as a contributor to national income, it has also lowered her status within the family and society. Where women are in wage employment, it has been noted that there are gender differentials in wages that discriminate against women.⁹ There is an difference in the wage levels of men and women workers for same or similar work performed. This wage differential has been compounded by the occupational segregation of women into certain

⁷ See Nigel Harriss, *Migration of Labour: Constructing Transitional Arrangements*, XXXVIII (42) *Econ. and Pol. Weekly*, 4464, 4467 (2003).

⁸ See for instance, Adriana Mata Greenwork, 'Gender Issues in Labour Statistics', in Martina Fetherhoff Louff (ed.), *Women, Gender and Work: What is Equality and how do we get there?* (2002) and Sarthi Acharya and Vinalini Mathrani, 'Women in the Indian Labour Force', in Alakh N. Sharma and Seema Singh (eds.), *Women and Work* (1993).

⁹ Jeemol Umi, *Gender and Informality in Labour Market in South Asia XXXVI* (26) *Econ. and Pol. Weekly*, 2360, 2374 (2001).

sectors/occupations that mirror the kind of work women do within the home — domestic work, and care work — that have lower wage levels than the occupations that are male dominated. Women who migrate across borders are also typically engaged in these very same jobs.

Studies have pointed out that apart from supply side reasons, there is growing demand for domestic services in the more developed countries in the world. The domestic nature of the work that renders it 'invisible' (noted earlier) also poses challenges to enforcement of rights of migrant in host countries.

Female migrants who leave their families behind are more likely to return than migrants who travel with their entire family. Returning migrants have sometimes been characterised as 'agents of development'. However, where their employment overseas was in the lowest skilled employment such a domestic work, their economic contribution to the sending countries economy upon return may not be very significant. However, this should not prevent us from noting the ripple effect such independent working women may make in more traditional societies upon their return.

Internal Migration

Rural to urban migration is a concern for many developing countries. Much of this migration is poverty-driven, and whole families migrate in search of work, becoming part of the growing urban poor, while living in precarious conditions. This is probably a bigger issue in India than in other countries in this region. Migration of women from rural to urban areas in search of work is noted in states such as Chhatisgarh, Jharkhand and Kerala. The latter usually deals with higher skilled female migration. India has a law in place to deal with inter-state migration, the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 but the law does not deal with intra-state migration which is also a dominant form of internal migration. There is also the incidence of large scale internally displaced persons (IDPs) due to deforestation, inundation, environmental disasters, and riots and strife.

Effects of migration on women

In the case of female migrants, her image as a breadwinner would considerably enhance her 'bargaining position' within the family and society. Amartya Sen has pointed to the links between the wage earning capacity of women and her consequent status within the family.¹⁰ Her position within the family involves both co-operation and conflict and thus her status outside

¹⁰ See for instance A.K. Sen, *Gender and Co-operative Conflict* in Irene Tinker (ed.), *Persistent Inequalities: Women and World Development* (1990).

the home considerably increases her fall-back options and hence her bargaining position. On the other hand, there are studies, which point out the lack of care available for the family, particularly of the children left behind of such women migrants. Incidences of incest and neglect are reported. Unless the policy of sending women abroad is coupled with a conscious policy of the sending country that acknowledges its greater responsibility and role in providing support services for such families left behind, the burden of migration falls squarely on the family of the migrants while the benefits of remittances and foreign exchange are enjoyed by the State. These measures could include - providing support and child-care services priority to such children in admission in schools, counselling services etc.

However, in the case of women left behind by male migration, increased money may force the woman to conform to the notions of a chaste wife, or keep indoors as befits the wife of a (now) richer family.

Remittances

Remittance flows are now the second largest source, behind FDI of external funding for developing countries. India received the highest remittance, of USD 10 Billion in 2001.¹¹ In 2001, total (for all countries) worker remittance receipts stood at US\$ 72.3 billion. Not only are they large, they seem more immune to economic cycles than FDI flows. In fact remittance flows tend to increase in times of economic hardship because families are dependent on them for their survival. The ILO estimates that remittances contribute more to Nepal's foreign exchange than manufacturing exports, tourism, foreign aid and other sources combined. The ILO studies reveal that remittances in Bangladesh account for more than half of the household income of families that receive them, with a high multiplier effect on consumption and GNP.¹²

Informal transfers through the *Hawala* or *Hundi* system are often used. The procedures of the formal banking system are seen to be long-winded, costly and offer poorer exchange rates than the informal systems. There is a need to provide cost-effective and safe banking channels through formal routes for money transfer home.

Money sent by women migrants' home is usually controlled by male members of the family. Her weaker position vis-à-vis property rights under personal/family laws get reinforced with her lack of control over remittances sent home. There is evidence to show that where women hold property in

¹¹ See UNESCO Information Kit on UN Convention on Migrants' Rights, July 1, 2003.

¹² See ILO, *Towards a Fair Deal for Migrant Workers in a Global Economy* op. cit. at 23-24.

their independent right, their status within the family improves and there is lessening of domestic violence faced by them. There is a need to ensure that assets purchased out of a woman's remittances are registered in her name instead of any other male member of the family.

Links between migration, irregular migration, smuggling and trafficking

According to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transitional Organised Crime (2000), the "smuggling of migrants" is the procurement of the illegal entry of a person into a State of which the person is not a national or a permanent resident, in order to obtain directly or indirectly, a financial or other material benefit.¹³ Smugglers are thus termed 'extra-legal travel agents' to willing clients. Trafficking on the other hand involves the use of violence, coercion or deception to exploit workers. It need not involve crossing borders. Women here are victims and are not liable to criminal prosecution. There is also evidence to show that trafficked persons often work as bonded or forced labourers in agriculture and domestic service. This leads to excessive power of the employer over migrant workers. In the domestic workers case we have seen this results in limitations placed on movement, withholding of passport along with working long hours and non-payment of wages. It is also necessary to pay equal attention not only preventing and repatriating trafficked woman but also dealing with their rights in destination countries - the knotty issue of rights of commercial sex workers and how to cope with the threat of HIV/AIDS. It is estimated that almost five percent of internal migrant workers in India and China are HIV infected.¹⁴ In fact the role played by the governments of sending countries in focusing on the welfare of their migrants workers overseas has greatly enhanced the position of such workers abroad vis-à-vis those countries that do not play such a role.¹⁵ In the case of women workers their sexual and reproductive health should be a matter of first-rate concern for sending countries. Where such a role by the sending and receiving state is not present, women rely on their own community or caste or religious networks and access non-governmental assistance, if available.

¹³ Art. 3.

¹⁴ World Economic Forum 2003, cited in ILO, *Towards a Fair Deal for Migrant Workers in a Global Economy* op. cit. at 66.

¹⁵ See for example the comparison of Filipino workers overseas as compared to workers from Indonesia, Thailand and Vietnam. See Ashish Bose, *Migrant Women Workers: Victims of Cross-Border Sex Terrorism in Asia*, XXXVIII (9) *Econ. and Pol. Weekly* 868 (2003). Philippines has an elaborate regulatory mechanism in place to deal with women migrant workers. See their Labor Code, Migrant Workers Act 1995 and their several government agencies dealing with migration.

It has also been pointed out that the extent of the flows of irregular workers is a strong indication that the demand for regular migrant workers is not being matched by the supply.¹⁶ Thus there is a close link between legal migration and irregular migration, and the migration procedures in country of origin, apart from the immigration procedures in the region countries. Thus, for countries in South-Asia which are the main sending countries or transit countries, a conscious policy of putting in place effective and migrant-friendly emigration policies would be a necessary step. This would also reduce irregular migration and trafficking, since they all form part of one continuum and policies and laws determine where a potential migrant would place himself or herself once a decision to migrate has been taken.

The ILO has noted the links between regular and irregular migration. "The extent of the flows of irregular workers is a strong indication that the demand for regular migrant workers is not being matched by the supply, with migrants serving as buffers between political demands and economic realities."¹⁷ The ILO has made a link between trafficking and availability of employment. "The recent rise in trafficking may basically be attributed to imbalances between labour supply and the availability of legal work in a place where the jobseeker is legally entitled to reside."¹⁸

As has been observed, "The complex web of factors that often underlie migration, especially in South Asia, make determination of voluntarism and coercion not a particularly useful approach".¹⁹ There is therefore a difficulty in clearly demarcating political and economic migrants, i.e., refugees/ internally displaced persons and migrants. Take for instance the tens of thousands displaced from Nepal in the current round of violence and insurgency; viewing them as economic migrants would dis-entitle them to humanitarian aid and possible *refoulement* (repatriation of refugees under international humanitarian law).

II Need for a comprehensive policy

Contrary to popular perception, more than half the migration of persons is from one developing country to another, where wage differentials are not large. Many of these are likely to be irregular migrants. *The ILO reports that the largest numbers of irregular migrants world-wide are likely*

¹⁶ ILO, *Towards a Fair Deal for Migrant Workers in a Global Economy op.cit.* at 12.

¹⁷ *Ibid.*

¹⁸ ILO, *Stopping Forced Labour* 35 (2001).

¹⁹ Rita Manchanda, *Gender Conflict and Displacement: Contesting Infantilisation of Forced Migrant Women*, XXXIX (37) *Econ. and Pol. Weekly* 4179, 4179 (2004). She points out that the 1951 Geneva Convention does not provide a separate category for women who suffer gender specific persecution or human rights violation in the form of domestic violence.

to be Nepalese and Bangladeshis in India.²⁰ There is thus a need for a cluster-based approach for dialogue to take place among affected countries in a region.

The International Organisation for Migration (IOM) has called for a 'cluster approach'. This refers to the need for sending, transit and receiving countries to work in a coherent and co-ordinated manner. Some of these could be the 5+5 dialogue²¹ or bilateral agreements between countries of origin and transit of asylum seekers or migrants. One of the ways to manage this migration has been an attempt by receiving countries to focus on enhancing 'stay-at-home' development. Such an approach would link aid to development policies that encourage people to find jobs/livelihood in their home countries and to reduce emigration pressure or to develop alternatives to emigration. One of the problems with such an approach is that it runs counter to the internationally accepted right of all persons to emigrate. Article 13 of the Universal Declaration of Human Rights adopted by the General Assembly in 1948 states:

1. Everyone has the right to freedom of movement and residence within the borders of each state. 2. Everyone has the right to leave any country, including his own and to return to his country. The fear of the influx of migrants who may cause unemployment in receiving countries, reduce wages or other social and cultural aspects of migration has to be balanced together with the rights of emigration.

There is also a need for greater efforts at multilateral and bilateral levels rather than unilateral efforts to manage migration. The ILO reports a surge in bilateral efforts at the current time. Already in 2004 a Global Commission on Migration comprising several countries, including India, has been set up, which was chaired by Switzerland and Sweden.²² There is thus a need to a clearly enunciated integrated policy on all migration matters, with a promotional and welfare focus. Such a policy should be in consultation with employers' and workers' representative and other stakeholders

Links between migration and development

Bulk of the research on migration world-wide has focused on the concerns of receiving countries and the concerns of the Diaspora. Emigration

²⁰ ILO, *Towards a Fair Deal for Migrant Workers in a Global Economy op.cit.* at 12.

²¹ Participants include Algeria, France, Italy, Libya, Malta, Mauritania, Morocco, Portugal, Spain and Tunisia that are five immigration and five emigration countries.

²² See for instance the Barcelona Process and Puebla Process dealing with trafficking and migration, the Bernese Initiative for migration governance etc. For details see, ILO, *Towards a Fair Deal for Migrant Workers in a Global Economy, op.cit.* at 4, 133-34.

has been a relatively less researched subject. In fact it has been noted that much of focus in sending countries has dwelt on the 'brain drain' issues.²³ The link between migration and development assumes importance because of the manner in which migration is linked with the pattern of development in sending countries. Domestic policies that have led to ruination of the agriculture and rural livelihoods have contributed to unemployment and poverty and the consequent migration to the cities. This has also triggered the supply driven mobility to seek employment across borders.

The impact of returnee migrants also impacts the development pattern of a sending country. Newer employment opportunities opened up in the country of origin by returning migrants or created by the remittances of migrants, may allow other family members to step out of typical caste based occupations or enhance their qualifications. The social effects of such migration thus have cascading effects going much beyond the migrant alone.²⁴

Rights of migrants

Managing migration by the sending countries requires action at a variety of stages. The position of migrants at all stages – prior to departure, during, transit and at destination should be addressed.

The idea of decent work is central to setting the benchmark for labour standards of migrants. There are several ILO standards dealing with the issues of freedom of association, non-discrimination and freedom from forced labour, conditions of work, social security apart from specific instruments dealing with rights of migrant workers. The ILO Migration for Employment Convention (Revised) 1949 (No. 97) aimed to regulate migrant flows and coincided with an active role played by the State in organising (see the guest worker programme in West Germany in that period) and closely supervising recruitment, employment and return of migrants.²⁵ Yet as has been noted, in the past few decades, immigration flows have been unilaterally determined by destination countries, leaving source countries to manage the

²³ Xiang Biao, Towards an Emigration Study: A South Perspective XXXIX (34) *Econ. and Pol. Weekly* 3798, 3798 (2004). He notes however that colonial history of migration is very concerned with emigration matters.

²⁴ Xiang Biao *op. cit.* at 3801 warns that remittances can also lead to the erosion of 'social capital' when the money is used back home only as a means of entertainment and leads to a culture of dependence. He also notes that the effects of migration may differ according to caste and religion – thus for Muslim migrants to the Gulf, their religious identity is often reinforced, while for Christian migrants from Kerala, international missionary networks worked in their favour.

²⁵ In addition see the Migrant Workers (Supplementary Provisions) Convention 1975 (No. 143) and the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted in 1990, which entered into force in 2003.

emigration flows. The challenges of the current period have been characterised by the 'commercialisation of migration' through smuggling and trafficking and the employment of migrant workers in informal employment in destination countries posing challenges to the managing of migration and the rights of migrant workers.

There is need for a strong pro-active system run by the State for monitoring migration. Such a system should include – registering details of workers, potential employer, entering into model employment contract as a pre-requisite for emigration, limiting the fees charged by recruiter, providing skills training, making provision for the welfare of the family of the woman migrant, providing for control by woman over remittances discussed above could be some of its features.

Migrant workers experience the most unfavourable working conditions and also have the greatest difficulty in accessing any remedies – due to language, discrimination, and barriers to join trade unions among others. The presence of contractors and sub-contractors among migrant workers is another reason for their precarious condition. The increasing informality of employment relationships in the destination countries is an added factor. The law must ensure the rights of migrants based on the principle of equality and non-discrimination. Thus for instance simplified procedures to access the remedies provided under law should be provided. Migrants should be permitted to pursue a case against a recruiting agency or other parties within their home country even while employed overseas and strict rules of appearance should be relaxed. In case a returned migrant wishes to pursue a case against an erstwhile employer in the destination country, all possible assistance should be made available by the consulate.

For women workers, who are typically to be found in domestic work, agriculture (usually as seasonal migrant workers) and labour-intensive manufacturing, the specific problems of low or absence of unionisation in these sectors, vulnerability and invisibility add to the woes already faced by other male migrants. Homes and agriculture are usually sectors that are not covered by labour laws in most countries in the world. As a result even if a woman is to seek redress, she may find herself not covered by the labour laws of the destination country. Agriculture is also considered one of the three most hazardous industries by the ILO. Accidents involving machinery and poisoning by pesticides and agrochemicals are rampant. Migrant workers are usually unable to access health care in the destination country for a variety of reasons – lack of information, inability to take time off, lack of child-care or support systems. Other than this, the systems of health care

for temporary migrants may be not as broad as those available to citizens or permanent residents, making it relatively costly for the temporary migrant.

Migrant women workers face gender discrimination in wage payments even as compared to male migrants who perform the same job. The gender segregation of jobs together with lower wages adds to the picture of gender discrimination at the workplace that women face. Thus, in order to ensure easy access to justice, hot lines for women migrants, permitting NGOs or migrant associations to file group complaints on behalf of victims, protection of employment and work status during investigation needs to be ensured. Where a woman migrant has to return in distress conditions, counselling and rehabilitative facilities should be made available at State expense. A welfare fund could be created (that could be partly contributory and partly State funded) to assist such migrants who require emergency help and to disburse soft loans. In addition there is a need for sound and robust investment climate in receiving countries to put remittances to best use.

The ILO advocates the development of model contracts to govern the situation of migrant workers, *such as* article 22 of the Model Agreement on Temporary and Permanent Migration for Employment, including Migration of Refugees and Displaced Persons annexed to the Migration for Employment Recommendation (Revised) 1949 (No. 86). The ILO instruments relate to minimum standards of protection; the provision of correct information about conditions in the country of employment; measures to facilitate the adaptation of migrants to living and working conditions in the country of employment; special provision on mechanisms for the transfer of migrants' earnings; employment opportunities; access to social services; medical services and reasonable housing; adoption of a policy to promote and guarantee equality of treatment and opportunity between regular status migrants and nationals in employment and occupation in the areas of access to employment remuneration, social security, trade union rights, cultural rights and individual freedoms, employment taxes and access to legal proceedings. There is a need for countries concerned to ratify these standards and to effectively implement them.

There is a need for portability and export of social security benefits when the migrants return. Presently the Equality of Treatment (Social Security) Convention 1962 (No. 118) provides for equality of treatment but this is based on the principle of reciprocity. There is thus a need to have a system of maintaining 'acquired rights' in place on a universal basis. In fact difficulty in transferring social security benefits or earnings back to their home country, may compel the migrant to continue to live longer in the

destination country than planned. There is also the need to prevent abuses in the recruitment and placement of migrant workers through private employment agencies.²⁶

III Conclusion

A safe migration policy is a matter of first-rate importance in a rapidly globalising world. There is a need for India to ratify the relevant UN and ILO instruments. It must be pointed out that the UN International Convention on the Elimination of all Forms of Racial Discrimination 1965 is one of the most widely ratified conventions, yet this does not deal with discrimination based on nationality and thus leaves migrant workers in several instances unprotected.

There is a need for a greater role of the government to manage safe migration. As far as possible many of the components of a worker-centric safe migration policy, particularly those concerning the rights of migrants at all stages of migration, should be embodied in legislation so that there is an access to legal and administrative remedies in case these rights are violated. A rights based regime is necessary to protect the interests of migrants.

²⁶ See Private Employment Agencies Convention 1997 (No. 181), which has important provisions concerning migrant workers. Certain forms of deductions by contractors would make it liable to be considered as forced labour according to the Committee of Experts. There is a need for the sending countries to have effective measures in place dealing with licensing requirements for contractors and monitoring the recruitment process at all stages.

MAHR IN MUSLIM FAMILY LAWS: AN EVALUATIVE CRITIQUE

Tasneem Kausar*

I Introduction

THE LAST century has witnessed historically unparalleled uprising of women activism and feminism. These movements have found their place not only in the realm of academia but also in national and international politics, media and economics. The fruits of these world-wide women movements vary from country to country. Consequently, it is difficult to draw any general picture of the status of women achieved through these struggles. It is the religious, political, economic and social differences amongst the countries of the world that account for this discrepant development. Without compromising the responsibility of other factors, it is the religion Islam that has often been named as the main factor inhibiting the development of women's rights in Muslim countries.¹ Islamic system and laws have been severely criticized as being harsh and discriminatory to women.² Amongst others, it has been the concept of 'mahr' in Muslim family laws that have received special criticism by feminists. One might rightfully ask that what do women have to object against the rule of mahr? Since, it directly entitles them to receive a monetary benefit from their husbands; any remonstrance against it appears misplaced and misconceived. However, as a part of jurisprudential inquiry launched upon the doctrines of Muslim family laws by western and Muslim feminists, the concept of mahr has been questioned and examined as one of the many, responsible for the unequal status of men and women within a Muslim marriage contract.³ This article evaluates the impact of mahr, by stating the position within *Shari'ah* and by appraising the impact of right of mahr upon the social, legal and financial status of women. More importantly, this article will assess and respond to the stances taken by the critics of

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¹ Lelia P. Sayeh and Adrian M. Morse, Jr., "Islam and the Treatment of Women: An Incomplete Understanding of Gradualism", 30 *Tex Int'l L J* 311, 312.

² See for e.g. Judith Miller, "The Challenge of Radical Islam", FOREIGN AFF., Spring 1993, at 43; Manoucher Parvin, "On the Synergism of Gender-and-Class Exploitation: Theory and Practice Under Islamic Rule", 51 *Rev Soc Econ* 201 (1993); Martin Kramer, "Islam & the West Including Manhattan: Bombing of World Trade Center by Muslim Extremists", *Commentary*, Oct. 1993, at 33.

³ See Adrien Katherine Wing, "Custom, Religion and Rights: The Future Legal Status of Palestinian Women", 35 *Harv Int'l L J* 149, 188-89 (1994) (noting that Palestinian women's rights organizations are seeking to eliminate dowry on the grounds that it is a 'burdensome custom' and therefore, inconsistent with the intradate's stated goal of improving women's status). See also, *Annexes Moors, Women, Property and Islam* 91 (1995).

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Muslim provision of mahr. The article is divided into five parts. After introduction in the first part, the second part briefly discusses the status of women in Islam and especially the rights bestowed upon them. The third part focuses upon the concept of mahr in Muslim family law. In this part, I have also analyzed the historical evolution of the institution of marital gift and a comparison has been drawn between the previous concepts of brideprice and dowry and the Islamic right of mahr. The fourth part entails the feminist denunciation of mahr as a protest against the traditional and transactional Muslim marriage paradigm. Further, it attempts to solve these ambiguities by presenting the Islamic stance upon these objections.

II Amelioration of the status of women by Islam: An overview

Though the history of women's treatment by western or eastern societies has never been one happy account,⁴ still Islam as a religion has been particularly singled out, especially by the West for its behavior in relation to women.⁵ It is only a recent phenomenon that western women have received their most basic rights, such as a right to higher education or right to own and appropriate property,⁶ whereas these rights were granted to Muslim

⁴ See, Encyclopedia Britannica, (11th Ed.), University Press Cambridge, England 1911, Vol.28 (noting the status of women in India, it states: "In India, subjection was a cardinal principle. Day and night must women be held by their protectors in a state of dependence says Manu. Describing the good wife, it mentions her as a woman whose mind, speech and body are kept in subjection, acquires high renown in this world, and, in the next, the same abode with her husband."); Encyclopedia Britannica, The Encyclopedia Britannica, Inc. Chicago, 1968, Vol. 23 (summarizing the legal status of women in the Roman civilization, it provides that even in historic times women was consider completely dependent. If married she and her property passed into the power of her husband...the wife was the purchased property of her husband and like a slave acquired only for his benefit. A woman could not exercise any civil or public office...could not be a witness, surety or tutor, or curator; she could not adopt or make a will or contract. Among the Scandinavian races women were under perpetual tutelage, whether married or unmarried. As late as the Code of Christian V, at the end of the 17th century, it was enacted that if a woman married without the consent of her tutor she will be forfeited of her property.); John Stuart Mill, The Subjection of Women, (the author states: "We are continually told that the civilization and Christianity have restored to the woman her just rights. Meanwhile the wife is the actual bondswoman of her husband; no less so, as far as the legal obligation goes, than slaves commonly so called.");

⁵ See, *supra* note 2. See also, Sayeh, *supra* note 1 at 312 (commenting that persecution of women has gone on throughout history and has only recently been diminished in some societies).

⁶ See, Kathleen A. P. Miller, "The Other Side of the Coin: A Look at Islamic Law as Compared to Anglo-American Law—Do Muslim Women Really have Fewer Rights than American Women?" 16 *NY Int'l L Rev* 65, 72 (stating that until the late 19th century, in the U.S., the married women had no authority to hold her property.); See, *Henry Krause, Family Law in a Muslim World* 98-99 (1986)(discussing the importance of the Married Women's Property Acts); See, Jamal A. Badawi, "The Status of Women in Islam" at p.4, available at: <http://www.islamfortoday.com/womenrights/badawi.htm> (last visited on 25th Jan. 2006.) (author notes that only around 1870 the situation started to improve for married women and they began to achieve their right to own property and to enter in the legal contracts.); see also, James C. Stoner, Jr., "Is Tradition Activist? The Common Law of the Family in the Liberal Constitutional World", 73 *U Colo L Rev* 1292, 1296-97.

women since the advent of Islam in the seventh century.⁷ The purpose of this part of the article is to present the position of Islam as per the status and rights of women. This section is important because it will provide a policy of Islamic law especially relevant to the preferential interpretations of textual sources of Islamic *fiqh*, which are done in the next part of the article.⁸

The status of women in Islam is one of equality and honor. Where the Greeks had theories about women being 'misbegotten' and 'soulless',⁹ and Romans and Christians were blaming the sins of mankind on Eve,¹⁰ Islam reached humanity with a 'fresh, noble and universal message.'¹¹ The fourth chapter of Quran, *Al Misa'*, literally meaning 'the women,' opens with the verse that solves the myth of creation and brings women at par with men as far as the phenomenon of original conception was concerned. The verse reads: 'O mankind! Keep your duty to your Lord who created you from a single soul and from (that single soul) created its mate of the same kind and from them twain has spread a multitude of men and women.'¹² It is difficult to believe that there is any existing religious scripture that has ever dealt with the humanity of women from all aspects with such amazing brevity, eloquence, depth and originality as this divine decree of the Quran has done. This verse is even more important because it clarifies the status of a woman as a complete human being. Hence, the permission for her to share in the most unique event of cosmic reality: the creation of human being.

Stressing further upon the conception of human being, Quran says: 'And Allah has given you mates of your own nature, and has given you from your mates, children and grandchildren, and has made provision of good

⁷ See generally, Noha Raqab, "The Record Set Straight: Women in Islam have Rights", available at: <http://www.submission.org/noha.html> (last visited on 25th Jan, 2006). See also, Miller, *supra* note 8, at 74 (stating that Muslim women received their rights in the 7th century A.D., while American women received most of their rights in the 19th and 20th centuries).

⁸ The textual sources of Islamic *fiqh* are exclusively comprised of Quran (God's revelation) and Sunnah or Hadith (the teachings and practice of Prophet Muhammad, may God be pleased with him).

⁹ See, Anne Dickson, "Anatomy and Destiny: The Role of Biology in Plato's Views of Women", in Carol C. Gould and Marx W. Watolfsky (eds.), *Women and Philosophy: toward a Theory of Liberation* (1976); Julia Annas, *Plato's Republic and Feminism*, in Osborne (ed.), *Women in Western Thought* 24-33. See, *Greek Philosophy and the Inferiority of Women*, available at: http://www.womenpriests.org/tradition/inf_gre.asp (last visited on 28 Jan, 2006).

¹⁰ See generally, Karen Armstrong, *The Gospel according to Woman: Christianity's Creation of the Sex War in the West*, (1986); see also, Nancy van Vuuren, *The Subversion of Women as Practiced by Churches: Witch-Hunters, and other Sexists*, 1988. see also, *Women in Islam vs. the Judeo-Christian Tradition*, available at: [http://www.troid.org/islamichit/Women in Islam/women.htm](http://www.troid.org/islamichit/Women%20in%20Islam/women.htm).

¹¹ See, Badawi, *supra* note 6, at p. 5.

¹² The translation and explanation of the verses of the Holy Quran appearing in this essay have been taken from Abdullah Yusuf Ali, *The Holy Quran: Text, Translation and Commentary*, (Sh. Muhammad Ashraf Publishers & Booksellers, Lahore, 1988).

things for you.' This verse of the Quran sufficiently clarifies that the nature of woman is not different from that of a man. And that her creation has been purposeful and not the result of some defective pregnancy as was understood in Greek, Roman and Christian history.¹³ Interestingly, the Quran did not stop there. It went a step further to redeem womankind from the eternal blame of the original sin: As against the biblical account,¹⁴ the Quran present the story of Adam and Eve differently.¹⁵ In the Quran, God never blames Eve and rather spoke about both being equally guilty.¹⁶ The Quranic story is especially important since it does not present the world and its existence as a by-product of some sin. The creation of human being and this worldly life is granted a special status in the divine scheme. The human life is not a punishment for a sin. In accordance with the Quranic account, Adam and Eve, upon their repentance, were both forgiven.¹⁷ The continuation of punishment after forgiveness would have hardly made any sense. Hence, man, or for that matter, human being is born into a natural state of purity and innocence.¹⁸

It was this spiritual elevation of women that became a precursor for their social, economic and political redemption in society. The concept of gender equality in Islam is one of its own kinds. Instead of presenting some straight-jacket equality, Islam has put forth the idea of qualitative equality. The Quran gave women: (1) legal status as persons, (2) the same religious duties as men, (3) the right to accept or deny marriage or to initiate divorce, (4) the right to receive education and to choose a profession, and (5) the right to inherit and manage property.¹⁹ It is important to note that Islam acknowledges the core differences amongst men and women, and hence, women are granted rights of their own, that in many instances, do not apply *mutatis mutandis* to men.²⁰ In Islam, the spheres of potential capabilities of

¹³ See, H. Eilertse, *The Dark Side of Christian History* 136 (quoting St. Thomas Aquinas (1225 to 1274 CE): 'as regards the individual nature, woman is defective and misbegotten.... the production of woman comes from a defect in the active force or from some material indisposition, or even from some external influence upon pregnancy...'); See, Aristotle, *Generation of Animals*, I, 728a, 82f. See also, M. Maloney, *The Arguments for Women's Difference in Classical Philosophy and Early Christianity*, 41-49.

¹⁴ See, Genesis 3:12-13, 15-16.

¹⁵ See, Al-Quran, 2:31-36, 7:19-25, 20:115-123. See Abu Ala al-Maudoodi, *Tafheem al Quran* (while commenting upon these above mentioned verses, the author holds that Quranic account of original sin is different from Judeo-Christian traditions).

¹⁶ However, there are Hadith available where Eve has been mentioned as responsible for the sin of Adam. But many jurists believe that such Hadith have been fabricated under the Judeo-Christian influence.

¹⁷ See, Al-Quran, *supra* note 15.

¹⁸ See, Hamnudah Abdalati, *Islam in Focus* 32 (describing the man's state at birth).

¹⁹ See generally, Badawi, *supra* note 6; see also, Interview with Deryl Davis, *The Role of Women in Islam, Religion and Ethics* 4 (May 10, 1992).

²⁰ See, Ruzqaiyah Waris Magsood, *Islam, Culture and Women*, available at: <http://www.islamfortoday.com/ruqaiyah09.htm> (last visited on 26th Jan, 2006).

men and women are equally important, if not exactly the same. Therefore, equality in Islam is evaluative and does not necessarily import 'similarity'.²¹

III The concept of *Mahr* in Muslim family laws

It is often remarked that there is no celibacy in Islam. Marriage in Islamic law is a commitment to life itself, to society and to the meaningful survival of the human race. The Quran clearly indicates that the marriage is sharing between the two halves of society, and its objectives include the emotional well-being and spiritual harmony of spouses.²²

Marriage under Muslim law is governed by a *nikah*, a kind of marriage contract, consisting of a binding offer and acceptance that give rise to reciprocal rights and obligations. According to the Quran, a woman has an unfettered right to withhold her consent to any term in the marriage contract, including whether to marry the proffered groom in the first place. Beside all other provisions for her protection, it is specifically decreed that a woman has the full right to her *mahr*, a marriage gift presented to a wife by the husband upon marriage. This section of the paper will discuss the conceptual import of *mahr* in Islam.

A. Historical Overview of Marriage Gift

The tradition of a marriage gift has been one of the oldest in the history of family relations. It was customary in many cultures and societies²³ that some gift had to be presented at the time of marriage. Historically, those prevalent marriage gifts were of many different traditions. To name a few, there was a gift given to the groom by the family of a bride (*dowry*),²⁴ or a gift given to the family of a bride by the groom or his family (*brideprice*),²⁵ or a rather less known gift had been the present given to a wife by the husband.²⁶ Besides, being gifts given at the time of marriage, the other common factor amongst them was their customary nature. Although well-supported by practice and tradition, none of those gifts were absolutely mandatory to make. There was indeed in Roman law, a mandatory *donatio propter nuptias*,²⁷ a gift from the family of the husband to the wife, but it was only required as a reciprocal gift to the *dos*, a gift given by the wife or her family to the groom. In the absence of *dos*, no *donatio propter nuptias*

²¹ See generally, Asghar Ali Engineer, *The Rights of Women in Islam* (1992).

²² See, Al-Quran, Ch.30: 21.

²³ See, *Dower and Maintenance*, available at: <http://www.al-islam.org/WomanRights7.htm> (last visited on 29 Jan, 2006).

²⁴ The tradition of dowry or *jahaz*, belong to that category of marital gift.

²⁵ See, Asat A. A. Fyze, *Outlines of Muhammadan Law* 132, (Oxford University Press, 1999).

²⁶ See, William Robertson Smith, *Kinship and Marriage in early Arabia*, 93, (London, 1886).

²⁷ See, Dower, at: <http://www.answers.com> (last visited on 29 Jan, 2006).

was required. Furthermore, most of the marriage gifts were only prevalent amongst the aristocratic nobility²⁸ and were not deemed to be of general application.

Similarly, marriage gifts in the form of dowries were common in ancient Greece and Rome, and modern Europe. Its history can be traced back to the times of ancient near East civilization. The Code of Hammurabi had the provisions for both brideprice and dowry.²⁹ The presence of similar custom in Jewish religious law has been recorded by historians and anthropologists. Jewish law established an obligatory gift called *mohar*, to be given to wife by the husband.³⁰ The value of *mohar* amounted to 200 *dinars* in the case of a virgin bride and 100 *dinars* in the case of a widow or divorcee.³¹ In addition to this, a husband also had to provide his wife with additional marriage gift, usually in the form of gold coins. Along with the gifts from the groom, the wife also received dowry from her natal family.³² It will be important to note that there existed a custom of *mahr* in pre-Islamic Arabia, though in an informal manner, where wife's family was given a brideprice called *mahr*. One may conclude that roots of *mahr* lay in the Judaic provision of *mohar*.

Hence, in pre-Islamic Arabia also, different forms of marital gifts were present depending upon the kind of marriage arrangement.³³ Scholars have noted as many as five different forms of marriages in the tribal Arabia.³⁴ Not all the marriage agreements gave rise to a right of receiving marital gift.³⁵ However, to note a common practice of that time, most of the marital gifts were given by the groom to the father or family of the bride to compensate them for the loss of a daughter, or more precisely for the loss of a worker, of another helping hand in the family.³⁶ This kind of gift was

²⁸ See, Mariastella Botticini and Aloysius Siew, "Why Dowries?" available at: <http://www.economics.utoronto.ca/slow/papers/dowry.pdf> (last visited on 5 Feb 2006); See also, "Elizabthan Wedding Customs" available at: <http://www.william-shakespeare.info/elizabthan-wedding-customs.htm> (last visited on 5 February, 2006).

²⁹ For extensive discussion upon the comparative history of dowry and brideprice see, Botticini and Siew, *supra* note 28, at 5-14.

³⁰ See, Mordcheai Akiva Friedman, *Jewish Marriage in Palestine: a Cairo Geniza Study* 285-286 (Tel Aviv, 1980).

³¹ *Ibid.*

³² *Ibid.*

³³ See, Smith, *supra* note 26.

³⁴ *Ibid.* See also, Sir Abdur Rahim, *Muhammadian Jurisprudence* 8 (Kausar Brothers, Lahore).

³⁵ *Ibid.* Rahim has noted a form of marriage named *shighar* where a man would give his daughter or sister in marriage to another in consideration of the latter giving his daughter or sister in marriage to the former. And none (wives as well as families) would receive any marital gift or dowry.

³⁶ See, Fyze, *supra* note 25, at 132.

known as *mahr*, payable to the father or brother of the bride.³⁷ The gift payable only to the wife was known as a *sadaq*.³⁸

Along with the customs of giving marital gifts, there also existed customs to deprive the woman or her family from receiving any *sadaq* or *mahr*. One of them was the custom of inheriting conjugal rights. If a man died, his son or brother would inherit his conjugal rights, in respect of his wife, in the same way as he inherited his property. The son or the brother of the deceased had a right either to give the widow in marriage to another man and take her *mahr*, or to declare her his own wife against *sadaq* already paid to her by the deceased. Another obnoxious custom was that a man would marry a woman and even give her *sadaq*, but after losing interest in her he would tarnish her image, accuse her of adultery and demand the money back.³⁹

It is noteworthy that the practice of giving a marital gift in Arabia revolved more around the concept of brideprice instead of a dowry. Although there was some mention of giving gifts to the wife by her family upon marriage, however, there was not enough evidence to suggest that those gifts were obligatory and were indirectly directed towards the husband.

The historical origin of the dowry system in India can be linked to the *brahama* marriages prevalent amongst the Hindus of the high caste in which the daughter was sent with a lavish dowry to the groom's house. Whereas, in the *asura* form of marriages amongst the lower caste Hindus, the brideprice was paid by the groom for marrying the bride.⁴⁰

Along with specific customs in the form of dowry or brideprice, there also had been the practice of 'simultaneous gift giving.' This means that both groom and bride would receive a gift. The dowry and brideprice would take place together in a marriage arrangement. The examples of such simultaneous gift giving can be found occurring in the Sumerian, Assyrian and Babylonian civilizations, Greeks, Jews, late Roman empires, western Europe and Muslim Arabs.⁴¹

B. *The Concept of Mahr in Islamic Law*

Some conclusions can understandably be drawn from the last section. The concept of *mahr* was not originally conceived by Islamic law. There had been centuries old practice of marriage gifts which was transformed by

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ See, Rahim, *supra* note 34, at 9.

⁴⁰ See generally, Mysore Narasimhachar Srinivas, *Some Reflections on Dowry*, (Oxford Press, 1984).

⁴¹ See, Botticini and Stow, *supra* note 28, at 23.

the Quran into the Islamic concept of *mahr*. Probably, the Jewish principle of *mohar* was the prelude to the Islamic institution of *mahr*. It has been noted that the Arabs were exposed to monotheistic religions.⁴² Judaism and Christianity existed amongst the population of southern Arabia. Therefore, it is not difficult to trace the roots of *mahr* to the Jewish *mohar*. However, the present form of *mahr*, owes its basis to the revelations contained in the Quran.

The Holy Quran ordains: 'And give the women (on marriage) their dower as a free gift, but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with good cheer.'⁴³ The Arabic expression used for *mahr* in this verse is '*sadaq*' which has been interpreted as free gift by Quranic scholars. The word *sadaq* has been derived from the source s-d-q, literally meaning truthfulness and sincerity. Thus, paying *sadaq* to a wife upon marriage is a mean to reflect the sincerity and truthfulness of intentions on the part of a husband. It is an expression of cordiality that must precede the beginning of a genial relationship. This point has been expressly mentioned by a number of commentaries of the Holy Qur'an.⁴⁴ The other expressions used for *mahr* in Quranic verses are *ajar*⁴⁵ (the reward) and *fariza*⁴⁶ (the obligation). The collective reading of all these expressions is reflective of the fact that *mahr* has been considered a gift and reward for the wife and an obligation for the husband.

Apart from literal interpretations and to understand '*mahr*' not as a word but a doctrine, a four-pronged analysis scheme⁴⁷ to explain the nature of marriage payments and transfers is used. These four social features to be considered are:

- (i) 'the prevalence of dowries, bride prices (paid by the groom to the bride's family), or marriage gifts (from the groom to the bride herself),
- (ii) the existence of individual property rights, which determines whether parents can transfer or bequeath property to their

⁴² See http://www.ucalgary.ca/applied_history/utor/islam/beginnings (visited June 16, 2005)

⁴³ Al-Quran, Ch. 4:4.

⁴⁴ See, Abu Al-Qasim Mahmud Zamakhshari, Al-Kashshaf, Ch. 4:4; Raghīb Isfahani, Al-Mufradat fi Gharib al-Qur'an 4:4 (saying that the dower has been called *sadaqah* because it is a symbol of the sincerity of faith).

⁴⁵ Al-Quran, Ch. 4:20 (Wed them with their leave, and give them their dowers (*qir*) according to what is reasonable.)

⁴⁶ Al-Quran, Ch.2:236 (There is no blame upon you if you divorce women before consummation of marriage or the fixation of dower. But must bestow (*fariza*) upon them a suitable gift.)

⁴⁷ See, Botticini and Stow, *supra* note 28 at 5.

children, and the laws and customs regarding inheritance (primogeniture, partible inheritance, exclusion of daughters from bequests),

- (iii) the rules governing marriage (monogamy versus polygamy), and
- (iv) the post-marital residential pattern (virilocal, uxorilocal, neolocal).⁴⁸

In regards to the first factor, it is useful to reiterate that the existing practice in the pre-Islamic Arabia was the customs of *mahr* and *sadaq*.⁴⁹ The society was more tilted towards the brideprice than dowries. However, women had no status and they were treated as chattels and objects. They had no property rights and could not inherit. The rules governing marriage were also not favorable to women. There was no bar upon polygamy and divorce. And at the same time, loose marriage-like relationships, prostitution and concubinage were also common. Lastly, the post-marital residential pattern was generally virilocal.⁵⁰ With this brief analysis I turn to religious doctrines of Islam. The concept of *mahr* in its present form was more an outcome of the religion than mere sociology of that time. Islam granted women rights to negotiate, consent and enter into agreements as a full legal person. She was given a right to hold and appropriate property and her property rights were not subjected to the supervision of her father, brother or for that matter her husband. This has been the policy of Islam, and from this point onwards, the Islamic *mahr* requires a policy-based interpretation. In connection to marriage, amongst others, the two rights given to women in Islam are: 1) the right to consent and, 2) the right to receive *mahr*. Interestingly, these two rights have been established against two very close male relations, the father and the husband. In most cases, her right to consent for a marriage stands juxtaposed to the right of her male guardian, generally the father to give her in marriage. Consequently, she was given the complete ownership of *mahr*, to ensure that a father or male guardian should not be left with a reason to interrupt the exercise of her right to consent. In the context of pre-Islamic customs of *sadaq* and *mahr*,⁵¹ the Quranic verses are instructive.⁵² The Quranic *mahr* is the exclusive property of the wife. Not only does a father have no claim to any part of the *mahr* of his daughter,

⁴⁸ *Ibid*.

⁴⁹ See, text accompanying footnotes 31-39.

⁵⁰ A virilocal marriage is the one in which the bride moves into the groom's household leaving her own. Against this pattern there are uxorilocal marriage which occurs when the groom moves into his bride's household. Neolocal denotes those marriages in which the groom and the bride live with neither their families.

⁵¹ Discussed in the last section of the article.

⁵² See, fn. 43 & 44.

but it is also not permissible to include, in the marriage agreement, a condition that apart from *mahr* anything additional would be paid to the father or family of the wife. In other words, a father is not allowed to derive any financial gain out of the marriage of his daughter. Thus, the termination of a direct financial interest, of the father or other male guardian, otherwise vested in the marriage of a female.

The next part of this paradigm examines the issue of *mahr* in the context of married women. In pre-Islamic Arabia, as well as in many cultures, societies and religions, till as late as nineteenth century, women would lose their personal identity upon marriage. To mention one example, till the 1860s under the Common law upon marriage woman entered a condition called 'coverture'.⁵³ According to the doctrine of coverture, upon marriage a woman's existence was incorporated into that of her husband. The wife had no individual rights of her own, to the extent that her name was changed to indicate the new ownership. A wife could not own property, vote, obtain an education, or enter into any contract on her own. Now, this is rather one of the moderate examples of the treatment of married women. In contrast, the second tier of the doctrine of *mahr*, operates to protect the status of married women. A husband is required to make a gift to his wife, upon which she will have exclusive ownership. Hence, from the very onset of a marital relationship, the separate identity for the wife has been established. She has an existence apart from the husband. Her right to *mahr* and then exclusive ownership of *mahr* is a reinforcement of her separate status, as a complete and capable legal person.

Once it has established women as legal persons, the *mahr* works further to designate the respective economic burdens and benefits within an Islamic marriage. From its earliest, Islam has been jealously guarding the property rights of married women. There has been a complete consensus amongst all major *Imams* of *fiqh* that a woman can seek judicial cancellation of her marriage if her husband interrupts or affects her free exercise of property rights.⁵⁴ Now, though Islam has given complete economic independence to a woman,⁵⁵ and has allowed a husband no right in regard to her property, it has still retained the historical custom of *mahr*. This shows that, from the Islamic point of view, *mahr* is not paid to woman because the

⁵³ See, William Blackstone, *Commentaries on the Laws of England*. Coverture was a part of the common laws of England and the United States through out most of the 1800's. The U.S. Supreme Court upheld the idea of coverture in the case of *Bradwell v. Illinois*, 1873.

⁵⁴ It has been also provided as a ground for seeking the dissolution of marriage in Dissolution of Muslim Marriage Act 1939.

⁵⁵ See Al-Quran, Ch. 4: 32 (saying: 'Men have a portion of what they have earned and women have a portion of what they have earned.' In this verse the Holy Quran has recognized the title of both men and women to the fruits of their labor.)

husband subsequently utilizes her physical energy or exploits her economically. As already stated, the Holy Quran describes the *mahr* as a 'free gift.' The *mahr* has been retained as Islam requires men to undertake the responsibility of maintaining their wives. The obligation of *mahr* on the very onset of marriage reflects the skilful arrangement of marital responsibilities by Islamic law. Within marriage relationship, husbands have been assigned all the economic burdens and wives have been made recipients of economic benefits. One may argue this arrangement as unjust to men, however its equilibrium lies in the different roles performed by male and female. Though exceptions are possible, but generally the role of female in the society is such that she needs some deliverance from economic burdens. The *mahr* is a prologue of the fact that in Islamic marriage a husband has the responsibility to provide for the wife.

In the same context, another commonly stated stance has been to define *mahr* as a security for the wife against a husband's exercise of his right to divorce. It may be possible to argue that in some situations *mahr* ends up acting as a security against divorce; however it is not the case generally. *Mahr* can be a security against divorce, but only where *mahr* is made payable upon divorce i.e. *muwajjal*⁵⁶ and the amount of *mahr* is a really large sum. The philosophy of *mahr*, in fact, has been that of a gift. It has been inserted in the marriage to enhance mutual love and cordiality. Similarly, there have been instances recorded in *Hadith* where Prophet Muhammad (pbuh) fixed such a nominal *mahr*⁵⁷ that it could hardly be a security. Besides, this statement means that when the Holy Prophet fixed the dower of his own wives, he provided them with a security against himself. It is also evident from *hadith* that Prophet Muhammad (pbuh) was not in favor of fixing large amounts as *mahr* and many a time he counseled women to return their *mahr* as a gift to their husbands. Therefore, it is sounder to construe *mahr* as a gift than a security provision.

Furthermore, it has been a common trend, especially in the text books written in South Asia, to use the term 'dower' as a synonym of *mahr*. Though dower as a western concept is probably closest to *mahr*, however, both do not stand for the same thing.⁵⁸ Dower is a common law principle and an outcome of the ecclesiastical practice of exacting from the husband⁵⁹ at

⁵⁶ The form of *mahr* where its payment is postponed till the death of husband, divorce or happening of some other event. For further detail see Fyze, *supra* note 25, at 136.

⁵⁷ In two such commonly known *hadith*, the fixed *mahr* was an iron ring and a pair of shoes.

⁵⁸ Richard Feeland, "The Islamic Institution of Mahr and American Law", 4 *Gonz. J. Int'l L.* (2000-01).

⁵⁹ Though in some instances, the pre-nuptial dower contract can be against father or brother of the bride.

marriage a promise to endow his wife.⁶⁰ The provision of dower, however, was only effective at the death of a husband. It was primarily a right of a widow and in some cases of a divorcee to use a portion of their husband's estate to maintain themselves. This right was inducted into the European law⁶¹ since women otherwise had no right to property and they could not inherit. Therefore, a provision for their support in the form of dower seemed necessary. The *mahr* is different from dower in at least two respects. First of all, the obligation of *mahr-i-muwajjal*,⁶² it is to be paid promptly at the and in the situation of *mahr-i-muwajjal*,⁶² it is to be paid promptly at the demand of wife, whereas dower is only effective upon death or divorce. The payment of *mahr* in Islamic law can be postponed to some future time or event which may not necessarily be the divorce or death of a husband. Secondly, the *mahr* exists irrespective of the other property rights of women. Upon receiving *mahr-i-muwajjal*⁶³ after the death of her husband, she does not lose her right to inherit from the deceased husband. Hence, equating *mahr* to dower will, first, reduce the status of *mahr* since it stands for the recognition of women as individuals. And second, it will extend *mahr*'s scope upon the issues of maintenance, which are dealt under separate rules in Islamic *fiqh*.

IV The analysis of feminist denunciation of *Mahr*

This part of the article deals with the major criticisms levied against the concept of *mahr* in Muslim family laws. The censure of *mahr* has assumed varied positions, ranging from the western orientalist attacks,⁶⁴ to the application of the domination theory by feminists. It has been argued that *mahr* belongs to primitive times when men use to own women, and hence should be discarded as a remnant of uncivilized times.⁶⁵ Some have rejected *mahr* since it makes wife a subject of her husband. The following sections of this part will enumerate the major criticisms upon *mahr* and will evaluate the position of critics and Islamic theory. Moreover, my intention is

⁶⁰ For further reference see, Blackstone, *supra* note 53, Vol. II at 134.

⁶¹ See, Henry Maine, *Ancient Law* 218 (3rd Amer. Ed., 1887). The general establishment of the principle of dower in the customary law of Western Europe can be traced to the influence of the Church, and to be included perhaps among its most serious triumphs. In a French ordinance of 1214, and in the almost contemporaneous Magna Charta in 1215, dower is referred to. But it seems to have already become customary law in England. The object of both ordinance and charter was to regulate the amount of the dower where this was not the subject of voluntary arrangement.

⁶² *Mahr* that is payable on the demand of wife.

⁶³ See, Fyze, *supra* note 25, at 136.

⁶⁴ See, Dower and Maintenance, *supra* note 23.

⁶⁵ Heather Jacobson, "The Marriage Dower: Essential Guarantor of Women's Rights in the West Bank and Gaza Strip", 10 *Mich. J. Gender & Law* 143, 147.

not to present a response in the line of religious apology; rather, it is an effort to evaluate and examine an important provision of Muslim family laws.

A. *Criticisms upon the provision of Mahr in Muslim family law*

1. *First criticism: Mahr is a consideration of marriage*

The first objection raised against *mahr* is its assimilation with the concept of consideration as present in the law of contract. It has been argued invariably that *mahr* is analogous to the brideprice which gives a transactional shade to the Muslim marriage. It reduces the traditional marriage paradigm to a mere contract of sale, since in Islam there is no right to conjugality without paying *mahr*.⁶⁶

2. *Second criticism: Mahr subjugates wife to the authority of husband*

It has been argued on the behalf of Muslim feminists that *mahr* is a custom that expects women to play a traditional role in society. According to them, the authoritative position of husband in a marital relationship is an effect of his responsibility to spend upon a wife. And since there is a similarity, even if a limited one, between marriage and sale, therefore, by paying *mahr* to wife, the husband construes as if he has ownership rights over the wife. By eliminating *mahr*, the feminists argue that the gender relations can be modernized and women can become equal partners in a marriage.⁶⁷ For modern Muslim feminists the *mahr* is a lynchpin in a decidedly un-modern marital relationship: the wife 'sells' sexual rights to the husband for *mahr*, and agrees to submit to his will with regards to her own public life in exchange for regular maintenance.⁶⁸

3. *Third criticism: Mahr creates a relationship of dependence between husband and wife*

This objection upon the *mahr* takes a two-fold position. Firstly, it objects that the payment of *mahr* reflects the status of women as that of protected dependents.⁶⁹ Hence, a relationship of inequality is created between the husband and wife. Secondly, it is questioned that if man and

⁶⁶ In *Muhammadi v. Jamiluddin* PLD 1960 Karachi 663, it was held that the wife is under Muhammadan law entitled to refuse herself to her husband until the prompt dower is paid. See also *Nuruddin Ahmad v. Masuda Khanum*, PLD 1957 Dacca 242.

⁶⁷ See, Laila al-Zwanni, *International Institute for the Study of Islam in the Modern World Workshop Report, 2000*, available at: <http://iisim.leidenuniv.nl/newsletter/6/iisim/3.html>; See Wing, *supra* note 5 at 188-89.

⁶⁸ See, Moors, *supra* note 3, at 108-9.

⁶⁹ See, Jacobson, *supra* note 65, at 143.

woman enjoy all human and natural rights and the relations between them are based on justice and equity, then why men should be burdened with the responsibility of *mahr*?⁷⁰ Critics argue that during the period when woman had no right of holding property, and had no economic independence, the *mahr* was justified to a certain extent, but as Islam has given her economic independence, there is no justification for sustaining the custom of *mahr*.⁷¹

B. *Evaluating the provision of Mahr: A reply to critics*

This complete set of feminist criticism revolves around a single concept, and that is, *mahr* in marriage is the same as consideration in a contract. Moors while relating to the reaction of a Palestinian girl in the 1970s records: '[W]hen asked by her brother whether she wished to have a dower, [she] replied indignantly, 'Am I a donkey that he has to pay for me?''⁷² Thus, to feminists *mahr* as the consideration part of marriage contract, first, objectifies women, then, subjugates them and finally, declare them protected dependents. In the context of this view, I will analyze first the relationship between *mahr* and consideration.

The basis of this integration of *mahr* and consideration lies in the theoretical equation drawn between the Muslim marriage and a civil contract. It has been unequivocally mentioned in almost all major Muslim family law treatises that Muslim marriage is a civil contract.⁷³ Even if one has to admit this mishomer, it can only be admitted to the extent of its legal connotation. Since there is a wide possibility of alteration in the terms and conditions of Muslim marriage, therefore, it has been conveniently designated the title of a civil contract. Since courts also had to deal with the enforceability of the *mahr* related conditions, they adopted the readily available concept of consideration that suitably fitted the contractual paradigm of Muslim marriage. This interchangeable use of consideration and *mahr* is, in fact, a conceptual transmutation of comparative domains. Here the concepts from one area of law are imported to others as synonyms of those concepts, which at least in this case, is not a correct approach. However, it must be noted that Muslim marriage is not a mere civil contract.⁷⁴ Rather, it has its peculiar religious and social dimensions⁷⁵ and so does have the concept of *mahr*. Therefore, when *Hedaya* mentioned *mahr* as a token of respect for wife,⁷⁶ it was

⁷⁰ See *Dower and Maintenance*, *supra* note 23.

⁷¹ *Ibid*.

⁷² See, Moors, *supra* note 3, at 108.

⁷³ See, Faiz Badruddin Tyabji, *Principles of Muhammadan Law* 94, (Butterworths, 1919); Nellie Bailie, *The Introduction of Muhammadan Law* (1874); Rahim, *supra* note 34, at 328.

⁷⁴ See Fyzee, *supra* note 25, at 88.

⁷⁵ *Ibid* at 89; See generally, G.H. Stern, *Marriage in Early Islam* 104-8 (London:1939).

⁷⁶ Hamilton, *Hedaya* 44 (Indian edition, 2005).

probably meant in the social context of the institute of *mahr* showing worth and desirability of the wife.

Furthermore, the primary objection against this assimilation (of *mahr* with consideration) lies in the fact that it takes away the social and religious flavors of marital relationship, thus, reducing it to a legally acceptable form of prostitution. It is therefore, submitted that *mahr* in Islamic family laws is not an equivalent of consideration as used in the law of contracts. This stance can be established on at least four grounds. Firstly, if *mahr* is consideration, then technically it should be the constituting part of the contract, whereas it is not. It is widely agreed⁷⁷ that *mahr* is an essential incident of the Muslim marriage.⁷⁸ Whereas consideration is the component of a contract, *mahr* is rather an after-effect of the marriage contract.⁷⁹ It is for this reason that its mention in the marriage contract is not absolutely essential to the validity of a marriage. Even if the man has stipulated a special condition in marriage contract that there should be no *mahr*, he still will be liable to pay *mahr* to his wife.⁸⁰ Such is the effect of *mahr* in marriage.

Secondly, it is true that the conjugality is dependant upon the payment of *mahr*, but not because it is the consideration of consubial intercourse. Since, in Muslim marriage, the only positive duty upon a wife is to make herself available for the cohabitation therefore, in case of non-payment of *mahr*, her primary channel to enforce payment is to withhold her person from the husband. Besides, there are conflicting opinions in *fiqh* upon this point.⁸¹ According to some, if wife has already admitted husband to sexual intercourse without payment of *mahr*, then she cannot refuse him afterwards upon the basis of non-payment.⁸² Therefore, it is difficult to draw any general correlation between the non-payment of *mahr* and refusal to conjugality.

Thirdly, the obligation of *mahr* changes in the case of dissolution of marriage without consummation. The rules have been derived from the following two verses of Quran. The first verse says:

⁷⁷ See, David Pearl and Werner Menski, *Muslim Family Law* 190-91 (Brite Books, Lahore: 1999).

⁷⁸ *Hamira Bibi v. Zubaida Bibi*, (1915) 43 LR 14 294.

⁷⁹ See, Pearl and Menski, *supra* note 77, at 179.

⁸⁰ *Ibid* at 181; See also, Hamilton, *supra* note 76, at 8.

⁸¹ For e.g. Imam Abu Hanifa argues that the wife can always refuse cohabitation until her claim of *mahr* is satisfied. However, the two disciples of Imam Abu Hanifa, Abu Yusuf and Shaybani disagree. According to them, the wife's right to refuse conjugality comes to an end as soon as marriage is consummated.

⁸² See, Tyabji, *supra* note 73, at 181. However, in *Rahim Jan v. Muhammad*, P.L.D. 1955 Lahore 122, it was held that consummation does not deprive the wife of her right to refuse conjugal relations if the prompt dower is not paid. For complete discussion on this case see Pearl & Menski, *supra* note 77, at 195-6.

'It is no sin for you if ye divorce women while ye have not touched them, nor appointed them a portion (*mahr*). Provide for them, the rich according to his means and the straitened according to his means, a fair provision. (This is) a bounden duty for those who do good.'⁸³

And the next verse adds:

'If ye divorce them before ye have touched them and ye have appointed unto them a portion, then (pay the) half of that which ye appointed, unless they (the women) agree to forgo it, or he agreeth to forgo it in whose hand is the marriage tie. To forgo is nearer to piety. Forget not kindness among yourselves.'⁸⁴

These verses of Quran clearly show that if a Muslim husband divorces his wife where no *mahr* has been fixed and no consummation has taken place, he is only required to make a suitable provision⁸⁵ for the divorced woman according to his own financial capacity. However, where *mahr* has been fixed and marriage has been dissolved by the husband without cohabitation, he shall have to pay half of the agreed amount as *mahr*.

Hence, the argument is simple. If *mahr* is the consideration of conjugality or surrender of a wife's person, then obligation to pay half of the fixed *mahr* in case of non-consummation does not fit in the contractual paradigm of this critique. Since a wife has not fulfilled her part of the contractual obligation, therefore, technically she cannot be entitled to receive any consideration. This requirement from a husband to pay half of the *mahr* to wife (where no cohabitation ever took place) clearly shows that *mahr* in Muslim marriage is not a mere consideration. In Quranic words, it is a 'free gift'⁸⁶ to a wife.

Lastly, the critics argue that since *mahr* is the consideration of a wife, therefore, as the price of a house, a garden or any property depends upon its size, beauty and usefulness, similarly the *mahr* varies according to a wife's beauty, education, familial status and wealth. First of all, there is almost no compulsive positive correlation between *mahr* and qualitative characteristics of a wife. A wife, who is outstanding in her beauty or status, may agree to enter a marriage contract upon a very nominal *mahr*. One such example has been the *mahr* of Fatima, the daughter of the Prophet (pwh).⁸⁷

⁸³ Al-Quran, Ch. II: 236.

⁸⁴ Al-Quran, Ch. II: 237.

⁸⁵ Such provision or gift given to wife upon divorce is called '*mudat*'. For detailed discussion upon *mudat* see *Mohammad Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945.

⁸⁶ Al-Quran, Ch. 4: 4.

⁸⁷ See Ameer Ali, *Mahomedan Law*, Vol. II at 44 (Calcutta: 1929).

Similarly, a woman of ordinary status and traits has all the right to demand a lavish *mahr*. Since *mahr* is not a price but a gift, therefore it has been left to the agreement and suitability of the parties. Secondly, this argument is mainly raised in the context of post-marital disagreement upon the *mahr* in situations where no *mahr* was fixed at the time of marriage. In such circumstances, *mahr* is decided in accordance with the principles of *mahr-e-misal*. Since, it is the duty of a judge or an arbitrator to decide that what should be the *mahr* of wife, therefore application of some objectivity has been allowed in this regard. However, the general rule is that the *mahr* of wife should be fixed with reference to the *mahr* of her female paternal relations (such as sisters and aunts) who are considered to be her equal. Since *mahr-e-misal* only accounts for a specific situation, therefore it is misleading to draw a general analogy upon it.

Thus, having sufficiently argued that it is erroneous to equate *mahr* with contractual considerations, the objections that *mahr* subjugates women and makes them dependent upon their husbands would be without much basis. Further, a direct answer to the issues raised in second and third criticism lies in the analysis of roles designated to the two genders under the Islamic scheme. Without suggesting gender stereotyping, and also acquiescing to the possibility of role-swapping, I would argue that the primary role of a man is to provide for his family. Islam bestows the financial responsibilities upon men and expects that financial benefits will flow from husband to wife and not vice versa. Therefore, this induction of *mahr* in Islamic marriage is symbolic of this scheme and its moral value is higher than its material value. The critics appear to misunderstand *mahr* as compensation paid to a wife for her being deprived of her economic rights or personal freedoms. The fact is otherwise. The husband has a duty to maintain his wife even if she works and earns independently. Therefore, instead of subjugating and making her dependent, *mahr* reinforces the economic rights of a wife within a marital relationship. Not only that, rather, it also enhances a wife's ability to bargain for desirable stipulations in her marriage contract specially those relating to *khalat* and polygamy. In the case of an unpaid *mahr*, a wife can make a credible threat to her husband that she will sue for payment if her wish is not granted. Furthermore, researches have shown that working wives often enjoy greater autonomy because of the income they contribute to the household.⁸⁸ Thus, though Islam reserves *mahr* for the personal usage of a wife, however, the possibility of contributing that money towards the household would arguably increase wife's power in the marital relationship.

V. Conclusion

In this short article, an attempt to offer an evaluative critique of Islamic provision of *mahr* in the light of general policy of Islam towards women has been made. The emphasis has been specifically made upon the original and primary sources of Islam. It is worthwhile to note that one of the most outstanding efforts of Islam has been to bestow legal status and rights upon women. Though, since the downfall of Muslim civilization, such teachings and precepts of Islam have not been strictly adhered to by many people who profess to be Muslims. This has given rise to many misunderstandings and unjustified criticisms upon the Islamic decrees like *mahr* in family laws. The analysis of *mahr* offered in this article makes it clearer that denunciation of such an important provision can prevent Muslim women to take full advantage of the rights granted to them in Islam. This further indicates that there is a pressing need to make an original and unbiased study of the authentic sources of Islam.

⁸⁸ Alean Al-Krenawi et al., "The Psychological Impact of Polygamous Marriages on Palestinian Women", *Journal of Women & Health* 1, 10-11 (2001).

SMOKING: LEGISLATIVE POLICY AND JUDICIAL APPROACH IN INDIA

S.N. Sharma¹

I Introduction

IN RECENT years, awareness about the evil effects of smoking has considerably increased. Nowadays, efforts are being made to save even non smokers from involuntary exposure to tobacco-smoke. The courts have demonstrated exceptional judicial activism by asserting that smoking should be banned in public places.¹

The Parliament has passed the Cigarettes and Other Tobacco Products (Prohibition of Advertisement & Regulation of Trade and Commerce, Production, Supply & Distribution) Act, 2003. The Act defines smoking and also bans it in public places. Some exceptions have also been grafted in the Act. Tobacco products have been specified in the schedule of the Act.² International opinion is also developing against smoking. The Resolution of the 39th World Health Assembly, May 15, 1986 emphasized the necessity of providing effective protection to non-smokers from involuntary exposure to smoking and to save children and young people from tobacco addiction. Similarly, the Resolution of the 43rd World Health Assembly, May 17, 1990 urged the member states to plan legislations and other effective measures for protecting their citizens.³

Smoking is a bad habit which finally leads to various grave health problems to those who become addicted to it. The problem needs urgent attention. Law is considered to be an important instrument of social change and many social problems have been curbed by means of law. For example, the Juvenile Justice Act, 2000 takes care of juvenile delinquency. The Immoral Traffic (Prevention) Act, 1956 looks into the problem of prostitution. The menace of drugs is reduced by the Narcotic Drugs & Psychotropic Substances Act, 1985. Similarly, to curb the menace of smoking, laws have been passed from time to time. This paper attempts to find out the legislative policy and judicial approach on the subject of smoking.

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² *Marli S. Deora v Union of India* AIR 2002 SC 40.

³ *The Cigarettes & Other Tobacco Products (Prohibition of Advertisement & Regulation of Trade and Commerce, Production, Supply & Distribution) Act, 2003.*

⁴ *Ibid*

II Cigarette Smoking

Cigarette smoking is a social vice and keeping in view its heavy evil consequences smoking deserves to be evaporated. Thus, some general aspects for formulating strategy to tackle it deserve to be referred to.

A. Definitional Aspect

Cigarette is paper-wrapped roll of finely cut tobacco for smoking and modern cigarette tobacco is usually a milder type as compared to cigar tobacco.⁴ In sixteenth century, beggars in Seville picked up discarded cigar butts and rolled them in scrap of paper for smoking. The poor man's smokes were known as *cigarillos*. During Napoleonic wars, French and British troops became familiar with them and French named them as cigarettes. In the beginning, all cigarettes were made by hands but with the passage of time, sophistication came into being. In 1880, James A. Ransack was granted a U.S. patent for a cigarette machine and the Bonsack machine was imported to England in 1883.⁵

From history's point of view, in seventeenth century, the tobacco was brought in this country by Portuguese from America. Tobacco in India is known from 1605 and its cultivation began in 1610 in Ceylon. Like tobacco plant in India also came from America and Tobacco smoking became common with the introduction of the plant.⁶ The forms in which tobacco is used presently, are, (a) cigars, (b) cigarettes, (c) bides, (d) pipes (e) tobacco chewing, (f) tobacco eating and (g) licking and snufftaking. However, the Schedule attached to the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003⁷ contains tobacco products which are cigarettes, cigars, cheroots, *Beedis*, cigarette tobacco, pipe tobacco and hookah tobacco, chewing tobacco, snuff, *Pan masala*, *Gulka*, tooth powder containing tobacco.⁸ The Act of 2003 has also defined the term cigarette. The term 'cigarette' includes any roll of tobacco wrapped in paper or in any other substance not containing tobacco. It also includes any role of tobacco wrapped in any substance containing tobacco but it does not include *beedi*, cheroot and cigar.⁹ It may be recalled that the same definition was offered in Section 2(b) of the Cigarettes (Regulation of Production, Supply & Distribution) Act, 1975, which has been repealed by the Act of 2003.

⁴ *Encyclopedia Britannica*, 318, 1966.

⁵ *Id.* at 318-319.

⁶ G.R. Madan, *Indian Social Problems: Social Disorganization and Reconstruction*, 192 (1993), 5th ed., reprinted 1998).

⁷ Hereafter, the Cigarettes and other Tobacco products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 has been referred as the Act of 2003.

⁸ See, Schedule attached to the Act of 2003.

⁹ See, s 3(b) of the Act of 2003.

B. Causes & Evil Effects

Keeping in view the unpopularity and disfavor by policy planners and legal prohibition on smoking in public places, it becomes necessary to find out the causes and effects of smoking.

(a) Causes

It is believed that cigarette smoking influences the activity of mind in certain respects. It acts as stimulant for involving narcotic substances, nicotine. It has mysterious influence on the activity of mind which leads to poet's inspiration, formation of political talent, creation of new ideas etc.¹⁰

It is also considered as panacea for many ailments but it appears to carry false notion. Smoking behavior is due to physiological need. Norman W. Heinstra in "The Effects of Smoking on Mood Change" states the finding:

[T]he results showed no significant differences between smokers and non-smokers. However deprived smokers showed significantly more errors on the tracking and vigilance tasks than subjects in the other group.¹¹

(b) Evil Effects

Smoking in general has adverse consequences of varied nature. It causes diseases, economic hardships, social problems and pollution.

(i) Medical Effect

Habitual or excessive cigarette smoking causes lung cancer and many other diseases, such as, heart disease, cancers of lung, pancreas, breast etc. circulatory ailment, cerebral hemorrhage, blindness, loss of sense of taste and smell, nervousness, respiratory diseases, nutritional defects, undesirable effects on glands etc.¹² The statement of objects and reasons of the Cigarette Act, 1975 stated.

Smoking of cigarettes is a harmful habit and in course of time can lead to grave health hazards. Researches carried out in various parts of the world have confirmed that there is a relationship between smoking of cigarettes and lung cancer; chronic bronchitis; certain diseases of the heart and arteries; cancer of bladder, prostate, mouth, pharynx and esophagus; peptic ulcer; etc., are also reported to be among the ill effects of cigarette smoking.¹³

¹⁰ See, *Supra* note 6.

¹¹ Norman W Heinstra, *The Effects of Smoking on Mood Change* in William L. Dunn, Jr (Ed.), *Smoking Behaviour: Motives and Incentives*, 200 (1973).

¹² See, *Supra* note 6 at 193.

¹³ See Statement of Objects & Reasons, The Cigarette (Regulator of Production, Supply & Distribution) Act, 1975.

(ii) Economic effects

Cigarette smoking is economically injurious to individual, family and nation. The claim that cigarette industry is prosperous and money minting business appears untrue if seen from larger point of view. Individual and family suffer because of the expenses incurred on tobacco or cigarettes and health problems which may otherwise be used for domestic purposes. Smoking causes loss of time, work and effort because of this habit of the people. Import of foreign brand cigarettes and tobacco is unnecessary burden on foreign exchange.

(iii) Social Effects

The use of tobacco is an expensive luxury and its evil effects generally occur among youth. Smoking is often associated with other bad habits, such as, gambling, drinking and undesirable social contacts; smoking and chewing provoke drunkenness.

(iv) Pollution

Smoking is greatest polluter as number of smokers is on increase. People smoke everywhere in homes, buses, trains, bus stands and other public places causing suffocation. Breathing becomes difficult. Smoker inhales voluntarily and others inhale involuntarily. Smoking also causes air pollution.

III Legislative Policy

Of the various forms of smoking, the popular forms are Bin and Cigarette. Till date, two main legislations have been passed. In 1975, the Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975 (hereafter referred as the Act of 1975), was enacted. It has been repealed by the Cigarettes & Other Tobacco Products (Prohibition of Advertisement & Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003.

A. The Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975

In the statement of objects and reasons, it was stated that smoking of cigarettes was a harmful habit and in course of time could lead to grave health hazards. It enumerated various diseases of cigarette smoking as reason in the interest of general public that trade or commerce in and production, supply and distribution of cigarettes was not to be made, unless the label bore the specified warning that "Cigarette smoking is injurious to health".

The Act of 1975 was a brief Act consisting of twenty-two sections only. Section 2 was a definition clause offering definitions of thirteen terms. Some

important terms defined by it were cigarette, production, sale and sale and specified warning. All these terms have been retained in the Act of 2003. Section 2(m) of the Act of 1975 stated:

"Specified warning" means the following warning namely, "Cigarette smoking is injurious to health."¹⁴

Section 3 of the Act puts restrictions on trade, commerce, production supply and distribution of cigarettes by providing that every package of cigarettes or label must bear the specified warning.¹⁵ There was heavy stress on the specified warning under the Act. Section 4 of the Act emphasized that the specified warning on a package of cigarettes should be legible, prominent, conspicuous and distinct. Even in advertisement the specified warning was to be included.¹⁶ The specified warning was to be expressed in the language used on the package or label but in case of foreign language, it was to be expressed in English language.¹⁷ No warning was according to the Act if letters used were less than three millimeters in size.¹⁸ If the provisions of the Act were contravened, the packet was liable to confiscation. And if it was proved to the satisfaction of the court that the possessor of the package was not responsible, the court could pass order against the guilty as it might think fit.¹⁹ Section 11 of Act empowered the court to give the owner option to pay in lieu of confiscation, such costs as it thought fit but not exceeding the value of the package. Section 12 provided that any person carrying on trade, commerce etc. without specified warning was liable to penalty not exceeding five times of the value of the package or one thousand rupees whichever was more. Section 17 of the Act provided that any person, selling, distributing, supplying etc. of any package of cigarettes which did not contain either on the package or on its label the specified warning, or advertising or taking part in advertisement which did not include specified warning "shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to five thousand rupees or with both."²⁰ Offences under the Act were bailable and cognizable.²¹ On the whole, the Act made positive approach to reduce the volume of cigarette smoking in society but in practice the warning that "cigarette smoking is injurious to health" could not deter the persons from cigarette smoking.

¹⁴ Sec 2(m), The Cigarette (Regulation of Production, Supply and Distribution) Act, 1975.

¹⁵ *Id.* S.3

¹⁶ *Id.* S.5

¹⁷ *Id.* S.6

¹⁸ *Id.* S.7

¹⁹ *Id.* S.10

²⁰ *Id.* S.17

²¹ *Id.* S.19

(B) The Cigarettes & Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply & Distribution) Act, 2003.

Thirty-ninth and Forty-third resolutions of World Health Assembly urging member states to extend effective protection to non smokers and risk groups comprising of pregnant women and children and Article 47 of the Constitution of India casting duty on state to improve public health are referred to in the preamble of the Act of 2003 for the comprehensive law on tobacco in public interest. Section 33 of the new Act has repealed the Act of 1975. The Act of 2003 consists of thirty-three sections whereas the predecessor Act consisted of twenty two sections. Section 3 of the new Act of 2003 offers definitions of sixteen terms whereas the old Act defined thirteen terms in Section 2. The three new terms included are public place, smoking and tobacco products.²²

The definition of "cigarette" under the Act of 1975 as well as under the Act of 2003 is the same without any difference. Section 3(b) offers an inclusive definition of the term "Cigarette." It says

"Cigarette" includes—

- (i) any roll of tobacco wrapped in paper or in any other substance not containing tobacco,
- (ii) any roll of tobacco wrapped in any substance containing tobacco, which, by reason of its appearance, the type of tobacco used in the filler or its packaging and labeling is likely to be offered to, or purchased by consumers as cigarette, but does not include *beedi*, *cheroot* and *cigar*.²³

Section 3(f) defines 'public place' as meaning any place to which the public have access, whether as of right or not. It includes auditorium, hospital buildings, railways waiting room, amusement centers, restaurants, public offices, court buildings, educational institutions, libraries, public conveyances and the like which are visited by general public but does not include any open place.²⁴ Section 2(f) says that "tobacco products" are the products specified in the schedule. The schedule mentions cigarettes, cigars, cheroots, *beedis*, cigarette tobacco, pipe tobacco and hookah tobacco, chewing tobacco, snuff, *pan-masala* or any chewing material having tobacco, *gukka* and tooth powder containing tobacco.

²² S. 3(f), (n) and (p), The Act of 2003.

²³ *Id.* S. 3(b)

²⁴ The Supreme Court in *Murli S. Deora v. UOI*, AIR 2002 SC 40 banned smoking in public places, namely, auditorium, hospital buildings, health institutions, educational institutions, libraries, courts.

Section 4 of the Act says that no person shall smoke in public place but can do so in a hotel having thirty rooms or a restaurant having seating capacity of thirty persons or more and at the airports, a separate provision may be made for smoking area or zone. It is entirely a new provision. Section 5 of the Act prohibits advertisement of cigarettes and other tobacco products. No person engaged in the production, supply or distribution of cigarettes or any other tobacco products shall advertise.²⁵ Section 6 of the Act makes an important provision that no person shall sell or permit sale of cigarette or any other tobacco product to any person who is under eighteen years of age or within one hundred yards of any educational institution. There are many provisions which also found place in the predecessor Act and only some changes have been introduced. The ambit of the Act has been broadened by the addition of "Other Tobacco Products".²⁶

Departing from the provision in the earlier Act, Section 10 of the new Act does not fix the size of letters and figures of specified warning or indication and leaves it for the rules. The Act also authorizes the power of entry, search and seizure, and confiscation of package,²⁷ Section 20 of the Act provides punishment for failure to give specified warning, and nicotine and tar contents. The punishment for first conviction is imprisonment not exceeding two years or fine upto Rs. 5,000 or both. For second or subsequent conviction, the maximum punishment is five years and fine upto Rs. 10,000. Section 21 provides punishment for violating Section 4 of the Act,²⁸ which is fine upto Rs. 200. The offence is compoundable and triable summarily. Section 22 provides punishment for contravening Section 5 which makes provision for the prohibition of advertisement of cigarettes and tobacco products. The maximum punishment for first offence is two years imprisonment or fine upto Rs 2000 or both. For second or subsequent conviction, the maximum punishment is five years imprisonment or fine upto Rs. 2000 or both. Section 27 says that an offence punishable under this Act shall be bailable whereas Section 28 of the Act provides that an offence committed under Section 4 or Section 6 is compoundable for amount not exceeding two hundred rupees. Thus, the Act makes elaborate provisions to check cigarette smoking and other tobacco products. In order to curb social vice, the Act creates many offences.

IV Judicial Approach

Prior to the enactment of the Act of 2003, the courts addressed the problem of cigarette smoking and the judiciary adopted an antismoking approach.

²⁵ S. 5, The Act of 2003.

²⁶ *Id.*, Ss. 7, 8 and 9.

²⁷ *Id.* Ss. 12, 13 and 17.

²⁸ S. 4 of the Act prohibits smoking in public places.

The Kerala High Court in *K. Ramkrishnan v. State of Kerala*²⁹ was seized with the matter in an original petition highlighting the dangers of passive smoking. It was prayed that smoking of tobacco in any form, whether in the form of cigarette, cigar, *beedies* or otherwise in public places was illegal, unconstitutional and violative of Article 21 of the Constitution. Justice Narayan Karup referred to the facts and figures to establish horrifying impact of smoking, active as well as passive, on society. He pointed out the various diseases, such as, cancer, pulmonary diseases, respiratory illness etc.³⁰ Pointing out the evil effects of smoking, he observed

The dangers of passive smoking are real, broader than once believed and parallel those of direct smoke. It has long been established that smoking harms the health of those who smoke..... Passive smoking ranks behind direct smoking and alcohol as the third leading preventable cause of death.³¹

The court pointed out that Article 21 included within its scope the right to pollution free air and the right to decent environment. Maintenance of health and environment fell within the purview of Article 21 of the Constitution as it adversely affected the life by slow and insidious poisoning reducing the very life span itself. The Court held that public smoking of tobacco in any form whether in the form of cigarettes, cigars, beedies or otherwise was illegal, unconstitutional and violative of Article 21 of the Constitution of India. The Court also held that tobacco smoking in public places fell within the mischief of the penal provisions relating to "public nuisance" as contained in the Indian Penal Code and also the definition of "air pollution" as contained in statutes dealing with environment and the Air (Prevention and Control of Pollution) Act, 1981.³² The Court also issued appropriate directions.

The matter of smoking was further examined by the Supreme Court in *Murlis Deora v. Union of India*.³³ The court held that smoking was injurious to health and may affect the health of smokers as well as passive smokers. Pointing out the several diseases, which may be caused by smoking, the Court observed.

The State of Rajasthan has claimed to have passed Act No. 14 of 2000 to provide for prohibition of smoking in place of public work or use and

²⁹ AIR 1999 Ker. 385. The bench comprised of A.R. Lakshmanan and K Narayan Kurup, J.J. Justice K. Narayan Kurup wrote the opinion for the Court.

³⁰ *Id.* at 387-389.

³¹ *Id.* at 390 (Original Emphasis).

³² *Id.* at 398.

³³ AIR 2002 SC 40

in public service vehicles for that state. It is stated that in Delhi also there is prohibition of smoking in public places.³⁴

In view of the adverse effect of smoking on smokers and passive smokers, the court directed and prohibited smoking in public places, namely, auditorium, hospital buildings, health institutions, educational institutions, libraries, court buildings, public office, public conveyances including Railways.

It is praiseworthy that judicial approach is explicit on the question of ban on smoking in public places, keeping in view the adverse socio-medical consequences.

V Conclusion

It is clear that the movement against smoking is gaining momentum day by day. The adverse medico-socio-legal consequences justify the creation of anti-smoking environment. There can be no cause justifying the cigarette smoking.

Cigarette smoking or tobacco is universally regarded as major health hazard and directly or indirectly is linked with many diseases, such as, lung cancer, chronic bronchitis, various diseases of heart, cancers, pulmonary diseases, cancers of different organs etc. Thus, movement against smoking needs to be strengthened further. And, it is testified by international efforts and national legislation on the subject.

Smoking is the area fully marked by legislative activism. For example, the Cigarettes (Regulation of Production, Supply & Distribution) Act, 1975 was enacted for putting restrictions on trade, commerce, supply and distribution of cigarettes and emphasized that specified warning, i.e. 'cigarette smoking is injurious to health' must be given. However, the Act is repealed by the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003. The present Act is certainly an improvement over the earlier Act and has broadened its domain by including other Tobacco Products.

The field is also marked by exceptional judicial activism which is heavily leaned against smoking. It prohibits smoking in public places and has issued appropriate directions. It appears that there are two issues which need utmost attention. Firstly, smoking has been banned in public places due to adverse medical consequences. The question arises how it can be permitted in private places keeping in view adverse medico-environmental consequences. Secondly, there

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should be strict enforcement of law if the smoking is to be curbed effectively. So far, the situation is far from satisfactory. However, the noteworthy healthy trend is that in recent years, there has been a rejuvenated and renewed attack on social vices i.e. legislative as well as judicial.

CROSS COUNTRY STUDY OF DECENTRALIZATION IN INDIA AND NEPAL

Rashmi Raj Regmi*

I Introduction

WE ARE the successor of the governance system established in the philosophy of Kautilya's Arshshastra in 3rd century BC. Kautilya practically enforced his theory of the social, political and economic structure of an ideal state and preserved it in the form of book.¹ The concept of *Ram Rajya* was there where every voice of people was heard and they are considered as source of power of state. The prominent ruler also used to claim that their authority is derived from the people and peoples will is supreme for them. Later, for the long time our society falls in the hand of unsuccessful and selfish leader who kept it in the dark ages. Different autocratic regimes were continued by different name in different part of this region. During the process of colonization East India Company integrated different states and starts its own regime. The Dark Age from the decentralization perspective was remaining continued till British time India² and *Rana* Regime in Nepal.³ After getting independence India started to institutionalize democracy. Different democratic institutions were established and strengthened constitution adopted the concept of federalism which itself is the aspect of decentralization.⁴ But in Nepal, practice is a bit different, when *Rana* regime was overthrow by the joint efforts of people and kings. The institutionalization of democracy was facing different blown up by the royalist and king himself. Maoists are also destroying the decentralized democratic institutions, which were established by the constitution of Kingdom of Nepal 1990 from last one decade.

The decentralization of power from central to local levels is crucial for democratization, the promotion of equity and people's participation in development. Basically devolution of followings three powers is considered more important in the process of effective decentralization.

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1 Collection Philosophy of Kautilya in economy and politics is available in the form of book published by different publisher.

2 Before independence all the power was centered in the representative of British Government to India and no society was authorized the power of self-governance.

3 Before 1950 there was family autocracy, which led Nepal for more than hundred years with centralised mechanism of governance. No society was allowed to think independently and all formal and informal power was vested in the Prime Minister who was the Commander-in-Chief.

4 See, Preamble of the Constitution of India.

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- Political decentralization; it transfers policy and legislative powers from central government to autonomous, lower-level assemblies and local councils that have been democratically elected by their constituencies.
- Administrative decentralization; it places planning and implementation responsibility in the hands of locally situated civil servants and these local civil servants are under the jurisdiction of elected local governments.
- Fiscal decentralization; it accords substantial revenue and expenditure authority to intermediate and local governments.

Though rulers used to claim that people are the source of state power and each and every step moved by them are for the people. But when the time comes to really empower people by providing them the right to self-governance, the hangover of past-centralized concepts comes in mind of our policy makers and leaders, which prevent them to work really for establishing democracy in local level. Because by the transfer of power they feel that they are curtailing their powers in centre. Whatever may be the attitude of leader, during last fifty years there were so many efforts started for the establishment of real democracy in local level. Certainly these efforts are fruitful and changing the attitude of the people but these is not sufficient. By the process of decentralization people not only get the opportunity to govern them but can develop their locality and reduce the backwardness and poverty, which they are facing.

Johannes Jutting *et al* write two motivating factors for decentralization:⁵

- Decentralization can lead to an increase in efficiency and
- Decentralization can lead to improved governance.

According to them these are traditionally adopted concept because other studies also proved that central state authority generally lack the time and knowledge to implements programs and policies which really reflects the need of people. H. Blair writes that decentralization enhance the accountability, especially the election of local officials by citizens, when accompanied by a strong legal framework, can create local accountability and thereby foster officials' legitimacy, bolstering citizen involvement and interest in politics, and deepening the democratic nature of institutions.⁶

⁵ Jutting *et al*, *Decentralization and Poverty in Developing Countries: Exploring the Impact* Working Paper No. 236, Research programme on: Social Institutions and Dialogue).

⁶ H. Blair, "Participation and Accountability at the Periphery: Democratic Local Governance in Six Countries", *World Development* 21-39(2000 Vol. 28, No. 1).

There are so many studies, which proved the fact that decentralization helps to reduce the poverty in local level. The study by Von Braun and Grote seems to be the most advanced and in-depth treatment of the impact of decentralization on poverty. Based on a rigorous review of the literature and cross-country comparisons, the authors come to the conclusion that decentralization serves the poor, but only under specific conditions.⁷ The authors recommend that these conditions should be analyzed within a framework that tackles political, fiscal and administrative decentralization simultaneously, while also taking into account different country specific conditions and different types of decentralization policies.⁸

Decentralization in Nepal

The efforts for decentralized governance in Nepal began in 1960s with the establishment of separate district, municipality and village level Panchayats. These Panchayats were elected local governance body and had the authority to formulate policy, undertake programmes and levy taxes. Before the promulgation of new Local Self Governance Act, 2055 Bs a number of issues relating to policy and processes of decentralization emerged and remained unresolved. The Constitution of the Kingdom of Nepal, 2047 Bs has aimed to develop Nepal as a welfare state in order to provide social, economic and political justice to all citizens. Constitution recognising decentralization as a state policy writes:⁹

The state shall maintain conditions suitable to the enjoyment of the fruits of democracy through wider participation of the people in the governance of the country and by way of decentralization.

However the clear way of decentralization process is not defined in constitution but it intended to establish decentralized system of governance as one of the fundamental policies to achieve the objectives outlined in the constitution. Different Acts have been enacted so far on decentralization following the direction of the new Constitution: The Village Development Committee (VDC), Municipality and District Development Committee (DDC) Acts of 2048 Bs and the Local Self-Governance Act 2055 Bs. The former Acts were only the continuation of the earlier system with a different nomenclature while the later was designed in more comprehensive way. The Local Self-Governance Act has tried to answer most of the unresolved question of decentralization in Nepal from very long time. The report of the

⁷ J. Von Braun and U. GROTE (2002), "Does Decentralization Serve the Poor?" in IMF ed.,

⁸ *Ibid.* Fiscal Decentralization 92-119(2002). Routledge, Washington, D.C.).

⁹ Article 25 (4), Constitution of Kingdom of Nepal, 2047 Bs.

High Level Decentralization Coordination Committee 2053 Bs was the basis for introduction of later Act. The Local Self-Governance Act, 2055 Bs and Local Self Governance Rules, 2056 Bs has made broad based organizational structure, devolution of authorities, special provision to include women and disadvantaged communities, planned development process and judicial authorities to local bodies.

We can point out following points as main characteristics of this Act.¹⁰

- It is a unified act that defines the principles and policies of decentralization;
- It devolved wide sectoral authority to local governance bodies;
- It established a Decentralization Implementation and Monitoring Committee (DIMC) to monitor whether the objectives, policies and provisions are followed, and ensure they are followed;
- It also established a working committee to execute the directives of DIMC;
- It enabled the creation of a Local Government Finance Commission (LGFC);
- It made provision for revenue sharing between local and central government, and among local governance bodies;
- It made provision for 20 percent representation of women in local governance bodies and for the representation of deprived and disadvantaged groups;
- It provided for more accountable and transparent local governance bodies through councils of respective committee, committee systems, and audit committees;
- It expanded the taxation and service fee collection authority of local governance bodies and recognised some rights of them over natural resources;
- It made participatory bottom-up planning, periodic planning, resource mapping and establishment of an information centre compulsory for local governance bodies;

¹⁰ For details, see Local Self Governance Act, 2055 Bs (Law Book Management Committee: Kathmandu).

- It ensure compulsory funding for local governance bodies by central government;
- It authorised DDCs to open sectoral units to take over the work of government line agencies and to hire their own professional staff, and
- It has recognised local governance bodies associations and made provisions for representation at DIMC.

This Act also defines the task of the central government and local governments, their limitations and responsibilities. Such as central government is responsible to coordinate to:

- Implement policy, co-ordinate and monitor decentralization through DIMC;
 - Monitor and supervise local governance bodies;
 - Build the capacity of local governance bodies;
 - Provide financial resources and grants and depute secretary and other staff;
 - Co-ordinate contact between ministries;
 - Demarcate administrative boundaries and classify local governance bodies; and
 - Support to election commission to hold elections and suspend or extend the tenure of representatives of local bodies;
- And local governance bodies are responsible to:
- Deliver sectoral services such as education, health, and agriculture by establishing their own sectoral units;
 - Prepare long and short-term local policies, plans and programmes;
 - Co-ordinate and build partnerships with civil society in programme planning and service delivery; and
 - Raise revenue from local taxation, fees and other sources.

II Structural framework

Three different bodies are recognized as local governance bodies viz. Village Development Committee (VDC), Municipalities and District Development Committee (DDC) by this Act.¹¹ There are 3913 VDCs, 58 Municipalities including one Metro and three Sub-metros and 75 DDC. VDCs and Municipalities are the local unites for governance in village and urban area elected by popular election of respective jurisdiction.

¹¹ Section 2, Local Self-Governance Act, 2005 Bs.

Village development committee (VDC) / municipalities

All VDCs are divided into nine wards. Municipalities are divided into a minimum of nine wards but the maximum number is not specified.¹² Wards with locally elected committee are the smallest units of local governance. Each ward has a governance unit named Ward Committee (WC) made up of the five elected members, one of which must be a woman.¹³ VDC committees and municipal committees run local governance affairs. Village Councils (VCs) and Municipal Councils (MCs) meet bi-annually to approve or question VDC and municipality policies, programmes and budgets. VDC chairpersons, vice-chairpersons, ward members and Six persons including one woman nominated by the Village Council from amongst those social workers, socially and economically backward tribes and ethnic communities, down-trodden and indigenous people living within the village development area, belonging to the class whose representation in the Village Council does not exist. Municipalities also have similar structure in ward and municipal level, led by Chairperson in ward and Mayor in municipal. Municipal councils (MC) also have similar structure like (VC) but the number of nominated members is more and maximum number of nominated member in (MC) is twenty.

District development committee

His Majesty's Government may specify each District maintained under the Local Administration Act, 2028 Bs (1971) as the district development area. Presently there are 75 DDCs based on the administrative division of the countries represent their respective district elected by indirect election. Each district is divided into nine to seventeen Ilakas (areas), which cover clusters of VDCs and municipality. The elected members of the VDCs and Municipalities are the voter for DDC. Each district has a district council (DC), which serves the same role as VCs and MCs have in respective jurisdiction, and an executive committee (DDC). The DCs meet annually and are made up of Mayors and Deputy Mayors of municipalities, VDC Chairpersons and Vice-Chairpersons, DDC Chairpersons, Vice-Chairpersons and members, the district's MPs and six nominated members. Provision is also made for village, municipal and district executive bodies to nominate additional members of the weaker sections of society and of them one must be a woman.

¹² S. 5, *Ibid*.

¹³ S. 7, *Ibid*.

III Fiscal Framework

The Local Self Governance Act and Rules has given local governance bodies some taxation and revenue authorities for example, to raise land and vehicle taxes; to charge fees for services, and to charge land revenue. DDGs are authorized to share revenue with government from for example, land registration, tourism, electricity and forest products and to market natural resources. However, the revenue collection areas remain weak because of overlapping authorities of line agencies of central government and local bodies. The local governance bodies have been given responsibility for delivering local services such as education and natural resource management but the finances for delivering these services are routed through the line agencies. The local bodies do receive grants from central government but these are grossly inadequate for them to properly carry out the functions expected of them. Nepalese local governance bodies receive less than four percent of the national budget and this proportion is decreasing because of present internal crises.

Poverty Reduction

The main priority of the Nepalese ninth plan was poverty reduction and it is same for present tenth plan. However, no clear linkage has been made between poverty reduction and decentralization. The Local Self Governance Act suggests that local bodies should allocate resources, prioritise those plans and programmes that contribute to employment generation, increase people's income and reduce poverty.

Local governance bodies have little understanding of the issues involved in poverty alleviation and the weak communication; coordination and interface between centre government and local bodies have hindered any efforts they have made. Local bodies are not provided with sufficient funding to take up poverty reduction programmes themselves and the government funning anti-poverty programmes outside the local governance framework. It is only donor funded poverty reduction programmes that are run through local governance bodies. In this situation local bodies of unable to do more things for the reduction of poverty in countries like ours where resources are limited, peoples are unaware about the benefit if locally run programmes and those who are a wear don't have technical ideas and support to effectively implement it.

Present situation

After the enforcement of present constitution Nepalese people participated in the election of local bodies in two times. But after the

termination of second terms of representatives' next election become impossible because of critical situation of law and order in the country created by Maoist terrorist activities. Uncertainty begins from that time. Though there was option to extend the term of existing representatives in law but government choose different way. By making amendment in Local Self-Governance Act, through Amendment Ordinance government provided power of local bodies to government employees. When this government was sacked by king and new government came in power the cadre of that party which is in power were nominated in local bodies. In 2004, this government also changed and power of local bodies went to the hand of government employees once again. In February 2005, king has taken power of central government in his hand and declared municipal election. Despite the boycott of mainstream political parties including Maoist the municipal election was held in 8th February 2006. The participation of people in this election was historically low in percentages. Election Commission in its statement after election stated that around 20 percent people participate in the election. But it was already informed to the general public that more than half of seats are remaining there without any candidacy. This fact proved that this election was only a drama to strengthen the royal regime ignoring all the democratic system and institutions aside.

Decentralization in India

"If my dream is fulfilled, and every one of the seven lakhs of villages becomes a well-living republic in which there are no illiterates, in which no one is idle for want of work, in which everyone is usefully occupied and has nourishing food, well-ventilated dwellings, and sufficient Khadi for covering the body, and in which all the villagers know and observe the laws of hygiene and sanitation."¹⁴

This is the spirit of Gandhi's concept of Swaraj (self governance), which leads movement for the independency against English regime in India. And after independence constitution adopted the concept of federalism, which is also the aspect of decentralization. So theoretically we can say that from very beginning Indian legal system adopted the concept of decentralization.

If we will go through the history we can find different institutions existing in local level with certain power of governance, which is traditionally recognized. But before 73rd and 74th amendment of the Constitution, the system of local governance was not formally regulated by specific Acts in

¹⁴ R. Prabu and UR Rao eds., *Village Republics: the Mind of Mahatma Gandhi*, cited in HRDC, *Decentralization in India, Challenges & Opportunities 3* (Discussion Paper Series 1, United Nations Development Programme, New Delhi).

India except the provision of empowerment of state governments against central government by the Constitution.¹⁵ But in state level there were some laws regarding local governance. Before constitutional recognition most of the local bodies were working social organisation after getting registration as societies under Societies Registration Act, 1860.

The Constitutional Amendments in 1992-93 have empowered Panchayats as local unit of state and are described as institutions of local self-government, and are expected to prepare plans for economic development and social justice. The *Adityasi* Act, 1996 provides powers of self-governance to the tribal communities living in 'Fifth Schedule' areas.

The 73rd Amendment added Parts IX provisions relating to Panchayats in Articles 243-243O and 74th Amendment added IX A relating to municipalities in Articles 243P-243ZG of the Constitution. These Articles of the Constitution are in the nature of basic provisions supplemented by laws of the respective States, which define the details as to the powers and functions of the various organs. The 'Eleventh Schedule' of the 73rd Amendment identifies 29 areas over which Panchayats can legitimately have jurisdiction. Some of these are agriculture, minor irrigation, animal husbandry, fisheries, social forestry, small-scale industries, and implementation of land reforms — focus on particular sectors within the rural economy.

All States have enacted new Acts or incorporated changes in their existing Acts in conformity with this provision of the constitution. Following are considered as basic feature of the 73rd amendments in constitution.¹⁶

- Continuity: By providing for duration of 5 years for an elected Panchayat and re-election of Panchayats before expiry or within six months of their dissolution as well as non-interference by Courts in electoral matters, continuity of Panchayats has been ensured by the 73rd Amendment.
- Gram Sabhas: All States have provided that a Sarpanch/Mukhia/Adhyaksha/Pradhan of the Gram Panchayat will convene a Gram Sabha, consisting of persons registered in the electoral rolls relating to a village comprised within the area of Panchayat at the village level at least twice a year. The following matters shall be placed before it by the Gram Panchayat :

¹⁵ These two Amendments of the Constitution inserted part IX and IX A respectively to provide the constitution reorganized of local bodies and empower them as local units of decentralized governance.

¹⁶ See *supra* note 15 at 8.

- Annual Statement of accounts and audit report
 - Report on the administration of the previous year
 - Proposals for fresh taxation or for enhancement of existing taxes
 - Selection of schemes, beneficiaries and locations
- Three-tier System: A uniform structure of three tiers — at village, intermediate and district levels has been prescribed but the constitution and composition of Panchayats has been left to preferences of States subject to all seats being filled by elected persons from the respective territorial constituencies of the Panchayats.
 - Reservation of Seats: Seats have been reserved for SC/ST in every Panchayat on the basis of proportional representation and such seats may be allotted by *rotation* to different constituencies in a Panchayat. Not less than one-third of the seats so reserved are further reserved for women belonging to SC/ST. Besides this, not less than one third of the total numbers of seats in a panchayat are reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat. A similar reservation for backward classes has been left to the discretion of States.
 - Powers and Authority: It is noteworthy that the 73rd Amendment provides for States to endow the Panchayats with powers and authority 'to enable them to function as institutions of self-government'. However, the functions of Panchayats Stated in the same Art 243G are in the nature of entrusted development and social justice and (b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to matters listed in the Eleventh Schedule. "
 - Election Commission: Governors of States are empowered by the 73rd Amendment to appoint State Election Commissioners and stipulate by rules the tenure and conditions of their service.
 - Finance Commission: Governors of States are also empowered to constitute State Finance Commissions to review the financial position of the Panchayats and to make recommendations to the Governor.
 - Audit of Accounts: Audit of Panchayats is to be provided for by the State Legislatures.

74th amendment of the constitution makes almost same types of provision for the Nagar Panchayats, Municipal Councils and Municipal Corporations. Certainly these urban bodies hold more effective power than village but the basis for this is the same the constitutional provision and state legislation.

Structural setup

If we take decentralization in macro level there are three tiers of governance in India viz. central government, state government and local government. And in micro level there is also three tier of governance system in local level viz. Gram Panchayats, Panchayat Samitis and Zila Parishads and in urban areas Nagar Panchayats, Municipal Councils and Municipal Corporations are there as primary local bodies for governance. Presently the concept of decentralization covers the later one. There are now approximately 250,000 Gram Panchayats, 6500 Panchayat Samitis and 500 Zila Parishads duly elected and governed by State legislation. To function effectively, these require rationalization of the district and sub-district administrative apparatus consistent with the State level conformity Acts. After the recent amendment of the Constitution it mandates that seats be reserved for SC\ST in every panchayat.¹⁷ Clause (4) of the same Article directs that the offices of the chairperson in the panchayat at the village or any other level shall be reserved for the SC\ST and women in such manner as the state legislature may, by law, provide. Article 243G endow the Panchayats with such power and authority as may be necessary to enable them to function as institution of self-government.

The 74th Amendments of the constitution intended to strengthen the institution of municipal bodies so as to make them effective democratic institutions at the grass root level in urban areas. A Nagar Panchayat is to be established in a place in transition from rural to urban area, Municipal council to be established for a smaller urban area and Municipal Corporation for larger urban areas. All of these bodies are to be directly elected on the basis of adult franchise. And for this purpose each municipal area is divided in Ward (small territorial constituency). The representation of ST\SC and women are also ensured here. And state election commissions are there to conduct the election of these bodies in free and fair manner.

Fiscal Arrangements

Conceptually talking we can say that local bodies are independent in the matter of fiscal arrangement, planning and expenditure. Basically there are three main sources for Indian local governance bodies. Own resources

¹⁷ Article 243-D (1), Constitution of India

through direct tax and income from owned or vested assets of local bodies; fees or assigned revenues like cesses/surcharges/share in taxes; and different types of grant from Central, State government and other institutions.

The powers, authority and responsibilities of the three levels of Panchayats and municipalities in financial matter are laid down in newly added Articles of constitutions and state law. State are authorised to determine the details about the financial authority of local bodies by making legislation.¹⁸ Constitution leaves it in the discretion to the State in what is to be passed on to the Panchayats. That's why we found different arrangement in different state in this matter. Karnataka and Andhra Pradesh are a bit ahead then other state in the process of empowering local bodies. These two states are trying to provide more power for local self-governance bodies.

State Legislatures can grant powers to tax any of the tiers of Panchayats. Though State Legislations have provided for granting powers to tax or assign certain taxes to Local bodies. The largest number of charges and taxes are levy able at present by gram Panchayats and municipalities. Even where powers of levy are vested at Panchayat Samiti or Zila Parishad levels, actual collection is done by the lower bodies of local governance and the revenue passed on; in some cases, these revenues are shared by different local bodies.

Poverty Reduction

Decentralization is recognized as an effective means of development and poverty reduction because it provides opportunity to local people to select the necessary projects for them in local level and power to implement it. Studies of decentralization have shown that devolution of authority can enhance systems of local governance in a number of ways. Such as, the establishment and empowerment of local resource user groups (delegation or privatization) can improve the ways in which local people manage and use natural resources, thereby improving the resource base on which poor people are often disproportionately dependent. In India policy makers in both central and state level are trying to develop the local bodies responsible for this. Constitutional and legal amendments are going on but the result is not so satisfactory. There are so many constraints, which are contributing for this result. As Crook and Sverrisson's cross-country comparison concludes,¹⁹

¹⁸ Art 243- H

¹⁹ R. C. Crook and A. S. Sverrisson, *Decentralization and Poverty Alleviation in Developing Countries: A Comparative Analysis or Is West Bengal Unique?* (2001 IDS Working Paper 130, Brighton).

The notion that there is a predictable or general link between decentralization of government and the development of more 'pro-poor' policies or poverty-alleviating outcomes clearly lacks any convincing evidence. Those who advocate decentralization on these grounds, at least, should be more cautious, which is not to say that there are not other important benefits, particularly in the field of participation and empowerment.

As per the warnings of these writers and our own unsatisfactory result show that there is need of being more cautious towards our policies which are based on the perception that if we will devolution the power to local governance bodies the poverty will start to decrease.

IV Conclusion

Instability and lack of commitment in central government is most crucial problem for Nepalese decentralisation. There is no institutional stability and even periodic election is not held. In this situation it is fruitless to talk about effective decentralisation. In India the local bodies are enjoying more stability in comparison to Nepal.

Unwillingness of the central/state government to devolution of real power to the local level is another problem in this regard. They feel that by the process of devolution they loose their power in centre.

Though the institution having constitutional power are also facing vulnerability in Nepal in this situation it is very difficult to say lack of constitutional protection is major problem for effective decentralisation but it is difficult to ignore this argument also. Certainly constitutional recognition empowers the local bodies as governance unit, which is lacking in Nepalese constitution. In India, before 73rd and 74th amendments of the constitution the situation was same but after it local bodies get constitutional identity. Though they get constitutional identity still they are depended heavily in state law. State can limit and provide the power to these bodies except the limitation made by constitution.

Confusion and overlap in power and responsibilities among the local bodies and Central governments line agencies is another problem in this regard. Clear demarcation of powers and limitations of all the participant of local governance and there relation with central government is necessary.

Weaker financial position and lack of resources is another problem for effective decentralisation. Because without strong financial capacity no body can do any thing which it wants to do. The local governance bodies of

our countries have to depend upon the grant of central government and in this condition it is very difficulty to maintain their independency.

Indifference caused by backwardness of people in the process of governance, domination of some elite family or group and lack of effective ideas to make accountable and responsible to the representative is another problem found in both countries.

It is necessary to implement effectively all the aspects of decentralisation so that people of local level can become able to understand there local problems, can determine their need, decide their priority and make efforts to reform it by their own strength and support of central government. These institutions need more independency in legal, functional and financial terms and technical support for the matters for any of the matter which they don't have manpower or idea. As we know that true devolution to local governments may be said to take place only when funds, functions and functionaries are transferred to the appropriate level of local government. Such a transfer has to be made in substance, not in written form only. And it has to go together only the mere transfer of funds without other changes may even worsen the situation.

HIV/AIDS PREVENTION & CREATING AWARENESS: ROLE OF MEDIA

Jyoti Singh*

"When you are working to combat a disastrous and growing emergency, you should use every tool at your disposal. HIV/AIDS is the worst epidemic humanity has ever faced. It has spread further faster and with more catastrophic long-term effects than any other disease. Its impact has become a devastating obstacle to development. Broadcast medias have tremendous reach and influence, particularly with young people, who represent the future and who are the key to any successful fight against HIV/AIDS. We must seek to engage these powerful organizations as full partners in the fight to halt HIV/AIDS through awareness, prevention and education..."

-Kofi Annan, United Nations Secretary-General

I Introduction

HOW VANQUISHED the mankind feels in front of virus that germinates Acquired Immuno Deficiency Syndrome (AIDS)? As AIDS is no longer a public health issue but has become a serious socio-economic & developmental concern, there is an immediate need to act with an utmost sense of urgency and sincerity. When a disease is a multifaceted malady which impacts and affects a society, remedies have to be multi-pronged. More so, when the disease defies treatment, curbing its spread and curing the societal misconception about the disease has to be synchronous with efforts to identify treatment. Such can be the process to combat and control the menace of HIV/AIDS. Thus, media is one of the instrumentalities which facilitates and gives a directional thrust to the efforts to curb the disease if not to treat it. If medicine can treat HIV/AIDS, media is capable to prevent it with an ultimate goal to cure it through its capabilities to impart education through entertainment. An article¹ entitled "An innovative approach to reducing HIV/AIDS prevalence through targeted mass media communications in Mumbai, India" focuses on the need for dissemination of related information and realities pertaining to the epidemic so that the ignorance is replaced by awareness and then creating multiplier effects of awareness engulfing the wider cross sections of the society. The article states that India is poised on the precipice of devastating HIV/AIDS

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epidemic. Twenty years after the first case of AIDS was reported in India, it is now home to second largest number of HIV infected people in the world with around 5.1 million people as in 2003 being infected by the deadly disease². Despite ardent efforts to proliferate awareness of HIV/AIDS being made by governmental and non-governmental agencies, the misconceptions relating to HIV/AIDS continue to outpace the efforts to educate people regarding the disease. Thus, with the passage of time role of media has become increasingly significant.

Task before visual and non-visual vehicles of media besides creating awareness and providing knowledge base about HIV/AIDS is also to remove the misconceptions about the transmission of the virus and the social ostracism of affected persons. Lack of information leads to denial and rejection of People Living With HIV/AIDS (hereinafter referred to as PLWHA) at personal and societal levels as the mankind, at large have not yet realized that even they are carrying the risk of contracting HIV and thus AIDS is not an issue for 'others'. By and large members of the society are oblivious that every body is vulnerable but the misconception is that only those individuals who are immoral and societal deviant are HIV/AIDS affected. On one hand the stigma and discrimination attached to the disease may keep away from seeking information or help as they are likely to be outcast as infected and on the other hand, for some the belief that they cannot be infected, promotes denial and keep them away from the realities of the disease being allured by the false sense of security. All such issues are capable of being resolved when ignorance gives place to knowledge. Another misconception is that HIV/AIDS incidence is escalating in high-risk groups such as commercial sex workers (CSWs), and their clients but strangely enough all of us fall under the high risk groups as long as the restraints and precautions are accorded low priority.

While addressing the Media Leaders Summit on HIV/AIDS, the Prime Minister, Dr. Manmohan Singh stressed on strengthening the national AIDS control efforts as commitment of the National Common Minimum Programme. He emphasized the need for supplementing all such efforts with an active and avid participation from all sections of the society culminating in a mass movement for creating awareness of AIDS. He further stated that while focusing attention on research for finding a vaccine for this pandemic, no stone should be left unturned in preventing its occurrence by using media in an intelligent and creative manner. In the absence of a vaccine, the social vaccine of education and awareness is the only preventive tool

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¹ Available at: <http://www.esrategicmarketing.com/SmMay-June04/art7.htm>.

² See, <http://www.unaids.org/en/>

we have. It is appropriately said that prevention begins with information. Media, which conveys information and moulds public opinion, must remain at the heart of our campaign to help people make informed choices.

Countries such as Thailand that have recorded declining trends of HIV/AIDS infection have demonstrated that this pandemic beats a retreat in the face of determined and sustained efforts in generating awareness among people, and empowering people with information to combat it effectively. Visibility in the media is an effective step towards creating greater awareness. Leaders of media, in cooperation with other segments of our polity and society, can play a significant role in educating public opinion.

In June 2001, at UN General Assembly Special Session on HIV/AIDS, the Heads of the State & Representatives of Governments, affirmed that "*Beyond the key role played by communities, strong partnerships among governments, the United Nations System...people living with AIDS and vulnerable group...the media, parliamentarians, foundations, community organizations and traditional leaders are important*".³

The media has the potential to create widespread awareness on HIV/AIDS, to promote the positive attitudes towards people living with HIV/AIDS, and influencing people to change high risk behaviour that make them vulnerable to the infection. It has a pivotal role to play in a fight against AIDS. It is a well known saying that "education is the vaccine against AIDS"

According to a survey conducted in India, 70% of Indians identified television as a primary source of information about HIV/AIDS. At the United Nations Assembly Special Session on HIV/AIDS in June 2001, it was agreed by the governments of the State that "*By 2005, ensure that 90%, and by 2010, 95% of youth aged 15-24 have information, education, services and life skills that enable them to reduce their vulnerability to HIV infection*".⁴

II Role of media

An effective media can raise the awareness level and can also bring about sustainable behaviour change thereby reducing vulnerability to the virus. Media is capable of performing the following roles in preventing HIV/AIDS:

a) *A channel for communication & discussion*: One of the roles of Media is to open the channels for communication and foster discussions about

HIV and interpersonal relations. Addressing HIV/AIDS in the entertainment programmes can have an enormous impact on the society at risk.

b) *A vehicle for creating a supportive and enabling environment*: Mass media can be instrumental in breaking the silence that envelops the disease and in creating an encouraging behavior for combating with existing social norms and making positive changes in the society. For example, the Indian village, Luisaan, turned its back on the dowry system after listening communally to Radio soap opera *Tinka Tinka Sukh* (Little steps for better life) aired on All India Radio.⁵

c) *Facilitator for removing stigma and discrimination attached with the disease*: HIV/AIDS afflicted individuals, besides the anatomical discomforts, undergo the mental suffering of stigma and discrimination at the hands of the society. A number of media campaigns have focused on the need to overcome prejudice and encourage solidarity with people infected/affected by virus. WHO has various extraordinary stories of HIV people who are not only fighting the virus but are also playing an integral role in prevention of AIDS.⁶

d) *A tool for creating a knowledge base for HIV/AIDS related services*: The collaborative efforts of all modes of media in association with NGOs, State organizations, and service providers have brought to the lime light the availability and source of beneficial services like counseling, testing and condom provisions, treatment and social care. The broadcasters and print media have a specific role to play as their efforts have tremendous recall value. For instance, The Kaiser Family Foundation in partnership with media companies have promoted dedicated toll free hotlines and has launched websites for educating the people about HIV/AIDS.

e) *Education through entertainment*: For creating an efficacious awareness about HIV/AIDS, the messages need to be informative, educative as well as entertaining as these are mutually exclusive. For instance, in 2002, Doordarshan, NACO and BBC World Service Trust joined hands in order to launch the country's mass media awareness programme about HIV/AIDS. The campaign was launched with an idea of spreading education in a more entertaining way with a popular interactive detective series *Jasoos* (Detective) Vijay, and a reality youth show "*Haath se Haath Milaa*", which had won the prestigious Indian

³ Declaration of Commitment on HIV/AIDS, adopted at the United Nations General Assembly Special Session on HIV/AIDS, 27 June 2001, New York, para. 32.

⁴ *Id.* at 23.

⁵ Available at: [http://www.sahims.nel.dohlibrary/200401_January21%20Wed/ Global %20Media%20AIDS-%20Initiative%20UNAIDS.pdf](http://www.sahims.nel.dohlibrary/200401_January21%20Wed/Global%20Media%20AIDS-%20Initiative%20UNAIDS.pdf)

⁶ Available at: <http://www.who.int/hiv/photosstories/en/index.html>.

Television Awards, 2003. In November 2005, BBC World Service Trust in association with Doodarshan and NACO were running India's largest HIV/AIDS awareness mass media campaign. In an interview Richard Gere, AIDS activist and famous actor,⁷ admitted that most public service announcements are unsuccessful as they are not entertaining. The education of HIV/AIDS has to be spread as if we are selling the product. Thus, a holistic approach for dealing with the emotional, psychological and physical realities is to be adopted. The Heroes Project is a public education initiative launched by Richard Gere and Parmeshwar Godrej to work with Indian media companies and leaders to develop coordinated public education campaigns on HIV/AIDS. It is supported with a grant from the Avahan Initiative of the Bill & Melinda Gates Foundation and by the Henry J. Kaiser Family Foundation which provide technical and substantive expertise to the project. Heroes project⁸ which hosts HIV/AIDS awareness show with SUN TV creates a mega platform, bringing together the South Indian Entertainment fraternity in an effort to draw public attention to the issues of HIV/AIDS. Even Star Celebrities are playing an important role. An Actress, Prachi Rahore, has been awarded with Special Max Stardust award, 2005⁹ for her contribution towards creating awareness about HIV/AIDS in Rajasthan. Movies like 'My Brother Nikhil' and 'Phir Milenge' are an attempt in educating people with entertainment.

f) Mainstreaming: Broadcasters are mainstreaming the HIV issue across a number of programmes, ensuring that the message permeates a diverse range of output, not just outlets and public service messages dedicated specifically to the issue. The fact that virus could affect all sections of the society is reinforced in such a way that many people who might not pay attention to a traditional AIDS campaign or who do not choose to watch AIDS programming, are exposed to HIV/AIDS messages. A coordinated, multifaceted campaign has greater impact than a single programme. Documentaries, new items, concerts, public service announcements, competitions, hotlines, books and websites can be linked together to reinforce awareness, information and messages about HIV related attitude and behaviour.

g) Putting HIV/AIDS on the news agenda and encouraging leaders to participate: In recent years several leading broadcasters from around the world have found innovative ways to report on the epidemic. The

⁷ Available at: <http://www.youandaids.org/Interview/Richard%20Gere/index.asp>.

⁸ Available at: <http://www.heroesprojectindia.org>.

⁹ Available at: <http://in.movies.yahoo.com/06011724/621d1.html>.

more the leaders see about HIV in news the greater the resources they invest in anti-AIDS strategies, which in turn lead to increased media coverage of the issue and helps to sustain public awareness which again has an impact on leaders' priorities.

h) Sharing resources and pooling material: Several campaigns were successful as they fully utilized the opportunity of pooling the available resources with others by sharing expertise and material. As a part of the campaign the trust produced weekly youth focused reality television show *Haath se Haath Milta* wherein the *yuva* stars traveled across the country to spread awareness about HIV/AIDS.¹⁰

i) Capacity building: Successful partnerships need not be with other media outlets. Alliances of NGOs, government departments and foundations can bring significant benefit for both the parties. For instance, as a result of the *KNOW HIV/AIDS* partnership, the Kaiser Family Foundation have offered the broadcasters expertise in terms of pinpointing key messages, giving up to date information and building HIV knowledge with creative media teams.

j) Media as an institution of oversight, restraint and collaborative efforts: Media can render yeoman's service in providing accurate and correct news coverage of HIV/AIDS, facilitate eliciting and generating public response to state sponsored efforts. Such efforts have the potentials to awaken social and political leaders to review their strategies and take mid course corrections in regard to policy concerning HIV/AIDS.

In such a process, the media has the potential to influence public opinion and attitudes about HIV/AIDS, including attitudes towards people living with HIV/AIDS. An analysis of media coverage and public opinion over several decades concluded that there is a strong relationship between them. When the media focuses on a particular issue, there is a higher degree of public awareness and support to tackle that issue. Attitudes affect how people respond to HIV/AIDS and how people with HIV/AIDS are treated or cared for by their peers, employers, families, communities, the health care system and the justice dispensing system.

Media too have the capability to bring about transformation in the thinking pattern of the society in respect of PLWHA and thus sowing the seeds of attitudinal changes. Media can be a great facilitator for the preventing process while educating the need for a healthy behaviour towards those individuals most vulnerable to HIV/AIDS and those individuals affected by it.

¹⁰ Available at: <http://sify.com/movies/bollywood/fullstory.php?id=14022815>.

III The Tasks Ahead

The importance of and the need for the participation of media in fighting AIDS has been time and again felt by the governmental and NGOs. On the inauguration of a seminar organized by Sachetana, an NGO, the convener of the programme and a well known journalist Rahul Deo¹¹ commented that media could play a motivational role to free the society of myths and misconceptions attached to HIV/AIDS. "Every society is vulnerable to infection. While organising similar seminars in Jaipur, Bhopal, Dehradun and Raipur, we realised that even the policy makers and legislators were not fully acquainted with facts about HIV/AIDS. It was under this backdrop that Sachetana decided to hold seminars for media persons all over the country," he explained. Rahul Deo further obligated the media to be careful while reporting on HIV/AIDS as the affected person bears a strong social stigma. Navin Joshi, another senior journalist, also demanded urgent attention in dissolving the social stigma related to it.

In a two day seminar organized by Sachetana and supported by Udayan Sharma Foundation, NACO and Samyak, senior journalist Sunita Aron said the old and stagnant statistics cannot be published time and again and suggested the state authorities to revise their records and come out with more details about the quality and nature of life of those who were highly vulnerable and also provide success stories of those carrying on with life despite being HIV positive. Thus, keeping in mind its crucial role in combating HIV/AIDS, media needs to be extra cautious while reporting and there is an urgent need for it to change the way it reports on HIV/AIDS.

To address the HIV/AIDS crisis facing the nation, the first-ever India Media Leaders Summit on HIV/AIDS was convened by the Ministry of Information & Broadcasting, the Ministry of Health & Family Welfare, and the Heroes Project in partnership with the Kaiser Family Foundation and Avahan Initiative of the Bill & Melinda Gates Foundation on 6 January 2005 in New Delhi. Twenty five top executives from the leading media companies across India met the Prime Minister, Dr. Manmohan Singh to discuss what they could do to address the growing epidemic in India. The media leaders and the government¹² unanimously proposed a plan to use their resources to propagate information about prevention of HIV and to help combat AIDS related stigma and discrimination. The Prime Minister, in his speech at "Media Leaders Summit on HIV/AIDS",¹³ spoke,

¹¹ Available at: <http://cities.expressindia.com/fullstory.php?newsid=160989>.

¹² "Media and government plans to address HIV/AIDS in India", EHM News Bureau - New Delhi.

¹³ Available at: http://www.hercosprojectindia.org/events/ev_pnsummit.htm.

"I am happy to associate myself with the Indian Media Leaders Summit on HIV/AIDS. I believe this meeting is a sequel to the Global Media Initiative hosted by the United Nations Secretary General, Mr. Kofi Annan in January 2004 in New York. It is an important milestone in our fight against the AIDS pandemic. The world has come to recognise this as a global threat to humanity. However, like so many other such threats that mankind has battled, I am confident that we shall overcome this one too but it will require massive efforts on the part of Government, media and all actors in civil society.

In this campaign the media plays an important and determining role in educating the public, creating awareness among them and transmitting crucial information so that people become aware, remain alert and take measures to prevent its occurrence. We all know that information is power, and that awareness therefore empowers. We are meeting here today to help ensure that AIDS awareness becomes an integral part of mainstream media and that it is able to reach out to the people through its tremendous creative and communicating power.

Many decades ago Mahatma Gandhi started publishing the Indian Opinion, a fortnightly newspaper, to educate people about the rules of health and hygiene so that they could follow them and keep themselves free from disease. It is interesting and instructive to recall Mahatma Gandhi's thoughts as written in the Indian Opinion when Plague occurred in Johannesburg in 1905. Posing the question, 'What is the duty of Press on such occasions?' Gandhiji wrote that media has the crucial responsibility to report incidents of Plague as fast as possible, inform people to prepare themselves to face the situation, focus attention on the factors behind the appearance of disease, critically comment on lapses which might have contributed to the emergence and spread of plague and educate people on the issue of maintaining their surroundings clean so that the disease could be prevented.

I believe that in organizing this Media Summit on HIV/AIDS, you are all deriving inspiration from this Gandhian approach. I am glad that the Ministries of Information & Broadcasting and Health & Family Welfare have teamed up with Non-Governmental Organisations like the Richard Gere Foundation to organize this Media Leaders' Summit."

While concluding his speech, the PM proposed, "First, lead by example and lead from the front. Your behaviour needs to change first, before you seek behavioural changes in others. Second, inform your friends and empower